IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES MADISON PROJECT Plaintiff, v. CENTRAL INTELLIGENCE AGENCY Defendant.	*	Civil Action No. 08-0708 (JR)

OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff James Madison Project ("JMP")[1] commenced this litigation pursuant to the Freedom of Information Act ("FOIA") to obtain copies of internal Central Intelligence Agency ("CIA") documents pertaining to an internal review of the CIA's Inspector General, John Helgerson ("Helgerson"), and of the Office of the Inspector General ("OIG").

The CIA has repeatedly delayed the processing of this request since October 2007, and only provided its first (and final) substantive response after JMP filed suit in April 2008. That response asserted that no documents were located. The record reflects, however, that the CIA's searches for responsive records were inadequate. As a result, this Court should deny the CIA's request for summary judgment and either require a more detailed affidavit on the adequacy of the search or allow JMP to conduct limited discovery to identify the proper scope of its response.

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[1] JMP (*http://www.jamesmadisonproject.org*) is a Washington, D.C.-based non-profit organization that was created in 1998 for the primary purpose of educating the public on issues relating to intelligence gathering and operations, secrecy policies, national security, and government wrongdoing. Much of the work undertaken by JMP involves litigation under FOIA.

PROCEDURAL BACKGROUND

The factual and procedural background concerning JMP's FOIA request at issue in this litigation is set out in detail in the CIA's Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment (filed July 14, 2008)("CIA's Memo"), the CIA's Declaration of Delores M. Nelson (dated July 14, 2008)("Nelson Declaration"), and JMP's Rule 56(f) Declaration of Bradley P. Moss, Esq. ("Moss Decl."), all of which are incorporated herein by reference.[2]

ARGUMENT

The CIA has moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Summary judgment should be granted only if the moving party has shown that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986); Waterhouse v. Dist. of Columbia, 298 F.3d 989, 991 (D.C. Cir. 2002). In determining whether a genuine issue of material fact exists, the Court must view all facts in the light most favorable to the nonmoving party. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The nonmoving party's opposition, however, must consist of more than mere unsupported allegations or denials and must be supported by affidavits or other competent evidence setting forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); see Celotex Corp., 477 U.S. at 324.

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[2] The factual statements made in the CIA's Memo and the Nelson Declaration are incorporated only in relation to pages 2 through 3 and paragraphs 15 through 19, respectively, and only to the extent that they do not constitute legal characterizations and conclusions.

In a FOIA case, the Court exercises *de novo* review and summary judgment is only available to a defendant agency that has fully discharged its obligations under FOIA. See Wolf v. CIA, 473 F.3d 370, 374 (D.C. Cir. 2007); Weisberg v. U.S. Dep't of Justice, 705 F.2d 1344, 1350 (D.C. Cir. 1983).

I. THE CIA FAILED TO CONDUCT AN ADEQUATE SEARCH FOR RESPONSIVE RECORDS AND GENUINE ISSUES OF MATERIAL FACT REMAIN PRECLUDING SUMMARY JUDGMENT AT THIS TIME

A. The CIA Is Unable At This Time To Demonstrate It Conducted An Adequate Search For Responsive Records

There is no dispute regarding the overarching case law pertaining to the adequacy of an agency's search for purposes of summary judgment. The burden rests upon the defendant agency to "show beyond a material doubt that it has conducted a search reasonably calculated to uncover all relevant documents." Id. at 1351. See also Campbell v. U.S. Dep't of Justice, 164 F.3d 20, 27 (D.C. Cir. 1988)("reasonableness" standard is applied to determine the adequacy of a search methodology, consistent with congressional intent tilting the scale in favor of disclosure). Put more succinctly, the CIA "must show that it has made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990)(citations omitted).

It is also undisputed that a court may rely upon agency affidavits in adjudicating the adequacy of the search, Founding Church of Scientology v. Nat'l Sec. Agency, 610 F.2d 824, 836 (D.C. Cir. 1979), so long as those affidavits are detailed, nonconclusory and submitted in good faith. Goland v. CIA, 607 F.2d 339, 352 (D.C. Cir. 1978); Perry v. Block, 684 F.2d 121, 127 (D.C. Cir. 1982)(*per curiam*)(highlighting that affidavits must

shed sufficient light on "scope and method of the search conducted by the agency"). "Even if these conditions are met the requestor may nonetheless produce countervailing evidence, and if the sufficiency of the agency's identification or retrieval procedure is genuinely in issue, summary judgment is not in order." Founding Church of Scientology, 610 F.2d at 836. See also id. at 837 ("To accept its claim of inability to retrieve the requested documents in the circumstances presented is to raise the specter of easy circumvention of the Freedom of Information Act . . . and if, in the face of well-defined requests and positive indications of overlooked materials, an agency can so easily avoid adversary scrutiny of its search techniques, the Act will inevitably become nugatory."). But see Wilbur v. CIA, 355 F.3d 675, 678 (D.C. Cir. 2004)("Likewise, the agency's failure to turn up a particular document, or mere speculation that as yet uncovered documents might exist, does not undermine the determination that the agency conducted an adequate search for the requested records.")(citations omitted).

Therefore, the central issue here is whether the specific circumstances of the case at bar reveal "positive indications of overlooked materials," Founding Church of Scientology, 610 F.2d at 837, which would have been found if the CIA had conducted a "diligent search for those documents in places in which they *might be expected to be found*." Miller v. U.S. Dep't of State, 779 F.2d 1378, 1385 (8th Cir. 1985)(emphasis added), cited with approval in Iturralde v. Comptroller of the Currency, 315 F.3d 311, 315 (D.C. Cir. 2003).

Relying upon the Nelson Declaration, the CIA asserts that since it: a) searched for responsive records in at least one (1) records system in which the identified scope of regulations would arguably be maintained; and b) utilized at least seven (7) different

search terms in conducting the search, there does not remain any substantial doubt as to the reasonableness of the CIA's search and therefore no genuine issue of material fact exists. CIA's Memo at 9.

The CIA's assertion to the contrary, the Nelson Declaration does not demonstrate conclusively that the CIA conducted a diligent search. As will be demonstrated infra, the bare-bones, boilerplate description detailed in the Nelson Declaration fails to provide this Court with any semblance of a comprehensive assessment of the adequacy of the CIA's search, as it lacks the specificity required by the law of this Circuit. JMP can also demonstrate that at issue here is not a "purely speculative" claim about the existence of responsive documents, see Ground Saucer Watch v. CIA, 692 F.2d 770, 771 (D.C. Cir. 1981), as JMP can identify countervailing evidence by way of at least one applicable federal statute and CIA official public statements, to say nothing of pure common sense.

At some appropriate time the CIA may in fact be entitled as a matter of law to summary judgment regarding the adequacy of its search, but based upon the current record—consisting of the Nelson Declaration—it is not yet that time.

B. The CIA's Nelson Declaration Is Insufficient For Purposes Of Summary Judgment, As It Fails To Provide This Court With Sufficient Factual Context Within Which To Evaluate The Adequacy Of The CIA's Search

1. The Nelson Declaration's Description Of The Search Terms And Location Parameters Used In The CIA's Search Is Insufficiently Detailed And Leaves Open Several Evidentiary Gaps

Agency affidavits must "explain in reasonable detail the scope and method of the search conducted by the agency [sufficient] to demonstrate compliance with the obligations imposed by the FOIA." Morley v. CIA, 508 F.3d 1108, 1121 (D.C. Cir. 2007), quoting Perry, 684 F.2d at 127. An affidavit that lacks the detail "necessary to

afford a FOIA requestor an opportunity to challenge the adequacy of the search and to allow the district court to determine if the search was adequate in order to grant summary judgment" will be deemed insufficient. See Morley, 508 F.3d at 1122 (rejecting as insufficient a CIA affidavit that failed to identify search terms, explain how the search was conducted in each component, or give an indication of what each component's search specifically yielded). Where the agency's responses raise serious doubts as to the completeness of the search or are for some other reason unsatisfactory, summary judgment in the government's favor would usually be inappropriate. Perry, 684 F.2d at 127.

The Nelson Declaration's description of the search conducted for responsive records consists largely of boilerplate language mostly devoid of any specific context.[3] It first

[3] The courts have previously addressed agency reliance upon boilerplate affidavits—albeit in the context of Exemption One invocations on the grounds of national security—and have permitted their use only to the extent that the agency's explanation was "sufficiently tailored" to its determination. See Coldiron v. Dep't of Justice, 310 F. Supp. 2d 44, 53 (D.D.C. 2004)(cautioning that "the court is not to be a wet blanket" and its review should not be vacuous, but ultimately conceding that the D.C. Circuit has permitted agency use of boilerplate affidavits in circumstances where the agency explanations were sufficiently tailored to the specific redactions). See also Schrecker v. Dep't of Justice, 254 F.3d 162, 166 (D.C. Cir. 2001)(relating to documents identifying confidential sources, disclosure "should be expected to reveal the identity of a confidential human source or reveal the identify of a human intelligence source when the unauthorized disclosure of that source would clearly and demonstrably damage the national security interests of the United States by harming the FBI's ability to continuously recruit sources for current and future use"); Halperin v. CIA, 629 F.2d 144, 149 (D.C. Cir. 1980)(regarding the names of CIA attorneys, disclosure would "tend to reveal details of [intelligence] activities and that representatives of hostile, foreign intelligence services working in this country who, by a variety of techniques, can undertake courses of action to ascertain what other contacts, what other locations, and then arrive at determinations whether [the CIA's attorneys are] doing any other function for the Central Intelligence Agency")(internal quotations omitted); Coldiron, 310 F. Supp. 2d at 52-54 (upholding the sufficiency of the FBI's affidavits only after concluding that the FBI indicated that disclosure of particular passages would make available the

generically describes the organization of the CIA record systems. Nelson Decl. at ¶¶ 7-9. It subsequently details the procedures by which the CIA conducts a search for records. Id. at ¶ 10. It is these procedures that are of considerable importance in assessing the adequacy of the CIA's search, as the Nelson Declaration explains that each individual CIA component devises its own search strategy for processing a FOIA request. Each individual strategy includes the identification of particular records systems that will be searched, as well as the particular search tools, indices, and terms that will be utilized in conducting the search. Id.

The Nelson Declaration, however, does not even attempt to provide this Court with an explanation of the particular strategies of the individual components tasked with conducting the search, including which particular search terms—if different—were used by each separate component. Instead, it condenses its entire explanation into two mere sentences that rely heavily upon conclusory adjectives and ambiguous language. See id. at ¶ 19 ("The CIA search *included* the Director of Central Intelligence Agency ("DCIA") area, *which includes* the records systems of the DCIA Action Center ("DAC") and the independent offices of the Office of Inspector General ("OIG"), the Office of General Counsel ("OGC"), and the Office of Public Affairs ("OPA"). These offices used a *variety* of search terms . . ., *including, for example*: 'internal review of operations,' 'CIA's Inspector General,' 'John L. Helgerson,' 'OIG,' 'Office of Inspector General,' 'OIG internal review,' and 'Deitz review.'")(emphasis added).

This explanation leaves open several evidentiary gaps, including, for example:

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very criteria used by the FBI to decide what actions warranted an investigation and that disclosure would reveal the cooperation of foreign governments).

1) whether the CIA search included components other than the DCIA area; 2) whether the search within the DCIA area actually involved the record systems of the DAC, OIG, OGC and OPA; 3) whether other record systems within the DCIA area were searched; 4) which of the "example" search terms were used in which particular records systems; 5) what other search terms were used in conducting the search; and 6) whether and to what degree the CIA revised its initial search in light of information discovered during initial phases of the search, including information from relevant but non-responsive documents.[4] Moss Decl. at ¶ 16, attached as Exhibit "1". Such evidentiary gaps undermine this Court's ability to assess the adequacy of the CIA's search and render the Nelson Declaration insufficiently detailed for purposes of summary judgment.[5]

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[4] "Consequently, the court [should evaluate] the reasonableness of an agency's search based on what the agency knew at its conclusion rather than what the agency speculated at its inception." Campbell, 164 F.3d at 28.

[5] Interestingly enough, the CIA affidavit deemed insufficient by the D.C. Circuit in Morley appears virtually indistinguishable from the Nelson Declaration.

> The [Dorn] Declaration incorporates a general explanation of how the agency responds to all FOIA requests, and after describing how a single FOIA request must be divvied up between multiple component units within the CIA, Dorn states that "each component must then devise its own search strategy, which includes identifying which of its records systems to search as well as what search tools, indices, and terms to employ." But the two brief paragraphs in the Declaration explaining the search itself provide no information about the search strategies of the components charged with responding to Morley's FOIA request. Dorn merely identifies the three directorates that were responsible for finding responsive documents *without "identify[ing] the terms searched or explain[ing] how the search was conducted" in each component.* . . . The remainder of the Declaration describes only basic CIA policy regarding FOIA responses and a description of the CIA's correspondence with Morley.

Morley, 508 F.3d at 1122 (citations omitted)(emphasis added). Similarly, the Nelson Declaration fails to identify which particular search terms were used in relation to the different particular components.

2. *The Nelson Declaration Fails To Explain In Any Context The Reasonableness Of Its Imposition Of An "End-Date"*

The D.C. Circuit has previously addressed the issue of temporal limits, such as a "time-of-request cut-off" policy, in the context of the adequacy of an agency's FOIA search and has maintained that that the legal standard for a temporal limit is whether the "limitation is consistent with the agency's duty to take *reasonable* steps to ferret out requested documents." See McGehee v. CIA, 697 F.2d 1095, 1101 (D.C. Cir. 1983)(emphasis in original). See also Public Citizen Inc. v. Dep't of State, 276 F.3d 634, 643 (D.C. Cir. 2002)(reaffirming the D.C. Circuit's rejection of the CIA's contention that the language of the FOIA and authoritative case law establishes that the use of a time-of-request cut-off is always reasonable). The burden of demonstrating that the imposition of a temporal limit upon a FOIA search comports with the agency's obligation to conduct a reasonably thorough investigation rests with the agency, not the requestor. McGehee, 697 F.2d at 1101. Therefore, in the context of a motion for summary judgment, the agency is required to demonstrate that there is no genuine issue of material fact with respect to the reasonableness of the temporal limit. Id. at 1102.

The Nelson Declaration, for its part, fails to satisfy this burden. The CIA, by virtue of its own statements, appears to have imposed a temporal limit on the search in the form of an "end-date" cut-off point, namely November 5, 2007. See CIA's Memo, Exhibit "B" ("Ex. B"). See also CIA's Memo, Exhibit "D" ("Ex. D")("Our processing included a search of records as described in our 5 November 2007 acceptance letter *existing through the date of that letter.*")(emphasis added). The Nelson Declaration, however, does not address this issue in any way, shape, or form, even if simply to reiterate that an "end-date" for responsive records was imposed. See Nelson Decl. at ¶ 19. It does not verify if

the temporal limit was actually imposed or explain how, given the CIA's administrative delays, the limit was reasonable. The CIA's failure to even address, let alone explain, the reasonableness of the imposition of the original "end-date" constitutes further evidence of the insufficiency of the Nelson Declaration.

Even if the Nelson Declaration had addressed the issue, it is JMP's position that permitting the use of the original "end-date" would be unreasonable in light of the CIA's eight-month administrative delay in processing the search. During those eight months, during which the CIA apparently took no action on JMP's request, the "internal inquiry" was concluded and changes to the operations of the OIG and the structure of the CIA's oversight of the OIG were implemented. See, e.g., Exhibit "2" ("CIA Tells of Changes for its Internal Inquiries"); Exhibit "3" ("CIA Sets Changes to IG's Oversight, Adds Ombudsman"); Exhibit "4" (detailing the changes implemented subsequent to this review). Arguably, untold numbers of responsive records were created during those eight months. Moss Decl. at ¶ 17. Despite that fact, *after* JMP finally was forced to initiate the present litigation in order to compel the CIA to comply with its obligations under FOIA, the CIA concluded its search in "early July 2008" and chose to rely upon the original "end-date" of November 5, 2007. Nelson Decl. at ¶ 19; Ex. D. By that point, the original "end-date" was no longer reasonable and arguably should have been modified to comport with the changed circumstances. This type of behavior was rejected as unreasonable by the D.C. Circuit in McGehee[6] and is equally unreasonable here.

[6] The D.C. Circuit highlighted that the CIA's imposition of an "end-date" for its search to the first 35 days after the Jonestown Tragedy, despite the agency's two-and-a-half year delay in responding to McGehee's request, was not reasonable and remanded that portion of the case with instructions to the CIA to "do better than it has thus far." McGehee, 697 F.2d at 1103-04.

3. *The Nelson Declaration's Inclusion Of Irrelevant FOIA Procedures Constitutes Supplemental Evidence That It Is Insufficiently Detailed*

For reasons known only to the CIA, the Nelson Declaration includes generic, boilerplate descriptions of CIA FOIA procedures pertaining to the review of responsive records for purposes of determining the applicability of FOIA exemptions, making redactions to withhold exempted information, and segregating exempt information. Nelson Decl. at ¶¶ 11-14. Given that the CIA's search failed to identify any responsive records, none of those three procedures were ever employed with respect to JMP's request.

The Nelson Declaration's inclusion of this information should raise concerns as to the CIA's good faith in its submission of an affidavit that is required to be "sufficiently detailed" and tailored specifically to this particular FOIA litigation in order to provide this Court with sufficient factual context in which to assess the adequacy of the CIA's search. Moss Decl. at ¶ 15. In effect, the Nelson Declaration's description of the CIA's search consists solely of: a) generic explanations regarding CIA's FOIA procedures (some irrelevant) and records systems; b) a recitation of JMP's FOIA request correspondence with CIA; c) two vague and insufficient sentences explaining the records system searched and search terms used; and d) one self-serving sentence asserting that the CIA's search was "diligent" and "reasonably calculated to discover" responsive records.[7] See Nelson Decl. at ¶¶ 7-19. This description does not and cannot meet the CIA's burden of providing an affidavit that is "detailed" and "nonconclusory."

[7] The CIA's unsubstantiated assertion that its search was diligent and adequate is of little consequence or importance in assessing whether, for purposes of summary judgment, the CIA has met its burden of demonstrating that there is no genuine issue of material fact regarding the adequacy of its search. Indeed, the D.C. Circuit has held that "[r]eliance on

The Nelson Declaration's vague description of the search terms and location parameters utilized in conducting the search, as well as its failure to explain the reasonableness underlying its imposition of the original "end-date" and its inclusion of irrelevant FOIA procedures, renders it insufficiently detailed and deprives this Court of an adequate context in which to assess the adequacy of the CIA's search. Therefore, the CIA's Motion for Summary Judgment ("CIA's Motion") should be denied pending, at a minimum, submission by the CIA of a more sufficiently detailed affidavit, if not additional searches and agency review.

C. JMP Can Identify Countervailing Evidence In Light Of The Applicability Of The Central Intelligence Agency Act of 1949 And CIA Official Public Statements That Raise A Genuine Issue Of Material Fact Regarding The Adequacy Of The CIA's Search

While it is true that the inability of an agency to find a particular document does not *generally* render a search inadequate, in certain circumstances a court may place significant weight on the fact that a records search failed to turn up a particular document. See Nation Magazine, Washington Bureau v. U.S. Customs Serv., 71 F.3d 885, 892, n.7 (D.C. Cir. 1995). See also Krikorian v. Dep't of State, 984 F.2d 461, 468 (D.C. Cir. 1993)(documents not found by agency factored into court's evaluation of adequacy of search). At a minimum, JMP can direct this Court's attention to at least one federal statute that would have imposed an obligation upon the CIA to create records responsive to JMP's request. The Central Intelligence Agency Act of 1949 ("the CIA Act") mandates that the OIG prepare and submit to the CIA Director a classified semiannual report ("the IG report") summarizing the OIG's activities during the immediately-

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affidavits to demonstrate agency compliance with the mandate of the FOIA does not, however, require courts to accept glib government assertions of complete disclosure or retrieval." Perry, 684 F.2d at 126.

preceding six-month period. 50 U.S.C. § 403q(d)(1). The CIA Director subsequently is obligated to transmit that report to the House Permanent Select Committee on Intelligence ("HPSCI") and the Senate Select Committee on Intelligence ("SSCI") with any comments he may deem appropriate. Id. See Exhibit "5" ("Semiannual Report to the Director, Central Intelligence Agency: July – December 2005").

In its original FOIA request, JMP provided the CIA with copies of news articles from October 2007 detailing the CIA's official verification that Director Hayden had authorized an "internal inquiry" into the activities of the OIG as a whole, and Helgerson in particular. CIA's Memo, Exhibit "A." See also Exhibit "6" ("CIA Chief Defends Review on Agency's Inspector General"). As indicated in a routine briefing between Helgerson and SSCI staff members in October 2007, the "internal inquiry" began in April 2007 and was being conducted by Director Hayden's senior counselor Robert L. Dietz. See Exhibit "7" ("Lawmakers Criticize CIA Director's Review Order"). In a pair of news articles dated February 2, 2008, at which point JMP's request was still being processed administratively, Director Hayden verified that the "internal inquiry" had been concluded and that Helgerson had agreed to "tighter controls" over the OIG's investigative procedures, as well as the appointment of an ombudsman and a "quality control officer" to oversee the activities of the OIG. See Exhibit "2;" Exhibit "3." See also Exhibit "4" (detailing the job responsibilities of the "quality control officer" and the ombudsman).[8]

[8] It should not be ignored that the CIA is, in effect, arguing that an allegedly-reasonably adequate search of its records did not find one responsive record pertaining to a ten month internal investigation which implicated not only the OIG but also included, at a minimum: a) OPA, for the comments made by Helgerson in the SSCI briefing and the press contacts by Director Hayden and CIA spokesman Paul Gimigliano; b) Office of Legislative Counsel, for the IG reports that Director Hayden was required to provide to the HPSCI and SSCI; and c) the Office of the Director, for the coordination of the

Given that the "internal inquiry" lasted approximately ten months and spanned three different reporting intervals, the OIG was obligated by the CIA Act to create at least three semiannual reports summarizing its activities that would have included references to the "internal inquiry," including: 1) efforts to cooperate with the inquiry; 2) discussions within OIG and with other CIA officials regarding possible changes to the OIG's investigative procedures and the appointment of an ombudsman and a "quality control officer;" and 3) discussions regarding the implementation of the agreed-upon changes. Director Hayden would have subsequently been required to transmit those reports to the HPSCI and SSCI. The CIA's failure to locate these records is assuredly a relevant factor for this Court to consider in evaluating the reasonableness of the CIA's search.[9]

In light of the insufficiency of the Nelson Declaration and JMP's identification of countervailing evidence in the form of at least one statutory provision that required the CIA to produce responsive records, the CIA has failed to meet its burden of demonstrating that there are no genuine issues of material fact pertaining to the adequacy of its search. Therefore, the CIA's Motion should be denied pending, at a minimum,

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"internal inquiry" with Director Hayden's senior counselor, Robert L. Dietz. On its own, this failure would not necessarily be sufficient to raise a genuine issue of material fact, but when combined with the insufficient explanations in the Nelson Declaration of the CIA's search and the CIA's failure to identify the three IG reports whose creation was statutorily-mandated, the fact that the CIA could not identify a single responsive record pertaining to this investigation is highly suspect.

[9] The fact that JMP's original FOIA request does not specifically seek records pertaining to the ultimate conclusions of the "internal inquiry" does not render unresponsive the reports created in compliance with the CIA Act. The D.C. Circuit has previously held that agencies have a duty to construe FOIA requests *liberally* to ensure responsive records are not overlooked. See Valencia-Lucena, 180 F.3d at 326. A reasonable, liberal construction of JMP's request for "documents pertaining to discussions concerning the decision to initiate an internal review" of the OIG would include records that reference the internal review itself.

submission by the CIA of a more sufficiently detailed affidavit, if not the completion of additional searches and agency review.

II. ALTERNATIVELY, JMP IS ENTITLED TO CONDUCT LIMITED DISCOVERY TO ASCERTAIN THE ADEQUACY OF THE CIA'S SEARCH

Discovery is a permissible and useful tool in the proper judicial administration of the FOIA with regard to agency searches that are inadequate. "If a party opposing [a motion for summary judgment] shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: . . . order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken . . ."[10] Fed. R. Civ. P. 56(f). Since in most FOIA cases the government possesses all of the relevant evidence, it is permissible to use discovery to uncover facts to determine the adequacy of the government's search or the exempt status of requested documents. See Weisberg v. Webster, 749 F.2d 864, 868 (D.C. Cir. 1984).[11] Given the insufficiency of the Nelson Declaration and the subsequent inability by the CIA to demonstrate that it conducted an adequate and reasonable search, discovery is necessary and permitted. See,

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[10] While some recent unpublished opinions have interpreted this to mean that "a FOIA plaintiff generally 'must establish how the specific discovery requested would create a genuine issue of material fact.'" Morley v. CIA, 2006 WL 280645, *1 (D.D.C. Feb. 6, 2006), quoting Center for Nat'l Security Stud. v. Dep't of Justice, 2002 U.S. Dist. LEXIS 2983, *4 (D.D.C. Feb. 21, 2002), this interpretation is an oversimplification of the original ruling that "[c]onclusory allegations unsupported by factual data will not create a triable issue of fact." Marks v. Dep't of Justice, 578 F.2d 261, 263 (9th Cir. 1978), cited by Exxon Corp. v. Federal Trade Com., 663 F.2d 120, 127 (D.C. Cir. 1980), cited by Carpenter v. Fannie Mae, 174 F.3d 231, 237 (D.C. Cir. 1999). Under this original interpretation, this Court should find the factual data and logical inferences presented by JMP sufficient to pass the Marks test.

[11] While the court was addressing the particular right of the government to utilize discovery, it affirmed that right by stating that the government, "like any other litigant," should be able to utilize the rules of discovery. Weisberg, 749 F.2d at 868.

e.g., Weisberg, 705 F.2d at 1348 (permitting discovery to resolve material factual dispute regarding adequacy of search).

Discovery does not need to be overly burdensome or excessive in scope. At a minimum, a limited number of interrogatories and depositions will be necessary to identify the full scope of responsive documents that exist and assess whether the CIA's search methodology was reasonably calculated to uncover all responsive documents in light of that information. Discovery would address several previously-identified gaps in the CIA's description of its search for records, including, for example: 1) which particular search terms were utilized with respect to different particular components or offices; 2) to what extent, if any, the CIA revised its search in light of identification of relevant yet non-responsive documents; and 3) whether the original "end-date" was imposed as a limitation on the search. Moss Decl. at ¶ 18.

CONCLUSION

For the foregoing reasons, the CIA's Motion for Summary Judgment should be denied, pending the submission by CIA's counsel of a more sufficiently detailed affidavit, or, alternatively, JMP should be permitted to undertake limited discovery.

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Respectfully submitted,

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