UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2011

(Argued: March 9, 2012 Decided: May 21, 2012)

Docket Nos. 10-4290-cv(L), 10-4289-cv(CON), 10-4647-cv(XAP), 10-4668-cv(XAP)

AMERICAN CIVIL LIBERTIES UNION, CENTAUR(L)

Before:

WESLEY, CARNEY, *Circuit Judges*, and CEDARBAUM, *District Judge*.[*]

Appeal and cross-appeal from a judgment of the United States District Court for the Southern District of New York (Hellerstein, *J.*), granting the parties' motions for partial summary judgment with respect to Plaintiffs' Freedom of Information Act request for the disclosure of records concerning the treatment of detainees in United States custody abroad since September 11, 2001. The Government challenges the portion of the judgment requiring it to disclose information in two memoranda pertaining to what the Government considers a highly classified, active intelligence method. Plaintiffs challenge the judgment insofar as it sustained the Government's withholding of certain records relating to the use of waterboarding and a photograph of a high-value detainee in custody. We agree with the district court that the materials at issue in Plaintiffs' cross-appeal are exempt from disclosure. The district court erred, however, in requiring the Government to disclose the classified information redacted from the two memoranda.

AFFIRMED in part and **REVERSED** in part.

TARA M. LA MORTE, Assistant United States Attorney (Amy A. Barcelo, Sarah S. Normand, Assistant United States Attorneys, *on the brief*), for Preet Bharara, United States Attorney for the Southern District of New York, New York, NY; (Tony West, Assistant Attorney General, Ian Heath Gershengorn, Deputy Assistant Attorney General, Douglas N. Letter, Matthew M. Collette, Attorneys, Civil Division, Appellate Staff, Department of Justice, Washington,

Constitutional Rights, Incorporated, Physicians for Human Rights, Veterans for Common Sense, and Veterans for Peace (collectively “Plaintiffs”) appeal from the same judgment insofar as it upheld the Government’s withholding of records relating to the CIA’s use of the Enhanced Interrogation

disclosure of records concerning (1) the treatment of detainees; (2) the deaths of detainees while in United States custody; and (3) the rendition, since September 11,

memoranda in a series of *ex parte*, *in camera* sessions. It also reviewed several declarations from high-level executive branch officials supporting the Government's withholding of the redacted information. At the first session, the district court issued a prelim It

to the classified information with alternative language meant to preserve the meaning of the text. The district court acknowledged the national security concerns potentially raised by the disclosure of some of the classified information, but nevertheless ordered that the Government either disclose the information or comply with the court's proposed compromise. The district court also ordered that references to the classified information in the transcript of the first *ex parte*, *in camera* proceeding be disclosed or otherwise released in accordance with the compromise. The district court memorialized its oral ruling in a December 29, 2009 order. The Government now appeals from that order.

II. Facts and Procedural History Relevant to Plaintiffs' Cross-Appeal

Many of the documents released by the Government in response to Plaintiffs' FOIA requests relate to the use of EITs. During the course of this litigation, the President prohibited the future use of certain EITs, including waterboarding, formerly authorized for use on high-value detainees.[2] On May 7, 2009, the district court ordered the

[2] On January 22, 2009, the President issued an executive order terminating the CIA's detention and interrogation program

Government to compile a list of documents related to the contents of 92 destroyed videotapes of detainee interrogations that occurred between April and December 2002 and which would otherwise have been responsive to Plaintiffs' FOIA requests. Pursuant to that order, the CIA identified 580 documents and selected a sample of 65 documents for the district court to review for potential release. Specifically, the sample records comprise:

- 53 cables (operational communications) between CIA headquarters and an interrogation facility;
- 3 emails postdating the videotapes' destruction;
- 2 logbooks detailing observations of interrogation sessions;
- 1 set of handwritten notes from a meeting between a CIA employee and a CIA attorney;
- 2 memoranda containing descriptions of the contents of the videotapes;
- 1 set of handwritten notes taken during a review of the videotapes;
- 2 records summarizing details of waterboard exposures from the destroyed videotapes; and
- 1 photograph of Abu Zubaydah dated October 11, 2002.

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and mandating that individuals in United States custody "not be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in Army Field Manual 2-22.3." Exec. Order No. 13,491, 74 Fed. Reg. 4,893, 4,894 (Jan. 22, 2009). Regpw4 (Jan. 22, 2?Œ4"

The Government withheld these records pursuant to FOIA Exemptions 1 and 3, and the parties filed cross-motions for summary judgment with regard to whether the records were exempt from disclosure.[3]

The Government defended its withholding of the records with three declarations of then-CIA Director Leon Panetta. The declarations explained that the records consist primarily of communications to CIA headquarters from a covert CIA facility where interrogations were being conducted, and include "sensitive intelligence and operational information concerning interrogations of Abu Zubaydah." Panetta Decl. ¶ 5, June 8, 2009. With respect to Exemption 3, the declarations explained that, if disclosed, the records would "reveal intelligence sources and methods" employed by the CIA, as well as "the organization and functions of the CIA, including the conduct of clandestine intelligence activities to collect intelligence from human sources using interrogation methods." *Id.* ¶¶ 32, 35. With respect to Exemption 1, the

[3] The Government also withheld portions of the records pursuant to other FOIA Exemptions. Plaintiffs do not challenge those withholdings on appeal.

declarations asserted that the records were properly classified pursuant to Executive Order No. 12,958 and that their disclosure could reasonably be expected to result in harm to national security.

In response, Plaintiffs argued that the EITs were not "intelligence methods" within the meaning of the CIA's withholding authorities because they had been repudiated, and, in the case of waterboarding, declared unlawful by the President. Plaintiffs also argued that the CIA had failed to provide any explanation for withholding the photograph of Abu Z

rejected Plaintiffs' argument that the President's declaration was a sufficient basis for rejecting the Government's position. The district court explained that it would "decline to rule on the question of legality or illegality in the context of a FOIA request." J.A. 1105-06. Rebuffing Plaintiffs' argument that the photo should be produced because the Government offered no justification for its withholding, the district court sustained the withholding and explained that "the image of a person in a photograph is another aspect of information that is important in intelligence gathering." J.A. 1115.

The district court memorialized its rulings in an October 13, 2009 order. In sustaining the withholding of the records under FOIA Exemption 3, the district court concluded that the CIA had satisfied its burden of showing that the release of the records could reasonably be expected to lead to unauthorized disclosure of intelligence sources and methods. The district court also rejected Plaintiffs' argument that records relating to illegal activities are beyond the scope of @the unauthorized discloreu`ÁpÖÖà IA Exemption 3,

order. In doing so, the district court reaffirmed its view that neither statutory language nor case law supports Plaintiffs' contention that the legality of the underlying intelligence source or method bears upon the validity of an Exemption 3 withholding.

On October 1, 2010, the district court entered partial final judgment pursuant to Federal Rule of Civil Procedure 54(b), granting Plaintiffs summary judgment with regard to the Government's withholding of the classified information in the two OLC memoranda, and granting the Government summary judgment with regard to the nondisclosure of records related to the contents of the destroyed videotapes and the photograph. Plaintiffs limit their cross-appeal to those records reflecting the CIA's use of waterboarding and to the photograph of Abu Zubaydah.

DISCUSSION

The Freedom of Information Act "calls for broad disclosure of Government records." *CIA v. Sims*, 471 U.S. 159, 166 (1985). But public disclosure of certain government records may not always be in the public interest. Thus, Congress provided that some records may be withheld from disclosure under any of nine exemptions defined in 5

U.S.C. § 552(b). *Id.* at 167.

An agency withholding documents responsive to a FOIA request bears the burden of proving the applicability of claimed exemptions. *Wilner v. NSA*, 592 F.3d 60, 68 (2d Cir. 2009). "Affidavits or declarations . . . giving reasonably detailed explanations why any withheld documents fall within an exemption are sufficient to sustain the agency's burden." *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994). We review the adequacy of the agency's justifications *de novo*. *Wilner*, 592 F.3d at 73. In the national security context, however, we "must accord *substantial weight* to an agency's affidavit concerning the details of the classified status of the disputed record." *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007) (internal quotation marks omitted); *see also Sims*, 471 U.S. at 179. Summary judgment is appropriate where the agency affidavits "describe the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Wilner*, 592 F.3d at 73. Ultimately, an agency ma} om374 IA

exemption if its justification "appears logical or plausible." *Id.* (internal quotation marks omitted).

I. The Government's Appeal—The OLC Memoranda

The Government contends that the information redacted from the OLC memoranda may be withheld from disclosure under either FOIA Exemption 1 or 3. In our view, Exemption 1 resolves the matter easily.[4] Exemption 1 permits the Government to withhold information "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" if that information has been "properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). The Government contends that the redacted information was properly classified under Executive Order No. 12,958, as amended, which authorized the classification of information concerning "intelligence activities (including special activities), intelligence sources or methods, or cryptology." Exec. Order No. 12,958 § 1.5(c), 60 Fed. Reg. 19,825 (Apr. 17, 1995), *as amended by* Exec. Order No.

[4] Because the FOIA Exemptions are independent of each other, we need only discuss why we conclude that the Government may invoke FOIA Exemption 1 to justify withholding the redacted information in the OLC memoranda. *See Wilner*, 592 F.3d at 72 (citing *Larson v. Dep't of State*, 565 F.3d 857, 862-63 (D.C. Cir. 2009)).

13,292, 68 Fed. Reg. 15,315 (Mar. 25, 2003) (hereinafter "Exec. Order No. 12,958").[5] Executive Order No. 12,958 also required as a condition to classification that an original classification authority "determine[] that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security" and "is able to identify or describe the damage." *Id.* § 1.1(a)(4), 68 Fed. Reg. at 15,315.[6]

The district court held that the exemption was inapplicable because, in its view, the information pertains to a "source of authority" rather than a "method of interrogation." J.A. 1174-75.[7] On appeal, as it did in the district court, the Government contends that the information pertains to an intelligence method and an intelligence

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[5] Executive Order No. 12,958 and all amendments thereto have since been superseded by Executive Order No. 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009). For purposes of Exemption 1, the propriety of a classification decision is considered under the criteria of the executive order that applied when the decision was made. *See Halpern v. FBI*, 181 F.3d 279, 289 (2d Cir. 1999).

[6] The parties do not dispute whether the remaining criteria for proper classification have been satisfied. *See* Exec. Order No. 12,958 § 1.1(a), 68 Fed. Reg. at 15,315.

[7] Addressing only the applicability of Exemption 3, the district court con• $ÀP# RRÒHen the decisiaàðÆ—@Â'Âabilit€€ÖÆR&Poánforà Add

activity, and that each category provides a basis for classification under Executive Order No. 12,958. In support of this contention, the Government has submitted declarations from General James L. Jones, then-Assistant to the President for National Security and National Security Advisor; General Michael V. Hayden, then-Director of the CIA; Leon Panetta, then-Director of the CIA; and Wendy M. Hilton, Information Review Officer for Detainee-Related Matters for the CIA.

Based on our *ex parte* and *in camera* review of the unredacted OLC memoranda and the Government's classified declarations, we agree with the Government that the redacted information was properly classified because it pertains to an intelligence activity. Plaintiffs concede that, even if we were to characterize the information as a "source of authority," "withholding [a] source of authority itself is . . . proper if disclosing it would reveal . . . intelligence sources, methods, or activities." Pls.' Br. 40-41. We give substantial weight to the Government's declarations, which establish that disclosing the redacted portions of the OLC memoranda would reveal the existence and scope of a highly classified, active intelligence activity.

See Doherty v. U.S. Dep't of Justice, 775 F.2d 49, 52 (2d Cir. 1985).

We reject any notion that to sustain the Government's assertion that the withheld information concerns a protected "intelligence activity" under Executive Order No. 12,958 is effectively to exempt the CIA from FOIA's mandate. In response to Plaintiffs' FOIA requests and related court orders, the Government has already produced substantial

Studies v. U.S. Dep't of Justice, 331 F.3d 918, 927 (D.C. Cir. 2003). "Recognizing the relative competencies of the executive and judici

weight and deference to the CIA's declarations, *see Doherty*, 775 F.2d at 52, we conclude that it is both logical and plausible that the disclosure of the information pertaining to a CIA intelligence activity would harm national security.

Furthermore, we reject the district court's suggestion that certain portions of the redacted information are so general in relation to previously disclosed activities of the CIA that their disclosure would not compromise national security. It is true that the Government has disclosed significant aspects of the CIA's discontinued detention and interrogation program, but its declarations explain in great detail how the withheld information pertains to intelligence activities unrelated to the discontinued program. Hilton Decl. ¶ 6. And even if the redacted information seems innocuous in the context of what is already known by the public, "[m]inor details of intelligence information may reveal more information than their apparent insignificance suggests because, much like a piece of jigsaw puzzle, each detail may aid in piecing together other bits of information even when the individual piece is not of obvious importance in itself." *Wilner*, 592 F.3d at 73 (alterations and internal quotation marks omitted); *see also Sims*, 471 U.S.

at 178; *ACLU v. U.S. Dep't of Defense*, 628 F.3d 612, 625 (D.C. Cir. 2011). Again, it is both logical and plausible that disclosure of the redacted information would jeopardize the CIA's ability to conduct its intelligence operations and work with foreign intelligence liaison partners.

Both parties contend that the district court's compromise, whereby the Government could avoid public disclosure of the redacted information by substituting a purportedly neutral phrase composed by the court, exceeded the court's authority under FOIA. We agree. FOIA does not permit courts to compel an agency to produce anything other than responsive, non-exempt records. *See* 5 U.S.C. § 552(a)(4)(B). If the Government altered or modified the OLC memoranda in accordance with the compromise, the Government would effectively be "creating" documents—something FOIA does not obligate agencies to do. *See, e.g.*, *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 152 (1980); *Pierce & Stevens Chem. Corp. v. U.S. Consumer Prod. Safety Comm'n*, 585 F.2d 1382, 1388 (2d Cir. 1978). Moreover, given the "relative competencies of the executive and judiciary," the district court erred in "second-guess[ing]" the executive's judgment

The Government sufficiently explained that the withheld information pertains to an "intelligence activity" and that disclosure of the information would likely result in harm to national security. The Government's declarations are not contradicted by the record, and there is no evidence of bad faith by the Government in this regard. Accordingly, the Government has sustained its burden of proving that the information redacted from the OLC memoranda is exempt from disclosure under FOIA Exemption 1. *See Wilner*, 592 F.3d at 73. We therefore reverse the district court's judgment insofar as it required disclosure of the information—either in full or in accordance with the district court's compromise—in the OLC memoranda and the transcript of the district court's *ex parte*, *in camera* proceeding.

II. Materials at Issue in Plaintiffs' Cross-Appeal

The district court agreed with the Government that the records related to the contents of destroyed videotapes of detainee interrogations and a photograph of high-value

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Government retains ultimate control and may prevent a criminal defendant from disclosing classified information, with the consequence of the court either dismissing the indictment or taking another action adverse to the prosecution. *See* 18 U.S.C. app. 3, § 6(e). By contrast, the Government cannot walk away from a FOIA case in order to avoid disclosure of classified information.

detainee Abu Zubaydah in CIA custody may be withheld from disclosure under FOIA Exemption 3. Plaintiffs challenge the withholding of only those records relating to the CIA's use of waterboarding and the photograph.

Exemption 3 permits the Government to withhold information from public disclosure provided that: (1) the information is "specifically exempted from disclosure by statute"; and (2) the exemption statute "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue" or "establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3); *see Sims*, 471ÑCÓ[illegible]6,ia f

limiting definition that goes beyond the requirement that the information fall within the Agency's mandate to conduct foreign intelligence." *Id*. at 169.[13]

Here, Plaintiffs argue that the provision of the NSA requiring the Director of National Intelligence to "ensure compliance with the Constitution and laws of the United States," *see* 50 U.S.C. § 403-1(f)(4), delimits the Director's obligation under section 102A(i)(1) to "protect intelligence sources and methods from unauthorized disclosure," *see* 50 U.S.C. § 403-1(i)(1), and the concomitant rights under FOIA to decline to disclose. The statutory language does not, however, draw any such limitation, and to do so by judicial device would flout *Sims*'s clear directive against constricting the CIA's broad authority in this domain. Again, *Sims*Ö÷VÆBlimyÅqu ione 50 U.S.C. § 4

that text.

Moreover, we are wary of the practical difficulties that would likely arise were the category of protectable intelligence methods circumscribed as Plaintiffs propose. In FOIA actions in which the government seeks to withhold information related to an intelligence method, an information officer and then the court would potentially be forced to engage in a complex inquiry to determine whether the government has sufficiently demonstrated the legality of the method to justify withholding. In this respect, we question how the court and the agency would handle varying assessments of legality. What becomes of information concerning a method that the President, on advice of counsel, considers legal, but which is later declared unlawful by a federal court or by a subsequent administration? Relatedly, is the legality of a method to be determined as of the time of the method's use or may a forward-looking proscription also apply retroactively to prevent reliance on an exemption? The matter currently before us helps illustrate the point. Even if we assumed that a President can render an intelligence method "illegal" through the mere issuance of public statements, or, more

formally, through adoption of an executive order, and if we further assumed that President Obama's Executive Order coupled with his statements describing waterboarding as "torture" were sufficient in this regard, we would be left with the difficult task of determining what retroactive effect, if any, to assign that designation. In our view, such an "illegality" inquiry is clearly beyond the scope and purpose of FOIA. *See Wilner*, 592 F.3d at 77.

Finally, we also note that prior courts faced with similar questions have declined to address the legality of an intelligence method as part of a FOIA analysis. In *ACLU v. U.S. Department of Defense*, the District of Columbia Circuit rejected the very argument raised by Plaintiffs here: that an interrogation technique formerly authorized for use on high-value detainees is no longer a protectable "intelligence method" for FOIA purposes if the President bans its future use. *See* 628 F.3d at 622. After noting that *Sims* "says nothing suggesting that the change in thdXÓ similar c

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charter. But in our view, *Wilner*'s principle is equally applicable here—a judicial determination of the legality of waterboarding is beyond the sc

disclosure under FOIA Exemption 3. *See Wilner*, 592 F.3d at 73, 76-77.

B. The Photograph of Abu Zubaydah

Plaintiffs contend that the CIA failed to provide any justification for withholding a photograph of Abu Zubaydah taken while he was in CIA custody abroad and that the post hoc explanations offered by the Government's counsel do not suffice to justify the withholding. We disagree. In a June 8, 2009 unclassified declaration, Director Panetta explained that all of the records he reviewed in connection with his invocation of FOIA Exemptions 1 and 3, including the photograph, are "related to the contents of 92 destroyed videotapes of detainee interrogations that occurred between April and December 2002." Panetta Decl. ¶ 3, June 8, 2009. Director Panetta further declared that "miscellaneous documents" in the sample records, including the photograph, "contain[] TOP SECRET operational information concerning the interrogations" of Abu Zubaydah. *Id*. ¶ 5. On appeal, the Government has expanded upon Director Panetta's justification for withholding by explaining that the photograph necessarily "relates to" an "intelligence source or method" because it records Abu Zubaydah's condition in

the period during which he was interrogated.

We have reviewed the photograph *in camera*. Our examination has been informed by our contemporaneous review of other sample records. Like the district court, we observe that a photograph depicting a person in CIA custody discloses far more information than the person's identity. We agree with the district court that the image at issue here conveys an "aspect of information that is important to9ty.

CONCLUSION

For the foregoing reasons, the judgment of the district court is hereby **AFFIRMED** in part and **REVERSED** in part. We affirm the judgment of the district court insofar as it sustained the Government's withholding of records relating to the CIA's use of waterboarding and the photograph of Abu Zubaydah. We reverse that part of the judgment that requires the Government either to disclose the classified information in the OLC memoranda and the transcript of the district court's *ex parte*, *in camera* proceeding, or to substitute language proposed by the district court.