

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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AMERICAN CIVIL LIBERTIES UNION, et al., :
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 Plaintiffs, :
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 -against- :
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DEPARTMENT OF DEFENSE, et al., :
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 Defendants. :
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ALVIN K. HELLERSTEIN, U.S.D.J.:

OPINION AND ORDER
GRANTING IN PART AND
DENYING IN PART MOTIONS
FOR PARTIAL SUMMARY
JUDGMENT

04 Civ. 4151 (AKH)

The American Civil Liberties Union and other plaintiffs have demanded that the government produce relevant documents concerning the “treatment of Detainees in United States custody,” the “death of Detainees in United States custody,” and the “rendition of Detainees and other individuals” to countries known to employ torture. Plaintiffs’ demands under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, were first made on October 7, 2003. The government, after being inattentive for many months to the obligations imposed on it by FOIA, see Am. Civil Liberties Union v. Dep’t of Def., 339 F. Supp. 2d 501 (S.D.N.Y. 2004) (“Opinion and Order of September 15, 2004”), has made large, but not complete, production,

plaintiffs believed the government could readily process. The priority list focused on specifically identified records, such as records “provided by defendant agencies to Congress, members of Congress, or congressional committees,” or “discussed or identified in the media.” My Opinion and Order of September 15, 2004 set out an expedited procedure with respect to the August 16, 2004 List.¹ Specifically, the government was required to produce the documents responsive to the List, or provide a declaration showing that an exemption against production applied, see Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), following which there would be motions for partial summary judgment to resolve disputes regarding documents claimed to be exempt.

Initially, defendant CIA took the position that it did not have to search its operational files and identify responsive documents, claiming an exemption by statute. See CIA Information Act, 50 U.S.C. § 431. However, the CIA Information Act itself provides exceptions to the exemptions from FOIA that it affords the CIA, and I held that since the agency had already conducted a search pursuant to an investigation of its Inspector General into allegations of improprieties of CIA operatives in Iraq, the statute by its explicit terms no longer exempted the CIA from its obligations under FOIA to search. I ordered the CIA to search its investigative files for responsive documents, and either to produce them or show them to be exempt. See Am. Civil Liberties Union v. Dep’t of Def., 351 F. Supp. 2d 265 (S.D.N.Y. 2005) (Opinion and Order of February 2, 2005, modified, April 18, 2005).²

Against this backdrop, plaintiffs and defendants both moved for summary judgment on issues arising from plaintiffs’ priority list of August 16, 2004. “Summary

¹ With respect to the remainder of plaintiffs’ outstanding requests, the Opinion and Order of September 15, 2004 required the government to produce responsive documents or identify them in a log to be publicly filed or examined ex parte and in camera.

² The CIA informed plaintiffs on April 15, 2005 that all Office of Inspector General (“OIG”) documents pertaining to ongoing investigations or law enforcement activities were exempt under FOIA. The CIA subsequently informed plaintiffs, in a letter dated July 15, 2005, that all responsive documents in the files of the OIG that no longer relate

judgment is the procedural vehicle by which most FOIA actions are resolved.” Jones-Edwards v. Appeal Bd. of the Nat’l Sec. Agency Cent. Sec. Agency, 352 F. Supp. 2d 420, 423 (S.D.N.Y. 2005) (citing Miscavige v. IRS, 2 F.3d 366, 369 (11th Cir. 1993) (“Generally, FOIA cases should be handled on motions for summary judgment, once the documents in issue are properly identified.”)).

This Opinion addresses five categories of issues that are disputed: (1) the DOD’s withholding of reports and documents relating to the International Committee of the Red Cross; (2) documents relating to the DOD’s interrogation activities; (3) the CIA’s refusal to confirm or deny the existence or possession of certain documents; (4) the CIA’s representation, with regard to documents relating to a request by former CIA Director Tenet to Secretary of Defense Rumsfeld that a certain Iraqi suspect be held at a high-level detention center and not be identified, that there are no meaningful, reasonably segregable portions of the documents that are not exempt from production; and (5) the DOD’s withholding of photographs taken by Joseph Darby at Abu Ghraib prison and provided to the Army’s Criminal Investigative Division. This written decision expands on, and supersedes, the rulings and observations that I made at the public and in camera oral arguments held on May 26, May 31, August 15, and August 30, 2005.

The Applicable Legal Principles

As the Second Circuit recently observed, “FOIA was enacted in order to ‘promote honest and open government and to assure the existence of an informed citizenry [in order] to hold the governors accountable to the governed.’” Nat’l Council of La Raza v. DOJ, 411 F.3d 350, 355 (2d Cir. 2005) (alteration in original) (quoting Grand Cent. P’ship, Inc. v. Cuomo, 166 F.3d 473, 478 (2d Cir. 1999)). Clearly, however, the policy of open disclosure is

to pending investigations or law enforcement proceedings were also exempt under FOIA.

not the only policy to consider. FOIA itself recognizes this, and provides nine exemptions

773, 776 (D.C. Cir. 1984). Once the agency has made a reasonable response, the burden on a FOIA plaintiff is high:

In order to justify discovery once the agency has satisfied its burden, the plaintiff must make a showing of bad faith on the part of the agency sufficient to impugn the agency's affidavits or declarations, or provide some tangible evidence that an exemption claimed by the agency should not apply or summary judgment is

public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

5 U.S.C. § 552(b)(3). The relevant statute, 10 U.S.C. § 130c, authorizes the withholding of “sensitive information” to the extent such withholding is requested by a foreign government or international organization. See 10 U.S.C. § 130c(a). Section 130c provides that if the information was “provided by, otherwise made available by, or produced in cooperation with” the foreign government or international organization, and certain other criteria are satisfied, the information may be exempted from release by the United States government. In particular, the national security official concerned must determine each of the following:

(1) That the information was provided by, otherwise made available by, or produced in cooperation with, a foreign government or international organization.

(2) That the foreign government or international organization is withholding the information from public disclosure (relying for that determination on the written representation of the foreign government or international organization to that effect).

(3) That any of the following conditions are met:

(A) The foreign government or international organization requests, in writing, that the information be withheld.

(B) The information was provided or made available to the United States Government on the condition that it not be released to the public.

(C) The information is an item of information, or is in a category of information, that the national security official concerned has specified in regulations prescribed under subsection [(g)] as being information the release of which would have an adverse effect on the ability of the United States Government to obtain the same or similar information in the future.

Id. § 130c(b).

Under FOIA, “[t]he two threshold criteria needed to obtain exemption 3 exclusion from public disclosure are that (1) the statute invoked qualifies as an exemption 3 withholding statute, and (2) the materials withheld fall within that statute’s scope.” A.

Michael's Piano, Inc. v. Fed. Trade Comm'n, 18 F.3d 138, 143 (2d Cir. 1994) (citing CIA v. Sims, 471 U.S. 159, 167 (1985)). Exemption 3, as the Second Circuit explained, "incorporates the policies of other statutes"; a statute that meets the requirements of Exemption 3 "may effectively exclude certain matters from disclosure, namely, as stated in exemption 3, those matters 'specifically exempted from disclosure by [the subject] statute.'" Id. (alteration in original) (quoting 5 U.S.C. § 552(b)(3)).

There is no dispute, except for one argument discussed below in this paragraph, that 10 U.S.C. § 130c qualifies as a withholding statute and that the ICRC qualifies as an appropriate international organization; the only question is whether the disputed materials fall within the statute's scope. See id. at 144 ("[W]e follow the approach taken by the Supreme Court in construing withholding statutes, looking to the plain language of the statute and its legislative history, in order to determine legislative purpose." (citing Sims, 471 U.S. at 168-73)). Plaintiffs' only argument that the statute does not apply is that no regulations have been promulgated to support the determination of the relevant national security official, the Secretary of Defense, that the release of the information would have "an adverse effect on the ability of the United States Government to obtain the same or similar information in the future." See 10 U.S.C. § 130c(b)(3)(C), (g), (h)(1)(A). However, the text of the relevant portion of the statute is in the disjunctive; the statute does not provide that the promulgation of regulations is a necessary precondition to the statute's effectiveness. Furthermore, a directive of Secretary Donald Rumsfeld requires confidential treatment of all ICRC communications. See Decl. of Charles A. Allen, Deputy Gen. Counsel (Internat'l Affairs), Office of Gen. Counsel, DOD, dated Mar. 25, 2005, ¶ 13 & Ex. B (describing and attaching Memo, Sec'y of Def., July 14, 2004). Accordingly, plaintiffs' argument is without merit. I hold that 10 U.S.C. § 130c

constitutes a withholding statute for the purposes of FOIA Exemption 3. I therefore turn to examine if the documents responsive to Items 8, 13, 49, and 58 fall within the scope of 10 U.S.C. § 130c.

Item 8 requests the reports delivered by the ICRC to DOD. Such reports clearly fall within the scope of 10 U.S.C. § 130c and accordingly, they are covered by FOIA Exemption 3. At oral argument, plaintiffs conceded that the ICRC reports were properly exempted under the statute, and I so ruled. Tr. of May 31, 2005, at 12.

The government argues that Items 13, 49, and 58 reflect a dialogue between DOD and the ICRC, and thus were produced “in cooperation with” the ICRC, and are properly exempted under 10 U.S.C. § 130c(b)(1). Plaintiffs disagree with this characterization and argue, in addition, that with respect to at least some documents, extensive discussions in the press constitute a waiver of confidentiality.

The ICRC represented that it maintained, and requested that the United States government likewise maintain, confidentiality with respect to the disputed information, see Letter from Finn Ruda, Deputy Head of ICRC’s Delegation for United States and Canada to Stewart F. Aly, Assoc. Deputy Gen. Counsel, DOD, confirming “that all records of communications from the ICRC or its representatives regarding detainees in Guantánamo and Iraq have been provided by the ICRC to the DOD on condition that the documents not be released to the public.” Second Decl. of Stewart F. Aly, dated Mar. 23, 2005, Ex. D (attaching letter) [hereinafter Second Aly Decl.]. The Finn letter also states that “the ICRC itself is withholding such documents from public disclosure.” Id. The requirements of § 130c(b)(2) and (b)(3) are thus satisfied.

As to the government’s first argument, that the contested information was

“provided by, otherwise made available by, or produced in cooperation with” the ICRC, see 10 U.S.C. § 130c(b)(1), I examined a sample of the documents ex parte and in camera. The government provided a binder of samples — tabs A, B, C, and D, pertaining, respectively, to Items 8, 13, 49, and 58. Tab B⁴ provided a sample of four out of twenty-two responsive documents; Tab C contained the one responsive document identified by DOD; and Tab D provided a sample of three of thirty-eight documents.

The documents sampled essentially contained responses by DOD to the observations reported by the ICRC, thereby exposing the information “provided by” the ICRC. Just as an attorney’s responses to a client’s requests for advice are privileged — see, e.g., Coastal States Gas Corp. v. Dep’t of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) (noting that “[w]hile its purpose is to protect a client’s disclosures to an attorney, the federal courts extend the privilege also to an attorney’s written communications to a client”); In the Matter of Fischel, 557 F.2d 209, 211 (9th Cir. 1977) (“Ordinarily the compelled disclosure of an attorney’s communications or advice to the client will effectively reveal the substance of the client’s confidential communication to the attorney. To prevent this result, the privilege normally extends both to the substance of the client’s communication as well as the attorney’s advice in response thereto.”); see also 8 J. Wigmore, Evidence § 2320 at 628-29 (McNaughton rev. 1961) (describing that one reason for privileging an attorney’s communications to a client is that disclosure could “lead[] to inferences of the tenor of the client’s communications”); 1 McCormick on Evidence § 89 at 326 (John W. Strong ed., 4th ed. 1992) (“[I]t is generally held that the privilege will protect at least those attorney to client communications which would have a tendency to reveal the confidences of the client.”) — so the DOD’s responses to the ICRC are exempt, for otherwise the ICRC’s request for confidentiality would be compromised.

⁴ Tab A pertained to Item 8, which was no longer contested; I examined the documents provided under Tabs B, C,

Specifically, I ruled as follows, after in

factors,” distinguishing such techniques from those “causing severe physical or mental pain.” Plaintiffs’ second request is for a DOJ memorandum specifying interrogation methods that the CIA may use against top Al-Qaeda members (Item 29), which, according to plaintiffs, may permit a technique known as “waterboarding” whereby a detainee believes he is drowning. Plaintiffs’ third request is for a directive signed by President Bush granting the CIA the authority to set up detention facilities outside the United States and/or outlining interrogation methods that may be used against detainees (Item 61).

The CIA, responding to these three categories of requests, gave a “Glomar response,” neither admitting nor denying the existence of these documents in its possession, and claiming “a “Glomar response” to the existence of these documents.”

identified as either existing, or not existing, without compromising national security. If the CIA were to state that the documents existed, the CIA would be admitting that it “had engaged in clandestine intelligence activities **or**

is not part of the public record.

The CIA justifies its Glomar response, neither admitting nor denying the existence of three categories of documents responsive to plaintiffs' demands, on the basis of Exemptions 1 and 3 to FOIA. I discuss each of these exemptions in turn.

(b) Exemption 1

Exemption 1 exempts matters that are “(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order.” 5 U.S.C. § 552(b)(1). Executive Order 12958, effective as amended March 25, 2003, provides for classification of national security information. Exec. Order No. 12958, reprinted as amended by E.O. 13292 in 50 U.S.C. § 435 [hereinafter E.O. 12958]; see also Exec. Order No. 13292, 68 Fed. Reg. 15315 (Mar. 28, 2003). Pursuant to E.O. 12958, an agency may classify information within specified categories if the appropriate classification authority⁷ “determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security”:

Sec. 1.1. Classification Standards. (a) Information may be originally classified under the terms of this order only if all of the following conditions are met:

- (1) an original classification authority is classifying the information;
- (2) the information is owned by, produced by or for, or is under the control of the United States Government;
- (3) the information falls within one or more of the categories of information listed in section 1.4 of this order; and
- (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, which includes defense against transnational terrorism, and the original classification authority is able to identify or describe the damage.

E.O. 12958 § 1.1(a). Permissible categories of information that may be classified include information concerning: (a) military plans, weapons systems, or operations; (b) foreign

government information; (c) intelligence activities (including special activities), intelligence sources or methods, or cryptology; and (d) foreign relations or foreign activities of the United States, including confidential sources. Id. § 1.4. Information may not be classified to “conceal violations of law,” to “prevent embarrassment,” or to prevent or delay release of information “that does not require protection”:

Sec. 1.7. Classification Prohibitions and Limitations.

(a) In no case shall information be classified in order to:

- (1) conceal violations of law, inefficiency, or administrative error;
- (2) prevent embarrassment to a person, organization, or agency;
- (3) restrain competition; or
- (4) prevent or delay the release of information that does not require protection in the interest of the national security.

Id. § 1.7(a). The Executive Order also provides for a Glomar response; in response to a FOIA request, “[a]n agency may refuse to confirm or deny the existence or nonexistence of requested records whenever the fact of their existence or nonexistence is itself classified under this order or its predecessors.” Id. § 3.6(a).

(c) Exemption 3

The CIA also justifies its Glomar responses under Exemption 3, which exempts matters “specifically exempted from disclosure by statute . . . (A) requir[ing] that the matters be withheld from the public in such a manner as to leave no discretion . . . , or (B) establish[ing] particular criteria for withholding or refer[ring] to particular types of matters to be withheld.” 5 U.S.C. § 552(b)(3). The framework for analyzing agency withholdings under Exemption 3 was outlined earlier in connection with the ICRC documents. See A. Michael’s Piano, Inc. v. Fed. Trade Comm’n, 18 F.3d 138, 143 (2d Cir. 1994) (requiring the government to show that “(1) the statute invoked qualifies as an exemption 3 withholding statute, and (2) the materials withheld fall within that statute’s scope”).

⁷ Ms. Dorn has the requisite classification authority. See E.O. 12958 §§ 1.1(a), 1.3.

The qualifying statute here is Section 103(c)(7) of the National Security Act of 1947, as amended, 50 U.S.C.A. § 403-3(c)(7) (West 2003), which commands the Director of Central Intelligence (“DCI”) to “protect intelligence sources and methods from unauthorized disclosure.”⁸ See

In effect, the situation is as if appellant had requested and been refused permission to see a document which says either “Yes, we have records related to contacts with the media concerning the Glomar Explorer” or “No, we do not have any such records.”

Id. at 1012. The Court of Appeals remanded to require the CIA to “submit a public justification, which is as detailed as is possible, for refusing to confirm or deny the existence of the requested records.” Id. at 1015 n.12. The Court of Appeals held that the district court should discharge its de novo review obligation by first creating “as complete a public record as is possible,” and only then, if necessary, by “examin[ing] classified affidavits in camera and without participation by plaintiff’s counsel.” Id. at 1013.

Later cases, relying on Phillippi I, have approved Glomar responses where substantive responses, either admitting or denying that particular documents existed, “would

conversations between the CIA and the press. The district court rejected plaintiff's arguments that since the world already knew, possibly from the CIA's own disclosures, that the real purpose of the Glomar Explorer apparently extended beyond oceanic research to raising a lost Russian submarine from the ocean floor, there could be no remaining statutory purpose to withhold descriptions of contacts with the press. The Court of Appeals upheld the district court's deference to the CIA, holding that courts lacked competence to decide such delicate questions affecting national security and should defer to "well-documented and specific affidavits of the CIA." Id. at 1330.

In sum, the line between what may be revealed and what must be concealed is itself capable of conveying information to foreign intelligence agencies. For this reason, this court cannot simply assume, over the well-documented and specific affidavits of the CIA to the contrary, that revelation of seemingly innocent information which might nonetheless jeopardize a fallback cover story is required under the FOIA, either because the information in question has already been made public, or even, as in the present case, because it was disseminated for confidential purposes by the CIA itself. Without the ability to engineer controlled leaks of disinformation, the CIA would be deprived of the ability to disseminate a fallback cover while simultaneously protecting it.

Id. The Court of Appeals also accepted that there was a national interest in keeping foreign analysts in the dark, and leaving them unsure if that which was publicly disclosed was all that was secretly known. As the Court of Appeals put it:

FOIA does not require the CIA to lighten the task of our adversaries around the world by providing them with documentary assistance from which to piece together the truth.

Id. at 1332. And, further, even if the only question was whether to recognize officially that which was informally or unofficially believed to exist, the niceties of international diplomacy sometimes make it important not to embarrass a foreign country or its leaders, and exemptions from FOIA protect that concern as well. Id. at 1332-33.

Historians will evaluate, and legislators debate, how wise it is for a society to

positions, commented at the conclusion of his book, Secrecy:

[A] huge proportion of the government's effort at classifying is futile anyway. Let [George F.] Kennan have the last word. In a letter of March 1997 he writes: "It is my conviction, based on some 70 years of experience, first as a government official and then in the past 45 years as an historian, that the need by our government for secret intelligence about affairs elsewhere in the world has been vastly over-rated."...

A case can be made...that secrecy is for losers. For people who don't know how important information really is. The Soviet Union realized this too late. Openness is now a singular, and singularly American, advantage. We put it in peril by poking along in the mode of an age now past. It is time to dismantle government secrecy, this most pervasive of Cold War-era regulations. It is time to begin building the supports for the era of openness that is already upon us.

Daniel Patrick Moynihan, Secrecy, 226-27 (Yale Univ. Press 1998); see generally Rep. of the Comm'n on Protecting and Reducing Gov't Secrecy (1997).

This is not to say that there is no room for secrets, or that the courts have the competence or the expertise of national security experts. Indeed, the courts generally respect the CIA's right to make a Glomar response. See Bassiouni v. CIA, 392 F.3d 244, 246 (7th Cir. 2004) ("Every appellate court to address the issue has held that the FOIA permits the CIA to make a 'Glomar response' when it fears that inferences from Vaughn indexes or selective disclosure could reveal classified sources or methods of obtaining foreign intelligence."). Most such cases involve requests by persons who claim to have had employment or other personal connections to the agency, or who seek such information about others who may have had such relationships. By giving a Glomar response, the CIA is able to avoid identifying its employees, or targets, and their activities. See, e.g., id. at 245 (Glomar response necessary to avoid "reveal[ing] details about intelligence-gathering methods"); Frugone v. CIA, 169 F.3d 772, 774 (D.C. Cir. 1999) (Glomar response necessary to avoid acknowledgment of employment); Minier v. CIA, 88 F.3d 796, 801-02 (9th Cir. 1996) (Glomar response necessary to avoid revealing if

person was a CIA agent); Hunt v. CIA, 981 F.2d 1116, 1119 (9th Cir. 1992) (“[D]isclosure of the existence or non-existence of records pertaining to Eslamina,” an Iranian national allegedly murdered by Hunt, “is tantamount to a disclosure whether or not he was a CIA source or intelligence target.”).

Other cases defer to the CIA’s unwillingness to describe its intelligence-gathering activities. *See, e.g., Miller v. Casey*, 730 F.2d 773, 774 (D.C. Cir. 1984) (upholding Glomar response to request for “information concerning alleged efforts by the United States and other countries to infiltrate intelligence agents and potential guerrillas into Albania during the period 1945-53”); Gardels v. CIA, 689 F.2d 1100, 1102-03 (D.C. Cir. 1982) (upholding Glomar response to request by a student at the University of California for “documents revealing covert CIA connections with or interest in the University”); Wolf v. CIA

of intelligence methods and activities that are available to the CIA or may be of interest to the CIA”; and that “[r]evealing that information reasonably could be expected to interfere with the United States Government’s collection of intelligence in the war on terrorism.” Fourth Dorn Decl. ¶¶ 11-12. Further, Ms. Dorn states that our foreign relations could be compromised because hitherto cooperating countries “may be less willing to cooperate if the U.S. Government were to officially acknowledge CIA current or past clandestine intelligence activities and methods, or intelligence interests.” *Id.* ¶ 15. In the Fifth Dorn Declaration, a classified document submitted to me *in camera*, Ms. Dorn provides further elaboration and describes particularized harms to justify the agency’s Glomar responses.

In Miller v. Casey, 730 F.2d 773 (D.C. Cir. 1984), the Court of Appeals upheld a Glomar response under Exemptions 1 and 3 upon descriptions of specific probable harms that might flow from substantive admissions or denials. The request in Miller was for:

All information on attempts by the U.S., U.K., and other western countries to infiltrate intelligence agents and potential guerrillas into Albania during the period between the end of World War II and the death of Stalin in 1953, including but not limited to those operations apparently betrayed to the Russians by Kim Philby.

Id. at 774. In response, the Information Review Officer for the Directorate of Operations of the CIA (the same position held by Ms. Dorn), described why national security and the United States’ foreign relations would be compromised by a substantive disclosure:

1) disclosure now might prevent foreign countries from participating in future covert missions, 2) disclosure might hamper future relations with Albania, 3) a pattern of denials or affirmances would permit hostile nations to piece together a “catalog” of U.S. covert missions, 4) denial or affirmation would enable the Soviet Union to ascertain the reliability of its double agent, Kim Philby, 5) acknowledgement could jeopardize sources and sympathizers still within Albania, 6) acknowledgement could hamper future recruitment of sources, and 7) acknowledgement would reveal the particular intelligence method--infiltration of agents--allegedly used in the mission.

Id. at 775-76.

The Information Review Officer showed also how acknowledging the existence of the Albanian program would reveal “intelligence sources or methods” in three possible ways, thereby compromising them: “by providing the critical confirmation which would allow Albanian leaders to identify participants in the covert action; by damaging future CIA efforts to recruit sources; and by revealing how, where and when the CIA has deployed its resources.” Id.

connection with detainees in United States' custody. The discussions of these documents in the public press, undoubtedly arising from numerous leaks of the documents, raise concern, however, that the purpose of the CIA's Glomar responses is less to protect intelligence activities, sources or methods than to conceal possible "violations of law" in the treatment of prisoners, or "inefficiency" or "embarrassment" of the CIA. Compare 50 U.S.C.A. § 403-3(c)(7) (West 2003) (protecting intelligence sources and methods), and E.O. 12958 § 1.4 (same; permissible subjects of classification), with E.O. 12958 § 1.7 (criteria that forbid classification). The Dorn Declarations amply discuss the need to protect "intelligence sources and methods." But they do not describe the intelligence sources or methods themselves, or reflect any discussion within the administration whether the particular methods might constitute a "violation[] of law," or an "embarrassment," or administrative "inefficiency" or "error," when debate on these points within the administration probably occurred, as suggested by the discussions in the press. See E.O. 12958 § 1.7. And since the existence of the documents that plaintiffs request, which give rise to all this controversy, is neither admitted nor denied, there is nothing to show the court that might allow me to arrive at my own conclusions. In short, I am not given enough relevant information to make the de novo determinations that FOIA would seem to require. See 5 U.S.C. § 552(a)(4)(B).

Nevertheless, under the cases and notwithstanding FOIA's clear statutory command, there is small scope for judicial evaluation in this area. See, e.g., Phillippi II, 655 F.2d 1325. The Fifth Dorn Declaration sets out that which the cases require. See Miller, 730 F.2d 773. The agency's arguments that it should not be required officially to acknowledge the precise "intelligence activities" or "methods" it employs or considers—for example, whether it has any role whatsoever in the interrogation of detainees—are given deference by the courts, for

the CIA, not the courts, is deemed to have the competence to “weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency’s intelligence-gathering process.” Sims, 471 U.S. at 180; see also Fitzgibbon v. CIA, 911 F.2d 755, 766 (D.C. Cir. 1990) (disapproving the district court’s performance of “its own calculus as to whether or not harm to the national security or to intelligence sources and methods would result from disclosure”). On the basis of the Fourth and, in particular, the Fifth Dorn Declarations, I accept the CIA’s Glomar response with respect to Items 29 and 61 of the August 16, 2004 List.

Item 1, however, a “[m]emorandum from DOJ to CIA interpreting the Convention Against Torture,” does not, by its terms, implicate “intelligence sources or methods.” The CIA’s Glomar response to that item focuses, not on plaintiffs’ demand, but on plaintiffs’ effort to explain to the government why, because of frequent references in the public press, it should not be difficult for the government to process its response. Thus, plaintiffs referred to news reports of interrogation techniques that may have been justified in the memorandum, such as “sleep deprivation,” the “use of phobias,” and the “deployment of ‘stress factors,’” distinguishing such practices from those that cause “severe physical or mental pain” characteristic of torture. The CIA justifies its Glomar response not on the text of the demand, but on all those references, as if they were part of the demand itself. See Fourth Dorn Decl., at 5 n.4. In effect, the agency seeks to use plaintiffs’ attempt to provide assistance to the government in identifying the memorandum as a basis for withholding information about the item requested. But plaintiffs’ speculation as to the possible contents of the memorandum is not controlling; rather, it is the unembellished request set forth in the August 16, 2004 List (set out in the “Description of Record” column) that controls. The List was created for the benefit of

defendant agencies, and they must be bound by it. See Miller, 730 F.2d at 777 (The “agency [i]s bound to read [the request] as drafted, not as either agency officials or [the requester] might wish it was drafted.”). I rule, therefore, that acknowledging whether or not the memorandum requested by plaintiffs exists reveals nothing about the agency’s practices or concerns or its “intelligence sources or methods.” Available exemptions can be proved if necessary to avoid compromise, if any, to the interest of national defense or foreign policy. Since the government has failed in its burden to justify its Glomar response, see 5 U.S.C. § 552(a)(4)(B); Halpern v. FBI, 181 F.3d 279, 287 (2d Cir. 1999); Carney v. DOJ, 19 F.3d 807, 812 (2d Cir. 1994), the government shall produce the documents relating to Item 1, or prove that the same are exempt from production.

U.S.C.A. § 403g (West Supp. 2003), as the statutes furnishing the requisite authority to withhold.¹²

The CIA supported its position by providing a Vaughn index of 126 pages, describing each document by its length and general subject matter, but not as to its specific content. See

necessary, and elaborate on the reasons for the redactions with sufficient specificity, the district court should be able to rule on the appropriateness of the redactions without conducting an in camera

I ordered the plaintiffs to select a sample size of fifteen documents, that is, about 20% of the total set of seventy-one responsive documents, and the government to re-review those fifteen to confirm that there are no segregable portions that may be released, subject to my review. Plaintiffs identified the fifteen documents to be reviewed, numbered according to the numbering scheme provided in Ms. Dorn's Fourth Declaration—13, 39, 263, 269, 273, 279, 291, 304, 335, 337, 346, 402, 428, 429, and 431—and the government re-reviewed them, and confirmed its position as to non-segregability.

Following this confirmation by the government, the CIA, in further support of its position, provided two classified declarations, Decl. of Porter J. Goss, Dir., CIA, dated Aug. 3,

needs from the government, in a Vaughn affidavit, is information that is...specific enough to obviate the need for an in camera review....”). Since plaintiffs’ objection was restricted to the

connection therewith, and I required the government to apply those rulings to all photographs responsive to plaintiffs' requests. The government processed the remaining photographs taken by Darby, and determined that eighty-seven photographs and four movies, redacted as appropriate, were responsive. See

later section.

The government argues that release of the Darby photographs, even if redacted, would constitute an “unwarranted invasion of personal privacy.” The government contends that even though the public, in Iraq and elsewhere, has seen photographs from Abu Ghraib when first they appeared in the press, presumably similar to the Darby photographs, the individuals depicted in the photographs would be recognized, even from redacted photographs.

Exemptions 6 and 7(C) contain the identical phrase “unwarranted invasion of personal privacy.” Exemption 6, however, has been interpreted to present a higher standard, since the agency must establish that disclosure “would” constitute a “clearly unwarranted” invasion, whereas Exemption 7(C) allows for the withholding of records or information that “could reasonably be expected” to constitute an “unwarranted” invasion. DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 756 (1989). Nonetheless, both exemptions require similar considerations by the reviewing district court. See, e.g., FLRA v. Dep’t of Veterans Affairs, 958 F.2d 503, 510 (2d Cir. 1992) (“And though Reporters Committee involved Exemption 7(C) its discussion governs Exemption 6, for the noted differences bear only on the type of information sought and the degree of invasion to a privacy interest that will be tolerated.”).

Exemption 6 is to be interpreted broadly as encompassing “information which applies to a particular individual,” Dep’t of State v. Washington Post Co., 456 U.S. 595, 602 (1982); in general, this exemption protects “individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information.” Id. at 599. When such information is sought, courts are to “determine whether release of the information would constitute a clearly unwarranted invasion of that person’s privacy.” Id. at 602.

enforcement purposes.” This assumption is consistent with case law under FOIA. See Ortiz, 70 F.3d at 732-33 (an unsigned, unsolicited letter used by the Department of Health and Human Services’ Office of Inspector General to launch a criminal investigation, and kept in its investigative files, was “compiled for law enforcement purposes”); Dep’t of Veterans Affairs, 958 F.2d at 508 (“To qualify as agency records, the requested information must either be created or obtained by the agency and within its control at the time the FOIA request is made.”); see also Ctr. for Nat’l Sec. Studies v. DOJ, 331 F.3d 918, 926 (D.C. Cir. 2003) (requiring “(1) a rational nexus between the investigation and one of the agency’s law enforcement duties; and (2) a connection between an individual or incident and a possible security risk or violation of federal law”); Quiñon v. FBI, 86 F.3d 1222, 1228 (D.C. Cir. 1996) (examining if the record was “created or acquired in the course of an investigation”).

I am satisfied from my review that publication of redacted photographs will not constitute an “unwarranted invasion of personal privacy,” since all identifying characteristics of the persons in the photographs have been redacted, and therefore, as a preliminary matter, I do not find a cognizable “invasion of personal privacy.” If, as the government argues, the protagonists might recognize themselves in re-publications of the photographs, or be recognized by members of the public, see, e.g., Massey v. FBI, 3 F.3d 620, 624 (2d Cir. 1993) (“Persons can retain strong privacy interests in government documents containing information about them even where the information may have been public at one time.” (citing Reporters Committee, 489 U.S. at 762-63)), even without identifying characteristics being revealed, that possibility is no more than speculative, a speculation which could apply equally to textual descriptions without pictures.

The Supreme Court addressed similar concerns in Dep’t of the Air Force v. Rose,

raised this objection, I do not consider it.

425 U.S. 352 (1976), as further explained in Reporters Committee, 489 U.S. at 768-69 (1989) (remarking that “much of our discussion” in Rose, which dealt with Exemption 6, was applicable to Reporters Committee, which dealt with Exemption 7(C)). Rose involved a request submitted to the Air Force for case summaries of honor and ethics hearings, with personal references and other identifying information removed from the summaries. The summaries were kept in the United States Air Force Academy’s Honor and Ethics Code reading files, and were regularly posted on forty squadron bulletin boards and circulated to various faculty members and administration officials. 425 U.S. at 355. Without examining the summaries to form its own view, the district court held that Exemption 6 was unavailable to the Air Force because “disclosure of the summaries without names or other identifying information would not subject any former cadet to public identification and stigma, and the possibility of identification by another former cadet could not, in the context of the Academy’s practice of distribution and official posting of the summaries, constitute an invasion of personal privacy proscribed by § 552(b)(6),” but it granted summary judgment to the Air Force on other grounds. Id. at 357.

The Second Circuit reversed, concluding that the district court’s decision “‘ignores certain practical realities’ which militated against the conclusion ‘that the Agency’s internal dissemination of the summaries lessens the concerned cadets’ right to privacy, as embodied in Exemption Six.’” Id. at 358 (quoting 495 F.2d 261, 267-68 (2d Cir. 1974)). The Court of Appeals remanded for further proceedings in which the Air Force was to “‘produce the summaries themselves in court’ for an in camera inspection ‘and cooperate with the judge in redacting the records so as to delete personal references and all other identifying information. . . . [The Court of Appeals thought] it highly likely that the combined skills of court and Agency, applied to the summaries, will yield edited documents sufficient for the

purpose sought and sufficient as well to safeguard affected persons in their legitimate claims of privacy.’’ Id. The Supreme Court affirmed, id. at 380-82, and, as it later explained in Reporters Committee, approved the procedure by which the district court was to remove identifying information and thereby protect the claimed privacy interest:

175-76 (noting that “disclosure of such personal information [regarding marital and employment status, children, living conditions and attempts to enter the United States] constitutes only a de minimis invasion of privacy when the identities of the interviewees are unknown”). If, because someone sees the redacted pictures and remembers from earlier versions leaked to, or otherwise obtained by, the media that his image, or someone else’s, may have been redacted from the picture, the intrusion into personal privacy is marginal and speculative, arising from the event itself and not the redacted image.

Moreover, even were I to find an “invasion of personal privacy,” any further intrusion into the personal privacy of the detainees by redacted publications would be, with the exception of the small number described above, minimal and, under a balancing analysis, not “unwarranted” in light of the public interest policy of FOIA. The Supreme Court has set forth its most recent iteration of the balancing analysis under Exemption 7(C) in Nat’l Archives and Records Admin. v. Favish, 541 U.S. 157 (2004); see also Reporters Committee, 489 U.S. at 772 (“[W]hether disclosure of a private document under Exemption 7(C) is warranted must turn on the nature of the requested document and its relationship to the basic purpose of the Freedom of Information Act to open agency action to the light of public scrutiny, rather than on the particular purpose for which the document is being requested.”) (quotations omitted). As discussed above, since Exemption 7(C) contains the easier burden for the government, I address that Exemption. See Reporters Committee, 489 U.S. at 762 n.12 (“Because Exemption 7(C) covers this case, there is no occasion to address the application of Exemption 6.”).

arrived at this holding after asking whether the information requested would advance a significant public interest:

Where the privacy concerns addressed by Exemption 7(C) are present, the exemption requires the person requesting the information to establish a sufficient reason for the disclosure. First, the citizen must show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake. Second, the citizen must show the information is likely to advance that interest. Otherwise, the invasion of privacy is unwarranted.

Favish at 172.

With the exception of the small number of Darby photographs that I ordered to be withheld, where the risk of exposure is too great and the informational value is minimal, the balancing analysis weighs in favor of disclosure in the present case. There is a substantial public interest in these pictures, evidenced by the active public debate engendered by the versions previously leaked to the press, or otherwise obtained by the media. See discussion in section (c) of this Opinion, infra. Moreover, the government concedes that wrongful conduct has occurred. Defs.' Br., at 70-72. Plaintiffs assert that they seek release of the Darby photographs to inform and educate the public, and to spark debate about the causes and forces that led to the breakdown of command discipline at Abu Ghraib prison and, possibly, by extension, to other prisons in Iraq, Afghanistan, Guantánamo, and perhaps elsewhere. These are the very purposes that FOIA is intended to advance. The photographs are sought to "shed[] light on an agency's performance of its statutory duties" and to "contribut[e] significantly to public understanding of the operations or activities of the government." Pls.' Reply Br., at 24 (quoting Reporters Committee, 489 U.S. at 773 & 775). As I remarked at oral argument:

photographs present a different level of detail and a different medium, and are the best evidence that the public could have as to what occurred at a particular time, better than testimony, which can be self-serving, better than summaries, which can be misleading, and better even than a full description no matter how complete that description might be.

Tr. of May 26, 2005, at 14. There is no alternative, less intrusive means by which the information may be elicited. See, e.g., Dep't of Def. Dep't of Military Affairs v. FLRA, 964 F.2d 26, 29-30 (D.C. Cir. 1992). The redacted originals, rather than piece-meal leaks and possibly partial depictions of several of the pictures, are more probative of what Darby and his fellow military personnel actually did. Under the requirements of Favish, the claimed public interest in production of the redacted photographs is substantiated and far outweighs any speculative invasion of personal privacy.

The government also opposes production because, it argues, doing so would conflict with the United States' obligations under the Geneva Conventions. The Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, 6 U.S.T. 3316, 74 U.N.T.S. 135 (the "Third Geneva Convention") provides that a detaining power must protect a prisoner of war "particularly against acts of violence or intimidation and against insults and public curiosity." Art. 13. The Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (the "Fourth Geneva Convention") provides that civilians under detention are entitled to "respect for their persons,

Law of War Matters, Dep't of Army, dated Mar. 25, 2005, ¶¶10-11 [hereinafter Corn Decl.].

The government's treaty interpretations are entitled to respect. See Kolovrat v. Oregon, 366 U.S. 187, 194 (1961) ("While courts interpret treaties for themselves, the meaning given to them by the departments of government particularly charged with their negotiation and enforcement is given great weight.").

The government argues that "[e]ven if the identities of the subjects of the photographs are never established," those subjects could suffer humiliation and indignity against which the Geneva Conventions were intended to protect. Corn Decl. ¶ 11. It also states, without supporting documentation, that the ICRC has taken the position that the Third Geneva Convention forbids publishing images that "show prisoners of war in degrading or humiliating positions or allow the identification of individual POWs." Cummings Decl. ¶ 17. The redactions and withholding that I ordered should protect civilians and detainees against "insults and public curiosity" and preserve their "honor." Production of these images coheres with the central purpose of FOIA, to "promote honest and open government and to assure the existence of an informed citizenry [in order] to hold the governors accountable to the governed," Nat'l Council of La Raza v. DOJ, 411 F.3d 350, 355 (2d Cir. 2005). Accordingly, I hold that the government may not withhold the Darby photographs, redacted to eliminate all identifying characteristics of the persons shown in the photographs, under Exemptions 6 and 7(C).

(c) The Government's Supplemental Argument: Exemption 7(F)

On July 28, 2005, more than two months after the motion was initially argued, the government added another ground of claimed exemption, Exemption 7(F), to supplement its opposition to production of the Darby photographs. Exemption 7(F), 5 U.S.C. § 552(b)(7)(F), exempts

records or information compiled for law enforcement purposes, but only to the

extent that the production of such law enforcement records or information...(F) could reasonably be expected to endanger the life or physical safety of any individual.

Plaintiffs and amici curiae, The Reporters Committee for Freedom of the Press and other prominent news organizations, object to my consideration of the government's eleventh-hour argument in reliance on Exemption 7(F). See Proposed Br. Amici Curiae, filed Aug. 3, 2005. Amici argue that the exemption now pressed by the government could have been presented much earlier, certainly by the date of oral argument in May, and that its invocation at this late date delays the ultimate resolution of the issues. Amici contend that the government's supplemental argument is not made in "good faith" and should not be considered by the court. See Piper v. DOJ, 374 F. Supp. 2d 73, 78-79 (D.D.C. 2005). While I appreciate the concern of amici, I rule that the government's opposition, although filed late, should be considered. See, e.g., Nat'l Council of La Raza v. DOJ, No. 03 Civ. 2559, 2004 WL 2314455, at *1 (S.D.N.Y. Oct. 14, 2004); see also August v. FBI, 328 F.3d 697 (D.C. Cir. 2003). The issue of the physical safety of our troops in Iraq and Afghanistan, and of the citizens of those countries, has

See Second Amended Decl. of Richard B. Myers, Chairman, Joint Chiefs of Staff, dated Aug.

freedom to oppressed peoples? Is that not because there's some underlying common mutual interest, some underlying common shared idea, some underlying common shared aspiration, underlying unified concept of what human dignity means? I think that's what we're trying to tell the rest of the world, anyway.

Jeffrey Toobin, Swing Shift, The New Yorker, Sept. 12, 2005, at 50.

The terrorists in Iraq and Afghanistan do not need pretexts for their barbarism;

DOJ, 182 F. Supp. 2d 81, 87 (D.D.C. 2002) (same, in connection with racial hate crime, the bombing of a church, and charges of first degree murder), aff'd, 64 Fed. Appx. 787 (2003); Shores v. FBI, 185 F. Supp. 2d 77, 85 (D.D.C. 2002) (same, identities of cooperating witnesses where plaintiff had already attempted retaliation).

Exemption 7(F) has thus been construed to protect individuals involved in law enforcement investigations and trials, as officials and as private citizens providing information and giving testimony. At least twice, however, the statute has been applied to give protection to broader groups of individuals who were not involved in particular criminal investigations and prosecutions. See

aberrational, see Maydak v. DOJ, 362 F. Supp. 2d 316, 321 n.4 (D.D.C. 2005) (“In general, this exemption [7(F)] has been interpreted to apply to names and identifying information of law enforcement officers, witnesses, confidential informants and other third persons who may be unknown to the requester.”). Plaintiffs also argue that since Congress lodged its concern about endangerment to life and safety under Exemption 7, and did not address the concern in an independent and generally applicable exemption, Exemption 7(F) should be applied in its narrow context, to the concern expressed by Congress, and not as a catch-all exemption. See Tr. of Aug. 30, 2005, at 22-23. In essence, plaintiffs contend that Exemption 7(F) should not be a substitute for the government’s power to classify information requiring protection.

Larouche was decided before the statutory amendment and without much analysis of Exemption 7(F). Its focus was on law enforcement—on the dangers of home-made machine guns to law enforcement personnel—a nexus to Exemption 7(F)’s central purpose. With regard to Living Rivers, the inundation maps were compiled by the Bureau of Reclamation to “maintain law and order and protect persons and property within Reclamation projects and on Reclamation lands” by protecting and alerting threatened communities, 272 F. Supp. 2d at 1319 (citing 43 U.S.C. § 373b(a)), again a nexus to law enforcement in that context. However, there is no such nexus with respect to the Darby photographs.¹⁹ The Darby photographs are being withheld, not to protect anyone involved in the courts martial investigations and prosecutions, but for another purpose. The persons who took the photographs, or handed them over to commanding officers, do not ask for protection. Law enforcement officials charged with investigating the circumstances that surrounded the taking of the Darby photographs do not ask

¹⁹ In its brief, at 4, amicus The American Legion suggests that because the Darby photographs “apparently concern, at least in part, activities inside a reserve brigade of military police,” the photos should be withheld because “[t]heir lives would be endangered by disclosure of the Darby photos, and they deserve no less protection than civilian police receive under the FOIA.” The government makes no such argument, and indeed, it is clear from General Myers’ declaration that he is concerned broadly about potential danger to all members of the United States’ armed forces and public, as well as to Iraqi and Afghan personnel and civilians.

for protection, and there is no allegation that release of the photographs will endanger their lives. And since the identifying characteristics of the detainees are to be redacted, they too are not endangered. The sole justification for suppressing the photographs is the DOD's concern about speech—generally, how some might exploit the Darby photographs, in propaganda and in terrorist activities, by arguing, through false extension, that the pictures represent the attitudes of all American soldiers, or indeed of all Americans, toward the Iraqi people.

It is not necessary for me to rule if Larouche and Living Rivers are, or are not, appropriate extensions of Exemption 7(F). I reject, however, the government's argument that reasoning must stop once a threat to life or safety is discerned. Balancing and evaluation are essential aspects of the judicial function, no less in considering the exemptions of FOIA than in other areas of the law. It is clear to me that the core values that Exemption 7(F) was designed to protect are not implicated by the release of the Darby photographs, but that the core values of FOIA are very much implicated.

The interest at stake arises from pictures of flagrantly improper conduct by American soldiers—forcing prisoners under their charge to pose in a manner that compromised their humanity and dignity. As I stated at the time of the original argument, and as I reiterated previously in this decision, the pictures are the best evidence of what happened, better than words, which might fail to describe, or summaries, which might err in their attempt to generalize and abbreviate. Publication of the photographs is central to the purposes of FOIA because they initiate debate, not only about the improper and unlawful conduct of American soldiers, “rogue” soldiers, as they have been characterized, but also about other important questions as well—for example, the command structure that failed to exercise discipline over the troops, and the persons in that command structure whose failures in exercising supervision

