

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

_____	)	
AMERICAN CIVIL LIBERTIES UNION	)	
et al,	)	
	)	
Plaintiffs,	)	
v.	)	04 Civ. 4151 (AKH)
	)	
DEPARTMENT OF DEFENSE et al,	)	
	)	
Defendants.	)	
_____	)	

**DECLARATION OF MEGAN M. WEIS**

Pursuant to 28 U.S.C. § 1746, I, Megan M Weis, hereby declare under penalty of perjury that the following is true and correct:

1. I am an Associate Deputy General Counsel in the Department of the Army, Office of General Counsel (“OGC”). OGC provides legal advice to the Secretary of the Army and other leaders within the Army. I have held my current position since June 2014. I previously served as an Associate Deputy General Counsel in the Department of Defense (DoD), Office of General Counsel, from April 2009 to June 2014. In that role, I oversaw Freedom of Information Act (“FOIA”) activities including administrative responses and litigation involving DoD. The statements in this declaration are based upon my personal knowledge and upon information made available to me in my official capacity.

2. On October 7, 2003, the American Civil Liberties Union (ACLU) filed a FOIA request for records related to the treatment, death, and rendition of detainees held in United States custody abroad after September 11, 2001. The ACLU filed a complaint in the above captioned case on June 2, 2004.

3. In April 2006, the government asserted it was properly withholding from release 29 photographs it identified as potentially responsive to plaintiffs' request; the Court ordered that a final ruling on the FOIA appeal as to the 29 photographs would govern any additional responsive images. In June 2006, this Court held that eight of the photographs were not responsive to ACLU's request, and ordered the release of the remaining 21 photographs in redacted form. The Second Circuit affirmed this Court's decision in an opinion dated September 22, 2008. The government filed a petition to the United States Supreme Court for certiorari on August 7, 2009. On October 28, 2009, Congress enacted the Protected National Security Documents Act of 2009 (PNSDA), Pub. L. No. 111-83, 123 Stat. 2184. The PNSDA precludes disclosure pursuant to Section 552 of title 5 of any photograph, taken between September 11, 2001, and January 22, 2009, that relates to the treatment of individuals engaged, captured, or detained by U.S. Armed Forces after September 11, 2001, in operations outside of the U.S., upon a certification by the Secretary of Defense that public disclosure of such photographs would "endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States."

4. Since the time of the district court's order directing the release of 21 photographs, the government processed and withheld a substantial number of additional images potentially responsive to plaintiffs' FOIA request (the original 21 photographs and the additional images to be referred to collectively as the "photographs"). These photographs were gathered by the U.S. Army Criminal Investigation Command in response to law enforcement investigations of alleged detainee mistreatment.

5. On November 13, 2009, Secretary of Defense Robert Gates certified that disclosure of the photographs would “endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States.” Upon remand in light of the certification, on July 11, 2011, this Court noted the Secretary’s certification and granted the government’s motion for summary judgment, ruling that the photographs were not subject to disclosure under FOIA Exemption 3.

6. Under the PNSDA, the Secretary of Defense’s certification expires after three years, and the Secretary may renew the certification at any time. On November 9, 2012, Secretary of Defense Leon Panetta issued a renewed certification regarding the photographs. In his certification renewal, Secretary Panetta determined, upon the recommendations of the Chairman of the Joint Chiefs of Staff, Commander, United States Central Command, and Commander, International Security Assistance Force/United States Forces-Afghanistan, that public disclosure of the photographs would “endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States.”

7. In August 2012, I began the process of addressing the upcoming expiration of the 2009 certification. The process by which the certification renewal was executed was similar to the one that was used for the original certification. The government adopted a similar approach in light of the Court’s acceptance of Secretary Gates’s certification as sufficient to uphold the Government’s assertion of FOIA Exemption 3.

8. The General Counsel of the Department of Defense designated me to conduct the review of the photographs on the Secretary’s behalf. *See* 10 U.S.C. § 113(d) (“Unless specifically prohibited by law, the Secretary may . . . perform any of his functions or duties, or

exercise any of his powers through . . . such persons in, or organizations of, the Department of Defense as he may designate.”). I gathered all of the photographs subject to the 2009 certification and reviewed all of them. During this review, I placed the photographs into three categories, and created a representative sample of five to ten photographs in each category to provide to senior military commanders for their review and judgment of the risk from public disclosure of each category. In creating these three categories, I considered the content of each photograph, to include the extent of any injury suffered by the detainee, whether U.S. service members were depicted, and the location of the detainee in the photograph (e.g., at point of capture, at a medical facility). Although the photographs had previously been reviewed and categorized in 2009, I conducted a full review of all of the photographs and recategorized them where appropriate before creating the representative sample. I worked with leadership in the DoD Office of the General Counsel to ensure the representative sample accurately characterized all of the photographs.

9. I then set out to obtain the recommendations of the senior military leadership and field commanders as to whether public release of the photographs would endanger U.S. citizens and government personnel serving overseas. After raising the issue with the senior lawyers for the Chairman of the Joint Chiefs of Staff, the Commander of U.S. Central Command, and the Commander, International Security Assistance Force/United States Forces-Afghanistan, I provided each attorney with the representative sample. I asked each attorney to provide the representative sample to his commander and seek a written recommendation regarding whether the Secretary of Defense should renew the certification of the photographs.

10. On October 28, 2012, General John R. Allen, then the Commander, International Security Assistance Force/United States Forces-Afghanistan, provided a written

recommendation that the Secretary of Defense recertify all of the photographs. A copy of General Allen's recommendation is attached as Exhibit A to this declaration.

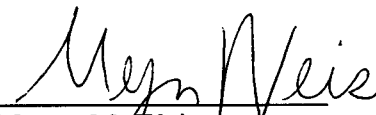
11. On October 29, 2012, General James N. Mattis, then the Commander of U.S. Central Command, concurred in General Allen's recommendation and further explained his view, as the commander of all U.S forces in the Middle East, that the certification should be renewed as to all of the photographs. A copy of General Mattis's recommendation is attached as Exhibit B to this declaration.

12. General Martin E. Dempsey, the Chairman of the Joint Chiefs of Staff, concurred in the recommendation of the two field commanders and described why he believed the certification should be renewed as to all of the photographs. A copy of General Dempsey's recommendation is attached as Exhibit C to this declaration.

13. After receiving those written recommendations, I met with the General Counsel of the Department of Defense to discuss the recommendations of the military leadership and to review the representative sample. I also prepared a draft memorandum for the Secretary of Defense that would renew the certification as to all of the photographs. This certification renewal was based on the certification memorandum used in 2009 that was accepted by this Court as sufficient in connection with the government's invocation of FOIA Exemption 3. I provided the DoD General Counsel with the draft renewal of the certification, the representative sample, the recommendation memorandums, and a compact disk with all of the photographs. The DoD General Counsel then met with the Secretary of Defense and discussed with him whether to renew the certification. Although I did not attend that meeting, afterward, I received the signed renewal of the certification with respect to all of the photographs, which I ensured was promptly provided to staff from the appropriate committees of Congress.

I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct to the best of my knowledge and information.

Dated this 19th day of December, 2014, in Washington, DC.

  
Megan M. Weis