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2 18-2265

3 American Civil Liberties Union v. Central Intelligence Agency

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5 UNITED STATES COURT OF APPEALS

6 FOR THE SECOND CIRCUIT

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8 August Term, 2018

9 (Argued: June 13, 2019

Decided: February 2, 2022)

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Docket No. 18-2265-cv

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12 AMERICAN CIVIL LIBERTIES UNION,

13 AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

14 *Plaintiffs-Appellees,*

15 v.

16 CENTRAL INTELLIGENCE AGENCY,

17 *Defendant-Appellant.*

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19 Before: LEVAL, POOLER, and CHIN, *Circuit Judges:*

20 Appeal from the June 19, 2018 amended judgment of the United States

21 District Court for the Southern District of New York (Hellerstein, J.) ordering the

22 Central Intelligence Agency to make public certain information contained in a

23 draft summary of the CIA's former detention and interrogation program, as well



1 as the transcript of certain ex parte proceedings before the district court. The CIA  
2 argues the information was properly withheld under Exemptions 1 and 3 to the  
3 Freedom of Information Act. We agree with the CIA that Exemption 1 requires  
4 withholding certain information the district court ordered disclosed.

5 Reversed in part.

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25 Scripps Co., First Look Media Works, Inc., Freedom of the  
26 Press Foundation, Gannett Co., International Documentary  
27 Association, Investigative Writing Workshop, McClatchy  
28 Co., Media Institute, MAP-The Association of Magazine



1                                    *Media, National Press Photographers Association, The New*  
2                                    *York Times Co., Online News Association, POLITICO LLC,*  
3                                    *Pro Publica, Inc., Radio Television Digital News Association,*  
4                                    *Reporters Without Borders, Society of Professional*  
5                                    *Journalists, The Tully Center for Free Speech, in support of*  
6                                    *Appellees.*

7 PER CURIAM:

8                    Appeal from the June 19, 2018 amended judgment of the United States  
9                    District Court for the Southern District of New York (Hellerstein, J.) ordering the  
10                    Central Intelligence Agency to make public certain information contained in a  
11                    draft summary of the CIA’s former detention and interrogation program, as well  
12                    as the transcript of certain ex parte proceedings before the district court. The CIA  
13                    argues the information was properly withheld under Exemptions 1 and 3 to the  
14                    Freedom of Information Act. We agree with the CIA that Exemption 1 requires  
15                    withholding certain information the district court ordered disclosed. We reverse  
16                    and remand for further proceedings consistent with this opinion.

17                                    **BACKGROUND**

18                    At issue here are discrete redactions to the publicly released report,  
19                    “Summary and Reflections of Chief of Medical Services on OMS Participation in  
20                    the RDI Program,” detailing the role of medical professionals in the CIA’s  
21                    detention and interrogation program. In August 2015, the American Civil Liberties



1 Union and American Civil Liberties Union Foundation (collectively, "ACLU")  
2 filed a FOIA request for a number of documents referenced in the publicly released  
3 executive summary of the Senate Select Committee on Intelligence's *Committee*  
4 *Study of the CIA's Detention and Interrogation Program* (the "SSCI Report"). The SSCI  
5 Report examined, in relevant part, the CIA's actions in handling suspected  
6 terrorists in secret overseas prisons known as "black sites." App'x at 20-21. The  
7 ACLU alleges that the CIA engaged in torture at these sites. In 2014, the  
8 government released a redacted version of the SSCI Report to the public, and later  
9 released a redacted version of the CIA's response. In 2015, the CIA "issued new  
10 guidance that declassified numerous aspects" of the black site program. App'x at  
11 21.

12 The ACLU brought this action in seeking the release of 69 "records and  
13 categories of records identified in the SSCI Report or whose classification status  
14 is implicated by its public release, by the CIA response, and by the  
15 accompanying change in classification guidance." App'x at 23. Among the  
16 records sought is the one at issue in this appeal: Document 66, titled "Summary  
17 and Reflections of Chief of Medical Services on OMS Participation in the RDI  
18 Program" (the "Draft OMS Summary"). The Draft OMS Summary is an 89-page

[REDACTED]

1 classified draft document prepared by the former head of the CIA's Office of  
2 Medical Services, and it describes and reflects on OMS's participation in the  
3 CIA's detention program. The Draft OMS Summary has not been adopted or  
4 approved by the CIA. The CIA states that "[t]he document is not limited to  
5 matters relating to OMS; the author purports to provide a detailed history of the  
6 CIA's detention and interrogation program over the course of several years. The  
7 author also discusses and comments upon specific press reports on the program  
8 and the extent to which the reporting was or was not accurate."

9 The government moved for summary judgment. The district court ordered  
10 the release of the Draft OMS Summary, but permitted the CIA to redact  
11 information concerning "foreign liaison services," "locations of covert CIA  
12 installations and former detention centers," "classified code words and  
13 pseudonyms," and "classification and dissemination control markings." App'x at  
14 175. The district court found that with the exception of those categories—which  
15 are not challenged on appeal—the CIA failed to establish the applicability of  
16 Exemptions 1 and 3 to the Draft OMS Summary.

17 The CIA moved for reconsideration, and the district court allowed it to  
18 make an ex parte submission identifying the specific information in the Draft



1 OMS Summary that the CIA sought to withhold, along with its justifications. The  
2 district court allowed a further ex parte submission, and conducted an ex parte,  
3 in camera hearing on January 18, 2018. During that hearing, the district court  
4 made individualized rulings on each of the CIA's claimed withholdings. The  
5 district court agreed with the CIA as to the majority of the proposed redactions,  
6 but ordered the disclosures, detailed below, challenged here on appeal. They  
7 include discussions of, and citations to, newspaper articles and other press  
8 reports regarding the CIA's black site detention and interrogation programs,  
9 although the government was allowed to redact comments related to the  
10 accuracy of such reports. The district court also directed the release of related  
11 information in the public transcript of the January 18, 2018 hearing (the  
12 "Transcript"). The district court ordered the information released immediately,  
13 but this Court stayed that order pending this opinion.

14 **DISCUSSION**

15 "We review *de novo* a district court's grant of summary judgment in a  
16 FOIA case [and] [w]e also review *de novo* a decision to require partial production  
17 of documents following *in camera* review, in keeping with the spirit and the text  
18 of the FOIA and its presumption in favor of disclosure." *Nat'l Council of La Raza*



1 *v. Dep't of Justice*, 411 F.3d 350, 355 (2d Cir. 2005) (internal citation and quotation  
2 marks omitted). FOIA "calls for broad disclosure of Government records,"  
3 subject to nine exemptions. *CIA v. Sims*, 471 U.S. 159, 166-67 (1985); 5 U.S.C. §  
4 552(b). "[C]onsistent with the Act's goal of broad disclosure, these exemptions  
5 have consistently been given a narrow compass." *N.Y. Times Co. v. Dep't of Justice*,  
6 756 F.3d 100, 111 (2d Cir. 2014) (internal quotation marks omitted). "The  
7 government bears the burden of demonstrating that an exemption applies to  
8 each item of information it seeks to withhold, and all doubts as to the  
9 applicability of the exemption must be resolved in favor of disclosure." *Florez v.*  
10 *CIA*, 829 F.3d 178, 182 (2d Cir. 2016) (internal quotation marks omitted).

11 "Affidavits or declarations . . . giving reasonably detailed explanations of  
12 why any withheld documents fall within an exemption are sufficient to sustain  
13 the agency's burden." *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir.  
14 1994). When reviewing exemption claims made in the national security arena, we  
15 "accord *substantial weight* to an agency's affidavit concerning the details of the  
16 classified status of the disputed record." *ACLU v. Dep't of Justice*, 681 F.3d 61, 69  
17 (2d Cir. 2012) (internal quotation marks omitted). Agency affidavits must  
18 "describe the justifications for nondisclosure with reasonably specific detail,



1 demonstrate that the information withheld logically falls within the claimed  
2 exemption, and are not controverted by either contrary evidence in the record  
3 nor by evidence of agency bad faith." *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 73  
4 (2d Cir. 2009). "Ultimately, an agency's justification for invoking a FOIA  
5 exemption is sufficient if it appears logical or plausible." *Id.* (internal quotation  
6 marks omitted).

7         Here, the CIA seeks to withhold material under FOIA Exemptions 1 and 3.  
8 Exemption 1 permits the agency to withhold information "specifically authorized  
9 under criteria established by an Executive order to be kept secret in the interest  
10 of national defense or foreign policy and [that is] in fact properly classified  
11 pursuant to such Executive order." 5 U.S.C. § 552(b)(1)(A). Executive Order  
12 13,526 allows information to be classified if it "pertains to" several categories,  
13 such as "intelligence activities (including covert action), intelligence source or  
14 methods," where an official with original classification authority has determined  
15 that "unauthorized disclosure could reasonably be expected to cause identifiable  
16 or describable damage to the national security." Exec. Order 13,526 § 1.4, 75 Fed.  
17 Reg. 707, 707-9 (Dec. 29, 2009).





1 Exemption 3 allows an agency to withhold information from public  
2 disclosure if “(1) the information is specifically exempted from disclosure by  
3 statute; and (2) the exemption statute requires that the matters be withheld from  
4 the public in such a manner as to leave no discretion on the issue or establishes a  
5 particular criteria for withholding or refers to particular types of matters to be  
6 withheld.” *Florez*, 829 F.3d at 183 (internal quotation marks omitted); 5 U.S.C. §  
7 552(b)(3). The National Security Act of 1947, as amended, requires the Director  
8 of National Intelligence to “protect intelligence sources and methods from  
9 unauthorized disclosure.” 50 U.S.C. § 3024(i)(1).

10 **I. Information Related to Specific CIA Intelligence Activities, Sources and**  
11 **Methods**

12 We discuss each contested disclosure as to specific CIA intelligence  
13 activities, sources and methods in turn:

14 **A. Name of City and a War**

15 The district court ordered disclosed that [REDACTED] medical  
16 services personnel in [REDACTED] during [REDACTED]. The CIA sought to redact  
17 this information on the ground that if disclosed, it would “associate the CIA with  
18 [] intelligence activities during that period of time and in that location,” and that  
19 information remains classified. Classified App’x at 113. The district court

[REDACTED]

1 ordered it released because “[t]his is so old now, there is no harm that could flow  
2 from this.” Classified App’x at 113.

3 The district court erred in ordering disclosure. The CIA offered a plausible  
4 reason for nondisclosure: to avoid associating the CIA with intelligence activities  
5 undertaken during a specific time and at a specific place. There is no basis in the  
6 record for the district court’s assessment that the information is “too old” to  
7 remain classified. “[E]ven if the redacted information seems innocuous in the  
8 context of what is already known by the public, minor details of intelligence  
9 information may reveal more information than their apparent insignificance  
10 suggests, because, much like a piece of a jigsaw puzzle, each detail may aid in  
11 piecing together other bits of information even when the individual piece is not  
12 of obvious importance in itself.” *ACLU*, 681 F.3d at 71 (internal quotation marks  
13 omitted). We reverse the district court’s order to disclose this information, and  
14 also reverse the order disclosing the discussion about this information in the  
15 Transcript.

16 B. [REDACTED]

17 The district court ordered the CIA to disclose [REDACTED]

[REDACTED]

1 [REDACTED] in both the OMS Draft Summary and  
2 the Transcript. The CIA sought to redact that information on the ground that it  
3 “would associate the CIA with specific individuals and activities [REDACTED],  
4 and thus the information pertains to CIA intelligence activities, sources, and  
5 methods.” Classified Gov’t Br. at 24. The district court ordered the information  
6 disclosed because it could not “see the need for classification of [REDACTED]  
7 [REDACTED]  
8 [REDACTED] Classified  
9 App’x at 114. Again, we find that the CIA proffered a plausible reason for  
10 nondisclosure, and the district court’s rationale simply is insufficient to reject the  
11 requested redaction, and its ruling as to this disclosure is reversed.

12 **C. Information relating to [REDACTED]**

13 The district court ordered disclosure of the fact that [REDACTED]  
14 [REDACTED], and that the CIA  
15 [REDACTED]. The CIA  
16 sought to redact the information that [REDACTED]  
17 [REDACTED]. It argued that the redaction was proper because  
18 [REDACTED]

[REDACTED]

1 [REDACTED] Classified App'x at 119. Further, the CIA  
2 argues, releasing such information "would give adversaries valuable insight into  
3 the CIA's tradecraft and [REDACTED]

4 [REDACTED] Classified  
5 App'x 14, 119. The district court ordered disclosure because "[i]t's too well  
6 known. That's to be published." Classified App'x at 119. We find nothing in the  
7 record to support the district court's conclusion that the information is already  
8 well known. Even assuming district court knew the information prior to reading  
9 the Draft OMS Summary, it does not follow that the information is so well  
10 known as to justify disclosure. The district court's order requiring disclosure is  
11 reversed.

12 **D. Construction**

13 The district court ordered the CIA to disclose a passage on page 53 of the  
14 Draft OMS Summary that described the CIA's construction of several detention  
15 facilities. The CIA sought to redact this information on the ground that  
16 information related to how the CIA constructs facilities was potentially harmful  
17 to national security because it would offer insights into how the facilities are  
18 used during interrogations. The district court disagreed, stating it did not "see a

[REDACTED]

1 harm" from disclosure, and "[i]t only shows you're doing the right thing."  
2 Classified App'x at 128. The government argued that disclosing the specifics of  
3 how CIA detention facilities, including the use of specific hardware, could allow  
4 an outside party to deduce how the CIA detains and interrogates people. The  
5 district court erred in not deferring to the CIA's plausible and logical reason for  
6 redacting this information, and its order requiring disclosure is reversed.

7 **E. Other Transcript disclosures**

8 The district court ordered the disclosure of information in the Transcript

9 related to discussions of: (1) [REDACTED]

10 [REDACTED]; (2) [REDACTED]

11 [REDACTED]; and (3)

12 [REDACTED]

13 [REDACTED]. The district court ordered disclosure of this

14 information from the transcript even though it previously, and correctly,

15 determined that these materials were properly withheld from disclosure when

16 the Draft OMS Summary was released. There was no basis for the district court

17 to order the disclosure of information in the Transcript that was correctly

18 withheld in the Draft OMS Summary.

[REDACTED]

1           Because we find that the above are properly withheld under Exemption 1,  
2           need not address the CIA's argument that the information is properly withheld  
3           under Exemption 3. *See Larson v. Dep't of State*, 565 F.3d 857 (2d Cir. 2009) ("FOIA  
4           Exemptions 1 and 3 are independent; agencies may invoke the exemptions  
5           independently and courts may uphold agency action under one exemption  
6           without considering the applicability of the other.").

7           The district court's order of the following disclosures is therefore  
8           reversed:

9           *OMS Draft Summary, page 2, paragraph 1:* [REDACTED]  
10          [REDACTED]

11  
12          *Transcript, page 4:14:* [REDACTED]

13  
14          *Transcript, page 5:2-4, 6:* [REDACTED]  
15          [REDACTED]  
16          [REDACTED]

17  
18          *Transcript, page 5:12-13, 22:* [REDACTED]  
19          [REDACTED]

20  
21          *Draft OMS Summary, page 6, third paragraph, second sentence:* [REDACTED]  
22          [REDACTED]

23          *Draft OMS Summary, page 53, first paragraph:* [REDACTED]  
24          [REDACTED]  
25          [REDACTED]  
26          [REDACTED]  
27          [REDACTED]

[REDACTED]

1 [REDACTED]

2 [REDACTED]

3

4 *Transcript, page 6:20-21:* [REDACTED]

5

6 *Transcript, page 12, lines 10-11, 16-19:* [REDACTED]

7 [REDACTED]

8

9 *Transcript, page 12:23-25-13:1:* [REDACTED]

10 [REDACTED]

11 [REDACTED]

12

13 *Transcript page 13:24-25, page 14:1, 2, and 5:* [REDACTED]

14 [REDACTED]

15 [REDACTED]

16

17 *Transcript, page 17:4:* [REDACTED]

18

19 **II. Published press reports**

20 The CIA also challenges the district court's order requiring a disclosure of  
21 certain information discussing and citing to certain press reports. The district  
22 court reasoned that "[t]hese are public newspaper accounts and they should be  
23 produced." App'x at 219. The CIA challenges this assessment, arguing that "the  
24 author's selection of specific press reports to discuss, his focus on particular  
25 aspects of the reports, and the manner in which he describes them—all tend to  
26 reveal classified and statutorily protected information that the CIA has not  
27 officially acknowledged." Appellant's Br. at 38. The ACLU argues there is a



1 difference between the press citations and the author's assessments of the  
2 articles, such that the bare citations may be released without confirming or  
3 denying the information within the cited articles.

4 Our Court requested supplement briefing from both parties on the issue,  
5 and we are persuaded by the rationales set forth in the government's letter brief  
6 that the contested material should be redacted. We thus reverse the district  
7 court's order disclosing the bare citations to press reports found in the Draft  
8 OMS Summary at (1) Page 22, first paragraph and footnotes 43-44;  
9 (2) Page 35, first full paragraph and footnotes 71-72; (3) Page 43, footnote 87; (4)  
10 Page 54, footnotes 114-115; (5) Pages 65-66, select text and footnotes 125, 127, and  
11 132; and (5) Pages 68-69, selected text and footnotes 135-138, 140.<sup>1</sup>

12 **CONCLUSION**

13 For the reasons given above, the order of the district court is reversed.

A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit

  


<sup>1</sup> The CIA release certain portions of text and corresponding citations to press reports on page 65, as indicated in its letter brief of October 19, 2021.