

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

OBAID ULLAH, AMERICAN CIVIL
LIBERTIES UNION, AMERICAN CIVIL
LIBERTIES UNION FOUNDATION,

Plaintiffs,

v.

CENTRAL INTELLIGENCE AGENCY,

Defendant.

Civ. A. No. 18-2785 (JEB)

**DEFENDANT’S STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO GENUINE ISSUE**

Pursuant to Local Civil Rule 7(h), Defendant Central Intelligence Agency (“CIA” or “Agency”) submits this Statement of Material Facts As To Which There Is No Genuine Issue in support of its Motion for Summary Judgment:

I. Plaintiffs’ FOIA Request

1. By letter dated April 18, 2018, Plaintiffs Obaid Ullah, the American Civil Liberties Union, and the American Civil Liberties Union Foundation (“Plaintiffs”) submitted a Freedom of Information Act (“FOIA”) request “for records relating to the United States’ disposal and the current whereabouts of the body of Mr. Gul Rahman, an Afghan citizen who the United States has acknowledged died while in the custody of [CIA] in November 2002.” Shiner Decl. ¶ 6 & Ex. B at 1.

2. Specifically, Plaintiffs sought “the release of records . . . concerning the following:

- The United States’ (or its agents’) disposition of Mr. Rahman’s body after his death in CIA custody in November 2002;

- Any and all documents referencing the location of Mr. Rahman’s body; and
- Procedures, protocols, or guidelines to be followed in the event of a CIA detainee’s death while in United States’ custody, including family notification, investigation, and disposition of the body.”

Shiner Decl. ¶ 6 & Ex. B at 4. Plaintiffs also requested expedited processing. Shiner Decl. Ex. B at 4-9.

3. By letter dated April 20, 2018, the CIA acknowledged receipt of Plaintiffs’ Freedom of Information Act (“FOIA”) request and assigned it the reference number F-2018-01415. CIA also denied Plaintiffs’ request for expedited processing. *Id.* ¶ 7 & Ex. C thereto.

4. By letter dated May 31, 2019, the CIA provided a final response to Plaintiffs. CIA produced nine documents in part and withheld twenty-nine documents in full. Redactions and withholdings were made pursuant to FOIA Exemptions (b)(1), (b)(3), (b)(5), (b)(6), and (b)(7). *Id.* ¶ 9 & Ex. D. Upon further review of the documents, the CIA determined that three of the documents withheld in full were not responsive. *Id.* ¶ 9.

5. By email dated June 14, 2019, Plaintiffs limited their challenges, noting they would not challenge the redaction or withholding of classified code words and pseudonyms; classification and dissemination control markings; or identities of CIA personnel who have not been officially identified with the CIA’s former rendition, detention, and interrogation program (the “RDI Program”). Accordingly, any redactions or withholdings of this information are not addressed in CIA’s declaration. *Id.* ¶ 10.

II. CIA’s Searches for Records

6. Given that Plaintiffs’ request dealt with aspects of the former RDI program, the CIA determined that the Rendition, Detention, and Interrogation Network, or “RDINet,” a central repository containing materials gathered from across the Agency detailing the former

detention and interrogation program, was the main location that would contain records responsive to Plaintiffs' request. *Id.* ¶ 11.

7. In addition, although RDINet is a comprehensive collection of materials related to the former detention and interrogation program, search professionals also conducted searches in the Office of the Inspector General ("OIG"); the Office of the General Counsel ("OGC"); the Office of the Director (to include the files of the Director, Deputy Director, and Chief Operating Officer); the Office of Congressional Affairs ("OCA"), and the Office of Medical Services ("OMS"). *Id.* ¶ 11.

8. A small team of search professionals and subject matter experts with access to the highly classified RDINet, and search teams for each of the other offices, conducted searches to find documents responsive to the three categories of information sought in the Plaintiffs' request. *Id.* ¶ 12.

9. For the first two portions of Plaintiffs' request, searches were conducted for documents containing any references to "Rahman" in combination with terms including "body," "death," "corpse," "remains" and variations of those terms. *Id.*

10. For the last part of Plaintiffs' request, the search teams also performed searches for documents using the words "death" and "detainee" where they appeared with words like "policy", "protocol", or "guidelines", and consulted persons knowledgeable about the topic. *Id.*

11. Upon conducting searches across the various office databases and hard copy files, CIA personnel then conducted a document-by-document review of the search results to determine responsiveness, and processed the responsive documents pursuant to FOIA. *Id.* The disposition of the thirty-five responsive records is discussed in the Agency's *Vaughn* index and supporting declaration.

III. Applicable FOIA Exemptions

A. Exemption (b)(1)

12. The CIA determined that FOIA Exemption (b)(1) withholdings in the documents at issue satisfy the procedural and the substantive requirements of Executive Order 13,526, which governs classification. *See* E.O. 13,526 §§ 1.1(a), 1.4 (c), 1.4 (d). As an original classification authority, the CIA's declarant, Antoinette Shiner, the Information Review Officer ("IRO") for the Litigation Information Review Office ("LIRO") at CIA, determined that the information at issue in this case is currently and properly classified, and appropriately withheld from disclosure. Shiner Decl. ¶ 1, 15. Additionally, this information is owned by, and is under the control of, the U.S. Government. *Id.* ¶ 15.

13. The information falls under classification category § 1.4(c) of the Executive Order because it concerns "intelligence activities (including covert action), [or] intelligence sources or methods," or under § 1.4(d) because it concerns "foreign relations or foreign activities of the United States." *Id.* ¶ 15. Further, its unauthorized disclosure could reasonably be expected to result in damage to national security. *Id.*

14. None of the information at issue has been classified in order to conceal violations of law, inefficiency, or administrative error; prevent embarrassment to a person, organization, or agency; restrain competition; or prevent or delay the release of information that does not require protection in the interests of national security. *Id.* ¶ 15. Further, the classified information is properly marked in accordance with § 1.6 of the Executive Order. *Id.*

15. More specifically, the classified information at issue consists of details about foreign liaison services; locations of covert CIA installations and former detention centers located abroad; and descriptions of specific intelligence methods and activities, including specific details related to intelligence collection and attempts to identify and capture certain

terrorists. *Id.* ¶ 16. To the greatest extent possible, CIA attempted to explain on the public record the nature of the information subject to Exemption (b)(1). *Id.*

16. Disclosure of these details, which would reveal intelligence sought by the Agency and the means by which it is acquired, could reasonably be expected to cause harm, and in some instances exceptionally grave damage, to the CIA's continued ability to collect this information and to the Agency's relationships with foreign partners, thereby damaging the national security. *Id.* ¶ 16.

17. Additionally, the CIA has not asserted Exemption (b)(1) for information about the program that was declassified as a result of the Senate Select Committee on Intelligence ("SSCI") review of the former RDI program and related disclosures. *Id.* ¶ 16.

18. **Foreign Liaison and Government Information.** The documents at issue contain certain details regarding foreign liaison and government information. Foreign liaison services and foreign government officials provide sensitive intelligence to the CIA in confidence. *Id.* ¶ 17. In order to ensure the uninterrupted flow of that information, the Agency protects the content of those communications as well as the mere fact of the existence of the U.S. Government's relationships with particular intelligence services and foreign government officials. *Id.* Disclosure of these details could damage the relations with the entities mentioned in the documents and with other foreign partners working with the Agency, in turn, harming intelligence sharing and cooperation on other areas of importance to national security. *Id.*

19. **Field Installations.** The documents also contain details regarding the locations of covert CIA installations and former detention centers located abroad. *Id.* ¶ 18. The places where the CIA maintains a presence constitute intelligence methods of the Agency. *Id.* Official acknowledgment that the CIA has or had a facility in a particular location abroad could cause the

government of the country in which the installation is or was located to take countermeasures, either on its own initiative or in response to public pressure, to eliminate the CIA's presence within its borders or curtail cooperation with the CIA. *Id.*

20. Disclosing the location of a particular CIA facility could result in terrorists and foreign intelligence services targeting that installation and the persons associated with it. *Id.*

¶ 18. Given the sensitive and politically charged nature of the former detention and interrogation program, even releasing information about the location of former facilities could harm relationships with foreign countries that housed those installations. *Id.*

21. In order to protect bilateral relations with these foreign partners, the CIA has consistently refused to confirm or deny the location of these facilities. *Id.* ¶ 18. In fact, these details were redacted from the Executive Summary publicly released by SSCI because of this sensitivity. *Id.* As discussed above, damage to those relationships with foreign governments could harm the CIA's continued ability to obtain accurate and timely foreign intelligence. *Id.*

22. **Intelligence Methods and Activities**. Finally, the documents also contain details that would disclose other intelligence methods and activities of the CIA. *Id.* ¶ 19. Intelligence methods are the means by which the CIA accomplishes its mission. *Id.* Intelligence activities refer to the actual implementation of intelligence methods in an operational context. *Id.* Intelligence activities are highly sensitive because their disclosure often would reveal details regarding specific methods which, in turn, could provide adversaries with valuable insight into CIA operations that could impair the effectiveness of CIA's intelligence collection. *Id.*

23. For example, the CIA routinely protects information such as dates because they would reveal intelligence methods and activities. *Id.* ¶ 20. Although these may be viewed as seemingly innocuous details, dates associated with a particular program or aspect of an operation

could reveal how certain intelligence is gathered, particularly when juxtaposed with publicly-available information. *Id.* For example, releasing precise dates of different operations or communications could reveal the CIA's involvement, or lack thereof, in world events that are reported in the press. *Id.*

24. In addition to dates, the CIA protected other undisclosed details about the practice of intelligence gathering and Agency tradecraft, which continue to have application to other types of CIA operations and activities. *Id.* ¶ 21. These methods and activities continue to be used in connection with current counterterrorism operations. *Id.* From these details, a picture of the breadth, capabilities, and limitations of the Agency's intelligence collection or activities would begin to emerge. *Id.*

25. Such disclosures could provide adversaries with valuable insight into CIA operations that would damage their effectiveness. *Id.* ¶ 21. Adversaries could use this information to develop measures to detect and counteract the Agency's intelligence methods and the operational exercise of those methods. *Id.*

26. Additionally, the Agency withheld specific, actionable intelligence that was collected in the pursuit of terrorist targets. *Id.* ¶ 21. Disclosing those details would show the focus of, or gaps in, the CIA's intelligence collection. *Id.*

27. For the above reasons, CIA determined that disclosure of the information withheld pursuant to Exemption (b)(1) could reasonably be expected to damage the national security. *Id.* ¶ 22.

B. Exemption (b)(3)

28. CIA relied upon two statutes to withhold information under Exemption (b)(3): the Central Intelligence Agency Act of 1949, 50 U.S.C. § 3507 (the "CIA Act"), and the National Security Act of 1947, 50 U.S.C. § 3024(i)(1) (the "National Security Act").

29. CIA determined that the documents at issue contain information concerning the organization, names, or official titles of personnel employed by the CIA, the disclosure of which is expressly prohibited by the CIA Act. Shiner Decl. ¶ 25.

30. CIA also determined to withhold the information under the National Security Act, because release of the information reveal intelligence sources and methods and their application by Agency personnel. Shiner Decl. ¶ 25.

31. Although neither the CIA Act nor the National Security Act requires the CIA to identify or describe the damage to national security that reasonably could be expected to result from the unauthorized disclosure of information covered by the statutes, for the same reasons discussed above, release of this information could impair the CIA's ability to carry out its core mission of gathering and analyzing intelligence. *Id.* ¶ 26.

C. Exemption (b)(5)

32. Here, the CIA invoked, pursuant to Exemption (b)(5), the deliberative process privilege, the attorney-client privilege, and the attorney work-product doctrine to protect internal communications and attorney work product.

33. **Deliberative Process Privilege.** The majority of the documents for which the deliberative process privilege was claimed are labeled as drafts, reflect information at the interim stages, and/or are associated with a given deliberation concerning how to handle different policies and/or procedures related to the former RDI program. Shiner Decl. ¶ 29. These communications do not convey final Agency viewpoints on a particular matter, but rather reflect different considerations, opinions, options, and approaches that preceded an ultimate decision and are part of a policymaking process. *Id.*

34. For example, as noted in the attached *Vaughn* index, certain responsive documents contain recommendations or deliberations at interim stages of Agency inquiries

and/or the CIA OIG's investigation into Rahman's death. *See, e.g., Vaughn Index*, Entry Nos. 1, 2, 9-21, 28-29, 31, 34-35; Shiner Decl. ¶ 29. Other documents discuss a draft policy regarding internal procedures to be followed in the event of a detainee death in CIA custody. *See, e.g., Vaughn Index*, Entry Nos. 22-27, 30; Shiner Decl. ¶ 29. There is no indication that the policy was ever finalized, and it is likely that the end of the RDI program obviated the need for such procedures. Shiner Decl. ¶ 29. These versions are undated and it is unclear which version is the latest in time. *Id.*

35. As noted in the *Vaughn index*, certain drafts were circulated via email or memorandum and request that personnel from various offices provide comments and/or edits. *See, e.g., Vaughn Index*, Entry Nos. 24, 26; Shiner Decl. ¶ 29. Each of these copies is deliberative insofar as it represents a particular stage in the drafting process and reflects different considerations contemplated by Agency employees. Shiner Decl. ¶ 29.

36. CIA's declarant examined the documents or portions of the documents withheld pursuant to the deliberative process privilege and determined that, to the extent there is any factual material, it is part and parcel of the deliberations and cannot be segregated. *Id.* ¶ 30. In some instances, the selection of facts in these documents would reveal the nature of the preliminary recommendations and opinions preceding final determinations. *Id.*

37. Disclosure of these documents would significantly hamper the ability of Agency personnel to candidly discuss and assess the viability of certain courses of action. *Id.* ¶ 31. Additionally, revealing this information could mislead or confuse the public by disclosing rationales that were not the basis for the Agency's final decisions. *Id.* Moreover, none of the information withheld pursuant to Exemption 5 has otherwise been publicly disclosed. *Id.*

38. **Attorney-Client Privilege.** In this case, the attorney-client privilege applies to confidential client communications between Agency employees and attorneys within the CIA on issues related to the former RDI program that were made for the purpose of obtaining legal advice. *Id.* ¶ 32.

39. Here, the attorney-client privilege only applies to a portion of the CIA OIG Report of Investigation entitled “Death of a Detainee in [REDACTED] (2003-7402-IG)” (Document 2), which recounts discrete pieces of legal analysis and advice from Agency attorneys to senior leadership and the field regarding aspects of the RDI program. *Id.* ¶ 32; *Vaughn* Index, Entry No. 2.

40. The confidentiality of these communications must be maintained. Shiner Decl. ¶ 33. If this confidential information were to be disclosed, it would inhibit open communication between CIA personnel and their attorneys, thereby depriving the Agency of full and frank legal counsel. *Id.*

41. Communications made pursuant to the attorney-client privilege are also covered by the deliberative process privilege inasmuch as the legal advice is one consideration in making a final decision. *Id.*

42. **Attorney Work-Product Doctrine.** The attorney-work product doctrine was asserted to protect work product in Document 14 created by the attorney who documented and identified certain details that could pose a litigation risk. Shiner Decl. ¶ 34. If this information were to be released, it would expose the attorney’s mental impressions to scrutiny and could reveal preliminary litigation risk analysis and strategy. *Id.*

D. Exemption (b)(6)

43. CIA also determined that certain information must be withheld pursuant to FOIA Exemption (b)(6). Shiner Decl. ¶ 35.

44. Here, Exemption 6 applies to personally-identifying information of CIA officers and non-CIA personnel mentioned in these records.¹ Shiner Decl. ¶ 36. CIA determined that the disclosure of this information would constitute a clearly unwarranted invasion of personal privacy and has been properly withheld under Exemption (b)(6). *Id.*

45. Each of these individuals maintains a strong privacy interest in this information because its release could subject them to intimidation, harassment, reputational damage or physical harm. *Id.* ¶ 37. The extensive media coverage and the sensitivity and controversy surrounding the former detention and interrogation program further heightens those privacy concerns. *Id.*

46. Conversely, the release of individuals' identities or other personal information would not further the core purpose of the FOIA – informing the public as to the operations or activities of the government. *Id.* ¶ 37. Because there are significant privacy concerns and no corresponding, qualifying public interest in disclosure, CIA determined that the release of this information would constitute a clearly unwarranted invasion of these individuals' personal privacy under Exemption 6. *Id.*

47. Further, to the extent that the identifying information is that of Agency personnel, foreign liaison, and human sources of intelligence, the protections of Exemption 3 in conjunction with Section 6 of the CIA Act jointly apply. *Id.*

¹ As indicated in the *Vaughn* index, the Agency asserted Exemption 7(C) in conjunction with Exemption 6 for certain personally-identifying information that was compiled for law enforcement purposes.

E. Exemption (b)(7)(C)

48. Certain records and information were generated by CIA's OIG and were "compiled for law enforcement purposes" within the meaning of Exemption 7. Shiner Decl. ¶ 38.

49. With respect to Exemption (b)(7)(C), much of the analysis is duplicative of Exemption (b)(6), which is discussed above. *Id.* ¶ 39. Although the balancing test for Exemption (b)(6) uses a "would constitute a clearly unwarranted invasion of personal privacy" standard, and the test for (b)(7)(C) uses the lower standard of "could reasonably be expected to constitute an unwarranted invasion of personal privacy," the analysis and balancing required by both exemptions is sufficiently similar to warrant a consolidated discussion. *Id.* The privacy interests are balanced against the public's interest in disclosure under the analysis of both exemptions. *Id.* Therefore, for additional analysis of Exemption (b)(7)(C), please refer to Part D above.

F. Exemption (b)(7)(D)

50. With respect to Exemption (b)(7)(D), as a matter of Agency policy, the OIG does not disclose the identities of persons it interviews or the substance of their statements unless such disclosure is determined to be necessary for the full reporting of a matter or the fulfillment of other OIG or Agency responsibilities. *Id.* ¶ 40.

51. Here, Exemption 7(D) was applied to protect the identities of individuals interviewed by the OIG and the information that they provided. *Id.* Certain documents contain details that would tend to identify the interviewed parties by virtue of their position in the Agency and or their role in, or knowledge of, the underlying events. *See, e.g., Vaughn Index, Entry No. 14; Shiner Decl. ¶ 40.* Additionally, as the OIG and Department of Justice

investigations were criminal nature, all information provided by these confidential sources was protected pursuant to Exemption 7(D). Shiner Decl. ¶ 40.

52. Exemption 7(D) requires no showing of harm, or balancing of privacy and public interests. *Id.* ¶ 41. However, the performance of the OIG's mission to conduct independent audits, investigations, and reviews of CIA programs and operations is heavily reliant upon its access to unfiltered information provided by confidential sources. *Id.* Disclosure of the sources and the information that they provided would severely compromise the OIG's ability to perform those duties. *Id.*

IV. Segregability

53. In evaluating the responsive documents, the CIA conducted a document-by-document and line-by-line review and released all reasonably segregable non-exempt information. *Id.* ¶ 42. In instances where no segregable, non-exempt portions of documents could be released without potentially compromising classified or privileged information or other information protected under the FOIA, then such documents were withheld from Plaintiffs in full. *Id.*

54. In this case, much of the withheld information is protected by several, overlapping FOIA exemptions. *Id.* After reviewing all of the records at issue, CIA determined that no additional information can be released without jeopardizing classified or privileged material, individuals' personal privacy, and/or other protected information that falls within the scope of one or more FOIA exemptions. *Id.*

55. Therefore, for the reasons set forth above, the documents are redacted in part or withheld in full pursuant to Exemptions (b)(1), (b)(3), and (b)(5); and, to the extent that they are personally-identifying, Exemptions (b)(6), (b)(7)(C), and (b)(7)(D).

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