

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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)	
American Civil Liberties)	
Union, et al.)	
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Plaintiffs,)	
)	
v.)	Civil Action No.
)	05-cv-9620 (AKH)
Department of Justice, et al.)	
)	Civil Action No.
Defendants.)	04-cv-4151 (AKH)
)	
)	
)	

DECLARATION OF MARGARET P. GRAFELD

I, Margaret P. Grafeld, declare and state as follows:

1. I am the U.S. Department of State's (the "Department's") Information and Privacy Coordinator and the Director of the Department's Office of Information Programs and Services ("IPS"). In these capacities, I am the Department official immediately responsible for responding to requests for records under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, the Privacy Act, 5 U.S.C. § 552a, and other applicable records access provisions. I have been in the employ of the Department of State since 1974, and have served with the Department's Information Access Program for most of my tenure with the Department. I am authorized to classify and declassify national security information pursuant

to Executive Order ("E.O.") 12958, as amended, and Department of State regulations set forth in 22 C.F.R. §§ 9.5, 9.9. I make the following statements based upon my personal knowledge, which in turn is based on a personal review of the records in the case files established for the processing of the subject request, the FOIA request submitted to the Department of Justice ("DOJ") in the above-captioned matter, and upon information furnished to me in the course of my official duties.

2. The core responsibilities of IPS include: records access requests made by the public (under the FOIA, the Privacy Act, and the mandatory classification review requirements of E.O. 12958, as amended, or the Ethics in Government Act), members of Congress, and other government agencies, and those that have been made pursuant to judicial processes, such as subpoenas, court orders, and discovery requests; records management; privacy protection; national security classification management and declassification review; corporate records archives management; research; operation and management of the Department's Library; and the application of technology that supports these activities.

3. The purpose of this declaration is to describe the Department's review of documents that were referred to the Department in connection with this litigation. A detailed

description of the information withheld, as well as the exemptions applied, follows.

I. ADMINISTRATIVE PROCESSING OF REFERRALS

4. DOJ referred 25 documents to the Department for review. The Department divided those 25 documents into 70 sub-documents for processing purposes. Of documents not previously reviewed in connection with this litigation, 29 sub-documents were denied in full or in part.

5. An explanation of the exemptions claimed, and descriptions of the 29 sub-documents withheld in full or in part, follows.

II. EXEMPTIONS CLAIMED BY THE DEPARTMENT OF STATE

FOIA Exemption (b) (1) - Classified Information

6. Title 5 U.S.C. Section 552 (b) (1) states that the FOIA does not apply to 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.

7. State Department information to which the (b) (1) exemption has been applied continues to meet the classification criteria of E.O. 12958, as amended. All

references to E.O. 12958 are to the order as amended by E.O. 13292 of March 25, 2003.

8. Some information withheld under exemption (b)(1) is classified SECRET. Section 1.2(a)(2) of E.O. 12958 states:

"Secret" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security that the original classification authority is able to identify or describe.

Some information withheld under exemption (b)(1) is classified CONFIDENTIAL. Section 1.2(a)(3) of E.O. 12958 states:

"Confidential" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause damage to the national security that the original classification authority is able to identify or describe."

Section 6.1(j) of E.O. 12958 states:

"Damage to the national security" means harm to the national defense or foreign relations of the United States from the unauthorized disclosure of information, taking into consideration such aspects of the information as the sensitivity, value, utility and provenance of that information.

9. Section 1.4. of E.O. 12958 states in pertinent part:

"Information may not be considered for classification unless it concerns . . . (b) foreign government information; . . . (d) foreign relations or foreign activities of the United States, including confidential sources"

Section 1.4(b) - Foreign Government Information

10. Section 6.1(r) of E.O. 12958 states in pertinent part that:

"Foreign government information" means:
(1) information provided to the United States Government by a foreign government or governments, an international organization of governments, or any element thereof, with the expectation that the information, the source of the information, or both, are to be held in confidence

11. Information that the U.S. Government obtained in confidence from foreign governments or international organization officials is also withheld and described in this declaration. The ability to obtain information from foreign governments is essential to the formulation and successful implementation of U.S. foreign policy. Disclosure of foreign government information provided in confidence would cause foreign officials to believe that U.S. officials are not able or willing to observe the confidentiality expected in such interchanges. Governments would become less willing in the future to furnish information important to the conduct of U.S. foreign relations, and in general less disposed to cooperate with the United States in the achievement of foreign policy objectives of common interest. Information withheld under Section 1.4(b) includes information obtained from foreign

governments that was used in inter-agency deliberations concerning the incarceration of suspected terrorists. Disclosure of this information reasonably could be expected to result in serious damage to the national security. The withheld State Department information is currently and properly classified pursuant to Section 1.4(b) of E.O. 12958 and is, therefore, exempt from disclosure under FOIA exemption (b) (1).

Section 1.4(d) - Foreign Relations or
Foreign Activities of the U.S.

12. Information withheld from some sub-documents described in this declaration is classified under Section 1.4(d) of E.O. 12958. In several sub-documents identified below, the withheld information concerns confidential communications with the International Committee of the Red Cross (ICRC), which plays an extremely important role in conflict situations, particularly as regards prisoners of war and other detainees. In order to be effective in its intermediary role between parties and individuals, communications to and from the ICRC must be treated in confidence. Failure to respect this could diminish the ICRC's effectiveness in its role as well as risk undermining the necessary climate of confidence between U.S. and ICRC

officials. In accordance with normal diplomatic practice, U.S. government communications to the ICRC are transmitted with the expectation of confidentiality, even though they are not marked as classified. Release of the information would risk damage to an important U.S. relationship. Additionally, information has been withheld that describes the potential roles of various countries in the effort to detain and prosecute suspected terrorists. Release of frank commentary on these countries' domestic and foreign policies and the extent to which they might cooperate with the United States on detainee issues has the potential to damage our relations with the concerned governments. The withheld information is currently and properly classified pursuant to Section 1.4(d) of E.O. 12958 and is, therefore, exempt from disclosure under FOIA exemption (b)(1).

FOIA Exemption (b)(2) - Administrative Information

13. Title 5 U.S.C. Section 552 (b)(2) states that the FOIA does not apply to matters that are "related solely to the internal personnel rules and practices of an agency" The (b)(2) exemption has been applied to information described below. The information withheld consists of the telephone and facsimile numbers of government officials. If released, the misuse of this information might enable interference with the

effective functioning of government offices in carrying out their lawful functions. Disclosure of this information could be expected to risk circumvention of agency regulations or impede the effectiveness of an agency's lawful activities. Accordingly, the information is exempt from disclosure under FOIA exemption (b)(2).

FOIA Exemption (b)(5) - Deliberative Process Privilege

14. Title 5 U.S.C. Section 552(b)(5) states that the FOIA does not apply to:

Inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency

15. This deliberative process privilege incorporated under (b)(5) is meant to protect the candid views and advice of U.S. Government officials in their pre-decisional deliberations respecting policy formulation and administrative direction. Disclosure of material containing such deliberations or of material on which such deliberations are based would prejudice the free flow of internal recommendations and other necessary exchanges. It would severely hamper the ability of responsible officials to formulate and carry out executive branch programs. Information has been withheld on the basis of this exemption. The withheld information is pre-decisional and contains

selected factual material intertwined with opinion the release of which would inhibit candid internal discussion and the expression of recommendations and judgments. The withheld information is, accordingly, exempt from release under FOIA exemption (b) (5).

FOIA Exemption (b) (5) - Attorney Work Product

16. Material has also been withheld because it is material prepared by or under attorneys in anticipation of litigation. The withheld information is, accordingly, exempt from release under FOIA exemption (b) (5).

FOIA Exemption (b) (6) - Personal Privacy

17. Title 5 U.S.C. Section 552 (b) (6) states that the FOIA does not apply to:

personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy....

The courts have interpreted the language of exemption (b) (6) broadly to encompass all information that applies to an individual without regard to whether it was located in a particular type of file. Some information has been withheld under this privacy exemption by excising names and other personal identifying information.

18. Inasmuch as the information withheld is personal to an individual, there is clearly a privacy interest involved. I am required, therefore, to determine whether any public interest in disclosure exists, and to weigh any such interest against the extent of the invasion of privacy.

19. I have concluded that (1) disclosure of the withheld information would result in a clearly unwarranted invasion of personal privacy; and (2) disclosure of the information would not serve the "core purpose" of the FOIA, i.e., it would not show "what the government is up to." Accordingly, the privacy interest clearly outweighs any public interest in disclosure of such personal information and must, therefore, prevail.

III. DOCUMENT DESCRIPTIONS

20. The documents described below are numbered according to the Bates numbers applied by DOJ. The numbers in parentheses are those used by the Department of State in its internal review and accounting.

State Department Case Number 200907904

Document 3362-3369 (J1A) is a State Department document entitled "Afghanistan Detention Options," dated November 7,

2001. Nine pages. Classified SECRET under E.O. 12958 section 1.4(d). Denied in full. Exemptions (b)(1) and (b)(5).

This document discusses the potential suitability of various countries for detaining prisoners of war and unlawful combatants captured during operations in Afghanistan. It contains sensitive analysis of the advantages and disadvantages of various countries, including their domestic and foreign politics. The document also raises questions associated with moving prisoners from point of capture to place of captivity. Release of the sensitive discussions reasonably could be expected to cause serious damage to U.S. foreign relations with the countries involved. The information is currently and properly classified SECRET under section 1.4(d) of E.O. 12958 and therefore exempt from release under FOIA exemption (b)(1). In addition, the document dates from the first days of the war in Afghanistan. As an early pre-decisional and deliberative issues paper, it is therefore exempt from disclosure under FOIA exemption (b)(5). There is no information that may be declassified, segregated and released.

Document 3370 (J1B) is a State Department document. Undated (but bearing an apparent facsimile transmission date of 11/7/01.) One page. Stamped SECRET. Currently UNCLASSIFIED. Denied in full. Exemption (b)(5).

This document is an issues paper listing factors for and against utilizing U.S. military facilities at Guantanamo Bay for prisoners associated with the war on terror. The paper, which is dated less than two months after the attacks of 9/11, is an early pre-decisional and deliberative document and therefore exempt from disclosure under FOIA exemption (b) (5). There is no factual information that is not interwoven in the deliberative material that may be segregated and released.

Documents 596 (J2) and 597-600 (J2A)

Document 596 (J2) is a fax cover sheet from the Office of the Legal Adviser, Department of State, to various addressees dated December 12, 2002. One page. Originally CONFIDENTIAL, currently UNCLASSIFIED. Denied in part. Exemption (b) (6).

Document 597-600 (J2A) is a draft cable dated December 12, 2002 from the Department of State to Geneva and other addressees. Four pages. Originally and currently CONFIDENTIAL under E.O. 12958, Section 1.4 (d). Denied in full. Exemptions (b) (1) and (b) (5).

Document 596 (J2) is a cover sheet to document 597-600 (J2A). Information withheld from this document comprises the names, internal organizations and phone numbers of individuals to whom the document was sent. Given the sensitive nature of the detention issue, release of this information could reasonably be expected to risk subjecting the individuals to

harassment. Release of the withheld information would constitute a clearly unwarranted invasion of personal privacy. The information is therefore exempt from release under FOIA exemption (b)(6).

Document 597-600 (J2A) is a draft response to a communication from the ICRC concerning the designation of the conflict in Afghanistan and its effect on detention of enemy combatants. The ICRC plays an extremely important role in conflict situations, particularly as regards prisoners of war and other detainees. In order to be effective in its intermediary role between parties and individuals, communications to and from the ICRC must be treated and held in confidence. Failure to respect this expectation of confidentiality could diminish the ICRC's effectiveness, as well as risk undermining the necessary climate of confidence between U.S. and ICRC officials. Release of the information would risk damage to an important U.S. foreign relationship. The withheld information is currently and properly classified CONFIDENTIAL under section 1.4(d) of E.O. 12958 and therefore exempt from release under FOIA exemption (b)(1).

Additionally, this draft document was transmitted to other agencies for their review and clearance. As such, it is pre-decisional and part of the inter-agency deliberative process on a specific detention issue. It is therefore exempt from

release under FOIA exemption (b)(5). There is no additional information that may be released from document 596 and no information that may be declassified segregated and released from document 597-600. All of the deliberative process information is also properly classified.

Document 3396-3399 (J8C) is a State Department document that bears the heading: "Additional State Department Comments on OLC Draft Memo Re: Interrogation." Four pages. UNCLASSIFIED. Denied in full. Exemption (b)(5).

This document contains detailed comments on a draft memorandum from DOJ's Office of Legal Counsel on the legal issues involved in interrogations of prisoners. The document also contains a number of analytical and substantive comments in the margins that appear to have been made by DOJ attorneys. The document is pre-decisional and deliberative and therefore exempt from release under FOIA exemption (b)(5). There is no factual information that may be segregated and released.

Document 1184 (J10) is a fax from the Office of the Legal Adviser, Department of State, to the Department of Justice dated July 14, 2004. One page. Classified SECRET under Section 1.4(d) of E.O. 12958. Currently UNCLASSIFIED. Denied in full. Exemption (b)(5).

This document forwards a preliminary State Department draft commentary containing State's views on a DOJ draft

memorandum on interrogation methods at Guantanamo. The document was prepared by an attorney in the Office of the Legal Adviser in reasonable anticipation of litigation, and constitutes attorney work product and is therefore exempt from disclosure under FOIA exemption (b) (5). It is also pre-decisional and deliberative in character and therefore exempt from disclosure under the deliberative process privilege of FOIA exemption (b) (5). There is no meaningful non-exempt material that may be segregated, declassified and released.

Document 3395 (J11) is a fax from the Legal Adviser of the Department of State to an Assistant Attorney General at the Department of Justice dated April 16, 2004. One page. UNCLASSIFIED. Denied in full. Exemption (b) (5).

This document provides a State Department legal opinion on the status of a person entering Iraq contrary to the authority of the Coalition Provisional Authority in Iraq. It was prepared by State Department lawyers in reasonable anticipation of litigation, and, as such, constitutes attorney work product. The opinion is also pre-decisional and deliberative in nature, and therefore exempt from disclosure under FOIA exemption (b) (5). There is no non-exempt material that may be segregated and released.

State Department Case Number 200908949

Documents 3360 (J1), 3304-3305 (J2) and 3293-3304 (J3)

Document 3360 (J1) is a fax cover sheet from the Office of the Legal Adviser to the NSC and Joint Chiefs of Staff (JCS) dated October 4, 2001. UNCLASSIFIED. Denied in part. Exemptions (b)(2) and (b)(6).

Document 3304-3305 (J2) is a fax cover sheet from the Office of the Legal Adviser to the NSC dated October 12, 2001. UNCLASSIFIED. Denied in part. Exemptions (b)(2) and (b)(6).

Document 3293-3394 (J3) is a fax cover sheet from the Office of the Legal Adviser to the NSC dated October 11, 2001. UNCLASSIFIED. Denied in part. Exemptions (b)(2) and (b)(6).

The only information withheld in these documents consists of one name (in 3360) and telephone and fax numbers in all three documents. The name withheld is that of a Colonel at the JCS. The Colonel's name has been withheld under standard procedures to protect members of the military from the possibility of harassment. Similarly, the names and facsimile numbers of others dealing with the detention issue have been withheld to prevent the possibility of their being the subject of harassment. Release of this information - particularly in the context of these sensitive legal and policy issues - would constitute a clearly unwarranted invasion of personal privacy and is therefore exempt from release under FOIA exemption

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(b) (6). Additionally, the telephone and facsimile numbers have also been withheld under exemption (b) (2) to prevent their being used to obstruct and thwart the lawful operation of the concerned offices in performance of their duties. The information is exempt from release under FOIA exemption (b) (2).

State Department Case Number 200908948

Documents 401 (J1), 402 (J1A), 403 (J1B), 409 (J2) and 430 (J5)

Document 401 (J1) is a fax cover sheet dated September 21, 2001, from the State Department Office of War Crimes Issues to offices in DOD, DOJ, and the NSC. One page. Marked SECRET. Currently UNCLASSIFIED. Denied in part. FOIA exemptions (b) (2) and (b) (6).

Document 402 (J1A) is a tasker for Interagency Working Group (IWG) papers. Undated. One page. Marked SECRET. Currently UNCLASSIFIED. Denied in part. FOIA exemption (b) (6).

Document 403 (J1B) is a sign-in sheet dated September 21, 2001. One page. UNCLASSIFIED. Denied in part. Exemptions (b) (2) and (b) (6).

Document 409 (J2) is a fax cover sheet dated October 10, 2001, from the Department of State Office of War Crimes Issues

to DOJ. One page. Marked SECRET. Currently UNCLASSIFIED .
Denied in part. Exemptions (b) (2) and (b) (6).

Document 430 (J5) is a fax cover sheet dated October 12, 2001, from the Department of State Office of War Crimes Issues to offices in DOJ, DOD, the NSC and the White House Counsel's Office. One page. Marked SECRET. Currently UNCLASSIFIED. Denied in part. Exemptions (b) (2) and (b) (6).

Information withheld from these five documents consists of the names (with the exception of three DOJ officials), telephone and/or facsimile numbers of officials involved in considering questions related to criminal prosecutions of al-Qaeda and other detainees. Disclosure of this information reasonably could be expected to result in harassment of the named individuals, given the sensitive nature of the legal and policy issues involved. Release would constitute a clearly unwarranted invasion of their personal privacy and the information is therefore exempt under FOIA exemption (b) (6). Release of the telephone and facsimile numbers could permit their being used to obstruct and thwart the lawful operation of the concerned offices in performance of their duties. The information is therefore exempt from release under FOIA exemption (b) (2).

Documents 404-405 (J1C), 406-408 (J1D), 410-420 (J2A), 422-429 (J3A), 3296-3303 (J4A), 431 (J5A), 432-440 (J5B), 3307-3314 (J6A) and 451-453 (J7B)

Document 404-405 (J1C) is a proposed Interagency Working Group agenda. Dated September 21, 2001. Two pages. Classified SECRET under E.O. 12958, Section 1.4 (d). Currently UNCLASSIFIED. Denied in full. Exemption (b) (5).

Document 406-408 (J1D) is an options paper for criminal proceedings. Undated. Three pages. Marked SECRET by hand. Currently UNCLASSIFIED. Denied in full. Exemption (b) (5).

Document 410-420 (J2A) is a draft options paper for prosecuting members of al-Qaeda. Undated. Eleven pages. Classified SECRET under E.O. 12958, Section 1.4(d). Currently Unclassified. Denied in full. Exemption (b) (5).

Document 422-429 (J3A) is a draft discussion paper on legal options. Undated. Eight pages. Classified SECRET under E.O. 12958, Section 1.4(d). Currently UNCLASSIFIED. Denied in full. Exemption (b) (5).

Document 3296-3303 (J4A) is a draft discussion paper on legal options for prosecuting terrorists dated October 11, 2001. Eight pages. Classified SECRET under E.O. 12958, Section 1.4(d). Currently UNCLASSIFIED. Denied in full. Exemption (b) (5).

Document 431 (J5A) is a proposed agenda for an Interagency Working Group meeting. Dated October 15, 2001.

One page. Marked SECRET. Currently UNCLASSIFIED. Denied in full. Exemption (b)(5).

Document 432-440 (J5B) is a draft discussion paper on legal options for prosecuting terrorists dated October 11, 2001. Nine pages. Classified SECRET under E.O. 12958, Section 1.4(d). Currently UNCLASSIFIED. Denied in full. Exemption (b)(5).

Document 003307 (J6A) is a discussion paper for an NSC deputies committee meeting on legal options for prosecuting terrorists. Undated. Eight pages. Classified SECRET under E.O. 12958, Section 1.4(d). Currently UNCLASSIFIED. Denied in full. Exemption (b)(5).

Document 000451 (J7B) is a discussion paper dated November 8, 2001. Three pages. Classified SECRET. Currently UNCLASSIFIED. Denied in full. Exemption (b)(5).

These documents consider options for prosecuting al-Qaeda and other terrorists captured in the U.S. and abroad. They examine, among other issues, the possibilities, "pros," and "cons" of using federal courts, military courts, military commissions, or some other mechanism. The documents are intended to inform policymakers prior to decisions on the issue of prosecuting terrorist suspects, and are both pre-decisional and deliberative. They are therefore exempt from release under FOIA exemption (b)(5). There is no factual

information not interwoven with the deliberative material that may be segregated and released.

Documents 3317-3320 (J8), 3333-3336 (J9A), and 3339-3343 (J10A)

Document 3317-3320 (J8) is a draft communication to the ICRC dated July 7, 2004. Four pages. Classified CONFIDENTIAL under Section 1.4(d) of E.O. 12958. Denied in full. Exemptions (b)(1) and (b)(5).

Document 3333-3336 (J9A) is a copy of 3317-3320 (J8), described immediately above, but without handwritten comments. Classified CONFIDENTIAL under Section 1.4(d) of E.O. 12958. Denied in full. Exemptions (b)(1) and (b)(5).

Document 3339-3343 (J10A) is a draft communication to the ICRC dated December 10, 2004. Five pages. Classified CONFIDENTIAL under Section 1.4(d) of E.O. 12958. Denied in full. Exemptions (b)(1) and (b)(5).

These documents contain drafts of U.S. responses to communications from the ICRC concerning detainee issues. As noted above, communications to and from the ICRC must be treated in confidence. Failure to respect this could diminish the ICRC's effectiveness in its role as well as risk undermining the necessary climate of confidence between U.S. and ICRC officials. Release of the information would risk damage to an important U.S. foreign relationship. The

withheld information is currently and properly classified CONFIDENTIAL under section 1.4 (d) of E.O. 12958 and therefore exempt from release under FOIA exemption (b)(1).

Additionally, the documents are drafts (in two cases virtually identical) that were circulated for clearance. As such, they are pre-decisional and part of the deliberative process and therefore exempt from release under FOIA exemption (b)(5).

There is no information that may be declassified, segregated, and released from these documents. All of the deliberative process information is also properly classified.

Documents 442-450 (J7A) and 3321 (J8A)

Document 442-450 (J7A) is a draft discussion paper dated November 7, 2001. Nine pages. Classified SECRET under E.O. 12958, Section 1.4(d). Denied in full. Exemptions (b)(1) and (b)(5).

Document 442-450 (J7A) discusses in some detail the "pros" and "cons" of possible locations outside the U.S. for detaining captured terrorists, including judgments about internal and foreign policies. Release of this frank discussion containing foreign government information could damage U.S. relations with the countries concerned. The information is currently and properly classified SECRET under Sections 1.4(b) and (d) of E.O. 12958, and is therefore exempt from disclosure under FOIA exemption (b)(1). The contents are

also pre-decisional and deliberative and are, therefore, also exempt from disclosure under FOIA exemption (b) (5).

Deliberative portions are also exempt under FOIA exemption (b) (1). There is no information that may be declassified, segregated and released.

Document 003321 (J8A) is a fragment (possibly page 15) from a background or briefing paper. Undated. One page. UNCLASSIFIED. Denied in full. Exemption (b) (5).

This draft document considers U.S. government reactions to reports of abuses of detainees. It contains hand-written changes. It is part of a pre-decisional and deliberative document and is, therefore, exempt from disclosure under FOIA exemption (b) (5). There is no non-exempt factual material that may be segregated and released.

CONCLUSION

All of the documents addressed herein have been carefully reviewed for reasonable segregation of non-exempt information. I have determined that no segregation of meaningful

information in the withheld material can be made without disclosing information warranting protection under the law.

Executed this 20th day of November 2009.


Margaret P. Grafeld