

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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AMERICAN CIVIL LIBERTIES UNION,
CENTER FOR CONSTITUTIONAL RIGHTS,
PHYSICIANS FOR HUMAN RIGHTS,
VETERANS FOR COMMON SENSE AND
VETERANS FOR PEACE,

Plaintiffs,

v.

DEPARTMENT OF DEFENSE, AND ITS
COMPONENTS DEPARTMENT OF ARMY,
DEPARTMENT OF NAVY, DEPARTMENT OF
AIR FORCE, DEFENSE INTELLIGENCE
AGENCY; DEPARTMENT OF HOMELAND
SECURITY; DEPARTMENT OF JUSTICE,
AND ITS COMPONENTS CIVIL RIGHTS
DIVISION, CRIMINAL DIVISION, OFFICE OF
INFORMATION AND PRIVACY, OFFICE OF
INTELLIGENCE POLICY AND REVIEW,
FEDERAL BUREAU OF INVESTIGATION;
DEPARTMENT OF STATE; AND CENTRAL
INTELLIGENCE AGENCY,

Defendants.
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04 Civ. 4151 (AKH)

SIXTH DECLARATION OF
STEWART F. ALY

I, Stewart F. Aly, declare under penalty of perjury that the following information is true and correct.

My Personal Involvement in this Litigation

1. I am a consultant to the Office of the General Counsel of the Department of Defense. I began my service in that capacity on March 6, 2007. Prior to that, from January 1, 1993, until December 31, 2006, I served as Associate Deputy General Counsel (Legal Counsel) in the Office of the General Counsel (OGC) of the Department of Defense ("DoD" or the "Department"). My

areas of responsibility included statutes relating to management and release of information, such as the Privacy Act and the Freedom of Information Act (FOIA). I personally reviewed FOIA requests and appeals as part of my official duties, and I had authority to make determinations regarding the release of records of the OGC. I served as counsel to the Office for Freedom of Information, which is the office responsible for formulation and promulgation of the Department's FOIA policy and have represented the Defense Department in major FOIA litigation.

2. I am familiar with the requests submitted under the Freedom of Information Act by the plaintiffs in this case; I am also familiar with the complaint, answer and other materials filed in this litigation. I served as Defense Department counsel in this case from its inception until my retirement. Michael Reheuser replaced me as Defense Department counsel in this case, and I have continued to advise and assist him because of my experience with and knowledge of this case. I have submitted declarations and attended hearings in this case both as the Defense Department counsel and in my current position as a consultant. The statements in this declaration are based upon my personal knowledge and upon my review of information available to me in my official capacity while I served as Associate Deputy General Counsel (Legal Counsel) and in my current position as a consultant.

3. The Department of Justice located a series of documents believed to be responsive to plaintiffs' request in a search in the Sensitive Compartmented Information Facility of the Office of Legal Counsel (OLC). This search was described in a letter to the Court dated September 21, 2009. The documents in which the Defense Department might have an interest were referred to the Defense Department. Because of my familiarity with this case from its inception, and in

particular with the documents processed by the Defense Department, I have reviewed all of these referred documents. The purpose of this declaration is to report on the status of these documents.

Documents Referred for Consultation

4. The Department of Justice referred to the Department of Defense a number of OLC documents for consultation. The Defense Department also received a few documents from other agencies for consultation. They included copies of several documents among the 101 previously referred to the Defense Department which are discussed in paragraph 36 of my Third Declaration dated June 8, 2007. The documents in this category were denied in full and listed in the Vaughn index attached to the Declaration of Steven G. Bradbury filed May 15, 2006.¹ One of these documents was declassified and released in full to the plaintiffs in this case last year; it is an OLC memorandum dated March 14, 2003. Another of these documents was declassified and released as part of the current search and review process; it is a single page memorandum dated May 11, 2004. As to a few of the documents referred for consultation, I was unable to confirm that they had been processed previously in this case.

5. Some of the documents referred to the Defense Department for consultation have been released on completion of the interagency review. In some cases, information which would identify individual detainees, military personnel and Defense Department civilian employees has been withheld following the Defense Department's standard policy on protecting the privacy of DoD personnel and as consistently done in the processing of Defense Department documents in this case. Withholding of this information has not been challenged by plaintiffs. The application

¹ The declaration mistakenly has a May 15, 2005 date, rather than the correct year.

of exemption 6 in this regard is described in paragraph 28 of my Third Declaration dated June 8, 2007.

Documents Referred for Processing or Determination of Prior Processing

6. OLC referred to the Defense Department a number of Defense Department documents for processing or a determination that the documents had already been processed by the Defense Department in this litigation and therefore required no further review. These fall into several categories:

(A) Some of the referred documents have been processed and released in this case or otherwise released to the public. For example, the documents include multiple copies of a Combined Joint Task Force memorandum dated October 7, 2003, which was released in full to the plaintiffs in this case. Also included were documents processed and released to the plaintiffs with redactions which they have not challenged, for example documents identified as CITF 68 and CITF 230. Other referred documents have been released to the public by the Defense Department outside this litigation, for example the Working Group Report on Detainee Operations dated April 4, 2003, ("Walker Report"), which was released in June 2004 and is available on the Defense Department web site. In addition, some of documents referred have been processed by the Defense Department for release by the Senate Armed Services Committee last year and are available on the Committee's website.

(B) Other referred documents were denied in full by the Defense Department during the processing of documents that was completed in June 2006. Each of these documents was identified to the plaintiffs at some point in the repeated listings and indices of documents denied

in full provided to them. Each of the documents in this category was not challenged by the plaintiffs. An example is a draft of the Walker Report discussed above, identified as document A-55.

(C) Some of the referred documents are not responsive to the plaintiffs' request under the agreed scope for the searches and processing of Defense Department documents in this case. Documents in this category include memoranda which discuss routine matters related to detainees with no mention of any of the topics included in the agreed scope. Another example is internal Defense Department documents for training military personnel in routine detention procedures which do not address any of the topics in the agreed scope.

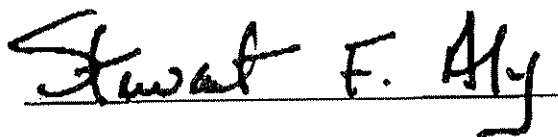
(D) A substantial portion of the referred documents to the Defense Department contain confidential information provided by or produced in cooperation with the International Committee of the Red Cross. The basis for assertion of FOIA exemption 3 over this information was presented to the Court in my Second Declaration, dated March 23, 2005, and the Declaration of Deputy General Counsel (International Affairs) Charles Allen, dated March 25, 2005. Tab B to my declaration provided to the Court an index of documents prepared in response to ICRC concerns similar to those the Department of Defense as part of the referrals described above. The Court has ruled on the validity of exemption 3 in this context after hearing argument and examining *ex parte* and *in camera* a representative sample of documents containing information provided by or produced in cooperation with the ICRC, saying that "DOD's responses to the ICRC are exempt, for otherwise the ICRC's request for confidentiality would be compromised." 389 F.Supp. 547 at 555. The plaintiffs have not challenged this holding on appeal. Therefore,

referred documents which contain this confidential information have not been processed under the Court's ruling on this issue.

7. All of the documents referred for processing or a determination that the documents had already been processed in this litigation fall into one or more of the categories in paragraph 6 above.

I declare under penalty of perjury that the foregoing is true and correct.

Executed: November 20, 2009

A handwritten signature in black ink that reads "Stewart F. Aly". The signature is written in a cursive style and is positioned above a horizontal line.

STEWART F. ALY