



June 23, 2009

Agency Release Panel  
 C/o Delores M. Nelson, Information and Privacy Coordinator  
 Central Intelligence Agency  
 Washington, D.C. 20505

**Re: FOIA Appeal, Reference # F-2009-00990**

Dear Ms. Nelson,

Requesters American Civil Liberties Union and American Civil Liberties Union Foundation (collectively, "ACLU") write to appeal the Central Intelligence Agency's ("CIA") refusal to confirm or deny the existence or nonexistence of records requested by Freedom of Information Act request number F-2009-00990 ("Request"). The Request seeks records pertaining to the detention and treatment of prisoners at the Bagram Theater Internment Facility in Afghanistan ("Bagram"). *See* Exh. A (FOIA Request dated April 23, 2009). Information and Privacy Coordinator Delores M. Nelson's letter refusing to confirm or deny the existence or nonexistence of responsive records ("Response Letter") is dated May 13, 2009. *See* Exh. B (Response Letter). The ACLU respectfully requests reconsideration of this determination and the release of records responsive to the Request.

The ACLU has requested the release of 10 distinct categories of information pertaining to detention of, treatment of, and process afforded to prisoners at Bagram. The FOIA office denied the ACLU's FOIA request with a "Glomar" response. The response letter stated, in conclusory terms, that "the CIA can neither confirm nor deny the existence or nonexistence of records responsive to your request [because t]he fact of the existence or nonexistence of requested records is currently and properly classified and is intelligence sources and methods information that is protected from disclosure by [statute]." Exh. B.

The "Glomar" response provided here is far too sweeping and categorical. The refusal to, essentially, confirm or deny the existence of *any* records about Bagram goes far beyond the bounds of a permissible "Glomar" response. Under the Freedom of Information Act ("FOIA"), an agency may invoke the "Glomar" response – refusing to confirm or deny the existence of requested records – only if the very fact of existence or nonexistence of the records is itself properly classified under FOIA exemption (b)(1), properly withheld pursuant to statute under exemption (b)(3), or properly subject to another FOIA exemption. *Philippi v. CIA* ("Philippi I"), 546 F.2d 1009 (D.C. Cir. 1976); Exec. Order No. 12,958, § 3.6(a), *as amended* by Exec. Order No. 13,292, 68 Fed. Reg. 15,315 (Mar. 25,

AMERICAN CIVIL LIBERTIES  
 UNION FOUNDATION  
 NATIONAL OFFICE  
 125 BROAD STREET, 18TH FL.  
 NEW YORK, NY 10004-2400  
 T/212.549.2500  
 WWW.ACLU.ORG

OFFICERS AND DIRECTORS  
 SUSAN N. HERMAN  
 PRESIDENT

ANTHONY D. ROMERO  
 EXECUTIVE DIRECTOR

RICHARD ZACKS  
 TREASURER

2003). It seems unlikely in the extreme that that merely confirming or denying the existence of particular records pertaining to Bagram would reveal a classified fact or intelligence sources or methods.

The Response Letter fails adequately to justify the sweeping and categorical Glomar response. The Response Letter does not explain the basis for invoking the Glomar response beyond the conclusory statement that “[t]he fact of the existence or nonexistence of requested records is currently and properly classified and is intelligence sources and methods information that is protected from disclosure by [statute].” Exh. B. The Response Letter does not explain why acknowledging the existence or nonexistence of *any* responsive records would reveal a classified fact. The Response Letter does not explain why acknowledging the existence or nonexistence of *any* responsive records would reveal an intelligence source or method. The Response Letter does not even explain how the requested records even *relate* to intelligence sources or methods. Most importantly, the Response Letter makes no attempt to distinguish between the ten distinct categories of information contained in the ACLU’s Request or to explain why confirming or denying *any particular category* of requested records would reveal a classified fact or intelligence sources and methods. The summary and categorical justification provided in the Response Letter is not an adequate justification for denying the ACLU’s FOIA request *in toto*. See *Riquelme v. C.I.A.*, 453 F. Supp. 2d 103, 112 (D.D.C. 2006) (“[A] Glomar response does not . . . relieve [an] agency of its burden of proof.” (citing *Philippi I*, 546 F.2d at 1013)).

The sweeping Glomar response provided in the Response Letter is particularly inappropriate because the government has acknowledged facts at issue in the Request. The government’s detention and interrogation operations at Bagram are by no means a secret. Previous government acknowledgement of information sought in a FOIA request waives an otherwise valid Glomar claim. *Wolf v. C.I.A.*, 473 F.3d 370, 378 (D.C. Cir. 2007) (“[W]hen information has been officially acknowledged, its disclosure may be compelled even over an agency’s otherwise valid exemption claim.” (internal quotation marks omitted) (citing *Fitzgibbon v. C.I.A.*, 911 F.2d 755, 765 (D.C. Cir. 1990))). Thus, the government may not refuse to confirm or deny the existence of records that detail information previously disclosed. *Id.*

The government has released, and thus officially acknowledged, information about the detention and interrogation of individuals at Bagram. The government routinely issues public statements about its detention operations at Bagram. See, e.g., *Troops in Afghanistan Kill, Detain Enemy Fighters*, Armed Forces Press Serv., Dep’t of Def., Aug. 29, 2008, available at <http://www.defenselink.mil/news/newsarticle.aspx?id=50986>; *Three Terrorists Captured; 26 Detainees Released*, Armed Forces Press Serv., Dep’t of Def., Dec. 7, 2006, available at <http://www.defenselink.mil/news/newsarticle.aspx?id=2335>. The detention of individuals at Bagram is the subject of public litigation in the

federal courts. *See Al Maqaleh v. Gates*, 604 F. Supp. 2d 205, 235 (D.D.C. 2009). Government filings in the Bagram litigation have officially (and specifically) acknowledged the existence of the Bagram detention facility and details of its operation, including the process for determining enemy combatant status of detainees at Bagram and the fact that certain individuals are detained at the facility. *See* Declaration of Colonel James W. Gray at ¶¶ 11–20, *Al Maqaleh*, 604 F. Supp. 2d at 205 (No. 06-CV-01669 (JDB)).

Congress has publicly disclosed information about Bagram provided by executive branch officials. For example, in 2008, the Senate Armed Services Committee revealed information provided by government officials about abusive interrogation techniques at Bagram. *See The Origins of Aggressive Interrogation Techniques: Hearing Before the S. Armed Servs. Comm.* 110th Cong. (2008) (Committee Statement), available at <http://levin.senate.gov/senate/statement.cfm?id=299242> (“The Officer in Charge of the Intelligence Section at Bagram Airfield, in Afghanistan has said that in January 2003 she saw – in Afghanistan – a power point presentation listing the aggressive techniques authorized by the Secretary on December 2, 2002.”). In testimony before the House Permanent Select Committee on Intelligence, the Director of National Intelligence also addressed detention policies at Bagram. *See Annual Threat Assessment: Hearing Before the H. Permanent Select Comm. on Intelligence*, 111th Cong. (Feb. 25, 2009) (statement of Dennis C. Blair, Director of National Intelligence).

The government has also acknowledged details about the detention and treatment of prisoners at Bagram through public release of agency investigatory reports on the subject. For example, the Department of Defense (“DoD”) released the Jacoby report, which discusses detention conditions and operations at U.S. facilities in Afghanistan. *See* Charles H. Jacoby, Dep’t of Def., CFC-A AO Detainee Operations: Report of Inspection [“Jacoby Report”], at 9 (May 19, 2004), available at <http://action.aclu.org/torturefoia/released/061906/JacobyReport.pdf>. The DoD also released the Church Report, which reviewed DoD interrogation operations and policy in Afghanistan and elsewhere. *See* A.T. Church, Office of the Sec’y of Def., Review of Department of Defense Detention Operations and Detainee Interrogation Techniques [“Church Report”] (Mar. 7, 2005), available at [http://www.dod.mil/pubs/foi/detainees/church\\_report\\_1.pdf](http://www.dod.mil/pubs/foi/detainees/church_report_1.pdf). The DoD has released records relating to the deaths of two detainees at Bagram in 2002 that DoD concluded were homicides. *See* Armed Forces Regional Medical Examiner, Landstuhl Regional Medical Center, Final Report of Postmortem Investigation, Feb. 3, 2003, available at <http://www.aclu.org/accountability/search.html><sup>1</sup>; *see also* Tim Golden, *In U.S. Report, Brutal Details of 2 Afghan Inmates’ Deaths*, N.Y. Times, May 20, 2005; Tim Golden, *Years After 2 Afghans Died, Abuse Case Falts*, N.Y. Times, Feb. 13, 2006. The DoD has also acknowledged and publicly released information about International Red Cross Committee (ICRC)

<sup>1</sup> Enter “DOD 003146” into “Document Number” search field.

findings about the Bagram detention facility. See Dep't of Def., Dep't of the Army, ARCENT CAAT Initial Impressions Report (IIR) Chapters 3-9, at 156, available at <http://www.aclu.org/accountability/search.html><sup>2</sup> (acknowledging ICRC report and that “[s]everal issues [have arisen] regarding the ICRC at Kandahar and Bagram due to the amount of time the detainees were being held”). Finally, DoD and the FBI have publicly released investigatory reports that include Bagram detainees’ detailed descriptions of their treatment. See, e.g., Summary of FBI Interview at Guantanamo Bay (May 21, 2002), available at <http://www.aclu.org/accountability/search.html><sup>3</sup> (“[P]rior to an interview in Bagram, [the detainee] was forced to strip naked in front of others.”); Summary of FBI Interview at Guantanamo Bay, *Subject Was Interviewed and Detailed How He Was Beaten by US Forces at an Unknown Location, Bagram and Kandahar* (Aug. 23, 2002), available at <http://www.aclu.org/accountability/search.html><sup>4</sup> (“After being moved to an unknown facility in Bagram, [the detainee’s] head was placed against the cement floor and his head was kicked. As a result of other beatings in Bagram, [redacted] received a broken shoulder.”).

Bagram is operated by the Department of Defense. However, the government has acknowledged that the CIA and DOD have cooperated in “detention and interrogation operations.” Robert L. Caslen, DLSOC Open Recommendations Review, S-008 DOD/OGA Guidelines, at 312 (Apr. 28, 2005) (released by DOD Joint Staff, Feb. 2009), available at [http://ccrjustice.org/files/Pages%20from%20Feb%202009%20DOD%20JS%20Release\(1\).pdf](http://ccrjustice.org/files/Pages%20from%20Feb%202009%20DOD%20JS%20Release(1).pdf). The Church Report discusses cooperation between the DoD and CIA at facilities in Afghanistan in some depth:

For the purposes of our discussion, other government agencies, or OGAs, are federal agencies other than DoD that have specific interrogation and/or detention-related missions in the Global War on Terror. These agencies include the Central Intelligence Agency . . . . [and] our investigation . . . focused primarily on DoD support for the CIA. . . . DoD personnel frequently worked together with OGAs to support their common intelligence collection mission in the Global War on Terror . . . . In support of OGA detention and interrogation operations, DoD provided assistance that included detainee transfers, logistical functions, sharing of intelligence gleaned from DoD interrogations, and oversight and support of OGA interrogations at DoD facilities.

Church Report, *supra*, at 17–18; see also *id.* at 18 (“[There were] occasions when DoD temporarily held [ghost] detainees for the CIA . . . . [T]here were approximately 30 ‘ghost detainees’” held by DoD for the CIA.). Given the publicly acknowledged information about Bagram and about the CIA role in

---

<sup>2</sup> Enter “DODDOA013242” into “Document Number” search field.

<sup>3</sup> Enter “DOJFBI003203” into “Document Number” search field.

<sup>4</sup> Enter “DOJFBI003236” into “Document Number” search field.

interrogating and detaining individuals at Bagram and other facilities, *see infra*, there is no valid basis for the CIA to maintain such a categorical Glomar response to the ACLU's Request.

The government has also acknowledged extensive details of the CIA's detention and rendition program, which operated at Bagram as well as at secret facilities in other countries. These acknowledgements are particularly relevant to Category 6 of the Request, which seeks records "pertaining to the rendition and/or transfer of individuals captured outside Afghanistan to Bagram." Exh. A. In 2006, President Bush publicly acknowledged the existence, nature, and scale of the CIA's secret detention and rendition program.<sup>5</sup> The Director of National Intelligence also revealed details of the rendition and secret detention program in 2006. Office of the Director of National Intelligence, *Summary of the High Value Terrorist Detainee Program* (Sept. 6, 2006), available at <http://www.dni.gov/announcements/content/TheHighValueDetaineeProgram.pdf>; Office of the Director of National Intelligence, *Biographies of High Value Terrorist Detainees Transferred to the US Naval Base at Guantánamo Bay* (Sept. 6, 2006), available at <http://www.dni.gov/announcements/content/DetaineeBiographies.pdf>. Former CIA Director George Tenet publicly discussed the rendition program on several occasions, including by specifically denying allegations by one individual that he had been rendered to Afghanistan and tortured by the CIA. *The Situation Room: Interview With Former CIA Director George Tenet* (CNN television broadcast May 2, 2007) (transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/0705/02/sitroom.02.html>). In 2007, CIA Director General Michael Hayden made public remarks to the Council on Foreign Relations in which he discussed the rendition program, including the number of individuals detained and rendered. Michael V. Hayden, Director, Central Intelligence Agency, Remarks at the Council on Foreign Relations (Sept. 7, 2007), available at <https://www.cia.gov/news-information/speeches-testimony/2007/general-haydens-remarks-at-the-council-on-foreign-relations.html>. Since taking office, President Obama has also acknowledged the CIA's involvement in detention, rendition, and interrogation. *See* Statement of President Barack Obama on Release of OLC Memos, Apr. 16, 2009, available at [http://www.whitehouse.gov/the\\_press\\_office/statement-of-President-Barack-Obama-on-Release-of-OLC-Memos/](http://www.whitehouse.gov/the_press_office/statement-of-President-Barack-Obama-on-Release-of-OLC-Memos/); *Obama's Interview Aboard Air Force One*,

---

<sup>5</sup> See White House Office of the Press Secretary, *News Release: President Discusses Creation of Military Commissions to Try Suspected Terrorists* (Sept. 6, 2006), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html> ("In addition to the terrorists held at Guantánamo, a small number of suspected terrorist leaders and operatives captured during the war have been held and questioned outside the United States, in a separate program operated by the Central Intelligence Agency."); White House Office of the Press Secretary, *Press Release: The White House Fact Sheet: Bringing Terrorists to Justice* (Sept. 6, 2006), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-2.html>; White House Office of the Press Secretary, *News Release: Press Conference of the President* (Sep. 15, 2006), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060915-2.html>.

N.Y. Times, Mar. 7, 2009. Immediately after taking office, President Obama ordered an end to the CIA's secret detention program. Exec. Order No. 13,491, 74 Fed. Reg. 4,893 (Jan. 22, 2009).

The CIA's interrogation practices have also been officially acknowledged. For example, in April 2009, the Department of Justice released four Office of Legal Counsel memos that had authorized particular interrogation practices used by the CIA in its detention and rendition program.<sup>6</sup> The memos include exhaustive details about interrogation techniques used by the CIA. *See, e.g.*, DOJ Off. Legal Counsel, Memorandum for John A. Rizzo, Senior Deputy General Counsel, CIA, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, *Re: Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee* (May 10, 2005). The memos also extensively discuss the procedures used by the CIA in transporting and detaining individuals subject to CIA rendition. *See* DOJ Off. Legal Counsel, Memorandum for John A. Rizzo, Senior Deputy General Counsel, CIA, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, *Re: Application of 18 U.S.C. §§ 2340-2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees* (May 10, 2005). The official acknowledgements contained in these memos are especially germane to Categories 6 and 10 of the Request, which seek information about rendition (Category 6) and about "the treatment of and conditions of confinement for prisoners detained at Bagram" (Category 10). *See* Exh. A.

The sweeping and categorical Glomar response provided in the Response Letter cannot survive in the face of these official public disclosures. The above acknowledgements by the U.S. government are specific and relevant to the records requested here. They undermine the CIA's Glomar claim, and necessitate that the Agency acknowledge whether it holds responsive records and to release those records or justify their withholding pursuant to the FOIA exemptions. *See Wolf*, 473 F.3d at 378.

Notwithstanding the extensive official acknowledgments about detention and treatment of prisoners at Bagram, the CIA's Glomar response is further weakened by the fact that there is substantial information about the subject matter of the ACLU's Request in the public domain. In assessing whether information is properly classified and thus properly withheld under Exemption(b)(1), courts take into account whether the information is already in the public domain. *See, e.g., Washington Post v. U.S. Dep't of Def.*, 766 F. Supp. 1, 9 (D.D.C. 1991) ("[S]uppression of 'already well publicized' information would normally 'frustrate the pressing policies of the Act without even arguably advancing countervailing considerations.'" (quoting *Founding Church of Scientology v.*

---

<sup>6</sup> Available at <http://www.aclu.org/olcmemos>. *See also* Press Release, Dep't of Justice, *Department of Justice Releases Four Office of Legal Counsel Opinions*, Apr. 16, 2009, available at <http://www.usdoj.gov/opa/pr/2009/April/09-ag-356.html>.

*Nat'l Sec. Agency*, 610 F.2d 824, 831–32 (D.C. Cir. 1979))). When extensive information about the subject of a FOIA request is already in the public domain, courts require a “specific explanation . . . of why formal release of information already in the public domain threatens the national security.” *Id.* at 10. Here, it is difficult to fathom how confirming or denying the existence of records that discuss matters already reported in the press and available to the public (and, in large part, officially acknowledged) would in any way threaten national security.

As detailed in the Request, the press has reported extensively on the Bagram detention facility. *See, e.g.*, Richard A. Oppel, *U.S. Captain Hears Pleas for Afghan Detainee*, N.Y. Times, May 25, 2009; R. Jeffrey Smith, *Obama Follows Bush Policy on Detainee Access to Courts*, Wash. Post, Apr. 11, 2009; Charlie Savage, *Judge Rules Some Prisoners at Bagram Have Right of Habeas Corpus*, N.Y. Times, Apr. 3, 2009 (“The United States is holding about 600 people at Bagram without charges and in Spartan conditions.”); David G. Savage, *Some Prisoners at Bagram Air Base Can Challenge Detentions, Judge Rules*, L.A. Times, Apr. 3, 2009; James Vicini, *Judge Rules Afghan Detainees Can Sue in US Court*, Reuters, Apr. 2, 2009; ‘How Bagram Destroyed Me,’ BBC News, Sept. 25, 2008; Fisnik Abrashi, *U.S. Allows First Family Visits to Afghan Prison*, Assoc. Press, Sept. 23, 2008; Suzanne Goldenberg & Saeed Shah, *Mystery of ‘Ghost of Bagram’ - Victim of Torture or Captured in a Shootout?*, Guardian (U.K.), Aug. 6, 2008; Eric Schmitt, *Pakistani Suspected of Qaeda Ties Is Held*, N.Y. Times, Aug. 5, 2008; Del Quentin Wilber, *In Courts, Afghanistan Air Base May Become Next Guantanamo*, Wash. Post, June 29, 2008; Katie Paul, *The Road From Gitmo: Alternative Ways of Handling Suspects in the War on Terror*, Newsweek, June 27, 2008; Eric Schmitt & Tim Golden, *U.S. Planning Big New Prison in Afghanistan*, N.Y. Times, May 17, 2008; Fisnik Abrashi, *Red Cross Faults Afghan Prison*, Assoc. Press, Apr. 15, 2008; Carlotta Gall, *Video Link Plucks Afghan Detainees From Black Hole of Isolation*, N.Y. Times, Apr. 13, 2008; Candance Rondeaux, Josh White & Julie Tate, *Afghan Detainees Sent Home to Face Closed-Door Trials*, Wash. Post, Apr. 13, 2008; Tim Golden & David Rohde, *Afghans Hold Secret Trials for Men That U.S. Detained*, N.Y. Times, Apr. 10, 2008; Ian Austin, *Canadian TV Network Seeks Release of Afghan*, N.Y. Times, Feb. 21, 2008; William Fischer, *Afghan Prison Looks Like Another Guantanamo*, Inter Press Service, Jan. 14, 2008; Andrew Gumbel, *Bagram Detention Center Now Twice the Size of Guantanamo*, Independent (U.K.), Jan. 8, 2008; Tim Golden, *Foiling U.S. Plan, Prison Expands in Afghanistan*, N.Y. Times, Jan. 7, 2008; *U.S. Expands Afghan Base at Bagram*, Assoc. Press, Oct. 6, 2007; Richard Leiby, *Down a Dark Road*, Wash. Post, Apr. 27, 2007; Matthew Pennington, *Inmates Detail U.S. Prison Near Kabul*, Assoc. Press, Oct. 2, 2006; Eliza Griswold, *American Gulag: Prisoners’ Tales from the War on Terror*, Harpers, Sept. 1, 2006; Carlotta Gall & Ruhullah Khapalwak, *Some Afghans Freed from Bagram Cite Harsh Conditions*, N.Y. Times, June 8, 2006; William Fisher, *Bagram - ‘Son of Guantanamo’*, Inter Press Service, Feb. 28, 2006; Tim Golden & Eric Schmitt, *A Growing Afghan Prison Rivals Bleak Guantanamo*, N.Y. Times, Feb. 26, 2006; Tim Golden, *Years After 2 Afghans*

*Died, Abuse Case Falters*, N.Y. Times, Feb. 13, 2006; Tim Golden, *Case Dropped Against U.S. Officer in Beating Deaths of Afghan Inmates*, N.Y. Times, Jan. 8, 2006; Tim Golden, *Abuse Cases Open Command Issues at Army Prison*, N.Y. Times, Aug. 8, 2005; Tim Golden, *In U.S. Report, Brutal Details of 2 Afghan Inmates' Deaths*, N.Y. Times, May 20, 2005; Emily Bazelon, *From Bagram to Abu Ghraib*, Mother Jones, Mar./Apr. 2005; Stephanie Hanes, *Two Groups Detail Abuse of Afghan Prisoners*, Baltimore Sun, May 5, 2004; Pamela Constable, *An Afghan Boy's Life in U.S. Custody: Camp in Cuba Was Welcome Change After Harsh Regime at Bagram*, Wash. Post, Feb. 12, 2004; Alan Cooperman, *CIA Interrogation Under Fire; Human Rights Groups Say Techniques Could Be Torture*, Wash. Post, Dec. 28, 2002; Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations; 'Stress and Duress' Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities*, Wash. Post, Dec. 26, 2002.

AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION

Non-governmental organizations have also reported on detention and treatment of individuals at Bagram. See, e.g., Amnesty International, *USA: Out of Sight, Out of Mind, Out of Court? The Right of Bagram Detainees to Judicial Review* (Feb. 2009), available at <http://www.amnesty.org/en/library/info/AMR51/021/2009/en>; Center for Human Rights & Global Justice, Human Rights First & Human Rights Watch, *By the Numbers: Findings of the Detainee Abuse and Accountability Project* (Apr. 2006), available at [http://www.chrgj.org/docs/By\\_The\\_Numbers.pdf](http://www.chrgj.org/docs/By_The_Numbers.pdf); Human Rights Watch, *"Enduring Freedom": Abuses by U.S. Forces in Afghanistan*, at 34–36 (Mar. 2004), available at <http://www.hrw.org/en/reports/2004/03/07/enduring-freedom-0>.

Individuals who were detained by the CIA at Bagram and elsewhere have publicly described their treatment. See, e.g., Eugene Robinson, *Crimes That Deserve Punishment*, Wash. Post, Apr. 10, 2009 (“After being arrested . . . they were blindfolded, shackled and flown to an interrogation center that all of them identified as being in Afghanistan. This was probably the prison facility at the U.S.-run Bagram air base north of Kabul. Twelve of the 14 said they were tortured.”); Mohamed Farag Bashmilah, *Disappeared in the Name of National Security*, Huffington Post, Feb. 19, 2009; First Amended Complaint, *Mohamed v. Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d 1128 (N.D. Cal. 2008) (No. 5:07-cv-02798 (JW)); Verbatim Transcript of Combatant Status Review Tribunal Hearing for ISN 10020, CSRT of Majid Khan, at 21, Apr. 15, 2007, available at [http://www.aclu.org/pdfs/safefree/csrt\\_majidkhan.pdf](http://www.aclu.org/pdfs/safefree/csrt_majidkhan.pdf) (“[T]he CIA . . . abused me”; “All of your classified information is from the CIA [redacted] These are the same people who tortured me.”); International Committee of the Red Cross, *ICRC Report on the Treatment of Fourteen “High Value Detainees” in CIA Custody* (Feb. 2007).

More generally, there is extensive information in the public domain about the CIA rendition and secret detention program, which is a subject of category 6



of the ACLU Request. The press has reported consistently on the rendition program since it was first revealed. Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, Wash. Post, Nov. 2, 2005. See also Scott Shane & Mark Mazzetti, *In Adopting Harsh Tactics, No Look at Past Use*, N.Y. Times, Apr. 21, 2009; Scott Shane, *Divisions Arose on Rough Tactics for Qaeda Figure*, N.Y. Times, Apr. 17, 2009; Mark Mazzetti & Scott Shane, *Interrogation Memos Detail Harsh Tactics by the C.I.A.*, N.Y. Times, Apr. 16, 2009; Mark Danner, *US Torture: Voices from the Black Sites*, N.Y. Rev. of Books, Apr. 9, 2009; Julie Sell, *U.N. Report Says U.S. Led 'Black Site' Renditions in War on Terrorism*, Miami Herald, Mar. 11, 2009; Scott Shane, *Inside a 9/11 Mastermind's Interrogation*, N.Y. Times, June 22, 2008; Colin Freeze, *'Extraordinary-rendition' procedure unreliable, says CIA vet who created it*, Globe and Mail (Can.), Apr. 14, 2008; Peter Bergen, *Exclusive: I Was Kidnapped by the CIA*, Mother Jones, Mar./Apr. 2008; Peter Bergen & Katherine Tiedemann, *Disappearing Act: Rendition by the Numbers*, Mother Jones, Mar. 3, 2008; Craig Whitlock, *Jordan's Spy Agency: Holding Cell for the CIA*, Wash. Post, Dec. 1, 2007; Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. Times, Oct. 4, 2007; Scott Shane & David Johnston, *Congress Seeks Justice Dept. Documents on Interrogation*, N.Y. Times, Oct. 4, 2007; Katherine Eban, *Rorschach and Awe: Politics & Power*, Vanity Fair, July 17, 2007; Marcin Grajewski, *CIA dissenters aided secret prisons report: author*, Reuters, July 17, 2007; Mark Benjamin, *The CIA's torture teachers*, Salon News, June 21, 2007; Scott Shane & Thom Shanker, *Rights Groups Call for End to Secret Detention of Suspects*, N.Y. Times, June 7, 2007; Dafna Linzer & Julie Tate, *New Light Shed on CIA's 'Black Site' Prisons*, Wash. Post, Feb. 28, 2007; Yossi Melman, *Testimony of a Journey Through Hell*, Haaretz (Isr.), Nov. 10, 2006; Tim Golden, *Detainee Memo Created Divide in White House*, N.Y. Times, Oct. 1, 2006; Farah Stockman, *Fate of Some Detainees Still Unknown*, Boston Globe, Sept. 22, 2006; Ingrid Melander, *EU Condemns Secret CIA Prisons*, Reuters, Sept. 15, 2006; Stephen Grey & Sarah Baxter, *CIA Still Hiding 'Ghost' Captives*, Sunday Times (U.K.), Sept. 10, 2006; Dafna Linzer & Glenn Kessler, *Decision to Move Detainees Resolved Two-Year Debate Among Bush Advisers*, Wash. Post, Sept. 8, 2006; Nicholas Watt & Suzanne Goldenberg, *European Human Rights Watchdog Calls for Clampdown on CIA*, Guardian (U.K.), Sept. 8, 2006; Jess Bravin, *Bush Confirms Existence of Secret CIA Prisons*, Wall St. J., Sept. 7, 2006; Ron Hutcherson & Margaret Talev, *Suspects Held in CIA Jails, Bush Confirms*, San Diego Union Trib., Sept. 7, 2006; Brian Knowlton, *European Reaction Split*, Int'l Herald Trib., Sept. 7, 2006; Deb Reichmann, *Bush Admits the CIA Runs Secret Prisons*, Assoc. Press, Sept. 7, 2006; Mark Silva, *Bush Confirms Use of Secret CIA Prisons*, Chicago Trib., Sept. 7, 2006; R. Jeffrey Smith & Michael Fletcher, *Bush Says Detainees Will be Tried; Confirms Existence of CIA Prisons*, Wash. Post, Sept. 7, 2006; Sheryl Gay Stolberg, *President Moves 14 Held in Secret to Guantánamo*, N.Y. Times, Sept. 7, 2006; Kevin Sullivan, *Detainee Decision Greeted Skeptically*, Wash. Post, Sept. 7, 2006; *Bush Justifies CIA Detainee Abuse*, US Fed News, Sept. 6, 2006; *U.S. Gives Details on CIA Detention Program*, Reuters, Sept. 6, 2006; Jeannie Shawl,

*Bush Confirms Existence of Secret CIA Prisons for High-Value Terror Detainees*, Jurist, Sept. 6, 2006; Jeremy Smith, *EU Lawmakers Back Report on CIA Terror Kidnappings*, Reuters, June 12, 2006; Jan Sliva, *Probe of CIA Prisons Implicates EU Nations*, Assoc. Press, June 7, 2006; Brian Ross & Richard Esposito, *Exclusive: Sources Tell ABC News Top Al Qaeda Figures Held in Secret CIA Prisons*, ABC News, Dec. 5, 2005; Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA Mistake: German Citizen Released After Months in Rendition*, Wash. Post, Dec. 4, 2005.

Non-governmental organizations and inter-governmental bodies have also reported extensively on the CIA rendition program. See, e.g., Center for Human Rights & Global Justice, *On the Record: U.S. Disclosures on Rendition, Secret Detention, and Coercive Interrogation* (2008), available at <http://www.chrgj.org/projects/docs/ontherecord.pdf>; Amnesty International, et. al., *Off the Record: U.S. Responsibility for Enforced Disappearances in the "War on Terror"* (June 2007), available at [http://chrgj.org/docs/OffRecord/OFF\\_THE\\_RECORD\\_FINAL.pdf](http://chrgj.org/docs/OffRecord/OFF_THE_RECORD_FINAL.pdf); International Committee of the Red Cross, *ICRC Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody* (Feb. 2007), available at <http://www.nybooks.com/icrc-report.pdf>; Human Rights Watch, *Ghost Prisoner: Two Years In Secret CIA Detention* (Feb. 2007), available at <http://hrw.org/reports/2007/us0207/us0207web.pdf>; Human Rights Watch, *List of "Ghost Prisoners" Possibly in CIA Custody* (last updated Dec. 1, 2005), available at <http://hrw.org/english/docs/2005/11/30/usdom12109.htm>; Committee on Legal Affairs and Human Rights, *Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report*, Eur. Parl. Doc. 11302 rev. (June 11, 2007), available at <http://assembly.coe.int/Documents/WorkingDocs/Doc07/edoc11302.pdf>; European Parliament Temporary Committee on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, *Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners*, Eur. Parl. Doc. A6-9999/2007 (Jan. 26, 2007), available at <http://www.europarl.europa.eu/comparl/tempcom/tdip/pe382246.pdf>.

Moreover, if the Glomar response was invoked to protect against disclosure of records that discuss detention or interrogation practices that are now banned, the response is inappropriate. On January 22, 2009, President Obama issued an Executive Order that prohibited abusive interrogation techniques and directed the CIA to cease operating secret detention facilities. See Exec. Order 13,491, 74 Fed. Reg. at 4,893. No harm can flow from merely acknowledging the existence of, and then releasing, responsive records relating to the use of practices that are no longer in use and are, in fact, expressly prohibited. Any records responsive to the ACLU Request that pertain to practices now banned are not properly withheld, and should be acknowledged and released. Other records previously withheld by the government have already been released for precisely this reason. On April 16, 2009, the Department of Justice released four Office of

Legal Counsel memos that provided the legal justification for certain now-prohibited interrogation practices. See American Civil Liberties Union, Released: The Bush Administration's Secret Legal Memos, <http://www.aclu.org/olcmemos>. In releasing the memos, President Obama explained that they could not remain properly classified for several reasons:

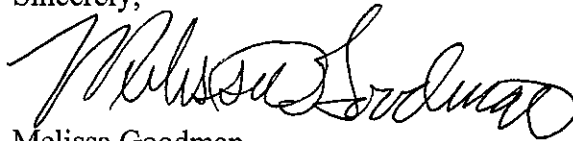
First, the interrogation techniques described in these memos have already been widely reported. Second, the previous Administration publicly acknowledged portions of the program – and some of the practices – associated with these memos. Third, I have already ended the techniques described in the memos through an Executive Order. Therefore, withholding these memos would only serve to deny facts that have been in the public domain for some time.

Statement of President Barack Obama on Release of OLC Memos, Apr. 16, 2009, available at [http://www.whitehouse.gov/the\\_press\\_office/statement-of-President-Barack-Obama-on-Release-of-OLC-Memos/](http://www.whitehouse.gov/the_press_office/statement-of-President-Barack-Obama-on-Release-of-OLC-Memos/).<sup>7</sup>

AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION

For the foregoing reasons, we respectfully request that you reconsider the decision to neither confirm nor deny the existence or nonexistence of any records responsive to the Request and that you release records responsive to the Request. We look forward to your prompt response.

Sincerely,



Melissa Goodman  
Staff Attorney  
ACLU's National Security Project

---

<sup>7</sup> See also Exec. Order No. 12,958, § 1.7(a) as amended by Exec. Order No. 13,292 (“In no case shall information be classified in order to: (1) conceal violations of law . . . ; [or] (2) prevent embarrassment . . . .”); Barack Obama, Memorandum for the Heads of Executive Departments and Agencies, *Classified Information and Controlled Unclassified Information* (May 27, 2009) (“[The government] must not withhold information for self-serving reasons or simply to avoid embarrassment.”); Barack Obama, Memorandum for the Heads of Executive Departments and Agencies, *Freedom of Information Act* (Jan. 21, 2009) (“The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears.”).

# Exhibit A



April 23, 2009

Information Officer  
Office of Freedom of Information and Security Review  
Directorate for Executive Services and Communications  
FOIA/Privacy Branch  
1155 Defense Pentagon, Room 2C757  
Washington, D.C. 20301-1155

FOIA/PA Mail Referral Unit  
Department of Justice  
Room 115  
LOC Building  
Washington, D.C. 20530-0001

Information and Privacy Coordinator  
Central Intelligence Agency  
Washington, D.C. 20505

Office of Information Programs and Services  
A/ISS/IPS/RL  
U.S. Department of State  
Washington, D.C. 20522-8100

Re: **REQUEST UNDER FREEDOM OF INFORMATION ACT/  
Expedited Processing Requested**

To Whom it May Concern:

This letter constitutes a request ("Request") pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq.*, the Department of Defense implementing regulations, 32 C.F.R. § 286.1 *et seq.*, the Department of Justice implementing regulations, 28 C.F.R. § 16.1 *et seq.*, the Department of State implementing regulations, 22 C.F.R. § 171.1 *et seq.*, and the Central Intelligence Agency implementing regulations, 32 C.F.R. § 1900.01 *et seq.* The Request is submitted by the American Civil Liberties Union Foundation and the American Civil Liberties Union (collectively, the "ACLU").<sup>1</sup>

<sup>1</sup> The American Civil Liberties Union is a national organization that works to protect civil rights and civil liberties. Among other things, the ACLU advocates for national security policies that are consistent with the Constitution, the rule of law, and

AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION  
LEGAL DEPARTMENT  
NATIONAL OFFICE  
125 BROAD STREET, 18TH FL.  
NEW YORK, NY 10004-2400  
T/212.549.2500  
F/212.549.2651  
WWW.ACLU.ORG

OFFICERS AND DIRECTORS  
SUSAN N. HERMAN  
PRESIDENT

ANTHONY D. ROMERO  
EXECUTIVE DIRECTOR

RICHARD ZACKS  
TREASURER

This Request seeks records pertaining to the detention and treatment of prisoners held at the Bagram Theater Internment Facility at Bagram Airfield in Afghanistan ("Bagram"), including records concerning the process afforded these prisoners to challenge their detention and designation as "enemy combatants."

Recent news reports suggest that the U.S. government is detaining more than 600 individuals at Bagram. See, e.g., Charlie Savage, *Judge Rules Some Prisoners at Bagram Have Right of Habeas Corpus*, N.Y. Times, Apr. 3, 2009 ("The United States government is holding about 600 people at Bagram without charges and in spartan conditions."). The Bagram prison population includes not only Afghan citizens captured in Afghanistan but also an unknown number of foreign nationals captured outside of Afghanistan but held at Bagram as suspected terrorists or "enemy combatants." See R. Jeffrey Smith, *Obama Follows Bush Policy on Detainee Access to Courts*, Wash. Post, Apr. 11, 2009. Some of these prisoners have been detained for as long as six years. See James Vicini, *Judge Rules Afghan Detainees Can Sue in U.S. Court*, Reuters, Apr. 2, 2009. Bagram prisoners are not permitted any access to counsel, see Warren Richey, *Terror Suspects Held in Afghanistan May Challenge Their Detention*, Christian Science Monitor, Apr. 3, 2009, and only recently have been permitted any contact with their family, see Fisnik Abrashi, *U.S. Allows First Family Visits to Afghan Prison*, Assoc. Press, Sept. 23, 2008; Carlotta Gall, *Video Link Plucks Afghan Detainees From Black Hole of Isolation*, N.Y. Times, Apr. 13, 2008.

Bagram prisoners reportedly receive an even less robust and meaningful process for challenging their detention and designation as "enemy combatants" than the process afforded prisoners at the U.S. Naval Base at Guantanamo Bay ("Guantanamo") – a process the U.S. Supreme Court declared unconstitutional last year. See Daphne Eviatar, *Judge Rules Bagram Detainees Can Appeal to U.S. Courts*, Wash. Independent, Apr. 3, 2009. Indeed, a federal judge recently observed that the "process at Bagram falls well short of what the Supreme Court found inadequate at Guantanamo." *Al Maqaleh v. Gates*, --- F.Supp.2d ---, 2009 WL 863657, \* 19 (D.D.C. Apr. 2, 2009). Moreover, there is public concern that the U.S. government is holding many prisoners at Bagram, rather than at Guantanamo, specifically to avoid any judicial review of their detentions in U.S. courts. Editorial, *The Next Guantanamo*, N.Y. Times, Apr. 12, 2009 ("the evidence suggests it was the prospect that Guantánamo

---

fundamental human rights. The ACLU also educates the public about U.S. national security policies and practices, including those pertaining to the detention, treatment, and process afforded suspected terrorists and alleged "enemy combatants" held in U.S. custody since the 9/11 terrorist attacks.

detentions might be subject to judicial oversight that caused the military to divert captives to Bagram instead”).

Media reports suggest that the conditions of confinement at Bagram are primitive and that abuse and mistreatment of prisoners was once, and may still be, widespread. *See, e.g.*, Daphne Eviatar, *Judge Rules Bagram Detainees Can Appeal to U.S. Courts*, Wash. Independent, Apr. 3, 2009; William Fischer, *Afghan Prison Looks Like Another Guantanamo*, Inter Press Service, Jan. 14, 2008 (“a recent confidential report from the International Committee of the Red Cross (ICRC) has reportedly complained about continued mistreatment of prisoners . . . massive overcrowding, ‘harsh’ conditions, lack of clarity about the legal basis for detention, prisoners held ‘incommunicado’, in ‘a previously undisclosed warren of isolation cells,’ and ‘sometimes subjected to cruel treatment’”). At least two Bagram prisoners have died while in U.S. custody; Army investigators concluded that these deaths were homicides. *See* Tim Golden, *In U.S. Report, Brutal Details of 2 Afghan Inmates’ Deaths*, N.Y. Times, May 20, 2005.

AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION

The U.S. government’s Bagram detention facility has been the focus of widespread media attention and public concern for many years. Despite that attention, however, very little information about the facility – or the prisoners held there – has been made public. *See, e.g.*, Charlie Savage, *Judge Rules Some Prisoners at Bagram Have Right of Habeas Corpus*, N.Y. Times, Apr. 3, 2009 (“United States officials have never provided a full accounting of the prison population”); R. Jeffrey Smith, *Obama Follows Bush Policy on Detainee Access to Courts*, Wash. Post, Apr. 11, 2009 (“The government has not said publicly how many of the approximately 600 people detained there are non-Afghans”); William Fisher, *U.S. Judge Gives Bagram Prisoners Right to Appeal*, Inter Press Service, Apr. 3, 2009 (“the U.S. has not released details of who is held there”); Tim Golden and Eric Schmitt, *A Growing Afghan Prison Rivals Bleak Guantánamo*, N.Y. Times, Feb. 26, 2006 (“Bagram has operated in rigorous secrecy since it opened in 2002”). The American public remains ill-informed about even the most basic facts about Bagram, including, for example, many of the policies and rules that govern the U.S. government’s detention of hundreds of people there; who precisely is being detained there, for how long, and on what basis; where and under what circumstances these prisoners were captured; whether the prisoners have a meaningful opportunity for challenging their (often prolonged) detention; whether that process meets the standards required by international, domestic, and military law; and whether any prisoners have successfully challenged their detentions through the existing status determination process.

Public attention to Bagram has recently intensified significantly. Earlier this month, a federal judge ruled that some prisoners at Bagram can challenge their detention in U.S. courts. *See* Charlie Savage, *Judge Rules Some Prisoners at Bagram Have Right of Habeas Corpus*, N.Y. Times, Apr. 3, 2009. This ruling has led to renewed scrutiny of the U.S. government's actions at Bagram and fierce speculation about whether the Obama Administration will deviate from Bush Administration policies and practices at Bagram. *See, e.g.,* R. Jeffrey Smith, *Obama Follows Bush Policy on Detainee Access to Courts*, Wash. Post, Apr. 11, 2009; *Obama to Appeal Detainee Ruling*, N.Y. Times, Apr. 10, 2009; David G. Savage, *Some Prisoners at Bagram Air Base Can Challenge Detentions, Judge Rules*, L.A. Times, Apr. 3, 2009 ("The prison at the Afghan base was being expanded during the last year of the Bush administration, leading some to predict that the Pentagon would resolve its Guantanamo problem by sending more inmates to Bagram . . . a spokesman said the [Obama] administration was taking 180 days to decide on its prison policy.").

In short, there is renewed public concern that Bagram has become, in effect, the new Guantanamo. *See, e.g.,* Editorial, *The Next Guantanamo*, N.Y. Times, Apr. 12, 2009.

#### Requested Records

1. All records, including logs, charts, or lists, pertaining to the number of people currently detained at Bagram.
2. All records, including logs, charts, or lists, pertaining to the names of individuals currently detained at Bagram.
3. All records, including logs, charts, or lists, pertaining to the citizenship of individuals currently detained at Bagram.
4. All records, including logs, charts, or lists, pertaining to date of capture and length of detention of individuals currently detained at Bagram.
5. All records, including logs, charts, or lists, pertaining to the places and circumstances of capture of individuals currently detained at Bagram.
6. All records created after September 11, 2001, pertaining to the rendition and/or transfer of individuals captured outside Afghanistan to Bagram, including memoranda, correspondence, procedures, policies, directives, guidance, or guidelines concerning when, why, and under what circumstances prisoners seized outside Afghanistan should be detained at Bagram rather than being brought to the United States, handed over to another country, or detained by the United States at



Guantanamo Bay or some other detention facility outside of Afghanistan.

7. All records created after September 11, 2001, including memoranda, correspondence, procedures, policies, directives, practices, guidance, or guidelines, as well as agreements, accords, contracts, correspondence, and memoranda, between the U.S. and Afghan government, pertaining to the detention at Bagram of individuals captured in Afghanistan, and when, how, and why the determination is made by the United States to detain Afghan citizens at Bagram rather than at prisons or other facilities operated or controlled by the Afghan government.
8. All records created after September 11, 2001, pertaining to the process for determining and reviewing Bagram prisoners' status, the process for determining whether their detention is appropriate, and the process for determining who should be released, including but not limited to:
  - A. Any memoranda, correspondence, procedures, policies, directives, practices, guidance, or guidelines concerning the development and operation of the status review process, as well as changes to that process over time.
  - B. Any memoranda, correspondence, procedures, policies, directives, practices, guidance, or guidelines concerning whether prisoners should be given access to or denied access to counsel or another representative.
  - C. Any memoranda, correspondence, procedures, policies, directives, practices, guidance, or guidelines concerning: the provision or withholding of notice to prisoners of the basis for their detention; the composition of the Unlawful Enemy Combatant Review Board ("UECRB"); the convening of or decision not to convene an UECRB; the kinds of evidence to be reviewed by the UECRB; the standard employed to determine whether detention is appropriate; the prisoner's opportunity to submit written statements or other evidence to the UECRB; the prisoner's opportunity to rebut the government's evidence or question government witnesses; the presentation or consideration of exculpatory evidence; the prisoner's opportunity to attend any UECRB hearing; the prisoner's access to any written decisions, determinations, or rulings by the UECRB; the use of or access to interpreters at any UECRB hearing and access to translations of any written evidence or written decisions, determinations, or rulings of the UECRB; any appeal or higher-level review of UECRB

AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION

determinations or the final determinations of the final decision-maker; any annual or periodic review of the prisoners' status after the initial determination is made.

- D. Any written notices provided to prisoners at Bagram regarding the basis for their detention.
  - E. Any transcripts of UECRB proceedings or any other proceeding that occurs during the status determination and review process.
  - F. Any evidence considered in UECRB proceedings or any other proceeding that occurs during the status determination and review process including written statements provided by the detainees and unclassified summaries of the government's evidence.
  - G. Any written decisions, determinations, or rulings issued by the UECRB, the commanding officer, or the final decision-maker.
  - H. Any written decisions, determinations, or rulings issued in the course of any appeal process or in the course of periodic reviews of the initial UECRB determination.
9. All records, including agreements, accords, contracts, correspondence, memoranda, policies, guidelines, or directives between U.S. and Afghan government officials created after September 11, 2001, pertaining to the transfer of Afghan prisoners detained at Bagram to Afghan facilities or Afghan custody; and the release of Afghan prisoners to the Afghan government, into Afghan reconciliation programs, or back into Afghan society.
10. All records created after September 11, 2001, pertaining to the treatment of and conditions of confinement for prisoners detained at Bagram, including but not limited to memoranda, correspondence, procedures, policies, directives, guidance, or guidelines, investigatory records, disciplinary records, medical records, and autopsy reports.<sup>2</sup>

## II. Application for Expedited Processing

We request expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E); 22 C.F.R. § 171.12(b); 28 C.F.R. § 16.5(d); 32 C.F.R. § 286.4(d)(3); and 32 C.F.R. § 1900.34(c). There is a "compelling need"

---

<sup>2</sup> To the extent that records responsive to this Request have already been processed in response to ACLU FOIA requests submitted on October 7, 2003 and May, 25, 2004, the ACLU is not seeking those records here.

for these records because the information requested is urgently needed by an organization primarily engaged in disseminating information in order to inform the public about actual or alleged Federal government activity. 5 U.S.C. § 552(a)(6)(E)(v); *see also* 22 C.F.R. § 171.12(b)(2); 28 C.F.R. § 16.5(d)(1)(ii); 32 C.F.R. § 286.4(d)(3)(ii); 32 C.F.R. § 1900.34(c)(2). In addition, the records sought relate to a “breaking news story of general public interest.” 22 C.F.R. § 171.12(b)(2)(i); 32 C.F.R. § 286.4(d)(3)(ii)(A); *see also* 28 C.F.R. § 16.5(d)(1)(iv) (providing for expedited processing in relation to a “matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity which affect public confidence”).

AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION

The ACLU is “primarily engaged in disseminating information” within the meaning of the statute and regulations. 5 U.S.C. § 552(a)(6)(E)(v)(II); 22 C.F.R. § 171.12(b)(2); 28 C.F.R. § 16.5(d)(1)(ii); 32 C.F.R. § 286.4(d)(3)(ii); 32 C.F.R. § 1900.34(c)(2). Dissemination of information to the public is a critical and substantial component of the ACLU’s mission and work. *See ACLU v. Dep’t of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004) (finding non-profit public interest group that “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience” to be “primarily engaged in disseminating information” (internal citation omitted)). Specifically, the ACLU publishes newsletters, news briefings, right-to-know documents, and other educational and informational materials that are broadly circulated to the public. Such material is widely available to everyone, including individuals, tax-exempt organizations, not-for-profit groups, law students and faculty, for no cost or for a nominal fee. The ACLU also disseminates information through its heavily visited website, [www.aclu.org](http://www.aclu.org). The website addresses civil rights and civil liberties issues in depth, provides features on civil rights and civil liberties issues in the news, and contains many thousands of documents relating to the issues on which the ACLU is focused.

The ACLU website specifically includes features on information obtained through the FOIA. *See, e.g.*, [www.aclu.org/torturefoia](http://www.aclu.org/torturefoia); <http://www.aclu.org/olcmemos/>; <http://www.aclu.org/safefree/torture/csrtfoia.html>; <http://www.aclu.org/natsec/foia/search.html>; <http://www.aclu.org/safefree/nsaspying/30022res20060207.html>; [www.aclu.org/patriotfoia](http://www.aclu.org/patriotfoia); [www.aclu.org/spyfiles](http://www.aclu.org/spyfiles); <http://www.aclu.org/safefree/nationalsecurityletters/32140res20071011.html>; [www.aclu.org/exclusion](http://www.aclu.org/exclusion). For example, the ACLU’s “Torture FOIA” webpage, [www.aclu.org/torturefoia](http://www.aclu.org/torturefoia), contains commentary about the ACLU’s FOIA request, press releases, analysis of the FOIA documents, an advanced search engine permitting webpage visitors to search the

documents obtained through the FOIA, and advises that the ACLU in collaboration with Columbia University Press has published a book about the documents obtained through the FOIA. Jameel Jaffer & Amrit Singh, *Administration of Torture: A Documentary Record from Washington to Abu Ghraib and Beyond* (Columbia Univ. Press 2007). The ACLU also publishes an electronic newsletter, which is distributed to subscribers by e-mail. Finally, the ACLU has produced an in-depth television series on civil liberties, which has included analysis and explanation of information the ACLU has obtained through the FOIA. The ACLU plans to analyze, and disseminate to the public the information gathered through this Request. The records requested are not sought for commercial use and the Requesters plan to disseminate the information disclosed as a result of this Request to the public at no cost.<sup>3</sup>

AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION

Furthermore, the records sought directly relate to a breaking news story of general public interest that concerns actual or alleged Federal government activity; specifically, the records sought relate the U.S. government's detention and treatment of suspected terrorists and alleged "enemy combatants" at Bagram, as well as their transfer or rendition to Bagram from other countries. The records sought also relate to the process the U.S. government affords Bagram prisoners to challenge the basis for their detention and designation as "enemy combatants" including whether that process is meaningful, and whether it departs in any way from the process typically required by the Geneva Conventions and Army Regulation 190-8. See 22 C.F.R. 171.12(b)(2)(i); 32 C.F.R. § 286.4(d)(3)(ii)(A); 28 C.F.R. § 16.5(d)(1)(ii); 32 C.F.R. § 1900.34(c)(2). For the same reasons, the records sought also relate to a "matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." 28 C.F.R. § 16.5(d)(1)(iv).

A recent court ruling that some prisoners at Bagram can challenge their detention in U.S. courts has sparked widespread media interest in and public concern about the U.S. government's practices at Bagram. See, e.g., Andy Worthington, *Justice Extends to Bagram, Guantanamo's Dark Mirror*, Counterpunch.org, Apr. 6, 2009; Charlie Savage, *Judge Rules Some Prisoners at Bagram Have Right of Habeas Corpus*, N.Y. Times, Apr. 3, 2009; David G. Savage, *Some Prisoners at Bagram Air Base Can Challenge Detentions, Judge Rules*, L.A. Times, Apr. 3, 2009; Nina Totenberg, *Ruling: Afghan Detainees Granted Habeas Corpus*, Nat'l Pub.

---

<sup>3</sup> In addition to the national ACLU offices, there are 53 ACLU affiliate and national chapter offices located throughout the United States and Puerto Rico. These offices further disseminate ACLU material to local residents, schools, and organizations through a variety of means, including their own websites, publications, and newsletters. Further, the ACLU makes archived material available at the American Civil Liberties Union Archives at Princeton University Library.

Radio, Apr. 3, 2009; Daphne Eviatar, *Judge Rules Bagram Detainees Can Appeal to U.S. Courts*, Wash. Independent, Apr. 3, 2009; Kim Landers, *Terrorism Suspects 'Can Challenge Afghan Detention'*, ABCNews.com, Apr. 3, 2009; William Fisher, *U.S. Judge Gives Bagram Prisoners Right to Appeal*, Inter Press Service, Apr. 3, 2009; Bill Mears, *Terror Suspects in Afghanistan Can Sue in U.S. Courts, Judge Rules*, CNN.com, Apr. 2, 2009; Ari Shapiro, *Terror Suspects to Gain Access to U.S. Courts*, Nat'l Pub. Radio, Apr. 2, 2009; Warren Richey, *Terror Suspects Held in Afghanistan May Challenge Their Detention*, Christian Sci. Monitor, Apr. 3, 2009; *Judge: 3 Can Challenge Detention at Bagram*, United Press Int'l, Apr. 2, 2009; James Vicini, *Judge Rules Afghan Detainees Can Sue in U.S. Court*, Reuters, Apr. 2, 2009; Daphne Eviatar, *Bagram Ruling Portends More Challenges to Obama Detention Policy in Afghanistan*, Wash. Independent, Apr. 2, 2009; *Inmates at Afghan Prison Can Challenge Detention*, AFP, Apr. 2, 2009; Nedra Pickler, *Judge: Bagram Prisoners Can Challenge Detention*, Assoc. Press, Apr. 2, 2009; Josh Gerstein, *Judge OKs Suits by Some Held by U.S. in Afghanistan*, Politico.com, Apr. 2, 2009; Marc Ambinder, *Judge: The Great Writ May Apply at Bagram*, TheAtlantic.com, Apr. 2, 2009; Lyle Denniston, *Major Extension of Boumediene*, Scotusblog.com, Apr. 2, 2009.

Public interest in Bagram has also recently intensified significantly due to speculation about what the Obama administration will do with the hundreds of people imprisoned there and whether it will craft new policies to govern Bagram detentions. *See, e.g.*, Michael Scherer, *Civil Liberties Advocates Dismayed at Obama's Recent Moves*, Time, Apr. 21, 2009; Josh Gerstein, *Legal Left Cools Toward Obama*, Politico.com, Apr. 14, 2009; Glenn Greenwald, *An Emerging Progressive Consensus on Obama's Executive Power and Secrecy Abuses*, Salon.com, Apr. 13, 2009; *The Rachel Maddow Show* (MSNBC television broadcast Apr. 13, 2009) (transcript available at <http://www.msnbc.msn.com/id/30210708/>); Glenn Greenwald, *Obama and Habeas Corpus – Then and Now*, Salon.com, Apr. 11, 2009; Stuart Taylor Jr., *A Judicial Decision That Plagues Obama*, Nat'l Journal, Apr. 11, 2009; Del Quentin Wilber, *A Plea to Obama from Father of Detainee*, Wash. Post, Apr. 9, 2009; Bruce Fein, *Czar Obama: The President's Incredibly Imperialist Wielding of Executive Power*, Slate.com, Apr. 9, 2009; Andy Worthington, *Justice Extends to Bagram, Guantanamo's Dark Mirror*, Counterpunch.org, Apr. 6, 2009; Charlie Savage, *Judge Rules Some Prisoners at Bagram Have Right of Habeas Corpus*, N.Y. Times, Apr. 3, 2009; David G. Savage, *Some Prisoners at Bagram Air Base Can Challenge Detentions, Judge Rules*, L.A. Times, Apr. 3, 2009; Bill Mears, *Terror Suspects in Afghanistan Can Sue in U.S. Courts, Judge Rules*, CNN.com, Apr. 2, 2009; Daphne Eviatar, *Bagram Ruling Portends More Challenges to Obama Detention Policy in Afghanistan*, Wash. Independent, Apr. 2, 2009; *see also* William Fisher, *U.S. Judge Gives Bagram Prisoners Right to Appeal*, Inter Press Service,

Apr. 3, 2009 (“Some critics of Obama administration detention policy have begun calling Bagram ‘Obama’s GITMO,’ charging that the new president is shipping detainees to the Afghan prison to evade the Supreme Court’s ruling giving habeas corpus rights to prisoners at Guantanamo.”).

In the past few weeks, numerous editorial boards have called for change on Bagram policy. See Editorial, *The Next Guantanamo*, N.Y. Times, Apr. 13, 2009; Editorial, *Obama Should Define Rights of Suspected Terrorists Held by U.S. Abroad*, L.A. Times, Apr. 9, 2009; Editorial, *The Constitution’s Reach*, Wash. Post, Apr. 7, 2009; see also Marie Cocco, *The Father of Guantanamo*, Truthdig.com, Apr. 8, 2009; Editorial, *A Reckoning at Bagram*, Wash. Post, Mar. 7, 2009; Editorial, *Overreach at Bagram*, Wash. Post, Jan. 7, 2009. Some editorial boards have criticized Judge Bates’ ruling. See, e.g., Editorial, *Off Base on Terror*, N.Y. Daily News, Apr. 4, 2009; Editorial, *Imperial Judiciary Goes Global*, Nat’l Review, Apr. 3, 2009.

AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION

The Obama administration’s recent decision to quickly appeal the Bagram ruling sparked another round of intense media coverage. See, e.g., Daphne Eviatar, *Obama Bungles Bagram*, Wash. Independent, Apr. 13, 2009; Josh Gerstein, *DOJ: Courts Could Harm Afghan Effort*, Politico.com, Apr. 12, 2009; R. Jeffrey Smith, *Obama Follows Bush Policy on Detainee Access to Courts*, Wash. Post, Apr. 11, 2009; *Obama Sticks to Bush Detainee Policy*, United Press Int’l, Apr. 11, 2009; Marc Ambinder, *Obama Appeals Bagram Detainee Ruling*, TheAtlantic.com, Apr. 11, 2009; Glenn Greenwald, *Obama and Habeas Corpus – Then and Now*, Salon.com, Apr. 11, 2009; Lyle Denniston, *U.S. Resists Rights at Bagram*, Scotusblog.com, Apr. 11, 2009; *Obama to Appeal Detainee Ruling*, N.Y. Times, Apr. 10, 2009. Public speculation about whether the Obama administration will alter Bagram policy continues despite the decision to appeal the Bagram ruling. See, e.g., R. Jeffrey Smith, *Obama Follows Bush Policy on Detainee Access to Courts*, Wash. Post, Apr. 11, 2009 (“officials said that [appeal] did not foreclose a change of heart after the completion in July of a comprehensive review of detainee policy”); Lyle Denniston, *U.S. Resists Rights at Bagram*, Scotusblog.com, Apr. 11, 2009 (“The future of Bagram detainees is one of the issues now being reviewed by a task force studying detainee policy worldwide.”).

Indeed, the U.S. government’s Bagram detention facility has been the focus of widespread and consistent media attention and public concern for many years. See, e.g., Charlie Savage, *Obama Upholds Detainee Policy in Afghanistan*, N.Y. Times, Feb. 21, 2009; Eric Schmitt, *Afghan Prison Poses Problem in Overhaul of Detainee Policy*, N.Y. Times, Jan. 26, 2009; Dan Efron, *The Gitmo Dilemma – Four Reasons Obama Won’t Close the Controversial Prison Soon*, Newsweek, Nov. 7, 2008; *How Bagram Destroyed Me*, BBC News, Sept. 25, 2008; Fisnik Abrashi, *U.S.*

*Allows First Family Visits to Afghan Prison*, Assoc. Press, Sept. 23, 2008; Suzanne Goldenberg and Saeed Shah, *Mystery of 'Ghost of Bagram' - Victim of Torture or Captured in a Shootout?*, The Guardian, Aug. 6, 2008; Eric Schmitt, *Pakistani Suspected of Qaeda Ties Is Held*, N.Y. Times, Aug. 5, 2008; Del Quentin Wilber, *In Courts, Afghanistan Air Base May Become Next Guantanamo*, Wash. Post, June 29, 2008; Katie Paul, *The Road From Gitmo: Alternative Ways of Handling Suspects in the War on Terror*, Newsweek, June 27, 2008; Eric Schmitt and Tim Golden, *U.S. Planning Big New Prison in Afghanistan*, N.Y. Times, May 17, 2008; Fisman Abrashi, *Red Cross Faults Afghan Prison*, Assoc. Press, Apr. 15, 2008; Carlotta Gall, *Video Link Plucks Afghan Detainees From Black Hole of Isolation*, N.Y. Times, Apr. 13, 2008; Candance Rondeaux, Josh White, and Julie Tate, *Afghan Detainees Sent Home to Face Closed-Door Trials*, Wash. Post, Apr. 13, 2008; Tim Golden and David Rohde, *Afghans Hold Secret Trials for Men That U.S. Detained*, N.Y. Times, Apr. 10, 2008; Ian Austin, *Canadian TV Network Seeks Release of Afghan*, N.Y. Times, Feb. 21, 2008; William Fisher, *Afghan Prison Looks Like Another Guantanamo*, Inter Press Service, Jan. 14, 2008; Andrew Gumbel, *Bagram Detention Center Now Twice the Size of Guantanamo*, The Independent, Jan. 8, 2008; Tim Golden, *Foiling U.S. Plan, Prison Expands in Afghanistan*, N.Y. Times, Jan. 7, 2008; *U.S. Expands Afghan Base at Bagram*, Assoc. Press, Oct. 6, 2007; Richard Leiby, *Down a Dark Road*, Wash. Post, Apr. 27, 2007; Matthew Pennington, *Inmates Detail U.S. Prison Near Kabul*, Assoc. Press, Oct. 2, 2006; Eliza Griswold, *American Gulag: Prisoners' Tales from the War on Terror*, Harpers, Sept. 1, 2006; Carlotta Gall and Ruhullah Khapalwak, *Some Afghans Freed from Bagram Cite Harsh Conditions*, N.Y. Times, June 8, 2006; William Fisher, *Bagram - 'Son of Guantanamo'*, Inter Press Service, Feb. 28, 2006; Tim Golden and Eric Schmitt, *A Growing Afghan Prison Rivals Bleak Guantanamo*, N.Y. Times, Feb. 26, 2006; Tim Golden, *Years After 2 Afghans Died, Abuse Case Falter*, N.Y. Times, Feb. 13, 2006; Tim Golden, *Case Dropped Against U.S. Officer in Beating Deaths of Afghan Inmates*, N.Y. Times, Jan. 8, 2006; Tim Golden, *Abuse Cases Open Command Issues at Army Prison*, N.Y. Times, Aug. 8, 2005; Tim Golden, *In U.S. Report, Brutal Details of 2 Afghan Inmates' Deaths*, N.Y. Times, May 20, 2005; Emily Bazelon, *From Bagram to Abu Ghraib*, Mother Jones, March/April 2005; Stephanie Hanes, *Two Groups Detail Abuse of Afghan Prisoners*, Baltimore Sun, May 5, 2004; Pamela Constable, *An Afghan boy's Life in U.S. Custody: Camp in Cuba Was Welcome Change After Harsh Regime at Bagram*, Wash. Post, Feb. 12, 2004.

More generally, questions regarding the legal process afforded suspected terrorists and alleged "enemy combatants" held in U.S. custody has been the subject of continuous and sustained public interest. See, e.g., Jackie Northam, *Tapes Provide First Glimpse of Secret Gitmo Panels*, Nat'l Pub. Radio, Apr. 10, 2009 (reporting on the release of taped

recordings of the “combatant status review tribunals” of six detainees); Andy Worthington, *Bad News, Good News for the Guantanamo Uighurs*, Huffington Post, Feb. 19, 2009; Jane Perlez, Raymond Bonner and Salman Masood, *An Ex-Detainee of the U.S. Describes a 6-Year Ordeal*, N.Y. Times, Jan. 5, 2009; Jeffrey Toobin, *Camp Justice*, The New Yorker, Apr. 14, 2008; Scott Horton, *Military Lawyers and the Gitmo Commissions*, Harpers, Oct. 30, 2007; *Army Officer: Guantanamo Hearings are Flawed*, MSNBC.com, Aug. 6, 2007; Andrew C. McCarthy, *The Profession v. Gitmo*, Nat’l Review, June 25, 2007; Jeffrey Toobin, *Killing Habeas Corpus*, The New Yorker, Dec. 4, 2006; Daniel Eisenberg and Timothy J. Burger, *What’s Going On at Gitmo?*, Time, May 29, 2005; Carol D. Leonnig, *Judge Rules Detainee Tribunals Illegal*, Wash. Post, Feb. 1, 2005. In particular, the Supreme Court’s June 2008 ruling that Guantanamo Bay detainees had a constitutional right to *habeas* was the subject of significant public attention and media interest. See, e.g., Kevin Drum, *Boumediene v. Bush*, CBS News, June 22, 2008; Robyn E. Blumner, *Supreme Court Preserves a Razor-Thin Redemption*, St. Petersburg Times, June 22, 2008; Richard Epstein, *How To Complicate Habeas Corpus*, N.Y. Times, June 21, 2008; Jack Balkin, *Two Takes: With ‘Boumediene,’ the Court Reaffirmed a Basic Principle*, U.S. News & World Report, June 19, 2008; David Stout, *Justices Rule Terror Suspects Can Appeal in Civilian Courts*, N.Y. Times, June 13, 2008; Linda Greenhouse, *Justices, 5-4, Back Detainee Appeals for Guantánamo*, N.Y. Times, June 13, 2008. Furthermore, the military commission proceedings held at Guantanamo in 2008 also generated substantial public interest. See William Glaberson, *Panel Convicts Bin Laden Driver in Split Verdict*, N.Y. Times, Aug. 7, 2008; Editorial, *A Mixed Verdict on Hamdan*, L.A. Times, Aug. 7, 2008; Scott Shane and William Glaberson, *Judge Clears Way for Trial of Bin Laden’s Driver*, N.Y. Times, July 17, 2008; Joanne Mariner, *Arresting the 9/11 Suspects, Guantánamo-Style*, Salon.com, June 7, 2008; Jackie Northam, *Sept. 11 Suspects Arraigned at Guantanamo Bay*, Nat’l Pub. Radio, June 6, 2008; Adam Zagorin, *U.S. Justice on Trial at Gitmo*, Time, June 4, 2008; *Gitmo’s Courtroom Wrangling Begins*, Time, Apr. 25, 2008.

More broadly, there has been continued public interest in the treatment of suspected terrorists detained by the United States ever since allegations of abuse and mistreatment first surfaced in December 2002. Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations*, Wash. Post, Dec. 26, 2002; see also Emily Bourke, *Red Cross Finds Doctors Present During CIA Torture*, ABC News, Apr. 8, 2009; Scott Shane, *Report Outlines Medical Workers’ Role in Torture*, N.Y. Times, Apr. 6, 2009; *Guantanamo Guard Admits Prisoner Abuse, ACLU Demands ‘Top to Bottom’ Review*, FoxNews.com, Dec. 18, 2008; *Detainee Abuse Linked to Bush Administration*, Assoc. Press, Dec. 12, 2008; *What FBI Agents Saw During U.S. Interrogations*, Int’l Herald



Tribune, May 22, 2008; Carrie Johnson & Josh White, *Audit Finds FBI Reports of Detainee Abuse Ignored*, Wash. Post, May 21, 2008; Scott Shane, David Johnston and James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. Times, Oct. 4, 2007; Jane Mayer, *The Black Sites*, The New Yorker, Aug. 13, 2007; Dana Priest, *Detainees Accuse Female Interrogators; Pentagon Inquiry Is Said to Confirm Muslims' Accounts of Sexual Tactics at Guantanamo*, Wash. Post, Feb. 10, 2005; R. Jeffrey Smith and Dan Eggen, *New Papers Suggest Detainee Abuse Was Widespread*, Wash. Post, Dec. 22, 2004; Neil Lewis, *Red Cross Finds Detainee Abuse in Guantánamo*, N.Y. Times, Nov. 30, 2004; Neil Lewis, *Broad Use of Harsh Tactics is Described at Cuba Base*, N.Y. Times, Oct. 17, 2004; Dana Priest, *CIA Puts Harsh Tactics on Hold; Memo on Methods of Interrogation Had Wide Review*, Wash. Post, Jun. 27, 2004; Dana Priest and Bradley Graham, *Guantanamo List Details Approved Interrogation Methods*, Wash. Post, June 10, 2004; Dana Priest and Joe Stephens, *Pentagon Approved Tougher Interrogations*, Wash. Post, May 9, 2004.

The release of documents concerning the treatment of suspected terrorists detained by the U.S. has generated significant public interest and media attention. See, e.g., Brian Knowlton, *Report Gives New Detail on Approval of Brutal Techniques*, N.Y. Times, Apr. 22, 2009; Joby Warrick and Peter Finn, *Harsh Tactics Readied Before Their Approval: Senate Report Describes Secret Memos*, Wash. Post, Apr. 22, 2009; Jonathan S. Landay, *Report Says Abusive Tactics Used to Link Iraq to Al Qaeda*, Miami Herald, Apr. 22, 2009; Jess Bravin, *Interrogation Views Spread with Help of Bush Aides*, Wall St. J., Apr. 22, 2009; Julian E. Barnes, *Military Helped With CIA Interrogation Tactics, Report Says*, L.A. Times, Apr. 22, 2009; Robert Baer, *Why Obama Needs to Reveal Even More on Torture*, Time.com, Apr. 20, 2009; Dan Froomkin, *How Many Others Were Tortured?*, Wash. Post, Apr. 7, 2009; Scott Shane, *Report Outlines Medical Workers' Role in Torture*, N.Y. Times, Apr. 6, 2009; Joby Warwick and Julie Tate, *Report Calls CIA Detainee Treatment 'Inhuman'*, Wash. Post, Apr. 6, 2009; Editorial, *The Tortured Memos*, N.Y. Times, Mar. 4, 2009; Devlin Barrett, *Officials: CIA Destroyed 92 Detainee Tapes*, Chicago Tribune, Mar. 3, 2009; David Johnston & Scott Shane, *Memo Sheds New Light on Torture Issue*, N.Y. Times, Apr. 3, 2008; *White House Denies Torture Assertion*, USA Today, Oct. 4, 2007; Jane Mayer, *The Memo*, The New Yorker, Feb. 27, 2006; Dana Priest, *Memo Lets CIA Take Detainees Out of Iraq; Practice is Called Serious Breach of Geneva Conventions*, Wash. Post, Oct. 24, 2004; Dana Priest and Bradley Graham, *U.S. Struggled Over How Far to Push Tactics*, Wash. Post, June 24, 2004; Dana Priest and R. Jeffrey Smith, *Memo Offered Justification for Use of Torture; Justice Dept. Gave Advice in 2002*, Wash. Post, June 8, 2004.

Indeed, the release of documents pursuant to the ACLU's past requests for records relating to the treatment of suspected terrorists in U.S. custody has been the subject of substantial and continuing public interest. To date, the ACLU has received over 100,000 pages of documents in response to its October 2003 request for such records, generating widespread attention from the public and the media. *See, e.g.,* Mark Mazzetti and Scott Shane, *In Adopting Harsh Tactics, No Inquiry Into Their Past Use*, N.Y. Times, Apr. 22, 2009; Ben Feller, *Obama Open to Torture Memos Probe, Prosecution*, Wash. Post, Apr. 22, 2009; Sheryl Gay Stolberg, *Obama Won't Bar Inquiry, Or Penalty, On Interrogators*, N.Y. Times, Apr. 22, 2009; Michael Sniffen, *3 Lawyers Face Scrutiny for Torture Advice*, Wash. Post, Apr. 22, 2009; Peter Baker and Scott Shane, *Pressure Grows to Investigate Interrogations*, N.Y. Times, Apr. 21, 2009; *In CIA Visit, Obama Defends Interrogation Memo Release*, CNN.com, Apr. 20, 2009; *Sept. 11 Planner Waterboarded 183 Times*, Reuters, Apr. 20, 2009; Michael Scherer and Bobby Ghosh, *How Waterboarding Got Out of Control*, Time.com, Apr. 20, 2009; *Memo: Two al Qaeda Leaders Waterboarded 266 Times*, CNN.com, Apr. 20, 2009; Scott Shane, *2 Suspects Waterboarded 266 Times*, N.Y. Times, Apr. 20, 2009; Joshua Brustein, *Former C.I.A. Director Defends Interrogation*, N.Y. Times, Apr. 19, 2009; R. Jeffrey Smith, *Justice Dept. Memos' Careful Legalese Obscured Harsh Reality*, Apr. 19, 2009; Editorial, *The Torturers' Manifesto*, N.Y. Times, Apr. 18, 2009; John Hendren, *Ex-CIA Official: 'This Was Torture'*, ABC News, Apr. 18, 2009; Greg Miller, *Did Waterboarding Work?*, Chicago Tribune, Apr. 18, 2009; Dana Priest, *White House Releases Torture Memos, Won't Pursue Prosecutions*, Wash. Post, Apr. 17, 2009; Editorial, *Dealing With a Disgrace*, Wash. Post, Apr. 17, 2009; Editorial, *Close the Torture Loophole*, L.A. Times, Apr. 17, 2009; Mark Mazzetti, *C.I.A. Memos Could Bring More Disclosures*, N.Y. Times, Apr. 17, 2009; Greg Miller and Josh Meyer, *Memos Reveal Harsh CIA Interrogation Methods*, L.A. Times, Apr. 17, 2009; Matt Apuzzo, *Memos Describe CIA's Harsh Interrogation Program*, Assoc. Press, Apr. 17, 2009; Carrie Johnson and Julie Tate, *New Interrogation Details Emerge*, Wash. Post, Apr. 17, 2009; Justin Vogt, *Zubaydah's Sanity, Bybee's Clarity*, New Yorker, Apr. 17, 2009; Glenn Greenwald, *The Significance of Obama's Decision to Release the Torture Memos*, Salon.com, Apr. 17, 2009; Mark Mazzetti and Scott Shane, *Interrogation Memos Detail Harsh Tactics by the C.I.A.*, N.Y. Times, Apr. 16, 2009; Ariane de Vogue, *DOJ Releases Controversial Torture Memos*, ABC News.com, Apr. 16, 2009; Michael Scherer, *Bush Approved Use of Insects*, Time.com, Apr. 16, 2009; Mark Mazzetti, *Obama Releases Interrogation Memos, Says CIA Operatives Won't Be Prosecuted*, N.Y. Times, Apr. 16, 2009; Terry Frieden, *More Delays in Release of 'Torture' Documents*, CNN.com, Apr. 2, 2009; Scott Shane, *Administration is Debating Release of Interrogation Memos*, N.Y. Times, Mar. 31, 2009; *New York Judge Orders Release of CIA 'Torture' Documents*,

FoxNews.com, Mar. 28, 2009; Scott Shane, *Documents Laid Out Interrogation Procedures*, N.Y. Times, July 25, 2008; Mark Mazzetti, '03 U.S. Memo Approved Harsh Interrogations, N.Y. Times, Apr. 2, 2008; Dan Eggen and Josh White, *Memo: Laws Didn't Apply to Interrogators*, Wash. Post, Apr. 2, 2008; Evan Perez, *U.S. 2003 Memo Allowed 'Enhanced' Interrogation*, Wall St. J., Apr. 2, 2008; Lara Jakes Jordan, *Pentagon Releases Memo on Harsh Tactics*, FoxNews.com, Apr. 1, 2008; *FBI Records: Detainees Allege Quran Abuse; ACLU Releases Hundreds of Documents Obtained in a Lawsuit*, CNN.com, May 26, 2005; *Harsh Tactics Were Allowed, General Told Jailers in Iraq*, N.Y. Times, Mar. 30, 2005; *U.S. Memo Shows Iraq Jail Methods*, BBC News, Mar. 30, 2005; Neil Lewis & Douglas Jehl, *Files Show New Abuse Cases in Afghan and Iraqi Prisons*, N.Y. Times, Feb. 18, 2005; Nat Hentoff, *What Did Rumsfeld Know? ACLU Releases Documents of U.S. Torture of Detainees by More than 'A Few Bad Apples'*, Village Voice, Dec. 28, 2004; Thomas Ricks, *Detainee Abuse by Marines is Detailed*, Wash. Post, Dec. 15, 2004; Paisley Dodds, *Unsealed Navy Documents Show More Prisoner Abuse*, Phila. Enquirer, Dec. 15, 2004; Richard A. Serrano, *Marines Burned, Shocked Prisoners, Documents Revealed*, Seattle Times, Dec. 15, 2004; *ACLU: Records Show Marines Tortured Iraqi Prisoners*, CNN.com, Dec. 15, 2004.

In addition, the records that the ACLU seeks include records relating to the "rendition" of suspected terrorists from their place of capture outside of Afghanistan to detention at Bagram Air Base. Rendition is an issue that is independently the subject of extensive public and media attention. See, e.g., Ariel David, *Italian Court Deals Prosecution a Blow in CIA Rendition Case*, San Jose Mercury News, Mar. 12, 2009; Julie Sell, *U.N. Report Says U.S. Led 'Black Site' Renditions in War on Terrorism*, Miami Herald, Mar. 11, 2009; Kevin Sullivan, *Former Guantanamo Prisoner Alleges Torture*, Wash. Post, Mar. 8, 2009; Paisley Dodds, *British Official Acknowledges Rendition Role*, Chicago Tribune, Feb. 27, 2009; Desmond Butler, *Alleged CIA Torture Victim Speaks Out*, FoxNews.com, Nov. 29, 2006; Jane Mayer, *The CIA's Travel Agent*, The New Yorker, Oct. 30, 2006; Jerry Markon, *Lawsuit Against CIA is Dismissed; Mistaken Identity Led to Detention*, Wash. Post, May 19, 2006; Scott Shane, *German Sues Over Abduction Said to Be at Hands of CIA*, N.Y. Times, Dec. 6, 2005; *German Claims Torture in Suing CIA's Ex-Director*, USA Today, Dec. 6, 2005; *Lawsuit Claims CIA Kidnapped, Tortured German Man*, CNN.com, Dec. 6, 2005; Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA Mistake; German Citizen Released After Months in 'Rendition'*, Wash. Post, Dec. 4, 2005; Dana Priest, *CIA Holds Terror Suspects in Secret Prisons; Debate Is Growing Within Agency About Legality and Morality of Overseas System Set Up After 9/11*, Wash. Post, Nov. 2, 2005; Scott Shane, *The Costs of Outsourcing Interrogation: A Canadian Muslim's Long Ordeal in Syria*, N.Y. Times, May 29, 2005;

Michael Hirsh, Mark Hosenball and John Barry, *Aboard Air CIA*, Newsweek, Feb. 28, 2005; Jane Mayer, *Outsourcing Torture*, The New Yorker, Feb. 14, 2005; DeNeen L. Brown and Dana Priest, *Deported Terror Suspect Details Torture in Syria; Canadian's Case Called "Typical" of CIA*, Wash. Post, Nov. 5, 2003.

### III. Application for Waiver or Limitation of Fees

We request a waiver of search, review, and duplication fees on the grounds that disclosure of the requested records is in the public interest because it "is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); 22 C.F.R. § 171.17(a); *see also* 28 C.F.R. § 16.11(k)(1); 32 C.F.R. § 286.28(d); 32 C.F.R. § 1900.13(b)(2).

AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION

As discussed above, numerous news accounts reflect the considerable public interest in the records we seek. Given the ongoing and widespread media attention to this issue, the records sought in the instant Request will significantly contribute to public understanding of the operations and activities of the Departments of Defense, Justice, State, and the Central Intelligence Agency with regard to the detention and treatment of prisoners at Bagram. *See* 22 C.F.R. § 171.17(a)(1)(ii); 28 C.F.R. § 16.11(k)(1)(i); 32 C.F.R. § 286.28(d); 32 C.F.R. § 1900.13(b)(2)(ii). Moreover, disclosure is not in the ACLU's commercial interest. Any information disclosed by the ACLU as a result of this Request will be available to the public at no cost. Thus, a fee waiver would fulfill Congress's legislative intent in amending FOIA. *See Judicial Watch Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) ("Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requesters.'" (citation omitted)); OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524, § 2 (Dec. 31, 2007) (finding that "disclosure, not secrecy, is the dominant objective of the Act," but that "in practice, the Freedom of Information Act has not always lived up to the ideals of that Act").

We also request a waiver of search and review fees on the grounds that the ACLU qualifies as a "representative of the news media" and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii); 28 C.F.R. § 16.11(d). Accordingly, fees associated with the processing of the Request should be "limited to reasonable standard charges for document duplication." 5 U.S.C. § 552(a)(4)(A)(ii)(I); *see also* 32 C.F.R. § 286.28(e)(7); 28 C.F.R. § 16.11(d) (search and review fees shall not be charged to "representatives of the news media").

The ACLU meets the statutory and regulatory definitions of a “representative of the news media” because it is an “entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii)(III); *see also Nat’l Sec. Archive v. Dep’t of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989); *cf. ACLU v. Dep’t of Justice*, 321 F. Supp. 2d at 30 n.5 (finding non-profit public interest group to be “primarily engaged in disseminating information”). The ACLU is a “representative of the news media” for the same reasons it is “primarily engaged in the dissemination of information.” *See Elec. Privacy Info. Ctr. v. Dep’t of Def.*, 241 F. Supp. 2d 5, 10-15 (D.D.C. 2003) (finding non-profit public interest group that disseminated an electronic newsletter and published books was a “representative of the news media” for purposes of FOIA); *see supra*, section II.<sup>4</sup>

AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION

\* \* \*

Pursuant to applicable statute and regulations, we expect a determination regarding expedited processing within 10 calendar days. *See* 5 U.S.C. § 552(a)(6)(E)(ii)(I); 22 C.F.R. § 171.12(b); 28 C.F.R. § 16.5(d)(4); 32 C.F.R. § 286.4(d)(3); 32 C.F.R. § 1900.21(d).

If the Request is denied in whole or in part, we ask that you justify all deletions by reference to specific exemptions to FOIA. We expect the release of all segregable portions of otherwise exempt material. We reserve the right to appeal a decision to withhold any information or to deny a waiver of fees.

---


<sup>4</sup> On account of these factors, fees associated with responding to FOIA requests are regularly waived for the ACLU. For example, in March 2009, the State Department granted a fee waiver to the ACLU with regard to a FOIA request submitted in December 2008. The Department of Justice granted a fee waiver to the ACLU with regard to the same FOIA request. In November 2006, the Department of Health and Human Services granted a fee waiver to the ACLU with regard to a FOIA request submitted in November of 2006. In May 2005, the United States Department of Commerce granted a fee waiver to the ACLU with respect to its request for information regarding the radio-frequency identification chips in United States passports. In March 2005, the Department of State granted a fee waiver to the ACLU with regard to a request submitted that month regarding the use of immigration laws to exclude prominent non-citizen scholars and intellectuals from the country because of their political views, statements, or associations. In addition, the Department of Defense did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in April 2007, June 2006, February 2006, and October 2003. The Department of Justice did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in November 2007, December 2005, and December 2004. Three separate agencies—the Federal Bureau of Investigation, the Office of Intelligence Policy and Review, and the Office of Information and Privacy in the Department of Justice—did not charge the ACLU fees associated with a FOIA request submitted by the ACLU in August 2002.

Thank you for your prompt attention to this matter. Please furnish all applicable records to:

Melissa Goodman, Staff Attorney, National Security Project  
American Civil Liberties Union  
125 Broad Street, 18th Floor  
New York, NY 10004

I affirm that the information provided supporting the request for expedited processing is true and correct to the best of my knowledge and belief.

Sincerely,

A handwritten signature in black ink, appearing to read "Melissa Goodman", written over a horizontal line.

Melissa Goodman  
American Civil Liberties Union Foundation  
125 Broad Street, 18th Floor  
New York, NY 10004  
Tel: (212) 549-2622

AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION

# Exhibit B

Central Intelligence Agency



Washington, D.C. 20505

May 13, 2009

Melissa Goodman, Esquire  
Staff Attorney, National Security Project  
American Civil Liberties Union Foundation  
125 Broad Street, 18<sup>th</sup> Floor  
New York, NY 10004

Reference: F-2009-00990

Dear Ms. Goodman:

This is a final response to your 23 April 2009 Freedom of Information Act (FOIA) request, received in the office of the Information and Privacy Coordinator on 27 April 2009, for **“records pertaining to the detention and treatment of prisoners held at the Bagram Theater Internment Facility at Bagram Airfield in Afghanistan (‘Bagram’), including records concerning the process afforded these prisoners to challenge their detention and designation as ‘enemy combatants.’”** We have assigned your request the reference number above. Please use this number when corresponding so that we can identify it easily.

In accordance with section 3.6(a) of Executive Order 12958, as amended, the CIA can neither confirm nor deny the existence or nonexistence of records responsive to your request. The fact of the existence or nonexistence of requested records is currently and properly classified and is intelligence sources and methods information that is protected from disclosure by section 6 of the CIA Act of 1949, as amended. Therefore, your request has been denied pursuant to FOIA exemptions (b)(1) and (b)(3). You may appeal my decision to the Agency Release Panel, in my care, within 45 days from the date of this letter. Please include the basis of your appeal.

Sincerely,

A handwritten signature in cursive script that reads "Delores M. Nelson".

Delores M. Nelson  
Information and Privacy Coordinator