UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION, CENTER FOR CONSTITUTIONAL RIGHTS, PHYSICIANS FOR HUMAN RIGHTS, VETERANS FOR COMMON SENSE AND VETERANS FOR PEACE,	:	ECF CASE
Plaintiffs,	:	04 Civ. 4151 (AKH)
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.	:	

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ADVANCE PUBLICATIONS, INC., AMERICAN SOCIETY OF NEWSPAPER EDITORS, CBS BROADCASTING, INC., THE E.W. SCRIPPS COMPANY, THE HEARST CORPORATION, INVESTIGATIVE REPORTERS AND EDITORS, INC., NBC UNIVERSAL, INC., THE NEW YORK TIMES COMPANY, THE SOCIETY OF PROFESSIONAL JOURNALISTS, THE NEWSPAPER GUILD-CWA, AND THE TRIBUNE COMPANY.

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The Reporters Committee for Freedom of the Press and fellow amici respectfully submit this memorandum of law in opposition to the government's claim that the Freedom of Information Act (FOIA) permits the withholding of records depicting detainee abuse at Abu Ghraib prison in Iraq. See Amici Curiae Statements of Interest, Motion for Leave to File. The government cites Exemption 7(F) to justify this claim, arguing that the illegal and immoral misconduct and abuse documented in the requested records is so incendiary that their release "could reasonably be expected" to pose a threat to the physical safety of military personnel and civilians in Iraq and Afghanistan. Declaration of General Richard B. Myers, Case No. 04 Civ. 4151 (AKH) (S.D.N.Y., dated July 21, 2005) (Myers Decl.") ¶ 25. Amici urge this court to decline the government's unprecedented invitation to expand the scope of Exemption 7(F) in this way, which would have the effect of substantially eroding meaningful news media coverage of official misconduct abroad during times of war in derogation of the underlying purpose of FOIA.

Under the government's faulty reasoning, the more likely it is that disclosure will show horrible government activities, the greater the need to shield the public from such information. But a different outcome is warranted because the more secretive the government becomes, the less likely the public is to obtain facts about government conduct through the news media and to hold the government accountable through democratic institutions.

SUMMARY OF ARGUMENT

Exemption 7(F) of the FOIA, 5 U.S.C. § 552 (7)(F), does not permit the government to hide records of *its own misconduct*, or of *the misconduct of its agents*, based upon a fear of violent public reaction to the disclosure. Amici do not dispute, as a general matter, the legitimacy of the government's interest in the safety of its military personnel, or even in the safety of foreigners living in American zones of conflict overseas. Amici do object, however, to the government's misdirected effort to undermine the FOIA by asserting, in essence, that its own misconduct has created an indictment too damning for the public to see.

The government erroneously proposes a novel and distasteful application of Exemption 7(F) based upon the degree of outrage disclosure might provoke. Historically, Exemption 7(F) has been used most frequently to protect names from disclosure when that publicity would ostensibly endanger individuals' personal safety. Two district courts have also allowed the use of Exemption 7(F) to suppress dam inundation maps and machine gun plans under the theory that the disclosure of technical information could be directly utilized to commit terrorism or crime. Living Rivers, Inc. v. United States Bureau of Reclamation, 272 F. Supp. 2d 1313, 1321-22 (D.Utah 2003); LaRouche v. Webster, No. 75 Civ. 6010 (MJL), 1984 WL 1061 at *8 (S.D.N.Y. Oct. 23, 1984). There is no precedent for the construction the government proposes.

The government's new request for secrecy appears to be based upon dubious reasoning and suspect timing, coming as it did literally within hours of its court-ordered

deadline to finally hand records over to the ACLU and other FOIA requesters. Notably, the court order was issued in response to the government's loss on a first argument, its unsuccessful reliance upon an argument that disclosure of the records violated detainees "privacy." Regardless of whether the government technically has the right to claim a new FOIA exemption after fully arguing and losing its claims to other exemptions, its latest action creates further and unnecessary delay, violating the right of the ACLU and the public to a timely resolution of this access dispute.

Enlarging Exemption 7(F) to accommodate the government's new argument would significantly undermine both the intent of the exemption and the integrity of the Act as a whole for two reasons. First, the government's interpretation would result in a perverse outcome by rewarding state actors who commit illegal activities so atrocious as to provoke fears of violent retribution should those acts be uncovered. Second, the government's justification is both so vague and overbroad with regard to improper military conduct that Exemption 7(F) would fast become an exception that entirely swallows the rule.

STATEMENT OF FACTS [1]

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[1] Amici rely upon the Statement of Facts set forth in Plaintiffs' papers and in the Myers Declaration as the basis for the arguments set forth herein. Certain key facts are included here for the convenience of the Court.

Since September 11, 2001, this country's war on terror has led to American invasions of Afghanistan and Iraq. Although the U.S. has toppled the oppressive regimes of both the Taliban and Saddam Hussein, respectively, large insurgencies continue to pose a danger to military personnel and civilians in Afghanistan and Iraq. Myers Decl. ¶¶ 6-11.

Against this backdrop, the American Civil Liberties Union and other plaintiffs filed a Freedom of Information Act request in October 2003 for records pertaining to American treatment of detainees in the war on terror.

The records at issue in this case graphically depict detainee abuse at Abu Ghraib prison. They are called the "Darby records" because they were first turned over to the Army in early 2004 by military policeman Joseph Darby. The public has never seen many of the images, with the notable exception of a handful that were leaked to the press. CBS's news magazine program 60 MINUTES II broke the story about Abu Ghraib in a Peabody Award winning report that aired on April 28, 2004. Seymour Hersh also published the photos in a May 10, 2004, article in *The New Yorker* magazine. Seymour Hersh, *Torture at Abu Ghraib*, May 10, 2004, avail. at http://www.newyorker.com/fact/content?040510fa_fact (visited August 1, 2005).

These news reports and photos made front page headlines around the world, directly sparking international and domestic debate about wartime detainee treatment, interrogation techniques, and military accountability. Although the U.S. government has never officially released any photos of Abu Ghraib abuse, Myers Decl. ¶ 21, that one leak directly triggered military prosecutions and policy changes.

ARGUMENT

The U.S. Supreme Court has found that the "core purpose" of the FOIA is "that the Government's activities be opened to the sharp eye of public scrutiny," that the Act exists to further "public understanding of the operations or activities of the government." U.S. Dep't of Justice v. Reporters Committee, 109 S. Ct. 1468, 1482-83 (1989). Enabling citizens to know what their government "is up to" is a "structural necessity in a real democracy." Nat'l Archives and Records Adm'n v. Favish, 124 S. Ct. 1570, 1580 (2004).

Release of the Darby records would open the government's activities at Abu Ghraib to precisely the kind of public scrutiny contemplated by the FOIA. The aftermath of the April 2004 leak of select Darby photos attests to the public's interest in knowing what its government "is up to" in the context of detainee treatment. Since then, government investigations and policy developments focusing on detainee conditions, interrogation techniques, and military accountability have dominated the American political landscape.

In the addendum to his testimony filed with the court, Joint Chiefs of Staff Chair Richard Myers inventories the criminal prosecutions conducted by the military since the Abu Ghraib abuses first came to light, presumably to show that additional records need not be released because corrective action has already taken place. Myers Decl. Addendum. In deprecating the value of the Darby records, however, Myers ignores the likely material role that the first photo leak played in the military's swift and thorough

prosecutions – some still pending – of offending soldiers; ongoing debate over legal definitions of “cruel and inhuman” detainee treatment and acceptable interrogation techniques; and continuing questions as to the responsibilities of high-ranking officials.

Because severe government corruption and abuse can arguably incite violent reactions in third parties learning about them for the first time, the government’s request, taken to its logical end, would allow Exemption 7(F) to be utilized as a mechanism for withholding disclosures about government misconduct based upon its degree of outrageousness – clearly an inappropriate standard.

The argument can even be applied outside the context of the war on terrorism, although that is where it will be most vulnerable to exploitation, given that any shocking government misconduct can arguably aggravate precarious public security. The more outrageous official conduct becomes, the more danger posed by its revelation, and the better Exemption 7(F) will fit. In the end, the government’s request for expanded exemption coverage would reward misconduct by obscuring government accountability at a time when it is most necessary for the public to have full access to the facts.

I. The Government Cannot Raise New FOIA Exemptions After the Court has Ordered Release of the Information

Although the government concedes that it must, as a general rule, assert all claimed FOI Act exemptions at once, Supplemental Mem. In Further Supp. of Def.’s Mot. for Partial Summ. J. at 13, it requests the court grant an exception for its eleventh hour Exemption 7(F) claim, filed literally hours before the deadline.

To support its position, the government cites Piper v. Dep't of Justice, 2005 WL 1384337 at *3 (D.D.C. June 13, 2005), in which a district court exercised its discretion to allow a new late stage exemption claim because the government's oversight was a good faith mistake. That case is inapposite, however, because here, the type of good faith mistake does not appear to be applicable to the Defense Department's ("DoD") Exemption 7(F) claim. In this case, DoD has long been aware of facts that it now relies upon to contend that releasing details of detainee mistreatment may lead to violence. This is evidenced by the very declarations it uses to support its amended memorandum. Myers Decl. ¶ 8(d) (Iraqi suicide bomber attacked British base in Jan. 2005); Declaration of Ronald Schlicher, Case No. 04 Civ. 4151 (AKH) (S.D.N.Y., dated July 20, 2005) ("Schlicher Decl.") ¶ 10 ("hostile commentary" in the spring of 2004); Myers Decl. ¶ 8(b) and (c) (Muslim sermons calling for retaliatory violence in 2004).

Moreover, these statements show that high-ranking DoD officials have long had – since 2004 – much of the evidence they now invoke to argue that unconscionable treatment of prisoners stirs the possibility of violence. Yet DoD claims that it only "knew of" the possibility of this kind of violence when riots occurred during the week of May 9, 2005, after a Newsweek report, later retracted, revealed that a government investigation into allegations that U.S. soldiers had flushed the Koran down the toilet to humiliate Muslim detainees held at Guantanamo Bay in Cuba. Plainly the government understood the potential for this type of violence long before the Newsweek story was published and could easily have raised Exemption 7(F) at the outset of litigation.

The government also had ample time to raise any exemptions it thought would apply as late as the May 26 appearance it made before this Court. Instead, it waited until

the final hours of the Court-ordered deadline to create the kind of delay already disfavored in this litigation. In September 2004, for instance, the Court ordered the government to respond to the ACLU's FOIA request after ignoring it for eleven months. ACLU v. Dep't of Defense, 04 Civ. 4151 (AKH) (S.D.N.Y Sept. 15, 2004) (no documents had been identified, no exemptions claimed). "To permit further delays in disclosure or providing justification for not disclosing would subvert the intent of FOIA." *Id.*

II. The Government's Plea for the Unprecedented Expansion of Exemption 7(F) is Inconsistent with the Law's History and Would Compromise the FOIA's Intent.

Statutory exemptions protect certain government records from release even when their content sheds light on government operations and activities. In the case of Exemption 7(F), the FOI Act protects from disclosure "records or information compiled for law enforcement purposes," but only to the extent that release "could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552 (7)(F).

Exemption 7(F) has never been interpreted to protect the type of records at issue here – where content reveals illegal and immoral government misconduct so disturbing that it could reasonably be expected to provoke violent reactions in the public that sees them.

Exemption 7(F)'s history makes clear that its primary function has been to protect "any individual" when disclosure of information *about him* could reasonably be expected to endanger *his* life or physical safety.

The FOIA Reform Act of 1986 amended all arms of Exemption 7, the law enforcement exemption; it was through these amendments that Exemption 7(F)'s protections were extended to "any individual," and not just law enforcement officials. See Attorney General's 1986 Amendments Memorandum, Foreword (Dec. 1987).

An examination of federal case law since Exemption 7(F)'s amendment shows the exception has been primarily used to protect the *names* of law enforcement agents, witnesses, and informants, when that disclosure would endanger their life or physical safety. see Rugiero v. Dep't of Justice, 257 F.3d 534, 552 (6th Cir. 2001) (names of DEA agents); Johnston v. Dep't of Justice, No. 97-2173, 1998 U.S. App. LEXIS 18557, at *2 (8th Cir. Aug. 10, 1998) (names of DEA agents); McQueen v. United States, 264 F. Supp. 2d 502, 521 (S.D. Tex. 2003) (names of informants and undercover agents); Ortloff v. Dep't of Justice, No. 98-2819, slip op. at 10 (D.D.C. Mar.22, 2002) (name of witness); Shores v. FBI, 185 F. Supp. 2d 77, 85 (D.D.C. 2002) (names of witnesses); Willis v. FBI, No. 99-CV-73481, slip op. At 20-21 (E.D. Mich. July 11, 2000) (magistrate's recommendation) (names of federal employees and third parties).

Only two district court cases use Exemption 7(F) to protect anything other than information about named individuals, and in those instances it was for technical information that courts found could have been directly utilized to commit crime or terrorism. In LaRouche v. Webster, No. 75 Civ. 6010 (MJL), 1984 WL 1061 at *8 (S.D.N.Y. Oct. 23, 1984), a district court endorsed use of Exemption 7(F) to suppress

machine gun plans where release could mean that law enforcement officers might have to face "individuals armed with homemade devices constructed from the expertise of other law enforcement people."

In both of these cases, district courts found that technical information might be useful to terrorists or criminals.

The government's argument in this case purports neither to protect named individuals from disclosures that endanger them, nor to withhold technical information that might assist in circumvention of the law.

Instead, the government asks this Court to invoke the exemption simply because the records might prove to be a strong indictment of its operations and activities. But "[i]f the documents are more of an embarrassment than a secret, the public should know of our government's treatment of individuals captured and held abroad. History and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse." ACLU v. Dep't of Defense, 04 Civ. 4151 (AKH) (S.D.N.Y Sept. 15, 2004) (quotations omitted).

CONCLUSION

For the aforementioned reasons, amici curiae respectfully urge this court to deny the government's request for a novel expansion of Exemption 7(F) and to order the Darby records released.

Respectfully submitted August 3, 2005,

By ______________________________

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