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,

Plaintiffs,

v.

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

Defendants.

DOCKET NO. 04-CV-4151 (AKH)

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PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

On January 13, 2005, Plaintiffs filed a motion for partial summary judgment, and accompanying memorandum of law [hereinafter "Plaintiffs' Memorandum of Law"], seeking the release of selected documents under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"). On March 30, 2005, Defendants Department of Defense ("DOD") and Central Intelligence Agency ("CIA") submitted a cross-motion for partial summary judgment as to these same documents, along with a memorandum of law in opposition to Plaintiffs' motion for partial summary judgment and in support of Defendants' cross-motion for partial summary judgment [hereinafter "Defendants' Memorandum of Law"]. Plaintiffs here submit this reply memorandum of law in support of their motion for partial summary judgment and in opposition to Defendants' cross-motion for partial summary judgment.

Plaintiffs seek the release of documents under FOIA pertaining to the treatment of individuals apprehended after September 11, 2001, and held in United States custody in detention facilities outside the United States. In particular, Plaintiffs' partial summary judgment motion challenges the Government's decision to withhold five categories of documents pursuant to four of FOIA's nine exemptions. The Government bears the burden of proving that the exemptions, which are narrowly construed, apply to the documents that have been withheld. Defendants' opposition and cross-motion fails to adequately justify the invocation of these exemptions or to meet their burden of proving that the exemptions at issue apply to the documents that Plaintiffs seek. As such, the Court should order the Government to release the following five categories of documents:

First, Plaintiffs seek documents pertaining to the activities of the International Committee of the Red Cross ("ICRC"). Defendant DOD has withheld these documents on the basis of 10 U.S.C. § 130c, which permits national security officials to withhold sensitive, confidential information from foreign governments or international organizations where *three* prerequisites are met. DOD has failed to demonstrate that the information contained in these documents meets the statute's prerequisites. The statute provides that regulations must be

prescribed "in order to carry out this section," and that the "regulations shall include criteria for making the determinations required under subsection (b)." 10 U.S.C. § 130c(g)(1). Because no regulations have been promulgated that include criteria for making the determinations required by the statute, DOD may not withhold any documents on the basis of 10 U.S.C. § 130c. Moreover, the statute requires that the information has been "provided by" or "produced in cooperation with" the ICRC. Here, however, there are numerous memoranda and letters documenting or pertaining to the DOD's meetings and conversations with members of the ICRC that contain information not "provided by" or "produced in cooperation with" the ICRC. The statute also requires that the information meet certain exacting confidentiality requirements. DOD has not demonstrated that much of the information in question meets these requirements.

Second, Plaintiffs seek the release of six memoranda from the DOD setting forth permissible interrogation techniques. DOD has released two documents in response to these six requests and has denied that additional documents exist. Yet, it is clear from documents released by DOD that additional documents responsive to these six requests do, in fact, exist. Plaintiffs therefore move the Court to require DOD to conduct a diligent search in order to locate these additional responsive documents, and to release them to Plaintiffs.

Third, Plaintiffs seek the release of three documents from Defendant CIA as to which the CIA has invoked a Glomar response, refusing to confirm or deny the existence of the documents. The Glomar doctrine is available when confirming or denying the existence of documents would result in the unauthorized disclosure of intelligence sources and methods. Here, however, the CIA has not demonstrated that these documents should be withheld; it certainly has not demonstrated that simply confirming or denying their existence would reveal intelligence sources or methods. Each of these memoranda contain statements of policy with respect to the permissibility of various interrogation techniques and detention practices. The CIA does not indicate that these documents provide information about the actual use of these techniques, about the targets of these techniques or about the existence of particular detention facilities. Accordingly, these documents should be released.

Fourth, Plaintiffs seek the release of documents relating to the CIA's request that the DOD hold an Iraqi prisoner off the prison rolls at a DOD detention center, and DOD's order implementing that request. Defendants have failed to identify documents containing either the request or the order implementing the request. Defendants have also failed to justify the invocation of Exemptions 1 and 3 as a basis for the withholding of the 72 documents that have been identified. The justifications submitted are insufficiently specific to meet the Government's burden of proof on this matter and do not demonstrate that there are no reasonably segregable portions of the documents that could be released.

Fifth, Plaintiffs seek the release of photographs and videotapes depicting the abuse of detainees in Iraq and Guantánamo. Defendant DOD has refused to provide these photographs, purportedly on the grounds that the Department is protecting the privacy of the detainees and that there is no public interest in their disclosure. Because these photographs and videotapes can be altered to delete any identifying details or information, their release would not constitute an invasion of personal privacy. Nor do the Geneva Conventions dictate a contrary result. Moreover, there is intense public interest in the release of these photographs. The release of the photographs would serve the core principles of FOIA by shedding light on the conduct of DOD in the performance of its statutory duties.

In sum, because Defendants have failed to satisfy their burden to justify the withholding of documents responsive to Requests 1, 4, 8, 10, 11, 13, 29, 37, 39, 40, 41, 42, 43, 49, 58, 61, and 69, the Court should order Defendants to produce all responsive documents forthwith.

STATEMENT OF FACTS

Plaintiffs incorporate herein the Statement of Facts from their Memorandum of Law in Support of Plaintiffs' Motion for Partial Summary Judgment.

ARGUMENT

I. DOD HAS IMPROPERLY WITHHELD DOCUMENTS PERTAINING TO THE INTERNATIONAL COMMITTEE OF THE RED CROSS.

Plaintiffs have requested documents pertaining to the ICRC and the ICRC's monitoring of detainees in the custody of the United States. *See* Plaintiffs' Memorandum of Law, Exhibit A (Items 8, 13, 49, and 58). Item 8 seeks all reports from the ICRC concerning the treatment and detention of Detainees; Item 13 seeks records that contain a "[r]esponse to concerns raised by the ICRC regarding the treatment of Detainees;" Item 49 seeks a "[l]etter from military lawyers over the signature of Brig. Gen. Janis Karpinski to the International Committee for the Red Cross (ICRC) responding to its concerns about conditions at Abu Ghraib;" and Item 58 seeks all documents reflecting discussions between the ICRC and military officers at Guantánamo Bay.[1]

Defendant DOD has withheld these documents, either in full or substantially in full, on the basis of 10 U.S.C. § 130c, which permits national security officials to withhold sensitive information received from foreign governments or international organizations where three conditions are met. *See* 10 U.S.C. § 130c(b)(1)-(3). First, the information must have been "provided by, made available by, or produced in cooperation with" the ICRC. *See* 10 U.S.C. § 130c(b)(1). Second, the ICRC must make a written representation that it is withholding the information from public disclosure. *See* 10 U.S.C. § 130c(b)(2). Third, the ICRC must either have requested in writing that the information be withheld or have provided the information to the United States on condition that it not be released to the public, or DOD regulations must specify that release of the information would have an adverse effect on the ability of the United States to obtain the same or similar information in the future. *See* 10 U.S.C. § 130c(b)(3)(A)-(C). The statute also requires that regulations be promulgated "in order to carry out this section," and that the "regulations shall include criteria for making the determinations required under subsection (b)." 10 U.S.C. § 130c(g)(1).

[1] Defendants have asserted that Items 50 and 51 do not exist or are no longer in the possession of the DOD. Plaintiffs withdraw these requests without prejudice and reserve the right to renew them should Plaintiffs obtain further information that these documents do indeed exist.

The DOD has not promulgated regulations that include criteria for making the determinations required by the statute. Accordingly, DOD may not withhold any documents under Section 130c. *See infra* Section I.A. Further, even if the Court determines that the adoption of such regulations is not a necessary predicate for the implementation of the statute, DOD has still not met its burden of proof with respect to the documents Plaintiffs are seeking. First, DOD has failed to index many of the responsive documents, much less to properly justify their exemption. *See infra* Section I.B. Second, although Defendant DOD justifies the exemption of certain documents on the grounds that they were produced "in cooperation with" the ICRC, DOD has failed to prove that the requested documents were in fact produced in cooperation with the ICRC or that these documents meet the statute's other prerequisites. *See infra* Section I.C. Third, DOD failed to justify the withholding of those portions of documents provided by the ICRC or produced in cooperation that relate to information that the ICRC officially made public in October 2003. *See infra* Section I.D.

A. Because DOD Has Failed to Promulgate Regulations, DOD May Not Withhold Any Documents on the Basis of 10 U.S.C. § 130c.

Because no regulations have been promulgated that include criteria for making the determinations required by the statute, DOD may not withhold any documents on the basis of 10 U.S.C. § 130c. The statute provides that regulations must be prescribed "in order to carry out this section," and that the "regulations shall include criteria for making the determinations required under subsection (b)." 10 U.S.C. § 130c(g)(1). In accordance with the plain language of the statute, because of the failure to prescribe such regulations, DOD may not withhold information on the basis of this statute.

B. The DOD's Search for Documents Pertaining to the ICRC Was Inadequate.

The DOD's search for documents pertaining to the ICRC and to the DOD's responses to the ICRC was plainly inadequate. The Government represented to Plaintiffs in a letter dated December 14, 2004, that *all* documents pertaining the ICRC had already been processed. *See*

Exhibit 1 (Letter from S. Lane to L. Lustberg, dated December 14, 2004). The Second Declaration of Stewart Aly [hereinafter "Second Aly Declaration"] purports to index and describe all of the responsive documents. *See* Second Aly Decl., ¶¶ 5,11. Yet, the Second Aly Declaration is clearly incomplete. "Responses" to concerns raised by the ICRC would certainly have been memorialized and discussed in other internal memoranda and electronic communications that do not appear on the indices appended to the Second Aly Declaration. All such documents should have been addressed and included in the present motion. Because they present the same issues as the documents the DOD has already addressed, the Court should proceed to order their release in connection with this motion.

C. DOD Has Improperly Invoked Exemption 3 to Withhold Items 13, 49 And 58.

DOD has improperly withheld documents and information responsive to Items 13, 49, and 58. Defendant DOD asserts that "any response by DOD to ICRC 'concerns' regarding the treatment of detainees was produced 'in cooperation with' the ICRC." *See* Defendants' Memorandum of Law, at 18. DOD argues that "[a] critical element of DOD's cooperation with the ICRC is the dialogue it has with the ICRC regarding detainees." *Id.* at 18 (*citing* Declaration of Charles A. Allen [hereinafter "the Allen Declaration"], Exhibit A (ICRC report stating that "detention problems are best solved through constructive dialogue"); Declaration of Diane E. Beaver [hereinafter "the Beaver Declaration"], ¶ 3 (noting that DOD minutes of ICRC meetings shared with ICRC to ensure accuracy)). Defendant also asserts, in a conclusory fashion and without further elaboration, that "the withheld documents were produced in cooperation with the ICRC because they were responses to ICRC concerns." *See* Defendants' Memorandum of Law, at 19; Second Aly Decl., ¶ 19. None of the foregoing arguments in any way demonstrate that these documents, with the exception of the minutes of meetings between the ICRC and DOD that were approved by both parties, were "produced *in cooperation with*" the ICRC. Moreover, even if the Court determines that the information in question was produced in cooperation with the

ICRC, DOD has failed to demonstrate with respect to this information that the statute's confidentiality requirements have been met.

1. DOD Has Failed to Demonstrate That These Documents Were Produced in Cooperation With the ICRC.

That the documents contain responses to ICRC concerns or reflect discussions with the ICRC does not, of course, indicate that they were "produced in cooperation with" the ICRC. To understand this term, the Court must look to its plain meaning. *See United States v. Dauray*, 215 F.3d 257, 260 (2d Cir. 2000) (consulting dictionary definition to determine the ordinary, common-sense meaning of the words in question); *Perrin v. United States*, 444 U.S. 37, 42 (1979). Webster's Third New International Dictionary defines the term "cooperation" as "the act of cooperating: a condition marked by cooperating: joint operation: common effort or labor." *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 501. Webster's defines "cooperate" as "to act or work with another or others to a common end: operate jointly." *See id.*

There is no indication from the evidence presented by DOD that the agency was working with the ICRC "to a common end" or operating jointly in the production of the information or documents Plaintiffs are seeking. DOD presented only two pieces of evidence supporting its sweeping argument that the information Plaintiffs seek was produced in cooperation with the ICRC: (1) the statement from the ICRC's website that the ICRC tries to resolve issues related to detainees and prisoners of war through "constructive dialogue;" and (2) the statement that the DOD sent the minutes of meetings with the ICRC to the ICRC to ensure their accuracy. Neither of these items are particularly indicative of cooperation; moreover, the second speaks only to a small subset of the documents Plaintiffs are seeking. Even if the ICRC and the DOD had engaged in a "constructive dialogue" -- and the DOD presents no evidence indicating whether that was the case -- a dialogue implies a back and forth conversation or negotiation, but does not indicate a joint effort or cooperation in the production of the information. Indeed there is extensive evidence that the dialogue between the ICRC and the DOD has consisted of disagreement, criticism, and negotiation regarding the condition of the detainees and that each

party produces documents containing information that was not produced in cooperation with the other, but to the contrary was produced entirely independently from the other entity. *See* Plaintiffs' Memorandum of Law, Exhibit I.

The fact that minutes were sent to the ICRC certainly does not indicate whether *other* documents were produced in cooperation with the ICRC. Many of documents that describe meetings with the ICRC were internal DOD documents that would presumably never have been shown to the ICRC. *See* Second Aly Decl., Tab B (Items 11, 12, 18); Tab C (Items 2, 4, 5). Moreover, as set forth in Section I.B. *supra*, there must have been other e-mails and other internal documents created by the DOD that the ICRC never saw. Such documents may have contained discussions of DOD's relations with the ICRC, of detainees and their conditions, and of the Geneva Conventions in relation to the ICRC.

The fact that the requested documents were "responses" to ICRC concerns does not mean that they were produced in cooperation with the ICRC. For example, in the document requested in Item 49, DOD contends that isolating some inmates was a military necessity and that prisoners held as security risks can legally be treated differently from prisoners of war or ordinary criminals. *See* Plaintiffs' Memorandum of Law, at 11. This document was plainly not produced *in cooperation with* the ICRC, but rather responded to the ICRC and presented the DOD's position based upon its own legal analysis. There is extensive information contained in the responses over and above the information provided by the ICRC, including comments regarding the DOD's positions on various issues, descriptions of various conditions of confinement for the detainees, and statements of policy. *See* Plaintiffs' Memorandum of Law, at 9-11.

2. DOD Has Not Demonstrated That This Information Meets the Statute's Confidentiality Conditions.

Moreover, even if these documents were produced in cooperation with the ICRC, DOD has failed to demonstrate that this information complies with any of the options set forth in the statute's third prerequisite. First, the ICRC has not requested in writing that such information be

withheld. *See* 10 U.S.C. § 130c(b)(3)(A). Rather, the ICRC's written request states only that "all records of communications *from the ICRC or its representatives* regarding detainees at Guantanamo and Iraq have been provided to the DOD on condition that the documents not be released to the public." Second Aly Decl., ¶ 13 (quoting Exhibit D, Letter from ICRC Deputy Head of Delegation for United States and Canada to Stewart Aly, dated March 9, 2005) (emphasis added). This request pertains only to those records that have been provided to the DOD, but does not address documents produced by the DOD in response to the ICRC. Second, the DOD has not demonstrated that the information was provided on the condition that it not be released to the public. *See* 10 U.S.C. § 130c(b)(3)(B). Since the information at issue was not provided to the DOD at all, but rather produced by the DOD, this subsection is inapplicable. Third, the DOD regulations do not specify that release of the information would have an adverse effect on the ability of the United States to obtain similar information in the future. *See* 10 U.S.C. § 130c(b)(3)(C). In order to demonstrate compliance with this provision, DOD relies solely on a directive. Obviously, this directive is not a regulation. Moreover, the directive pertains only to ICRC communications provided to DOD. *See* Allen Decl., Exhibit B. For these reasons, all information not provided by the ICRC to DOD, even if produced in cooperation with DOD, is not covered by Section 130c.

D. With Respect to Concerns That the ICRC Has Officially Made Public, the ICRC Has Not Met the Statute's Confidentiality Prerequisites.

Title 10 U.S.C. § 130c requires that the ICRC represent that it is withholding the information from public disclosure. *See* 10 U.S.C. § 130c(b)(2). With respect to the information publicly released by the ICRC, DOD cannot meet this prerequisite. As such, the information that ICRC officially disclosed is not protected by Section 130c and should be released.

In October 2003, a senior Red Cross official publicly challenged the United States' policy of holding detainees in conditions of indefinite detention. *See* Plaintiffs' Memorandum of Law, Exhibit I (collecting news articles describing the ICRC's public statements on the legal status of detainees). This senior Red Cross official stated publicly, in regard to conditions at Guantánamo

Bay, that "[t]he open-endedness of the situation and its impact on the mental health of the population has become a major problem." *See id.* Given that the ICRC raised this matter publicly, it is not tenable for DOD to argue that the ICRC is withholding these matters from public disclosure. Further, the ICRC has acknowledged elsewhere that it has disclosed certain information to the public. Indeed, in one of the very sources upon which DOD relies, the ICRC acknowledges that it "felt compelled to make some of its concerns public" and to remove these concerns from the ICRC's usual confidential dialogue. *See* Second Aly Decl., ¶ 14. For this reason, the ICRC documents and responses to the ICRC documents that contain information about the ICRC's concerns with the indefinite detention of Guantánamo detainees and its relationship to their mental health -- information that was subsequently made public in or about October 2003 -- must be released.

In sum, because the DOD has not promulgated regulations necessary to implement this section, all documents withheld pursuant to 10 U.S.C. § 130c should be released. In any event, even if the Court determines that such regulations are not a necessary predicate to the DOD's reliance on this statute, most of the requested documents should nonetheless be released because they contain information not provided by or produced in cooperation with the ICRC. These documents should also be released for the further reason that the statute's confidentiality provisions have not been met. Finally, all documents concerning the ICRC's public disclosures must be released, even if the information in question was provided by or produced in cooperation with the ICRC.

II. DOD HAS FAILED TO PRODUCE SEVERAL RESPONSIVE DOCUMENTS PERTAINING TO INTERROGATION TECHNIQUES.

Defendant DOD states that Plaintiffs' six requests seeking documents describing DOD interrogation techniques, Items 4, 37, and 39-42, actually address only two documents. *See* Defendants' Memorandum of Law, at 8. DOD notes that Requests 4, 37, and 40 all concern policies put into effect by Lieutenant General Ricardo S. Sanchez, and that Requests 39, 40 and 42 all address memoranda from the Combined Joint Task Force. *See* Second Aly Decl., ¶ 23. In

response to these six requests, Defendant DOD released two documents to Plaintiff, a memorandum from Sanchez dated September 14, 2003 and a memorandum from the Combined Joint Task Force dated October 12, 2003. *See* Second Aly Decl., Exhibits E, F. DOD asserts that it was not able to locate other responsive documents. However, it is clear from several sources, including the Investigation of Intelligence Activities At Abu Ghraib by George R. Fay [hereinafter the "Fay Report"], that there are more than two documents that are responsive to these six requests. *See* Exhibit 2 (Excerpt from the Fay Report referring to a September 10, 2003 memorandum); *see also* Exhibit 3 (Douglas Jehl and Eric Schmitt, The Reach of the War: The Interrogators, *The New York Times*, May 21, 2004, at A1 (referring to September 10, 2003, and September 28, 2003 memoranda). This evidence demonstrates that, at the very least, there are two other memoranda, dated September 10, 2003 and September 28, 2003, that should have been produced. The Court should order DOD to produce these documents forthwith.

III. THE CIA IMPROPERLY REFUSED TO CONFIRM OR DENY THE EXISTENCE OF ITEMS 1, 29, AND 61 AND HAS FAILED TO JUSTIFY THEIR WITHHOLDING.

Plaintiffs seeks Items 1, 29, and 61 from the August 16, 2004 List. Items 1 and 29 are legal memoranda authored by the Department of Justice regarding the legality of employing various types of interrogation techniques. Item 61 seeks an order from President Bush authorizing the CIA to set up detention facilities outside the United States. The CIA has invoked the "Glomar" response, arguing that the "[t]he very fact of whether the CIA possesses records responsive to Requests 1, 29 and 61 is exempt from disclosure under Exemption 1 because it is classified for reasons of national security pursuant to Executive Order and under Exemption 3 because it could reveal intelligence activities and methods that the DCI has the statutory responsibility to protect." Defendants' Memorandum of Law, at 22. The CIA has not appropriately justified the decision to withhold these documents from public disclosure. The CIA has certainly not justified the invocation of Glomar.

As set forth in Plaintiffs' initial Memorandum of Law, while agencies are entitled to substantial deference, they earn this deference only when their affidavits and supporting documents enable the Court to undertake a *de novo* review. *See* Plaintiffs' Memorandum of Law, at 19-23. The agency's exemption determinations are only afforded substantial weight when accompanied by reasonably detailed explanations of why material was withheld. In deciding this issue, the Court must not "relinquish[] its independent responsibility." *Goldberg v. U.S. Department of State*, 818 F.2d 71, 77 (D.C.Cir. 1987); *Ray v. Turner*, 587 F.2d 1187, 1194 (D.C. Cir. 1978) (noting that FOIA drafters "stressed the need for objective, independent judicial determination, and insisted that judges could be trusted to approach the national security determinations with common sense, and without jeopardy to national security").

Defendants' Memorandum suggests otherwise and ignores the plain language of FOIA. CIA relies on *Stillman v. CIA*, 319 F.3d 546 (D.C.Cir. 2003), noting that in *Stillman* the Court of Appeals criticized the district court for failing to "evaluate the pleadings and affidavits to be submitted by the Government in defense of classification decision," thereby erroneously withholding deference ordinarily owed to national security officials. *See id.* at 548. In fact, the error in Stillman, *which was not a FOIA case*, was that the district court had determined that the Plaintiff had a First Amendment right to the material he was seeking but did not first determine whether the material was "properly classified." *Id.* at 548. *Stillman* is entirely inapposite in the present context and does not address in any way the level of deference owed to national security officials.

The CIA has neither demonstrated that these documents should be withheld nor that simply confirming or denying their existence would reveal intelligence sources or methods. The Glomar doctrine is available when confirming or denying the existence of documents would result in the unauthorized disclosure of intelligence sources and methods. Simply confirming or denying the existence of these documents, and indeed their release, would merely serve to demonstrate that the CIA has in its possession a memorandum from the DOJ interpreting the Convention Against Torture and specifying legally permissible interrogation techniques, as well

as a memorandum from the President concerning the authority to establish detention facilities abroad. Nowhere does the CIA indicate that these documents provide information about the actual use of these techniques, about the targets of these techniques or about the existence of particular detention facilities.

In each of the cases on which the CIA relies in support of its invocation of the Glomar response in this case, the FOIA request specifically sought information about a particular individual or field of operation. In *Rubin v. CIA*, 2001 WL 1537706 (S.D.N.Y. Dec. 3, 2001), for example, plaintiff filed a FOIA request with the CIA seeking records regarding two literary figures, Stephen Spender and T.S. Eliot. *See id.* at *1. The CIA refused to confirm or deny the existence of any such records on the grounds that "confirming or denying the existence of the requested information would effectively disclose the very fact that must be protected in this case--whether the CIA has a current or past covert interest in a specific individual." *Id.* at *3-*4. *See also Wolf v CIA*, 357 F.Supp.2d 112, 116 (D.D.C. 2004) ("*Because the FOIA request concerned whether the CIA has gathered intelligence on a particular foreign national*, acknowledging the existence of such records could reveal intelligence sources and methods and information harmful to foreign relations.") (emphasis added). Similarly in *Hunt v. CIA*, 981 F.2d 1116 (9th Cir. 1992), the issue was whether the CIA could rely on the Glomar doctrine to refuse to confirm or deny the existence of documents relating to a particular foreign national. *See id.* at 1120.

In this case, to the contrary, the relation between the documents sought and the existence or lack thereof of particular operations or even of the CIA's interest in particular operations is vague and speculative. The CIA has not demonstrated that disclosure of these documents would reveal intelligence sources and methods. The statement that "[t]hese documents would exist if CIA had engaged in clandestine intelligence activities or had an interest in pursuing clandestine intelligence activities upon which DOJ allegedly advised or which were allegedly included in the 'Presidential Directive,'" does not suffice to meet the CIA's burden of proving that these documents would reveal intelligence sources and methods. A vague concern about interest, without further specifics as to the particular intelligence sources at issue, does not suffice under

either Exemption 1 or 3. Based on the information publicly available, these various memoranda are legal opinions or statements of policy about permissible techniques and practices. For these reasons, the Court should order their release.

IV. CIA HAS FAILED TO APPROPRIATELY JUSTIFY THE WITHHOLDING OF CERTAIN DOCUMENTS RESPONSIVE TO ITEM 43.

Plaintiffs seek the release of documents relating to CIA Director George Tenet's request that Defense Secretary Donald Rumsfeld hold an Iraqi prisoner at a detention center but not be listed on the prison rolls, as well as Secretary Rumsfeld's order implementing that request. Plaintiffs' Memorandum of Law, Exhibit A (Item 43). Not only have Defendants failed to identify documents containing either the request or the order implementing the request, but they have also failed to justify the exemption of the 72 documents identified with respect to Exemptions 1 and 3.[2] The justifications submitted are insufficiently specific to meet the Government's burden of proof on this matter and to demonstrate that there is no reasonably segregable information that could be released.

First and foremost, Plaintiffs seek a response from Defendants, including the DOD, regarding the existence of documents describing or embodying the request by Tenet and the order implementing that request by Rumsfeld. DOD has never responded to this request, and the CIA's index does not list these documents. The Court should order Defendants to search for and produce these documents forthwith.

Moreover, these documents should be released, given that this information has already been officially revealed by Defense Secretary Rumsfeld. DOD acknowledged that the prisoner should have been but was not registered with the ICRC. *See* Plaintiffs' Memorandum of Law, Exhibit Q (Shanker et al., *Rumsfeld Admits He Told Jailers to Keep Detainee in Iraq Out of Red Cross View*, N.Y. TIMES, June 18, 2004, at A10). Publicly available information cannot be

[2] For the purposes of this motion, and without prejudice to Plaintiffs renewing this challenge in the future, Plaintiffs do not challenge the CIA's decision to withhold portions of these documents pursuant to other exemptions.

withheld under exemptions 1 and 3. *See, e.g., Afshar v. Department of State,* 702 F.2d 1125, 1133 (D.C.Cir. 1983) (official Government disclosures can preclude the invocation of Exemptions 1 and 3); *Founding Church of Scientology v. NSA,* 610 F.2d 824, 831-32 (D.C.Cir. 1979) (suppression of "well publicized" information would frustrate policies of Act without advancing countervailing interests); *Lamont v. Department of Justice*, 475 F.Supp. 761, 772 (S.D.N.Y. 1979) (Weinfeld, J.) (the "sunshine" purposes of FOIA would be thwarted if information remained classified after it had been "specifically revealed to the public"); *cf. Military Audit Project v. Casey,* 656 F.2d 724, 741-45 (D.C.Cir. 1981) (concluding that precise information withheld had not been previously revealed). Plaintiffs are entitled to the information that was officially disclosed by the DOD.

The CIA's justifications for withholding the requested documents pursuant to Exemptions 1 and 3 are insufficiently detailed. The declaration submitted by the CIA does not demonstrate that there is no reasonably segregable information. Plaintiffs acknowledge that the CIA has properly withheld the name of the detainee, as well as "cryptonyms," and the location of CIA stations. But the CIA provides no justification for withholding the rest of the information, except to assert without elaboration or explanation that it would reveal intelligence sources and methods. As set forth above, there is insufficient information in this declaration for the Court to conduct a de novo review. *See supra* Section IV.

As such, the Court should order the release of these documents or at the very least undertake an *in camera* review. Where the underlying documents contain evidence of illegality or unlawful activity, it is appropriate for the Court to view the agency's decision with a heightened scrutiny and to conduct an *in camera* review. *See* Plaintiffs' Memorandum of Law, at 27-29. DOD acknowledged that the prisoner should have been but was not registered with the ICRC, thereby acknowledging the underlying illegality. *See* Plaintiffs' Memorandum of Law, Exhibit Q (Shanker et al., *Rumsfeld Admits He Told Jailers to Keep Detainee in Iraq Out of Red Cross View*, N.Y. TIMES, June 18, 2004, at A10). At a minimum, the Court must undertake an *in camera* review to ascertain whether or not these documents are being improperly withheld.

V. DOD HAS IMPROPERLY WITHHELD PHOTOGRAPHS AND VIDEOTAPES DEPICTING THE ABUSE OF DETAINEES.

DOD has withheld photographs depicting the abuse of detainees on the basis of Exemptions 6 and 7(C), which provide that documents or information may be withheld when disclosure would cause an unwarranted invasion of personal privacy. *See* 5 U.S.C. §§ 552(b)(6) & (b)(7)(C).[3] In determining whether a document or information should be withheld under Exemptions 6 and 7(C), the Court must consider whether the public interest in disclosure outweighs the privacy interest involved. In the face of an overwhelming public interest in the release of these photographs, Defendant DOD has refused to release them, purportedly on the grounds of protecting the personal privacy of the detainees depicted therein.

Plaintiffs share the DOD's concern for the privacy and dignity of the detainees who suffered torture and abuse at the hands of DOD and its employees. For this reason, the photographs and videotapes can and should be altered to delete any identifying information and obscure any identifying details. The redaction of identifying details would safeguard the privacy and dignity of the detainees while disclosing information pertaining to a matter of extraordinary and widespread public concern.

DOD has not justified the continued withholding of these photographs. First, although Plaintiffs challenged the withholding of three categories of responsive photographs and videotapes (Items 10, 11, and 69), DOD addresses only the Darby photographs in this motion (Item 69). As set forth below, the Court should order the release of all three categories. *See infra* Section III.A. Second, the release of all three categories of photographs and videotapes, if properly altered to obscure any identifying details, could not reasonably be expected to cause an unwarranted invasion of personal privacy.[4] *See infra* Section III.B. Third, Defendant argues that

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[3] Exemption 6 shields information contained in "personnel and medical files and similar files" when disclosure "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Exemption 7(C) provides that a record "compiled for law enforcement purposes" may be withheld if disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C).

[4] Although these two exemptions are analyzed in tandem, the standard in Exemption 7(C) -- "could reasonably be expected to constitute an unwarranted invasion of personal privacy" -- is a lower standard than that in Exemption 6, which requires the agency to consider whether disclosure "would constitute a clearly unwarranted invasion of personal privacy." Because the documents analyzed herein, and many of the others, are now part of criminal

release of the photographs would violate the public curiosity provisions of the Geneva Conventions. However, the Geneva Conventions would plainly permit the release of the photographs and videotapes if all identifying details were redacted. *See infra* Section III.C. Fourth, even if the release of the photographs and videotapes constituted an invasion of privacy, their public disclosure would contribute significantly to the public interest and serve the core principles of FOIA by shedding light on the agency's performance (or non-performance) of its statutory duties. *See infra* Section III.D. Finally, and in any event, DOD must justify the withholding of each picture or videotape on an individual basis. It has not done this. *See infra* Section III.E.

A. The Court Should Order the Release of All Three Categories of Photographs and Videotapes Plaintiffs Are Seeking.

In the August 16, 2004 List, Plaintiffs specifically sought photographs and videotapes depicting the abuse of detainees at Guantánamo (Item 10) and in Iraq (Item 11), as well as the photographs provided by Joseph Darby, a military policeman assigned to Abu Ghraib, to the Army's Criminal Investigation Division (Item 69). *See* Plaintiffs' Memorandum of Law, Exhibit A. On November 8, 2004, DOD invoked Exemptions 6 and 7 in response to these requests, and stated that "[a]s to any photographs or videotapes that exist the records have been determined to be exempt but the Department of Defense is currently reassessing the public and privacy interest associated with these records." *See* Plaintiffs' Memorandum of Law, Exhibit D. On the basis of this representation ("[T]he records have been determined to be exempt."), Plaintiffs moved for summary judgment on all three categories of photographs. However, in Defendants' Opposition and Reply, the DOD addressed only the Darby photographs, and stated that the Department has not yet processed the other categories of responsive documents for withholding or release. *See* Defendants' Memorandum of Law, at 9-10, n.3.

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investigation files, Plaintiffs will utilize the standard set forth on Exemption 7(C). However, Plaintiffs note that as to photographs that are not compiled for law enforcement purposes, the burden on the Government is greater.

The Court should order the release of all three categories of photographs. Given that these requests were included in the August 16, 2004 List, and that Defendant DOD stated in their November 8, 2004 Response that the documents had been determined to be exempt, all three sets of documents should have already been processed and included in Defendants' Motion and Memorandum of Law. Indeed, Defendants have now had more than 8 months to process this request (and over 18 months since Plaintiffs filed their initial request). Moreover, the Government's letter to the Court, dated April 5, 2005, states that certain photographs contained in the Army's Criminal Investigation Division (CID) files have already been processed. *See* Exhibit 4 (Letter from S. Lane to United States District Judge Alvin K. Hellerstein, dated April 5, 2005). In addition, many of the CID documents produced to Plaintiffs reference photographs depicting the abuse of detainees. *See* Exhibit 5 (sample of Army CID documents that refer to photographs as part of the CID file). At the very least, then, those photographs that have already been processed should have been included in Defendants' Motion and Memorandum of Law. Regardless, the Court can and should order the release of all three sets of photographs given that the legal issues presented by the release of photographs responsive to Requests 10 and 11 are the same as those presented by the Darby photographs, and in each case the privacy interests at issue do not outweigh the public interest in disclosure.

B. The Release of the Photographs Would Not Invade the Personal Privacy of the Detainees.

The release of appropriately redacted photographs would not invade the personal privacy of the detainees. If all identifying details are redacted, then the photographs cannot be linked to particular individuals. If the photographs do not identify particular individuals, their release does not constitute an invasion of personal privacy.

The first inquiry when determining whether or not documents are exempt from production under Exemptions 6 and 7(C) is whether the release of the documents would constitute an "invasion of personal privacy." 5 U.S.C. §§ 552(b)(6) & (7)(C); *Albuquerque Publishing Co. v. United States Department of Justice*, 726 F.Supp. 851, 855 (D.D.C. 1989)

("Our preliminary inquiry is whether a privacy interest is involved."). DOD argues that because the detainees depicted in the photographs "often appear naked or otherwise improperly clothed, posed in ways that were designed to embarrass and humiliate the individuals in the pictures," their release would implicate significant privacy interests. *See* Defendants' Memorandum of Law, at 68 (citing Second McGuire Decl., ¶ 8). However, the personal privacy of the detainees would not be invaded if the photographs were appropriately redacted to obscure personal details and any other identifying information.

As set forth in Plaintiffs' Memorandum of Law in Support of Motion for Partial Summary Judgment, the question of whether or not a privacy interest is at stake turns on whether or not the pictures in question can be linked to "particular, named individuals." *United States Department of Justice v. Ray*, 502 U.S. 164, 175-76 (1991); *see also* Defendants' Memorandum of Law, at 59 (quoting *Ray*, 502 U.S. at 175-76 (where highly personal information regarding "marital and employment status, children, living conditions and attempts to enter the United States" is "linked publicly with particular, named individuals," disclosure amounts to a "significant" invasion of privacy)). Furthermore, in each of the cases on which DOD relies in support of its position, the information at issue could have been linked to particular and identifiable individuals if released. *See, e.g., National Archives and Records Admin v. Favish*, 541 U.S. 157, 179-80 (2004) (photographs of scene of the suicide of Deputy White House Counsel Vincent Foster); *Department of Defense v. FLRA*, 510 U.S. 487, 497 (1994) (holding that disclosure of names and addresses would constitute invasion of personal privacy); *United States Department of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982) (properly withholding passport information pertaining to two named individuals); *New York Times Co. v. NASA*, 920 F.2d 1002, 1005 (D.C.Cir. 1990) (voice tapes from the shuttle Challenger were not subject to disclosure because they identified crew members by the sound and inflection of their voices); *Church of Scientology v. United States Department of the Army*, 611 F.2d 738, 747 (9th Cir. 1979) (religious affiliation of particular, named individuals not subject to release). In each case, general information or information not linked to particular individuals was subject to

release, with names and identifying details deleted. As the Supreme Court has held, release of such personal information "constitutes only a de minimis invasion of privacy when the identities [] are unknown," and becomes significant only when the personal information is linked to particular individuals. *See Ray*, 502 U.S. at 176. Therefore, redacting the photographs and videotapes so that they cannot be linked to particular, identifiable individuals would address the privacy concerns raised by the Government.

DOD erroneously argues that even if the information released did not identify particular individuals, it would still constitute an invasion of personal privacy. First, DOD argues that even with redactions, each detainee depicted would still "suffer the personal humiliation and indignity accordant with the knowledge that these photographs [of abuse or mistreatment] have been placed in the public domain." Defendants' Memorandum of Law, at 73 (*citing New York Times v. NASA*, 782 F.Supp. 628, 631-32 (D.D.C. 1991) (concluding that voice tapes from the shuttle Challenger would "cause the Challenger families pain" and inflict "a disruption [to] their peace of mind every time a portion of the tape is played within their hearing"), *on remand from* 920 F.2d 1002, 1005 (D.C.Cir. 1990)). Yet, this broad interpretation of "personal privacy" does not accord with either the case law or the legislative history. In *New York Times v. NASA*, as in the other cases cited above, the deciding factor was that the publication of the voice tapes from the Challenger would have resulted in a "disruptive assault" on the Challenger families by subjecting them "not just to a barrage of mailings and personal solicitations, but also to a panoply of telephone calls from media groups." 782 F.Supp. at 632. Thus, the invasion of privacy occurred not because the families' peace of mind of would be disturbed, but rather by virtue of the actual invasion of their homes by mailings, solicitations, and telephone calls from the media. Moreover, at common law, there is no right to privacy in the publication of images that do not reveal the identity of the subject of the photograph. *See* PROSSER AND KEETON ON TORTS 853 (5th ed.) (citing cases in which the publication of a picture of a hand, leg or foot, or an unidentifiable corpse, which did nothing to indicate whose they were, did not constitute an invasion of personal privacy). Finally, to the extent that there is any ambiguity in the term

"invasion of personal privacy," the legislative history is clear that the information would have to be linked to a particular identifiable individual to invade that individual's personal privacy. "Exemption [6 was] intended to cover detailed Government records on an individual which can be identified as applying to that individual." H.R.Rep.No. 1497 (89th Congress), 1966 USCCAN 2428.

Second, DOD argues that the redactions would not protect the privacy of the detainees because "given that some of these photographs previously were unofficially placed into the public domain," the identities of certain of the detainees could be established. *See* Defendants' Memorandum of Law, at 72-73. It is not clear what DOD intends by the term "public domain." To the extent the term public domain refers to the media, most of the photographs Plaintiffs are seeking are not in the public domain. While Plaintiffs have no way of knowing how many responsive photographs exist, at the very least 1,800 slides and several videos were shown to members of Congress in May 2004. *See* Plaintiffs' Memorandum of Law, Exhibit O (John Barry, et al., "The Roots of Torture," Newsweek, at May 24, 2004). Of these 1,800 images, only a small fraction are in the public domain. Indeed, if there were other available pictures, they would have already been published by the media or others. Moreover, there have been thousands of detainees in United States custody in Iraq, Afghanistan and Guantanamo. For this reason, the issues presented herein are not akin to those presented in *Alirez v. NLRB*, 676 F2d. 423 (10th Cir. 1982), in which the deletion of names and other identifying information was inadequate to protect identities of individuals given limited number of people involved in the underlying incidents. *See id.* at 428.

C. The Release of the Photographs Would Be Consistent With the Geneva Conventions.

DOD states that it has made the decision to withhold these photographs in light of the United States international treaty obligations under the Third and Fourth Geneva Conventions, which prohibit subjecting detainees to insult and public curiosity. *See* Defendants' Memorandum of Law, at 69-70. Defendant argues that the "release of these photographs of

abuse and mistreatment would subject the pictured detainees to insult and public curiosity, regardless of any redactions made to the photographs." *See id.* Plaintiffs do not dispute that the United States has interpreted Article 13 of the Third Geneva Convention and 27 of the Fourth Geneva Convention to prohibit the taking and publication of detainee photographs where it would subject detainees to public curiosity, including depicting detainees in degrading or humiliating circumstances. However, these provisions of the Conventions do not prohibit the publication of such images where the individual detainees cannot be identified. The public curiosity provisions of the Conventions have been construed by the United States, other states, and the ICRC to prohibit the dissemination of photographs that depict individuals that can be identified.

United States practice is consistent with this construction. Department of Defense guidelines governing both media access to Guantánamo Bay and embedded media in Iraq, prohibit the dissemination of photographs or videotapes that identify individual detainees, but allow the dissemination of images insofar as they do not identify individual detainees. *See* Horton Decl., ¶¶ 19, 20 (citing Supplemental Public Affairs Guidance (PAG) on Detainees (Exhibit B to Declaration of Edward R. Cummings); Memo from Public Affairs Officer to Potential Media Embeds re: Media Embed Informational Package ¶ 1(k)(18) (Exhibit D to Declaration of Edward R. Cummings)). These policies are consistent with DOD's interpretation of the public curiosity provisions of the Conventions which protect detainees and prisoners of war from being "'photographed in such a manner that viewers would be able to recognize'" the prisoner, but that permit depicting detainees "'with their faces covered or their identities otherwise disguised.'" Horton Decl., ¶ 18 (quoting Jennifer K. Elsea, *Congressional Research Service Report for Congress: Lawfulness of Interrogation Techniques under the Geneva Conventions* (Sept. 8, 2004), p.CRS-19).

This construction is further supported by the practice of other states. States have condemned "parading" of prisoners which seemed designed to insult or mock the prisoners, but have accepted release of pictures which seemed designed for a legitimate humanitarian purpose.

Importantly, the British Ministry of Defense specifically allowed British media to show Iraqi prisoners of war - but requested that identifying features be obscured or pixillated. *See* Exhibit 6 (excerpt from A.P.V. Rogers, LAW ON THE BATTLEFIELD 53 (2d ed.)).

Contrary to DOD's assertions, the United States' historical construction of the Conventions accords with the ICRC's interpretation of the Conventions. The Cummings Declaration states without citation that the ICRC takes the position that Article 13 categorically prohibits states party to the Conventions from disseminating photographs that show prisoners of war in degrading or humiliating positions. *See* Cummings Decl., ¶ 13. However, with respect to photographs of abuse in particular, the ICRC recently stated that the Conventions permit the dissemination of such photographs if faces and identifying features are obscured. *See* Sassoli Decl., ¶ 12 (citing "Pics not breaching convention," *South Africa News* (May 21, 2004) (attached thereto as Exhibit A)); Horton Decl., ¶ 19.

Moreover, the purpose of the public curiosity provisions is to protect prisoners of war from inhuman and degrading treatment, not to protect the occupying power. The ICRC Commentary to the Third Geneva Convention, upon which DOD also relies, describes Article 13 as protecting the POW's "honor." ICRC COMMENTARY ON THE GENEVA CONVENTION (III) RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 140 (Jean de Preux ed., 1960). The analogous Commentary to the Fourth Geneva Convention, discussing the same protection extended to interned civilians, describes it as a protection designed to prevent exposure to "systematic scorn for human values." COMMENTARY ON THE GENEVA CONVENTION (IV) RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 240 (Jean Pictet gen. ed. 1958). Release of photographs of detainees, without identifying features, will not impugn their honor, or demonstrate a systematic scorn for human values, but will ensure their protection. The proscription against exposing prisoners to insult and public curiosity reflects a concern for the prisoner as an individual. Sassoli Decl., ¶ 13. Allowing the dissemination of photographs and videotapes altered to obscure the identity of the individual is consistent with this concern and serves the Conventions aims. *See id.* at 14. The provisions themselves, and the ICRC's

Commentary, specifically clarify that the purpose of the provision is the protection of the prisoner's interests - and not those of the detaining power.

In sum, the release of these photographs and videotapes, where the features of the individual detainees were appropriately altered, would not violate the public curiosity provisions of the Geneva Conventions.

D. Even if There is a Privacy Interest at Stake, the Public Interest in Disclosure Outweighs the Privacy Interests of the Detainees.

Even if the Court determines that there is a privacy interest at stake, the Court must nonetheless balance the interest in privacy that would be furthered by nondisclosure against the public's interest in disclosure. The release of these photographs would serve the core purposes of FOIA and contribute significantly to public understanding of the operations or activities of the government.

The question is whether disclosure "could reasonably be expected to constitute an *unwarranted* invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C) (emphasis added); *see also* 5 U.S.C. § 552(b)(6). Pursuant to Exemptions 6 and 7(C), the Court must balance the privacy interests that would be compromised by disclosure against the public interest in release of the requested information. The fundamental focus of this inquiry must be on the relationship of the requested material to the basic purpose of FOIA, which is to expose agency action to public scrutiny. *See United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 769-770 (1989) (quoting *Department of the Air Force v. Rose*, 425 U.S.352, 372 (1976)). "Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose." *Id.* at 773. In crafting this standard, the Supreme Court reiterated that the Congressional purpose underlying FOIA was to "'contribut[e] significantly to public understanding *of the operations or activities of the government.*'" *Id.*

Defendants argue that the release of the Darby photos "would not significantly further the public interest because these photographs are not necessary to confirm or refute evidence of

Government misconduct nor will they contribute significantly to the public's knowledge of these events." *See* Defendants' Memorandum of Law, at 70. The Government states that allegations of abuse have been "widely publicized," and that "the United States has recognized that abuse and mistreatment took place at Abu Ghraib prison in Iraq and has released detailed accounts of these abuses." *See id.*

In fact, however, the disclosure of this information *would* serve the public interest and the core purposes of FOIA in that it would shed light on an agency's performance of its statutory duties. The government's release of reports pertaining to abuse does not establish that the release of these pictures and videotapes will not contribute significantly to the public interest. To the contrary, the photographs and videotapes could depict entirely separate events that have never been documented or described in detail. Moreover, even if the images have been described in other documents, the photographs may capture the expressions of the United States personnel, or convey the character of the abuse in a way that a written account never could. Photographs also humanize victims in a way that text cannot. Plaintiffs believe that the release of the photographs will generate public concern for the victims of abuse and torture, and in a way that text alone would not.

Moreover, the information that Plaintiffs seek need not, contrary to Defendant's argument, "confirm or refute evidence of Government misconduct." Although doing so would serve a permissible public interest -- indeed these photographs are probative of Government misconduct -- it is not necessary that the release of the documents serve this particular interest. Defendant's argument is based on *United States v. Davis*, 968 F.2d 1280 (D.C.Cir. 1998), in which the Court required an analysis of whether information sought would confirm or refute alleged government misconduct because it was not evident that the information at issue was even connected to government misconduct. *See id.* at 1282. In this case, by contrast, Government involvement and misconduct is clear: the photographs shed light on an agency's performance and contributes significantly to public understanding of the operations and activities of government.

DOD argues that the release of these photographs will not inform the public about the CID's performance of its duties, and hence their release would not serve FOIA's core purposes. First, FOIA's purposes are not so narrowly drawn and there is no support for the idea that if these documents shed light on the DOD's overall performance of its duties their release would not serve the public interest. Second, the release of the photographs could, in fact, shed light on the issue of whether or not the CID has adequately performed its mission to conduct investigations into abuse of detainees.

Finally, the issues presented herein are entirely distinguishable from the cases cited by the Defendant in support of their contention that "[a]s there are less intrusive means to satisfy the public's right to know on this issue, these photographs should not be released." *See* Defendants' Memorandum of Law, at 72. In *United States Department of Defense v. FLRA*, 964 F.2d 26 (D.C. Cir. 1999), for example, the Court held that there were alternative sources and means for obtaining the names and addresses that were the subject of the FOIA request. *See id.* at 33-34. In that instance, the information sought was technical, and identical to information that could be obtained in other ways. Photographic images, on the other hand, are not identical to other information, and cannot be replaced by technical, written descriptions. There are no less intrusive means to obtain this information.

In sum, the public interest in a document does not turn on the agency's decision that enough information about a certain topic has reached the public, but rather on whether the documents requested shed light on an agency's conduct. In this case, these photographs would shed light on the agency's conduct and should be released.

E. Even if the Court Does Not Order the DOD to Release These Photographs, DOD Should be Ordered to Justify Their Withholding on a Case by Case Basis in Each Instance Balancing the Privacy Concerns with the Public Interest Involved.

Finally, at the very least, Defendant has not adequately justified its decision to withhold the requested photographs by reference to appropriately detailed Vaughn declarations and

indices. The decision to withhold these photographs on the basis of Exemptions 6 and 7(C) should be explicated on a photograph by photograph basis given the variety of privacy concerns and the intense public interest at stake. Certain pictures, for example, may not reveal the identities of the detainees, even without redaction. Finally, if necessary, the Court should undertake an *in camera* review in order to determine whether or not the release of the photographs and videotapes being withheld would invade the personal privacy of the detainees depicted.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant Plaintiffs' motion for partial summary judgment, deny Defendants' cross-motion for partial summary judgment, and order Defendants DOD and CIA to release the documents described above.

Respectfully submitted,

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