

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

Plaintiffs, :

v. :

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

Defendants. :
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04 Civ. 4151 (AKH)

DECLARATION OF
STEWART F. ALY

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

1. I am Associate Deputy General Counsel (Legal Counsel) in the Office of the General Counsel (OGC) of the Department of Defense (“DoD” or the “Department”). I have served in this office, either as the Acting or as Associate Deputy General Counsel, since 1993. My areas of responsibility include statutes relating to management and release of information, such as the Privacy Act and the Freedom of Information Act (FOIA). I personally review FOIA requests,

appeals, and cases in litigation as part of my official duties, and I have authority to make determinations regarding release of records of the OGC. Among my other responsibilities, I serve as counsel to the Office for Freedom of Information and Security Review (OFOISR), which is the office responsible for formulation and promulgation of DoD's FOIA policy.

2. I am familiar with the requests submitted under the Freedom of Information Act by the plaintiffs in this case; I am also familiar with the complaint, answer and other materials filed in this litigation. The statements in this declaration are based upon my personal knowledge and upon my review of information available to me in my official capacity. This declaration is submitted to explain the efforts taken by the Department to comply with the Court's Order, dated September 15, 2004 (the "Order"), and to set forth the specific reasons why the Department has been unable to fully comply with the Order.

The Department's Efforts to Comply with the Order

3. To comply with the Order, the Department has taken steps to complete its search for responsive documents.¹ These efforts include searches by the following components within the Department: the Army, see Declaration of Major Samuel W. Morris, dated October 15, 2004; Army Criminal Investigative Command, see Declaration of Philip J. McGuire, dated October 14,

¹ Prior to this litigation, the Department had conducted searches for documents regarding the treatment of detainees held by the United States overseas in the course of compiling materials in several investigations into allegations of detainee abuse. These investigations involved the review of documentary evidence as well as statements from witnesses with knowledge relevant to such allegations. These investigations fall into two general categories: 1) specific criminal investigations conducted by the appropriate components with the Department, most notably the United States Army Criminal Investigation Command and the Naval Criminal Investigative Service; and 2) investigations conducted by high ranking officials within the Department including reports from Army Major General Anthony Taguba, Major General Donald Ryder, Major General Geoffrey Miller, General Anthony Jones, General George Fay, the Inspector General of the Army, and the Schlesinger Commission.

2004; the Navy, and the Defense Intelligence Agency (“DIA”), see Declaration of Brian S. Kinsey. All of these components have identified responsive documents.

4. To comply with the Order, the Department has taken steps to log the responsive documents that it has located. The resulting logs catalogue at least 145,000 pages worth of documents from the Army, including Army CID, not including numerous CD ROMs, audio tapes and other files that have not yet been catalogued because of the sheer volume of materials. Similarly, DIA has produced a log of over 100 pages identifying responsive documents and providing information to the Court regarding the status of these documents. The Navy Criminal Investigative Service has produced a log listing its responsive reports of case investigations case totaling more than 7,000 pages.

5. To comply with the Order, the Department has processed documents that are responsive to the 70 documents and category of documents included on plaintiffs’ list of August 16, 2004 (the “List”).²

6. The Department has completed its processing of approximately 4,000 pages consisting of the report of General Taguba (document 7) and its annexes (these annexes included other documents identified on the List (documents 5, 16, 53, and 54)). Accordingly, the Department has released these documents with appropriate redactions to protect the privacy of individuals named in the documents. Because these documents were classified, the Department

² Prior to September 15, 2004, the Department had already released certain items on the List, either in whole or with portions of exempt information redacted. For example, the Department has released the Reports of General Jones and General Fay (documents 66 and 67) and the Report of the Inspector General of the Army (which includes document 52) with redactions of classified information; other documents had been released in full, including the report of the Schlesinger Commission (document 68) and the memoranda identified as documents 33 through 35.

had to complete a security review to determine whether the information contained within remained classified; this security review was performed by personnel at the United States Army Central Command. As a result of this review, the report and its annexes have been declassified. In addition, the Department had to perform a review of the 4,000 pages to redact information covered by the exemption 6 which protects the privacy of individuals named in the documents and to consult with the Department law enforcement components to determine whether any of the information was covered by exemption 7 covering ongoing law enforcement investigations.

7. The Department has also completed its processing of the report of General Ryder and is releasing the Ryder report with redactions for materials covered by exemption 2 and exemption 5. To release the Ryder report, the Department was required to undergo a similar review process as that required for the Taguba report described above.

8. Army CID is the Army command responsible for investigating serious crimes whenever an Army interest exists. It has located and released documents from nine closed investigations that are responsive to plaintiffs' List.

9. In addition, the Department has finished its review of several items on the List and determined that the requested documents cannot be produced to plaintiffs. These documents include documents constituting communications from the International Committee of the Red Cross ("ICRC") or containing information derived from such communications. (List documents 8, 13, 49, 50, 51 and 58). These documents are not producible because communications with the ICRC are specifically exempt from disclosure by statute. See 10 U.S.C. § 130c ("Nondisclosure of information: certain sensitive information of foreign governments and international organizations"). The ICRC treats its documents as "strictly confidential," and

provides such information on the condition that it not be released to the public. As such documents concerning the ICRC's observations and findings are specifically exempted from disclosure by 10 U.S.C. § 130c, these documents are protected from release by Exemption 3(B) (5 U.S.C. § 552(b)(3)(B)). Documents sent to the ICRC responding to ICRC observations and findings are also covered by this statute. The Department is currently litigating the exempt status of ICRC communications with the Department in litigation pending in Gerstein v. Department of Defense, Case No. C 03-05193 (N.D.Cal.).³

10. Review of documents located in the searches that have been conducted by the Defense Department requires detailed scrutiny to ensure that exempt information is redacted while information that can properly be released is not withheld. In particular, since many of the documents responsive to the plaintiff's request are classified, they require careful review to segregate this classified information, and to determine the continued need to maintain its classified status. This review must be conducted by experienced individuals with expertise in the subject matters covered in the documents and familiarity with classification guidance. Given the subject matter of this request, the number of such individuals is fairly small.

11. The Defense Department has received approximately two linear feet of documents

³ For the Court's information, some items on the plaintiffs' List either could not be identified or have not been located in our searches, such as document number 2. In addition, the Department has been unable to locate and process in full one category of documents -- documents provided to Congress (document 70 on the List) -- because those documents are not centrally located but rather were provided by components directly to Congress and because the documents provided to Congress include not just documents regarding the treatment of detainees; in fact, the vast majority of these documents address a large number of other topics, including the conduct of the war in Iraq and Afghanistan. As a practical matter, the reports of high ranking officials referenced in footnote one of this declaration are the best source of information provided by the Department to Congress regarding the treatment of overseas detainees.

referred from other agencies. Such referrals consist of Department documents that, for various reasons, have been provided to other agencies. Accordingly, we expect that the vast majority, if not all, of these documents are duplicates of documents already in the possession of the Department which have been, or are being, compiled and processed in the course by the Defense Department's efforts.

12. To comply with the Order, the Department has enlisted not less than 250 individuals, and likely many more, at various locations within the Department since the last conference in this case on September 10, 2004. Individuals at military installations in the Washington DC area and around the country have conducted searches for responsive documents, reviewed documents for responsiveness and releasability, logged responsive documents that have been located, and prepared materials to submit to the Court. The Department has not fully tracked the hours of all the personnel working on this project but the Department's efforts consist of thousands of hours.

The Reasons for the Department's Inability for Fully Comply with the Order

13. Despite the Department's efforts, it has been unable to fully comply with the Order in two main areas: completion of the search and processing of documents.

14. The Department has been unable to complete its search and catalogue all responsive documents for two reasons: 1) the incredible breadth of the search request made by plaintiffs and the resulting vast amount of documents that must be individually reviewed on a line-by-line basis; and 2) the existence of documents in the possession of the Coalition Provisional Authority ("CPA"), the organization that had authority for governing Iraq after the removal of Saddam Hussein.

15. The overbreadth of plaintiffs' search request is a result of the generic terms used in

the request and the lack of limitation in the search. For example, the search seeks any and all documents regarding the treatment of detainees by the United States overseas but does not limit its definition of the terms “detainees” or “treatment.” As “detainee” in this context is a generic term that can be used to describe any person who is detained overseas for any reason and is not limited to allegations of abuse. Even if the search is limited to documents concerning the abuse or mistreatment of detainees held in Iraq, Afghanistan and the Naval Base at Guantanamo Bay, I estimate that it would require hundreds of thousands of hours to complete the search and to determine whether, for example, interrogations of detainees included any allegation by an individual detainee that he had been in some way mistreated.

16. The Department’s search results to date confirm the overbroad nature of plaintiff’s request. For example, DIA conducted a search of its computerized database of records using the search terms contained in plaintiffs’ request and the result exceeded one million pages worth of documents. Similarly, the Army has not yet catalogued all of the results of its search but the documents identified to date total 145,000 pages worth of documents, not including the documents that are in the possession of the Army CID (the relevant Army CID documents include the documents associated with more than 200 criminal investigations). Thus, after expending significant resources to conduct searches to narrow the scope of potentially responsive documents, the Department has identified documents far exceeding one million pages; there is no method other than a line-by-line review of these documents for the Department to determine if these documents are truly responsive and to identify the applicable exemptions.

17. Prior to the commencement of this lawsuit, the Department had been in negotiations with plaintiffs to narrow the scope of their request. The Department believes that good faith

negotiations could result in an appropriate narrowing of plaintiffs' request so that the desired information is retrieved more efficiently and quickly. In the alternative, the Department requests that the Court narrow the scope of the request regarding the treatment of overseas detainees to allegations of physical or mental abuse that have been the subject of investigations by any component within the Department. Even then, responding to this request will require hundreds of thousands of hours to complete the search and to process all responsive records.

18. In the course of responding to the Order, the Department became aware of a Department project to preserve documents created during the operation and existence of the Coalition Provisional Authority (CPA), the organization charged with running Iraqi governmental functions following the removal of Saddam Hussein. As the CPA ceased to exist as of June 2004, it does not possess any staff of persons knowledgeable about its operations to conduct a search of its files for responsive documents.

19. The current project to preserve CPA documents involves a large-scale effort to capture and preserve in electronic format all paper documents and computer files generated by the CPA. Storer Decl. ¶ 2. It was originally estimated that the project would result in preservation of 500,000-700,000 pages of documents. Storer Decl. ¶ 3. At its current stage of development, the project has captured approximately 420,000 pages of documents. Storer Decl. ¶ 4.

20. Two major tasks remain before the project is completed – capture and preservation of documents remaining in Baghdad (estimated at 350,000 pages) and conversion of electronic records (approximately 1.5 terabytes) into searchable format. Storer Decl. ¶ 5. Although difficult to estimate, the expected completion date for these projects is February 2005

(approximately ninety days). Storer Decl. ¶ 5.

21. Database functions include the ability to conduct electronic searches for key terms. Each search, however, involves a significant investment of time and money, and conducting searches diverts resources from the priority task of completing the collection and preservation of documents and files. Storer Decl. ¶ 7. For these reasons, the most reasonable and efficient way to search the database for potentially responsive documents would be to run keyword searches based on plaintiffs' FOIA requests after the database is fully assembled. Storer Decl. ¶ 7.

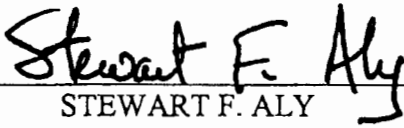
22. The Department has not yet searched the existing CPA database. The Department recommends searching the database after the database has been completed and, in the meantime, to focus the Department's efforts on the search and processing of documents within the rest of the Department. However, if the Court wishes, the Department can institute a search of the existing database as soon as possible but such an approach will require another substantial search after the database has been completed.

23. Finally, there are substantial hurdles to the expeditious processing of documents responsive to plaintiffs' List. Many of these documents contain classified information, which must be reviewed by appropriate personnel within the Department to determine if the information can be released. Unlike the search task where the Department can more readily assign additional individuals to work on the project at many locations where responsive documents may be located, the Department has a limited and finite number of personnel with the expertise and appropriate security clearances needed to perform the security review. In some subject areas, there may only be a handful of individuals who can reasonably make these determinations. Accordingly, the Department requests that the Court set a schedule for the processing of

documents whereby the Department would process at least 5,000 pages per month and, every thirty days, release those documents to plaintiffs if appropriate or identify the basis for the withholding of the documents. It is my estimate processing 5,000 pages per month would require hundreds of hours to review them for classification and other exemptions and then prepare any documents containing non-exempt information for release.

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

Executed: October 15, 2004


STEWART F. ALY