13-3684-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

CENTER FOR CONSTITUTIONAL RIGHTS,

Plaintiff-Appellant,

—against—

CENTRAL INTELLIGENCE AGENCY, DEPARTMENT OF DEFENSE, DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, DEFENSE INTELLIGENCE AGENCY, UNITED STATES SOUTHERN COMMAND,

Defendants-Appellees,

(*caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND SPECIAL APPENDIX FOR PLAINTIFF-APPELLANT

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—and—

DEPARTMENT OF JUSTICE and its Components FEDERAL BUREAU OF INVESTIGATION and EXECUTIVE OFFICE OF UNITED STATES ATTORNEYS, DEPARTMENT OF DEFENSE and its Components DEFENSE INTELLIGENCE AGENCY and UNITED STATES SOUTHERN COMMAND, EXECUTIVE OFFICE OF UNITED STATES ATTORNEYS,

Defendants.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure Rule 26.1, Appellant certifies that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction over this matter based upon the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(a)(4)(B), (6)(E)(iii), and 5 U.S.C. §§ 701-706, and 28 U.S.C. § 1331. Joint Appendix ("JA") 1. On September 12, 2013, the court entered summary judgment in Defendants' favor. Special Appendix ("SPA") 1, *Ctr. for Constitutional Rights v. DOD*, 2013 U.S. Dist. LEXIS 130843 (S.D.N.Y.). Plaintiff Center for Constitutional Rights (hereinafter, "CCR") filed a timely notice of appeal on September 30, 2013. JA 1376; *see* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUE PRESENTED FOR REVIEW

Whether the district court showed excessive deference to the government in allowing the defendant Department of Defense ("DoD") to withhold records in violation of FOIA, by accepting DoD's claims that:

(1) releasing *any* image of *any* detainee could reasonably be expected to harm national security by inflaming anti-American sentiment, notwithstanding DoD's policy of routinely releasing detainee images;

(2) releasing any of the records at issue would reveal detainee Mohammed al-Qahtani to be a cooperator, thereby jeopardizing the United States' relationship with other cooperators, despite the fact that DoD has already officially disclosed

al-Qahtani's cooperation, and despite its failure to explain how releasing *these* records could suggest his cooperation; and

(3) none of the records at issue could be released, even in part, notwithstanding FOIA's requirement that any segregable portion of a record be released.

STATEMENT OF THE FACTS AND CASE

I. Al-Qahtani's Detention and Torture

Mohammed al-Qahtani has been held without trial at Guantánamo Bay, Cuba since 2002. From 2002 to 2003, al-Qahtani was subjected to sustained abuse, including "stress positions, 20-hour interrogations, tying a dog leash to his chain and leading him through a series of dog tricks, stripping him naked in the presence of a female, repeatedly pouring water on his head, and instructing him to pray to an idol shrine." JA 319, 153, 159, 207. Interrogators also used dogs during the interrogation to "shock and agitate" him. JA 1197. As described in government documents of record here, after months of abusive interrogation, al-Qahtani was exhibiting symptoms of "extreme psychological trauma," including "talking to non-existent people, reporting hearing voices, [and] crouching in a corner of the cell covered with a sheet for hours on end." JA 652-53, 1195-1206. These practices led a 30% drop in his weight and to his hospitalization in December 2002. JA 674, 724.

On January 14, 2009, a DoD official overseeing military commission prosecutions admitted that the government had tortured al-Qahtani and that, as a result, he could not be prosecuted before a military commission.

al-Qahtani's mistreatment first drew public attention in 2005, after a leaked log of his interrogations was published in Time Magazine. JA 690-96. In subsequent official disclosures, the U.S. government has acknowledged extensive facts regarding al-Qahtani's detention and abuse at Guantánamo, including (1) the dates and conditions of his confinement, JA 108-09, 129-33, 1140-41, 1193-94; (2) DoD and FBI's involvement in interrogating him, JA 107-08, 1191-96; (3) the abusive interrogation tactics used against him by FBI and military interrogators, JA 110, 131, 305, 1196-97, 1200, 1215-16; (4) al-Qahtani's mental and physical state during his period of interrogation, including severe weight loss and evidence of psychological trauma, JA 103-04, 674; and (5) the government's assertion that he cooperated by providing valuable intelligence to interrogators. JA 117-19, 309-310.

Despite this extensive public record, and despite the obvious public interest in U.S. detention policy and mistreatment of Guantánamo detainees in general, and al-Qahtani in particular, the government has refused to release any videotapes or photographs of al-Qahtani taken during this time period. Specifically, it has refused to release mug-shots of al-Qahtani, video of him in his cell and interacting

with the guards, videos of him being interrogated, and a video depicting forced-cell extractions.

II. Procedural History

On March 4, 2010, Appellant CCR, which also represents al-Qahtani in connection with his petition for a writ of habeas corpus pending in the United States District Court for the District of Columbia,[1] filed FOIA requests with a number of government agencies, including DoD and FBI,[2] seeking the disclosure of three categories of records: (1) videotapes of al-Qahtani made from February 13, 2002 through November 30, 2005; (2) photographs of al-Qahtani taken from February 13, 2002 through November 30, 2005; and (3) any other audio or visual recordings of al-Qahtani made from February 13, 2002 through November 30, 2005. On January 9, 2012, well after the statutory time period within which these agencies were required to issue a final decision regarding the request, CCR filed a lawsuit seeking the release of records responsive to its FOIA request. Counsel in this action, who also act as al-Qahtani's habeas counsel, sought and received al-Qahtani's consent to proceed with the lawsuit. *See* JA 37-38.

[1] *See al-Qahtani v. Obama*, No. 05-cv-1971 (D.D.C. filed Oct. 5, 2005).

[2] CCR also submitted FOIA requests to the Central Intelligence Agency, DoD Defense Intelligence Agency, United States Southern Command, and the Department of Justice.

DoD and FBI subsequently provided CCR with declarations detailing their searches and bases for withholding responsive records.[3] Specifically, DoD and FBI identified 62 such records, including:

- 53 FBI videotapes "depict[ing] [al-Qahtani's] activities within his cell as well as his interaction with DoD personnel at Guantánamo Bay"[4] ("FBI Videos"), JA 1323;
- Six "mug-shot" photographs, JA 1291;
- One videotape depicting two forced cell extractions ("FCE Video") JA 1278; and
- Two videotapes "document[ing] intelligence debriefings of al-Qahtani taken in July 2002 and April 2004" ("Debriefing Videos"), JA 1276.

(hereinafter, the "Responsive Records"). As pertinent here, the FBI and DoD claimed the right to withhold each of the Responsive Records pursuant to Exemption 1, which permits agencies to withhold from disclosure any record that has been "properly" classified pursuant to an Executive Order. *See* 5 U.S.C. § 552(b)(1).[5]

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[3] The CIA submitted a *Glomar* response neither confirming nor denying the existence of responsive records. CCR challenged that response below, but does not do so on appeal.

[4] The FBI provided an individualized description of the 53 FBI Videotapes in an index filed *ex parte* for *in camera* review. JA 1338-39.

[5] The FBI also withheld the 53 videotapes under FOIA Exemptions 3, 6, 7(A), and 7(C), 5 U.S.C. § 552(b)(3), (6), (7)(A), (7)(C), as well as Section (j)(2) of the Privacy Act, *see* 5 U.S.C. § 552a(j)(2). DoD also asserted that all six photographs and the 53 FBI Videos were exempt from release pursuant to FOIA Exemptions 6, 7(A), and 7(C), and that the FCE and Debriefing Videos are exempt under FOIA

On October 3 and December 27, 2012, CCR and DoD, respectively, cross-moved for summary judgment. DoD defended its withholding under Exemption 1 in three public declarations and one classified declaration,[6] which claimed that releasing any portion of the Responsive Records could reasonably be expected to cause damage to national security.

Specifically, DoD's declarant, Major General Karl R. Horst, contended that releasing any portion of the Responsive Records could "adversely impact the political, military and civil efforts of the United States by fueling civil unrest, endanger the lives of U.S. and Coalition forces, and providing a recruiting tool for insurgent and violent extremist groups thereby destabilizing partner nations." JA 1303. By way of example, Horst cites the unrest that followed the release of the images of abuse at Abu Ghraib and the video depicting Marines urinating on Taliban soldiers, as well as media reports of U.S. forces desecrating Korans. JA 1299-1300. Horst does not describe how each Responsive Record, or even each category of Responsive Records, could damage national security; rather, he argues that disclosing *any* image that depicts an individual in U.S. custody could

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Exemptions 3 and 6. The district court did not reach these claims, or rule upon the applicability of those exemptions.

[6] The classified Declaration of William K. Lietzau, filed *ex parte* for *in camera* review, purports to explain the "damage to national security that might reasonably be expected to result from disclosure of the Debriefing Videos." *See* Gov't Br. at 17 (Dkt 37).

cause harm. JA 1300 (the 53 FBI Videos "could also be used to foment anti-American sentiment given that they all depict Mr. al-Qahtani in U.S. custody"); JA 1302 ("[K]nowing the still photograph was obtained from the released video-recordings in and of itself would be inflammatory given the sensitivities surrounding the U.S. detention of foreign nationals."). Horst further claims that the Responsive Records could be "easily manipulated so as to be used as recruiting material" — for example, by "overlay[ing] staged audio which falsely indicates the mistreatment of the detainees when none has occurred," by "pixilat[ing]" the images "to show physical signs of mistreatment, such as bruising or bleeding," or by combining the released footage with "non-released footage, such as anti-U.S. rallies or inflammatory speeches." JA 1302. He concludes that all the Responsive Records must be withheld "[g]iven the risk that our enemies could find or choose to characterize the responsive records as inflammatory." *Id.*

In his declaration, Rear Admiral David B. Woods, likewise argues that the release of any detainee's image could be reasonably expected to harm national security by "mak[ing] it substantially less likely that the detainee will cooperate and provide information in the future," because such release could provide "the appearance of cooperation with the United States," which could lead to reprisals or retribution against the detainee and/or his family. JA 1284. Woods argues that disclosing any detainee's cooperation would cast doubt on the government's

commitment to protecting the confidentiality of informants, thereby deterring other individuals from cooperating and denying the United States "the critical intelligence they provide." JA 1285. He also argues that "the policy to classify the images of current and former detainees must be consistently applied" because classifying only those images of detainees cooperating with the United States "would frustrate the purpose of the policy by revealing whether a particular detainee was cooperative." JA 1285-86.

DoD also submitted the declaration of Deputy Assistant Secretary of Defense for Rule of Law and Detaining Policy William K. Lietzau, who argues that releasing any portion of the Responsive Records "would permit detainees to communicate with the public in disruptive ways using channels other than those provided for them by Joint Task Force-Guantánamo ("JTF-GTMO") and the International Committee of the Red Cross ("ICRC")." JA 1307. According to Lietzau, once detainees realized that their images could be released to any member of the public who requested them, detainees might begin to covertly embed messages to enemy forces. *Id.* Lietzau also contends that releasing any of the Responsive Records would damage national security by "rais[ing] serious questions by US allies and partners and others in the international community as to whether the United States is acting in accordance with long-standing policy to

protect detainees from public curiosity, consistent with the Geneva Conventions." JA 1308-09.[7]

The aforementioned declarants provide four reasons in support of their claim that releasing the FCE Video could harm national security. First, Horst states that the FCE Video is "is particularly subject to use as propaganda and to incite a public reaction because of its depiction of forcible guard and detainee interaction." JA 1301. Second, Woods asserts that disclosing the FCE Video "could result in the development of tactics and procedures to thwart the actions of the FCE team, thereby placing the safety and welfare of the members in jeopardy." JA 1286. Third, Lietzau contends that releasing the FCE Video would "encourag[e] disruptive behavior at DoD detention facilities" by detainees who seek to publicize their resistance. JA 1309-10. Finally, Lietzau threatens that, if FCE videos were subject to release, DoD might "reconsider its current policy recording all forced-

[7] Lietzau also argues that releasing al-Qahtani's images would violate his privacy, in that al-Qahtani has not taken advantage of the DoD policy permitting the ICRC to take the detainee's photograph and provide them to family members, and using FOIA "as an end run around this established process would violate the detainees' privacy and personal autonomy and undermine the purpose of this process, which permits detainees to exercise significant control over appropriate release and distribution of their images." JA 1311. He also argues that al-Qahtani's habeas counsel's representation that al-Qahtani "'strongly desires all videotapes and photographs of him to be released CCR'" is insufficient because CCR "never submitted an express waiver of privacy interests from Mr. al-Qahtani." JA 1311-12 (quoting Declaration of Sandra Babcock, dated Oct. 2, 2012).

cell extractions for documentation in training purposes," undermining their safety and effectiveness. JA 1310-11.

In its motion for summary judgment, CCR argued that these justifications were vague, conclusory, overly expansive, or controverted by evidence in the record, including evidence that DoD routinely released images of Guantánamo detainees without incident. CCR adduced evidence that DoD had already publicly disclosed al-Qahtani's cooperation, thereby undermining its concern that releasing his image would chill other cooperators by suggesting that al-Qahtani cooperated. CCR also presented extensive DoD disclosures detailing FCE tactics, rendering implausible its claim that disclosing the FCE Videos would reveal these tactics and thereby harm national security. CCR argued that the DoD's declarants failed to tailor their justifications for withholding to the Responsive Records and failed to explain why no portion of the records were reasonably segregable, contending that DoD's justifications were limitless in that any record could be manipulated to foment hostility toward the United States. Finally, CCR argued that the fact that al-Qahtani consented to its FOIA suit eliminated any concerns that disclosing the records would violate the Geneva Conventions or al-Qahtani's privacy.

Oral argument was heard on the cross-motions for summary judgment on September 3, 2013. On September 12, 2013, the district court issued an order granting DoD's motion for summary judgment in full and denying CCR's.

Specifically, the court found "logical and plausible" DoD's claim that "extremists would utilize images of al-Qahtani (whether in native or manipulated formats) to incite anti-American sentiment, to raise funds, and/or to recruit other loyalists, as has occurred in the past," particularly because al-Qahtani is a "high-profile detainee" whom the government has admitted to torturing. SPA 25. The court also held that it was "entirely plausible that disclosure of the Withheld Videotapes and Photographs could compromise the Government's cooperative relationships with other Guantánamo detainees." SPA 26. The court determined that the government had provided "other plausible reasons for withholding the FCE Videotape," without specifying which ones it found persuasive. *Id.* While the court did not reach DoD's invocation of al-Qahtani's privacy interest, it stated in a footnote that "we believe that al-Qahtani's interest in avoiding further privacy invasions is entitled to considerable weight." SPA 27. The court expressed doubt that al-Qahtani could have waived his privacy interest in light of the habeas judge's April 20, 2012 finding that he is incompetent. SPA 27. *But see* JA 38 (counsel's attestation that that al-Qahtani consented to CCR's FOIA request on June 1, 2011).

The district court dismissed CCR's evidentiary submissions as "of limited legal relevance." SPA 28. Specifically, she cited the rule that the "'application of Exemption 1 is generally unaffected by whether the information has entered the realm of public knowledge,'" and held that the only exception is "'where the

government has officially disclosed the specific information the requester seeks.'" *Id.* (quoting *Halpern v. FBI*, 181 F.3d 279, 294 (2d Cir. 1999)). The court concluded that the Responsive Records did not fall within that exception because the government had not previously released any of them. SPA 28-29. The court also downplayed the significance of the prior disclosures by remarking that, with the exception of photographs used for border control and military commission trials and photographs taken by the ICRC, the government had not released images in which a specific detainee was identifiable. SPA 27. As set forth below, that statement is factually incorrect.

Finally, the court found that there was "no evidence that any of the Withheld Videotapes or Photographs depict illegal conduct, evidence of mistreatment, or other potential sources of governmental embarrassment." SPA 29. The court held that, having viewed the FBI's *ex parte* description of the 53 FBI videotapes, it could "confirm the Government's public representation that these records do not document any abuse or mistreatment." *Id.* (internal quotation marks omitted). The district court, however, offered no such assurance with respect to the mug-shots or the Debriefing and FCE Videos.

CCR filed a timely appeal on September 30, 2013.

SUMMARY OF THE ARGUMENT

Congress enacted FOIA to protect democratic decision-making by assuring an informed electorate. This purpose weighs heavily in favor of disclosure and permits withholding only in narrowly-defined circumstances. The strong presumption in favor of disclosure in the FOIA caselaw does not disappear upon the government's invocation of national security. Indeed, when Congress last amended Exemption 1, it sought not to facilitate the withholding of information under this Exemption, but to enhance the courts' power to curb the epidemic of Executive over-classification — a problem that persists to this day. To that end, Congress explicitly rejected proposals that would have required the courts to accord a presumption of validity to classification decisions and rebuffed entreaties by the White House to limit judicial scrutiny of those designations to "arbitrary and capricious" review. Instead, overriding a presidential veto, Congress directed the courts to scrutinize *de novo* the substantive propriety of classification decisions.

There is and can be no question that the Executive agencies enjoy an institutional advantage in assessing national security threats and that the courts should, as the case law provides, give substantial weight to detailed agency affidavits that set forth logical and plausible claims of harm. But the statutory text, the legislative history, and subsequent judicial opinions all make clear that "substantial weight" does not mean "dispositive weight," and that the deference

that courts accord to agency judgments must not reduce the judicial branch to a rubber stamp. Here, the district court's uncritical acceptance of the government's justifications for withholding the videotapes and images at issue crosses the line from proper deference to wholesale acquiescence.

The records that CCR seeks fall along a continuum, from still mug-shots, to videos of al-Qahtani alone in his cell, to videos of so-called forced cell extractions ("FCEs") and of actual interrogations. To bear the burden imposed upon it by FOIA to withhold these records, DoD must give a "logical and plausible" account as to how the release of *each* such record could be reasonably expected to cause harm to national security. DoD has failed to meet that burden in this case.

Rather than tailoring its response to the records that CCR seeks, DoD relies on a series of blanket assertions. For example, it argues that U.S. detainee policy is so inherently inflammatory that releasing *any* image of *any* detainee in U.S. custody could foment anti-American sentiment and aid enemy recruitment. That claim is not only inconsistent with DoD's history of routinely releasing images of Guantánamo detainees without incident; the logic underpinning the claim would also eviscerate any constraints on the government's invocation of Exemption 1. Innumerable facets of our foreign policy stoke resentment toward the United States — under DoD's reasoning, the government could classify records pertaining to any of them. This is fundamentally at odds with FOIA's purposes: the public's right to

a transparent government cannot yield to government speculation that someone, somewhere might, in the words of the DoD's declarant, "find or choose to characterize the responsive records as inflammatory." JA 1302. Perversely, the DoD's justification is strongest where the sought records expose the most outrageous official misconduct. To embrace DoD's rationale would thereby turn the impropriety of the government's actions into a justification for secrecy — the very antithesis of the accountability that FOIA was enacted to promote.

DoD further claims that even innocuous images and videos of detainees are properly classified because they could be doctored to depict abuse or otherwise refashioned into enemy propaganda. But that claim is also limitless: any record could be distorted so as to foster animus toward the United States. DoD's contention in this regard, which effectively makes Exemption 1 as expansive as the enemy propagandist's imagination, would, as shown below, effectively repeal Congress's 1974 amendments to that provision.

Even more implausibly, DoD argues that every one of the Responsive Records, without exception, fall within Exemption 1 because releasing images of al-Qahtani could reveal or "suggest" that he cooperated, thereby casting doubt on the United States' commitment to protecting the confidentiality of its informants. But nowhere does DoD explain how releasing a mug-shot or a video of al-Qahtani being forcefully extracted from his cell — or, for that matter, any of the other

withheld records — could arouse suspicions that he was a cooperator. More importantly, DoD has already officially acknowledged the very fact it implausibly asserts others might obliquely infer from disclosure: that is, it has repeatedly broadcast that al-Qahtani cooperated with U.S. authorities. It defies common sense to contend that any harm would follow from further hinting at a fact so widely published.

Nor has DoD justified its withholding of the FCE videos. DoD claims that disclosing the videos would enable detainees to develop techniques to thwart FCE tactics, a contention belied by the fact that DoD has publicly released extensive details about these exact tactics. DoD also speculates, implausibly, that the prospect of disclosure will motivate detainees to showcase their continued resistance to the United States. However, it offers nothing to substantiate its surmise that detainees would risk life and limb, not out of protest or fear of interrogation, but to perform for the camera in the slim chance that, a decade hence, a court might order the video's release. And even if either contention passed the test of logic and plausibility, DoD fails to meet its burden of explaining why no part of the FCE Video could be segregated and released.

By accepting DoD's assertions — assertions which are not only vague and conclusory, but defy logic and common sense — the district court here did not merely fail to apply the legal standard mandated by the Court; it abdicated the

judicial watchdog role assigned to it by Congress, in favor of an all-too-common rote deference to executive prerogative in this area. For the reasons set forth in detail below, the district court's decision should be reversed and DoD should be ordered to release the Responsive Records or the matter remanded for further proceedings.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment under Exemption 1 of FOIA *de novo*. *Wilner v. NSA*, 592 F.3d 60, 69 (2d Cir. 2009).

ARGUMENT

I. The District Court's Excessive Deference to DoD's Exemption 1 Claims Is Contrary to FOIA

A. FOIA Standard of Review

Congress enacted FOIA "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). To that end, FOIA "create[s] a 'strong presumption in favor of disclosure.'" *Pub. Citizen, Inc. v. Rubber Mfrs. Ass'n*, 533 F.3d 810, 813 (D.C. Cir. 2008) (quoting *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991)). While FOIA includes nine exemptions pursuant to which an agency may withhold information, *see* 5 U.S.C. §§ 552(a)(4)(B) & (b)(1)-(9), this Court has made clear that each of these exemptions "are narrowly construed

with doubts resolved in favor of disclosure," *Halpern v. FBI*, 181 F.3d 279, 287 (2d Cir. 1999) (internal quotation marks omitted). The exemptions "do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7-8 (2001).

In order to accomplish its goal of government transparency, FOIA places the burden on the government to demonstrate that an exemption applies to each piece of information it seeks to withhold. *Nat'l Council of La Raza v. DOJ*, 411 F.3d 350, 356 (2d Cir. 2005). It further requires that the government release "any reasonably segregable, nonexempt portions" of otherwise exempt documents. *Lykins v. Dep't of Justice*, 725 F.2d 1455, 1463 (D.C. Cir. 1984) (citing 5 U.S.C. § 552(b)). "[T]he focus of FOIA is information, not documents, and an agency cannot justify withholding an entire document simply by showing that it contains some exempt material." *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977). Put differently, "an entire document is not exempt merely because an isolated portion need not be disclosed . . . . [T]he agency may not sweep a document under a general allegation of exemption." *Vaughn v. Rosen*, 484 F.2d 820, 825 (D.C. Cir. 1973); *Hopkins v. United States Dep't of Housing & Urban Dev.*, 929 F.2d 81, 85-86 (2d Cir. 1991).

To satisfy its burden, the government must submit a so-called *Vaughn* declaration and index setting forth the bases for any claimed exemptions. *See Halpern*, 181 F.3d at 290-93 (citing *Vaughn*, 484 F.2d at 826-28). In recognition of the reality that federal agencies tend to "claim the broadest possible grounds for exemption for the greatest amount of information," agencies are required to produce "a relatively detailed analysis" of the withheld material "in manageable segments" without resort to "conclusory and generalized allegations of exemptions." *Id.*; *Vaughn*, 484 F.2d at 826-27. "Specificity is the defining requirement of the *Vaughn* index and affidavit." *Lawyers Committee for Human Rights v. INS*, 721 F. Supp. 552, 560 (S.D.N.Y. 1989); *Reader's Digest Ass'n, Inc. v. FBI*, 524 F. Supp. 591, 594-95 (S.D.N.Y. 1981) (agency affidavits falling short of document-by-document review of the material are inadequate to support agency's summary judgment motion). In particular, the *Vaughn* declaration must be sufficiently detailed to enable the court to determine whether any part of the exempt record is reasonably segregable. *Stolt-Nielsen Transp. Group LTD. v. United States*, 534 F.3d 728, 733-34 (D.C. Cir. 2008); *Mead Data Cent. Inc.*, 566 F.2d at 261; *Johnson v. Exec. Office for United States Attys.*, 310 F.3d 771, 776 (D.C. Cir. 2002) ("the agency must provide a detailed justification for its non-segregability"); *Lykins*, 725 F.2d at 1463; *Hopkins*, 929 F.2d at 85-86.

FOIA requires courts to undertake *de novo* review of an agency's claim of entitlement to an exemption. 5 U.S.C. § 552(a)(4)(B). As part of that *de novo* review, courts are required to consider segregability issues even where the parties have not specifically raised such claims. *Trans-Pac. Policing Agreement v. U.S. Customs Serv.*, 177 F.3d 1022, 1028 (D.C. Cir. 1999); *see also Hopkins*, 929 F.2d at 85-86 (vacating order where there was "nothing in the district court's opinion suggest[ing] that it considered" whether the privileged data was segregable).

A FOIA plaintiff will defeat a government's claim of exemption where: "(1) the *Vaughn* index does not establish that the documents were properly withheld; (2) the agency has improperly claimed an exemption as a matter of law; or (3) the agency has failed to segregate and disclose all non-exempt material in the requested documents." *Elec. Privacy Info. Ctr. v. Transp. Sec. Admin.*, 2006 U.S. Dist. LEXIS 12989, at *18 (D.D.C. Mar. 12, 2006).

B. Exemption 1

The force of these basic principles — the presumption in favor of openness, the government's obligation to articulate a detailed basis for withholding, and the court's duty to scrutinize the government's assertion *de novo* — does not flag upon the government's invocation of Exemption 1. *See* 120 Cong. Rec. S19806-19823 (daily ed. Nov. 21, 1974) (Statement of Sen. Bayh), *reprinted in* Subcomm. on Gov. Info. & Individual Rights, H. Comm. on Gov. Operations, 94th Cong. &

Subcomm. on Admin. Practice & Procedure, S. Comm. on the Judiciary, 94th Cong., Freedom of Information Act and Amendments of 1974 (P.L. 93-502) Source Book: Legislative History, Texts, and Other Documents 470 (Comm. Print 1975) (hereinafter, "FOIA Source Book") (rejecting the argument that "documents that are claimed to fall within the national security exemption [should be] treated differently than documents that are claimed to fall within the other exemptions"); *Lamont v. Department of Justice*, 475 F. Supp. 761, 767-768 (S.D.N.Y. 1979) (**"**[T]he requirement that 'any reasonably segregable portion of a record' shall be released to [a] FOIA claimant and the fact-specific phrasing of Exemptions 1 . . . indicate that Congress did not intend the Court passively to accept even the most sincerely advanced agency statements without having a factual basis supporting the claimed exemption.") (quoting 5 U.S.C. § 552(b)).

Exemption 1 allows the withholding of records that are "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy," and "are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). The current standard for classification is set forth in Executive Order 13,526, which lists four requirements for classifying information: first, an "original classification authority" must classify the information, *id.* § 1.1(a)(1); second, the information must be "owned by, produced by or for, or [] under the control of the United States Government,"

id. § 1.1(a)(2); third, the information must "fall[] within one or more of the categories of information listed in section 1.4" of the Executive Order, *id.* § 1.1(a)(3);[8] and fourth, an original classification authority must "determine[] that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security" and be "able to identify or describe the damage." *Id.* § 1.1(a)(4). "Damage to the national security," in turn, is defined as "harm to the national defense or foreign relations of the United States from the unauthorized disclosure of information, taking into consideration such aspects of the information as the sensitivity, value, utility, and provenance of that information." *Id.* § 6.1(l).

To sustain its burden under Exemption 1, the government must submit "affidavits [that] describe the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Wilner v. Nat'l Sec- Agency*, 592 F.3d 60, 73 (2d Cir. 2009); *ACLU v. DOJ*, 681 F.3d 61, 69 (2d Cir. 2012). The agency's justification for invoking Exemption 1 must be "logical" and "plausible."

[8] DoD contends that the Responsive Records fall within three of the eight protected categories of information set forth in Section 1.4 of the Executive Order: "military plans, weapons systems, or operations," Exec. Order 13,526 § 1.4(a); "intelligence activities (including covert action), intelligence sources or methods, or cryptology," *id.* § 1.4(c); and "foreign relations or foreign activities of the United States," *id.* § 1.4(d). *See* JA 1580-81, 1592, 1600.

Wilner, 592 F.3d at 73. "Logical" and "plausible" are not empty terms. A claim that defies common sense cannot be "logical." *ACLU v. CIA*, 710 F.3d 422, 431 (D.C. Cir. 2013) ("There comes a point where . . . court[s] should not be ignorant as judges of what [they] know as men [and women]."") (finding that the government's Exemption 1 justification was neither "logical" nor "plausible") (quoting *Watts v. Indiana*, 338 U.S. 49, 52 (1949)). And, as the Supreme Court has explained elsewhere, a claim is not "plausible" if the claimant has only adduced facts that establish a "mere possibility" of it being true. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). "Plausible" necessarily means something more than merely "conceivable." *Id.* at 1951.

Furthermore, under the plain language of the governing Executive Order, DoD must demonstrate that it is "logical" and "plausible" that disclosure "*reasonably* could be expected to result in damage to the national security." Exec. Order 13,256 § 1.1(a)(4) (emphasis added). In other words, a "logical" and "plausible" account of some remote harm to national security that could only theoretically materialize will not suffice, for the job of the court is "not to defer to [the classification authorities'] worst fears, but to interpret and apply . . . the Freedom of Information Act, which advances values important to our society, transparency and accountability in government." *ACLU v. DOD*, 389 F. Supp. 2d 547, 576 (S.D.N.Y. 2005).

To be sure, both Congress and the courts have recognized that the Executive branch has a comparative advantage over the judiciary in assessing threats to national security and that, accordingly, courts should accord "'substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.'" *ACLU v. DOJ*, 681 F.3d at 69 (quoting *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007)) (emphasis omitted). However, "'deference is not equivalent to acquiescence.'" *Azmy v. U.S. DOD*, 562 F. Supp. 2d 590, 597 (S.D.N.Y. 2008) (quoting *Campbell v. U.S. DOJ*, 164 F.3d 20, 30 (D.C. Cir. 1998)). Even in the national security context, courts must not "relinquish[] their independent responsibility" to review an agency's withholdings. *Goldberg v. U.S. Dep't of State*, 818 F.2d 71, 77 (D.C. Cir. 1987). Thus, even where the government claims an exemption based on national security, an agency's affidavits are only entitled to deference where they contain "reasonable specificity of detail rather than merely conclusory statements," and where "they are not called into question by contradictory evidence in the record.'" *Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982) (quoting *Halpern*, 629 F.2d at 148); *Campbell*, 164 F.3d at 30-31 (holding that categorical description of withheld material and categorical description of harm likely to ensue from its release is inadequate to justify withholding under Exemption 1); *see also* 120 Cong. Rec. S19806-19823 (daily ed. Nov. 21, 1974) (Statement of Sen. Kennedy), *reprinted in* FOIA Source Book

438 (While "we expect an agency head's affidavit to be given considerable weight in judicial determinations on classified material, . . . if the agency cannot produce enough evidence to justify keeping a document secret, then the document should be released."). "To accept an inadequately supported [Exemption 1] claim 'would constitute an abandonment of the trial court's obligation under the FOIA to conduct a *de novo* review,'" and would effectively reduce to surplusage Exemption 1's clause requiring courts to assess the propriety of classification. *King v. United States Dep't of Justice*, 830 F.2d 210, 219 (D.C. Cir. 1987) (quoting *Allen v. CIA*, 636 F.2d 1287 (D.C. Cir. 1980).

As this caselaw shows, Exemption 1 was not meant to reduce the courts to the original classification authority's rubber stamp. To the contrary, the current version of Exemption 1 embodies Congress's intention to disallow the kind of broad withholding sought by the government and endorsed by the district court's decision in this case. Rather, Congress's central motive was to rein in the Executive's abuse of its classification authority and to repudiate the excessive deference that courts were according classification decisions.

Specifically, Exemption 1, as it now exists, was designed to "close up [a] loophole" in the 1966 FOIA law that allowed "the mere rubberstamping of a document as 'secret' [to] forever immunize it from disclosure." 120 Cong. Rec. S19806-19823 (daily ed. Nov. 21, 1974) (Statement of Sen. Muskie), *reprinted in*

FOIA Source Book 448. The prior version of Exemption 1 permitted the Executive to withhold records that were "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." 5 U.S.C. § 552(b)(1) (1966). In 1973, the Supreme Court construed that language to prevent courts from examining the substantive propriety of classification; to claim this exemption, the Supreme Court held, the government needed only to show that the records were in fact classified. *See EPA v. Mink*, 410 U.S. 73 (1973). Congress immediately responded by overriding that decision. First, it amended Exemption 1 to require courts to assess whether the records are "in fact *properly* classified pursuant to [an] Executive order." 5 U.S.C. § 552(b)(1) (1976) (emphasis added). Second, to assist in assessing the substantive propriety of a classification decision, Congress authorized courts to review classified submissions *in camera*. 5 U.S.C. § 552(a)(4)(B). Third, Congress amended the statute to provide for *de novo* review of any claim of exemption. *Id.* These amendments were crafted, in the words of one member of Congress, to "give the Freedom of Information Act some teeth." 120 Cong. Rec. H10864-10875 (daily ed. Nov. 20, 1974) (Statement of Rep. Abzug), *reprinted in* FOIA Source Book 431.

Congress's primary purpose for amending Exemption 1 was the need to restrain excessive and arbitrary classification. *See, e.g.*, 120 Cong. Rec. S19806-19823 (daily ed. Nov. 21, 1974) (Statement of Sen. Kennedy), *reprinted in* FOIA

Source Book 438 ("[W]e know too well how the classification system has been overused and misused. We know too well that of the millions of documents marked 'secret,' most should rightfully be open to scholars, journalists, and the interested public."); *Id.* (Statement of Sen. Muskie), *reprinted in* FOIA Source Book 448 ("[This] amendment was a response to the increased reliance by former administrations to use national security to shield errors in judgment or controversial decisions."); *id.* at 449 (noting the Executive's "record of abuse" of its classification authority); *id.* (Statement of Sen. Barker), *reprinted in* FOIA Source Book 460-61 ("the Federal Government exhibits a proclivity for overclassification of information, especially that which is embarrassing or incriminating"). Against the backdrop of the Executive's perennial "misuse of . . . the national security exemption," Exemption 1's drafters highlighted the need for "an independent review of such exemptions to prevent agencies from making unilateral and arbitrary classification to violate the intent of the law." *Id.* (Statement of Sen. Clark), *reprinted in* FOIA Source Book 477-78.[9]

Congress voiced particular concern that excessive judicial deference would undermine the courts' intended role as a bulwark against overclassification. During the amendment process, Congress considered and explicitly rejected

[9] *See also* 120 Cong. Rec. H10864-10875 (daily ed. Nov. 20, 1974) (Statement of Rep. Udall), *reprinted in* FOIA Source Book 430 ("If there is a more transparent and bedraggled banner to wave in this post-Watergate era, it is the one bearing national security as a shield against the public's right to know.").

proposals that would have diminished the level of scrutiny that courts would apply to classification determinations. Thus, citing its view that the courts lacked the institutional competence to assess classification decisions, the Ford Administration sought an exemption that would have accorded "an express presumption that the classification was proper," and permitted disclosure only following a finding that classification was "arbitrary, capricious, or without a reasonable basis." Letter from President Ford to Honorable William S. Moorhead (August 20, 1974), *reprinted in* FOIA Source Book 380. But Congress "soundly rejected th[e] contention" that "judges lack the knowledge and expertise necessary to make decisions about disclosure in [national security] cases," and "refused to create a presumption in favor of agency classifications or to retreat from full *de novo* review." *Ray v. Turner*, 587 F.2d 1187, 1210 (D.C. Cir. 1978). When President Ford vetoed the amendments — again, based on his view that judges were ill-equipped to second-guess the classification authorities — "both Houses of Congress overwhelmingly voted to repudiate that contention by convincingly overriding the presidential veto," thereby "unambiguously express[ing]" their "belief that judges are competent to analyze the substance of matters allegedly pertaining to the national security." *Zweibon v. Mitchell*, 516 F.2d 594, 642 (D.C. Cir. 1975); *see also* 120 Cong. Rec. 17023 (1974) (Statement of Sen. Muskie) (rejecting the "outworn myth that only those in possession of military and

diplomatic confidences can have the expertise to decide with whom and when to share their knowledge"); 120 Cong. Rec. S19806-19823 (daily ed. Nov. 21, 1974) (Statement of Sen. Cranston), *reprinted in* FOIA Source Book 466 ("a judge is at least as competent as some Pfc or some low echelon civilian bureaucrat who classified the document in the first place."). The drafters of Exemption 1 understood the perils of the laxer arbitrary-and-capricious standard of review proposed by President Ford: allowing "courts to require disclosure only if the Government had no reasonable basis whatsoever to classify them . . . would make the secrecy stamp again practically determinative." *Id.* (Statement of Sen. Kennedy), *reprinted in* FOIA Source Book 438.[10]

The need for judicial vigilance in Exemption 1 cases is, if anything, more urgent today. There exists a "consensus that the executive habitually overclassifies."[11] Adam M. Samaha, *Government Secrets, Constitutional Law and Platforms for Judicial Intervention*, 53 UCLA L. Rev. 909, 940 (2006). Indeed,

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[10] *See also* 120 Cong. Rec. H10864-10875 (daily ed. Nov. 20, 1974) (Statement of Rep. Erlenborn), *reprinted in* FOIA Source Book 415-16 (noting that, while the "reasonable basis" standard of review may be appropriate in the regulatory context, where decisions are reached "as a result of adversary proceedings, public proceedings, and the making of a record," it is inappropriate in the classification context, where such decisions are made "on an arbitrary basis [by] some employee of the executive branch").

[11] *See also* Report of the Commission on Protecting and Reducing Government Secrecy, S. Doc. No. 105-2, at xxi (1997) ("The classification system . . . is used too often to deny the public an understanding of intelligence activities and other highly sensitive matters.").

intelligence officials estimate that between 50% and 90% of documents are improperly classified. Espionage Act and the Legal and Constitutional Issues Raised by WikiLeaks: Hearing Before the H. Comm. on the Judiciary, 111th Cong. 2 (2010) (hereinafter, "House WikiLeaks Hearing") at 84 (prepared statement of Thomas S. Blanton); *see also* Public Interest Declassification Board, *Transforming the Security Classification System: Report to the President* 1 (Nov. 2012) ("[P]resent practices for classification and declassification of national security information are outmoded, unsustainable and keep too much information from the public.").[12] In other words, when a court is confronted with an official claim that a record is classified because its release would likely harm national security, there is a *better than half chance* that this claim is erroneous. As one member of Congress has stated, "We are at a moment in our history where there is an overwhelming overclassification of material . . . . And the process itself is arcane, and there is no accountability." House WikiLeaks Hearing 4 (remarks of Rep. William D. Delahunt).

The point here is not that officials who overuse their classification authority are always, or even usually, acting in bad faith. To the contrary, courts have recognized that exaggerated claims to Exemption 1 are not necessarily evidence of "bad faith or lack of due diligence" but rather, a "reflect[ion] [of] an inherent

[12] *Available at* http://www.archives.gov/declassification/pidb/recommendations/transforming-classification.pdf.

tendency [by national security officials] to resist disclosure.'" *Lamont v. Department of Justice*, 475 F. Supp. 761, 771-772 (S.D.N.Y. 1979) (quoting *Ray v. Turner*, 587 F.2d 1187, 1195 (D.C. Cir. 1978)). As explained by one study:

> Numerous incentives push powerfully in the direction of classification, including the culture of secrecy that pervades some government agencies; the desire to conceal information that would reveal governmental misconduct or incompetence; the relative ease with which executive officials can implement policy when involvement by other officials, members of Congress, and the public is limited; the pressure to err on the side of classification rather than risk official sanctions or public condemnation for revealing sensitive information; and the simple press of business, which discourages giving thoughtful consideration to classification decisions.

Brennan Center for Justice, *Reducing Overclassification Through Accountability* (2001) (hereinafter, *Reducing Overclassification*) 2-3; *see also id.* at 22 (documenting the tendency by government officials to classify documents so as to artificially "confer additional importance to the information they are conveying," and quoting a former national security official as saying that "protection of bureaucratic turf accounts for as much as 90% of classification").

By contrast, there are few incentives — beyond forced compliance with FOIA — for the Executive to refrain from overclassification. Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 Admin L. Rev. 131, 148-55 (2006) (explaining that the "internal checks on secrecy are minimal"); *Reducing Overclassification* 3 (noting that "classification is an easy exercise that can be accomplished with little effort or reflection, that there

is no accountability for overclassifying," that "classifiers receive insufficient training in the limits of their authority," and that "those who have access to classified information are neither encouraged to challenge improper classification decisions nor rewarded for doing so"). In bolstering Exemption 1, Congress understood that classification authorities would "do a better job, and a more honest and thoughtful job, of classifying documents in the future if they know their decision may be reviewed by an independent judiciary." 120 Cong. Rec. S19806-19823 (daily ed. Nov. 21, 1974) (Statement of Sen. Cranston), *reprinted in* FOIA Source Book 467; *see also* Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. Rev. 909, 940 (2006) (noting that the prospect of judicial review may prompt more careful classification decisions); David McCraw and Stephen Gikow, *The End to an Unspoken Bargain? National Security and Leaks in a Post-Pentagon Papers World*, 48 Harv. C.R.-C.L. L. Rev. 473, 501 (2013) ("The prospect of facing more and more searching *in camera* review would check the natural instinct of an administration to classify more rather than less.").

In sum, Congress passed the current iteration of Exemption 1 in an effort to curb the Executive's abuse of its classification authority. Its solution was to enhance the court's authority to review and reverse classification decisions. 120 Cong. Rec. S19806-19823 (daily ed. Nov. 21, 1974) (Statement of Sen. Cranston),

reprinted in FOIA Source Book 466 ("Under [the amended Exemption 1], our courts, not our bureaucrats, will have the final say as to what information can legitimately be kept secret without violating the basic right of a democratic people to know what is going on in their Government."). The decision below, with its rote acceptance of vague, sweeping, or far-fetched justifications for withholding, defeats that Congressional purpose. It should not be permitted to stand, lest FOIA generally, and Exemption 1 in particular, risk continued emasculation.

II. DoD Failed To Meet Its Burden Under Exemption 1

A. The District Court Erred In Crediting DoD's Claim That The Responsive Records Could Incite Anti-American Sentiment Or Aid Extremist Recruitment

Basing its decision entirely on the declaration by Major General Karl R. Horst, JA 1295-1303, the district court held it "both logical and plausible" that "extremists would utilize images of al-Qahtani (whether in native or manipulated formats) to incite anti-American sentiment, to raise funds, and/or to recruit other loyalists." SPA 25-26. Given the purposes of FOIA, and the limitations of Exemption 1, discussed above, the problems with this finding are obvious. Instead of an explanation as to how any given record, or at least each category of records at issue would provoke the United States' enemies, Horst resorts to the sweeping proposition that *any* depiction of *any* detainee in U.S. custody endangers national security because (1) such depictions are inherently provocative and, more broadly,

(2) even innocuous depictions could be manipulated to stir up hostility to the United States.

There are numerous problems with Horst's contention. First, the record flatly contradicts his unqualified position: DoD routinely discloses images of detainees, exposing the implausibility of his claim that any such depiction could reasonably be expected to harm national security. Second, DoD's position is limitless: by Horst's account, virtually any record could be refashioned into a propaganda piece. More troubling, permitting the government to classify anything "our enemies could find or choose to characterize . . . as inflammatory," JA 1302, effectively creates a unfettered "heckler's veto:" it permits the Executive to disregard the people's right to a transparent government whenever there is a distant risk that someone, somewhere could respond with violence. *Cf. Gernetzke v. Kenosha Unified Sch. Dist. No. 1*, 274 F.3d 464, 467 (7th Cir. 2001) (to suppress speech "on the basis of the angry reaction that it may generate is precisely what the 'heckler's veto' cases . . . forbid"). Given that almost every facet of U.S. policy inspires enmity in some corner, the government could always justify withholding on such grounds. Finally, and perversely, the force of this justification reaches its apex where the information the government seeks to withhold conceals egregious violations of international norms. Embracing DoD's position would thus stymie FOIA's aim of restraining the government from concealing illegal conduct behind

its classification stamp. *See Ray v. Turner*, 587 F.2d 1187, 1210 (D.C. Cir. 1978) (Congress amended Exemption 1 to prevent the Executive from classifying information that "is embarrassing or incriminating").

With the exception of the FCE Video, discussed *infra*, nothing in the Horst declaration addresses how the records CCR seeks would endanger the safety of U.S. or Afghan personnel. Rather, Horst resorts to false analogies and vague generalizations, which the district court nonetheless accepted at face value. For example, Horst contends that "[p]rior experience from the release of photographs and information about detainees has demonstrated the harm to national security that the release of the Withheld Videotapes and Photographs could cause." JA 1299-1300. But the "prior experience" on which he bases this judgment — unrest following the dissemination of Abu Ghraib photos in 2004, the reports regarding the alleged mishandling of Korans at Guantánamo in 2005, the 2012 release of a video depicting Marines urinating on Taliban corpses, and details about a Koran burning incident in 2012 — are among the worst instances of abuse and most troubling displays of cultural insensitivity by the United States that have emerged during the war on terror. DoD has not offered any account as to how any — much less all — of the varied records that CCR seeks would cause similar unrest. In fact, DoD has taken the *opposite* position throughout this litigation, not only dismissing as mere "speculat[ion]" CCR's contention that the Responsive

Records "may depict illegal conduct, evidence of mistreatment, or may otherwise be embarrassing to DOD," Gov't Br. at 18 (Dkt. 37); *see* Exec. Order. No. 13526 § 1.7(a)(1)-(2) (prohibiting classification to conceal unlawful acts or to prevent embarrassment), but specifically certifying that, unlike the incendiary images that previously caused unrest, the Responsive Records here do not contain anything that would constitute a "violation[] of law" or would cause "embarrassment to a person, organization, or agency." JA 1287. The court, for its part, agreed — albeit based on an insufficient record — that the records "do not document any abuse or mistreatment."[13] However, if the records do not depict any abuse or mistreatment, then DoD's reliance upon the impact of the disclosure of images of torture in Abu Ghraib or the desecration of enemy soldiers' bodies is misplaced; if, on the other hand, they do depict abuse or mistreatment, they cannot be classified on account of the anger that would appropriately accompany the disclosure of such human rights abuses. Exec. Order. No. 13526 § 1.7(a)(1)-(2).[14]

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[13] The court appears to have made this finding with respect to all the Responsive Records despite stating that it reviewed an *ex parte* individualized description only of the FBI Videos. SPA 29.

[14] This case is also readily distinguishable from *Judicial Watch, Inc. v. United States DOD*, 715 F.3d 937 (D.C. Cir. 2013), which upheld the CIA's claim to withhold images of Osama bin Laden's body. The CIA's declaration in that case gave detailed reasons as to how releasing those specific images might cause harm to national security. None of those reasons are applicable here. *See id.* at 942 (noting, for example, that extremists had already mobilized around bin Laden's "martyrdom" and attacked the appropriateness of his burial at sea); *id.* at 943 ("[T]his is not a case in which the declarants are making predictions about the

Having failed to provide a justification specifically tailored to the records CCR seeks, Horst conclusorily claims that *any* image of a detainee in U.S. custody could reasonably be expected to cause harm to national security. JA 1301 ("the 53 FBI Videotapes, which portray Mr. al-Qahtani inside his cell during detention, and the photographs of Mr. al-Qahtani, could also be used to foment anti-American sentiment *given that they all depict Mr. al-Qahtani in U.S. custody*.") (emphasis added); JA 1302 ("[K]nowing the [image] was obtained from the released video-recordings in and of itself would be inflammatory given the sensitivities surrounding the U.S. detention of foreign nationals."). DoD may not sustain its burden with such a sweeping claim. *See King v. United States Dep't of Justice*, 830 F.2d 210, 219 (D.C. Cir. 1987) ("categorical descriptions of redacted material coupled with categorical indication of anticipated consequences of disclosure" was "clearly inadequate").

Indeed, the record below squarely contradicts DoD's alarmist assertion that any disclosure of a detainee's image would "fuel[] civil unrest, endanger the lives of U.S. and Coalition forces, and provid[e] a recruiting tool for insurgent and violent extremist groups thereby destabilizing partner nations." JA 1303. As CCR

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consequences of releasing just any images. Rather, they are predicting the consequences of releasing an *extraordinary set of images*, ones that depict American military personnel burying the founder and leader of al Qaeda.") (emphasis added). Moreover, unlike here, it was undisputed that the images of bin Laden were not classified to "shield wrongdoing or avoid embarrassment." *Id.*

demonstrated, DoD routinely releases or permits the release of images of Guantánamo detainees without incident. For example:

- DOD has released numerous images of Guantánamo detainees engaged in various activities, including receiving medical treatment, playing soccer, and getting haircuts. JA 788-800, 834.
- DOD has granted the Associated Press permission to publish photographs of detainees. JA 665-72.
- In another FOIA suit, DOD declassified and released images of at least four detainees. JA 804.
- Through discovery for a Military Commission proceeding, the government has released a video of Canadian officials interrogating a Canadian detainee at Guantánamo. The recording shows the detainee's face and includes audio of the detainee's voice. JA 782-86.
- DOD has permitted the ICRC to take photographs of detainees to be provided to detainee families. According to the ICRC, while these photographs are "not meant to be used in the public realms . . . the ICRC is not in a position to control their usage after they have been received by the families of the detainees." Several such images have been widely disseminated. JA 661-62.

The district court accorded these disclosures no weight because the detainee is only identifiable in a few of them. SPA 27. That, however, is completely beside the point.[15] There is nothing in the Horst declaration that even suggests, let alone establishes in a "logical" or "plausible" manner, that the propaganda value of a photograph or video is appreciably greater where the detainee is identifiable. And,

[15] The district court's finding was also factually inaccurate. The court stated that the only identifiable detainee images released were those taken by the ICRC or those used for border control and military commission trials. SPA 27. That finding ignores at least four other identifiable detainee images released pursuant to a FOIA request. JA 804.

even if that were the case, it would be extraordinarily easy for an enemy propagandist to graft a face onto a detainee's featureless image.[16] The fact that the government continues to safely release these images renders implausible and illogical its claim that disclosing any detainee image will endanger national security.

Moreover, DoD's justification fails for a separate reason: it is utterly without limit. Endorsing DoD's rationale would accord the government the right to withhold any record that an enemy propagandist could doctor so as to paint the United States in a negative light. It is difficult to imagine a record — whether in image or document form — that could not be manipulated in that way: any picture of U.S. personnel could be pixilated or photoshopped to portray offensive conduct; any document could be edited in Adobe to introduce provocative anti-Muslim statements.[17] Even images of the Capitol building have been refashioned into

[16] Indeed, Horst himself argues that even innocuous images might harm national security because they could be "manipulated" to suggest that al-Qahtani was subject to criminal or abusive acts. JA 1301-02 (claiming that extremist groups could "overlay staged audio which falsely indicates the mistreatment of the detainee," or "pixelate[] [video-recordings] . . . to alter the images of the detainee's face or person to show physical signs of mistreatment"). In any event, there are numerous free websites that enable face grafting. *See, e.g.*, http://www.facedub.com/.

[17] *See, e.g.*, wikiHow, *4 Ways to Edit a PDF File*, *available at* http://www.wikihow.com/Edit-a-PDF-File.

propaganda pieces and used by Islamic militants to encourage violence.[18] Horst effectively admits as much: according to his declaration, *any* image — no matter how innocuous — could be transformed into propaganda simply by splicing the released records with "non-released footage, such as anti-U.S. rallies or inflammatory speeches." JA 1302.[19] DoD's position, then, makes Exemption 1 as far-reaching as the enemy propagandist's imagination. But this position, which the district court expressly accepted, SPA 25-26, is fundamentally incompatible with the principle, discussed above, that all exemptions must be construed narrowly. *See King*, 830 F.2d at 219 ("[A]ffidavits cannot support summary judgment if they are conclusory . . . or if they are too vague or sweeping.") (internal quotation marks omitted). It also eviscerates the rule that the government must articulate a "plausible" account of "reasonably expected" harms to national security, not merely unsubstantiated speculation about remote but theoretically conceivable ones. *Cf. Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951 (2009) (a claim that is merely "conceivable" does not meet the threshold for "plausibility").

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[18] *See, e.g.*, *Apocalypse Washington*, Daily Mail, May 30, 2008 (describing a computer altered image of the Capitol building in ruins posted to jihadist website).

[19] DoD's rationale would also severely weaken the requirement that the government release all "reasonably segregable" portions of otherwise exempt documents. Generally, the government segregates by redacting exempt material. If, however, the government's rationale were accepted, it could evade the segregability requirement by simply pointing out the fact that that anyone with elementary computer skills can convert a PDF into a Word.doc, lift out the redacted marking, and replace it with incensing content.

Equally limitless is DoD's position that the government may properly classify any record that "our enemies could find or choose to characterize . . . as inflammatory." JA 1302. Almost every aspect of U.S. foreign policy is regarded as inflammatory by some hostile entity.[20] By DoD's logic, the government could classify records pertaining to any aspect of every, or almost every, U.S. policy, including, for example: U.S. support for Israel, which has certainly done damage to the U.S.'s image in the Arab world;[21] continued U.S. aid to Egypt, which has alienated the Egyptian Muslim Brotherhood;[22] U.S. support for free trade agreements, which have inspired violent protests abroad;[23] the history of the United States' involvement in South and Central America, which has been exploited by

[20] *See e.g.*, Paul Hollander, *The New Virulence and Popularity*, in *Understanding Anti-Americanism* 6 (Paul Hollander, ed.) (2004) (explaining that anti-Americanism has a litany of causes, included "American economic policies, unfair trade practices, overbearing political dominance, American military presence, insults to national pride, the subversion of cultural traditions by American mass entertainments, rapacious energy policies, and so forth").

[21] *See* Lenore G. Martin, *Assessing the Impact of U.S.-Israeli Relations on The Arab World* (July 2003).

[22] *See Morsy Backers Threaten Escalation Against Embassies of "Pro-Coup" States*, Egypt Independent, July 15, 2013, *available at* http://www.egyptindependent.com/news/morsy-backers-threaten-escalation-against-embassies-pro-coup-states.

[23] *See Troops Patrol Colombian Capital After Rioting*, The Guardian, Aug. 30, 2013 (describing violent protest against free trade agreement with the United States).

anti-American regimes to bolster their legitimacy;[24] or U.S. assistance in building schools and hospitals in Afghanistan, which has incited retaliatory attacks.[25] The government's desire to avoid anger and enmity is not, and cannot be, an adequate basis for concealing information from the public: to hold otherwise would allow the speculative prospect of a violent reaction by an offended group to circumscribe the boundaries of the public's right to a transparent government, rendering FOIA applicable only in the least compelling circumstances. *Cf. ACLU v. DOD*, 389 F.Supp.2d 547, 575 (S.D.N.Y. 2005) ("Our nation does not surrender to blackmail, and fear of blackmail is not a legally sufficient argument to prevent us from performing a statutory command.").

DoD's contention that the government may classify anything that might incite our enemies is deeply problematic for another reason: the force of that justification is strongest where the government's conduct most clearly violates international norms. Put differently, under DoD's logic, the more egregious the conduct, the more persuasive the grounds for withholding. It is wholly expected and appropriate that human rights abuses against foreigners in U.S. custody will inspire anger at home and abroad; yet, were DoD to prevail here, the government

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[24] *See generally*, Michael Shifter, *Tracing the Roots of Anti-Americanism in Latin America*, Georgetown J. of Int'l Affairs 107 (Summer/Fall 2004).

[25] *See Acid Attacks, Poison: What Afghan Girls Risk By Going to School*, CNN.com, Aug. 2, 2012, *available at* http://www.cnn.com/2012/08/02/world/meast/cnnheroes-jan-afghan-school/.

would be permitted to sweep such actions under the rug. In fact, the district court demonstrated the perils of this logic, citing the fact of al-Qahtani's torture as a basis for upholding classification. *See* SPA 27 ("the written record of [al-Qahtani's] torture may make it all the more likely that enemy forces would use al-Qahtani's image against the United States"). This reasoning, which uses the impropriety of the government's actions as a justification for secrecy, turns FOIA on its head. FOIA was enacted to *disable* the Executive from shrouding its transgressions in secrecy. *See supra* Section I.b (citing, *e.g.*, *Ray v. Turner*, 587 F.2d 1187, 1210 (D.C. Cir. 1978)).

In sum, DoD's speculative argument that releasing any detainee image could trigger unrest or aid extremist recruitment is implausible. DoD's practice of releasing detainee photos undermines that claim. And the logic animating this claim is offensive to the purposes of FOIA: the government's policy of indefinite detention without charge and its use of torture may anger our enemies — with or without the prompting of further disclosures — but they are also subjects of profound public interest. The offensiveness of these practices to some simply cannot trump the public's right to "know what their government is up to." *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989). The decision of the district court must therefore be reversed.

B. The Court Erred In Crediting DoD's Assertion That Releasing the Records Would Jeopardize Cooperative Relationship With Detainees

DoD asserts that releasing any portion of the Responsive Records could harm national security by arousing suspicions that al-Qahtani cooperated with U.S. authorities. According to DoD's declarant, Rear Admiral Woods, disclosing al-Qahtani's cooperation — or even creating a perception thereof — could subject al-Qahtani and his family to reprisals, cast doubt on the commitment of the United States to protecting informants, and deter others from providing valuable intelligence. JA 1283-86. Respectfully, this contention is insufficiently unsupported, as a matter of law, and fails this Court's logic and plausibility test. This is so for three reasons.

First, Woods offers no explanation whatsoever as to how disclosing the records that CCR seeks would arouse suspicions that al-Qahtani was a cooperator. Second, even if disclosure of detainee images could arouse such suspicions, that concern disappears where, as here, DoD has already officially acknowledged the detainee's cooperation. And third, DoD's blanket claim that releasing *any* detainee images will chill cooperation is belied by its practice of regularly releasing such videos and images.

Woods' recital of the damage to intelligence gathering that could result from releasing the Responsive Records is missing a critical step, without which his

account is neither "logical" nor "plausible." Woods claims that "[h]uman intelligence is an essential piece of the strategic intelligence being gathered to protect the United States from terrorist threats," JA 1283; that "cooperation of intelligence sources at JTF-GTMO remains critical to the ongoing human intelligence efforts," JA 1283-84; that because known or suspected cooperators may be subject to reprisals, sources will not cooperate unless they can be certain that the United States will maintain the confidentiality of that relationship, JA 1284; and that if "a potential source has any doubt about the government's ability to protect cooperative relationships . . . sources, present and future, will be less willing to cooperative . . . [which] would seriously affect the national security of the United States. JA 1285. Thus, Woods contends, "current and future sources must be confident that the government can and will do everything in its power to prevent the disclosure of any information" — including detainee images — "that suggests their cooperation with the United States." JA 1284.

The hole in this argument is glaring: nowhere does Woods offer any fact, based either on experience or on his expertise, regarding how disclosing any, much less all, of the varied images and videos that CCR seeks would "suggest [al-Qahtani's] cooperation." In the one paragraph that comes closest to approaching an "explanation" of the causal link between the disclosure here sought and potential reprisals, Woods claims that "[t]he public release of detainee images by

the United States could reasonably be expected to lead to reprisals against the depicted detainee's family or associates by enabling hostile persons or organizations to link the family or associates to the detainee." JA 1284. But absolutely no light is shed on how the images in this case — *e.g.*, a mug-shot or video of al-Qahtani being forcibly dragged from his cell — would suggest that he had engaged in any reprisal-worthy conduct.

Likewise, the declaration posits that "the release of any detainee's image" might jeopardize the detainee's life or safety because:

> If released without trial, the detainee may be considered an informant; if released after trial or after serving a sentence, the detainee may be considered to have provided useful information to the United States as a means to obtain a shorter sentence or better conditions of detainment.

JA 1284-85. But this sentence does nothing to further DoD's assertion. In both of these scenarios, the inference of cooperation arises from something wholly unrelated to the disclosure of the detainee's image: in the first case, the inference results from the fact of release without trial; in the second, it results from a speculated *quid pro quo* (early release in exchange for cooperation). But leaving aside that this extraordinary statement would argue against *ever* disclosing the release of *any* detainee, though that is something that DoD routinely does,[26] it does not even purport to address the individual documents here at issue. That is, DoD

[26] *See, e.g.*, DoD News Release: Detainee Transfer Announced, Dec. 5, 2013, *available at* http://www.defense.gov/releases/release.aspx?releaseid=16404.

has failed to set forth any reason – much less a logical or plausible one – as to why the disclosure of a still mug-shot, the FBI Videos, or the FCE Video would reveal al-Qahtani to be a cooperator or otherwise cast doubt on the government's commitment to protecting the confidentiality of its informants.

Even if DoD could explain how mere disclosure of a detainee's image would automatically suggest his cooperation, its claim that *these* records ought not be released on this basis is implausible for a second reason: DoD has officially acknowledged that al-Qahtani cooperated with U.S. authorities. For example, in a news release in June 2005, DoD detailed the "valuable intelligence information" that al-Qahtani allegedly provided to interrogators, including inculpatory information about 30 of bin Laden's alleged bodyguards at Guantánamo. JA 309-10. Likewise, a declassified report of the Office of the Inspector General contains an entire section entitled "Al-Qahtani Becomes Fully Cooperative" detailing the "significant intelligence" that al-Qahtani allegedly provided. JA 1230-33.

The district court erroneously assigned no significance to these acknowledgments, an error that stems from its misapplication of the so-called "official disclosure doctrine." That doctrine holds that an agency does not automatically waive its right to assert Exemption 1 when the requested information enters the public domain; rather, such waiver only occurs where the requested information is "(1) as specific as the information previously released; (2) matches

the information previously disclosed, and (3) was made public through an official and documented disclosure." *Wilson v. CIA*, 586 F.3d 171, 186 (2d Cir. 2009); SPA 28. The district court concluded that, because DoD never released the specific images and videotapes CCR seeks, it could not have waived its right to claim an Exemption 1 withholding.

But CCR has never argued that, by disclosing al-Qahtani's cooperation, DoD waived its right to withhold the images and videotapes of al-Qahtani. Rather, its point, which the district court failed to understand or consider, is that, because it officially acknowledged al-Qahtani's cooperation, DoD cannot now argue that the information here at issue should not be disclosed because it would "suggest" a widely-known fact. That is, it is neither "logical" nor "plausible," to use this Court's standards, to conclude that the disclosure of these materials would, by suggesting al-Qahtani's cooperation (even assuming that this inference could be drawn from these documents), somehow damage national security when it has itself disclosed in no uncertain terms the fact of al-Qahtani's cooperation. As one court put it, "[i]t is a matter of common sense that the presence of information in the public domain makes the disclosure of that information less likely to 'cause damage to the national security . . . [I]f the information has already been disclosed and is so widely disseminated that it cannot be made secret again, its subsequent

disclosure will cause no further damage to the national security." *Wash. Post v. DOD*, 766 F.Supp. 1, 9 (D.D.C. 1991).[27]

Finally, again, DoD's blanket claim that releasing any of the Responsive Records would dissuade current and future detainees from cooperating is belied by the fact that DOD has repeatedly released other detainee images. *See supra*. The district court improperly discounted these prior releases based on its finding that, "[w]ith the exception of (1) photographs used for border control and military commission trials and (2) photographs taken by the ICRC and released to a consenting detainee's family, the Government has not disclosed any images in which a specific detainee is identifiable." SPA 27. That statement is factually

[27] Although CCR does not invoke the official disclosure doctrine *per se*, it bears noting that, had CCR sought records that verified al-Qahtani's cooperation instead of images and videotapes that merely "suggested" it, DoD — having already officially disclosed that fact — would be barred from invoking Exemption 1. To hold that DoD may invoke Exemption 1 to conceal records that may *indirectly* divulge what the government has already explicitly acknowledged, however, mocks the logic animating the doctrine. Moreover, unlike other cases in which courts have rejected attempts by FOIA requesters to invoke the official disclosure doctrine, this is not a case where the publicly disclosed information (al-Qahtani's cooperation) was the product of "[u]nofficial leaks and public surmise," *Afshar v. Dep't of State*, 702 F.2d 1125, 1130 (D.C. Cir. 1983), "media speculation," *Pub. Citizen v. Dep't of State*, 11 F.3d 198, 201 (D.C. Cir. 1993), or "a disclosure made by someone other than the agency from which the information is being sought," *Frugone v. CIA*, 169 F.3d 772, 774 (D.C. Cir. 1999). Nor is this a case where the information the government ultimately seeks to shield (*i.e.*, information *hinting* at cooperation) is more specific than that which has already been released (*i.e.*, information *confirming* cooperation). *ACLU v. United States DOD*, 628 F.3d 612, 620-21 (D.C. Cir. 2011). It follows that, under a faithful application of the official disclosure doctrine, the government has waived its right to use *as a justification for withholding* its interest in concealing al-Qahtani's cooperation.

incorrect; it overlooks evidence in the record that DoD has declassified and released at least four detainees' identifiable images. JA 804. But even if the district court's observation were correct, the fact that DoD publicly released *any* identifiable images — as opposed to, for example, releasing images to a detainee's defense counsel pursuant to a protective order — suffices to undermine DoD's assertion that it must withhold all identifiable detainee images.

In sum, DoD's blanket claim that releasing any of the Responsive Records would adversely impact intelligence gathering is neither logical nor plausible. Woods fails to explain how releasing any, much less all, of the Responsive Records could suggest al-Qahtani's cooperation. And, even if Woods could provide a particularized account, it defies common sense that any additional harm would flow from obliquely affirming a fact that the DoD has explicitly disclosed — *i.e.*, the fact of al-Qahtani's cooperation.

C. DoD's Justifications for Withholding the FCE Video Are Neither Logical Nor Plausible

In a footnote, and without any explanation, the district court also found plausible DoD's claim that (1) the FCE video "could result in the development of tactics and procedures to thwart the actions of the FCE team, thereby placing the safety and welfare of the members in jeopardy," JA 1286; and that (2) their disclosure could harm national security by "encouraging disruptive behavior" by DoD detainees "simply to confirm their continued resistance to the United States in

the ongoing armed conflict." JA 1309-10; SPA 26. Neither claim justifies the blanket withholding of the FCE videos.

First, DoD's claim that releasing any portion of the FCE video would enable detainees to develop countermeasures is undercut by record evidence in the form of extensive public disclosures, previously made, detailing FCE team tactics and procedures. These official disclosures include:

- Extensive detail about the function that each FCE team member plays. JA 368, 551.
- Extensive details about the equipment FCE teams use, the orders and instructions they give to detainees before entering the cell, and their use of pepper spray as a show of force. JA 368, 551-52.
- An acknowledgement that the FCE practices in Guantánamo are "[s]imilar to procedures used in detention facilities throughout the United States," JA 368.
- Numerous photographs of training sessions and demonstrations of forced cell extraction techniques that show techniques for restraining inmates, the positions of guards, and the equipment used during FCEs. JA 409-12.

These disclosures make DoD's blanket withholding of the FCE videotape unsupportable under Exemption 1. *Wash. Post v. DOD*, 766 F.Supp. 1, 9 (D.D.C. 1991) ("[I]f the information has already been disclosed and is so widely disseminated that it cannot be made secret again, its subsequent disclosure will cause no further damage to the national security."); *Founding Church of Scientology v. NSA*, 610 F.2d 824, 831-32 (D.C. Cir. 1979) (withholding of "well

publicized" information would frustrate policies of FOIA without advancing countervailing interests).

Even if the Court were to accept DoD's contention that the FCE Video contained information that could enable future detainees to develop tactics to thwart FCE teams, that contention does not justify withholding the FCE Video in its entirety. FOIA specifically mandates the disclosure of all reasonably segregable portions of otherwise exempt documents. 5 U.S.C. § 552(b). Here, DoD's own description of the FCE Video indicates that there are reasonably segregable portions: for example, parts of the FCE Video show only the FCE team congregating outside the presence of al-Qahtani, *see* JA 1292; other parts show al-Qahtani alone in his cell. DoD has not provided any explanation — much less a logical or plausible one — as to how a detainee could use those segments to develop counter-tactics. *See, e.g.*, *Int'l Counsel Bureau v. DOD*, 723 F.Supp.2d 54, 63-64 (D.D.C. 2010) (finding DoD failed to show that there were no segregable portions of an FCE video where "[t]he Department's declarations . . . offer no explanation of how . . . portions of the videos [] during which no detainees would be present [] would permit detainees to develop counter-tactics."). The district court's failure to require such an explanation, or otherwise make any segregability finding was reversible error. *See Hopkins*, 929 F.2d at 85-86 (vacating order where there was "nothing in the district court's opinion suggest[ing] that it

considered" segregablility); *Krikorian v. Department of State*, 984 F.2d 461, 467 (D.C. Cir. 1993) ("A district court that simply approve[s] the withholding of an entire document without entering a finding on segregability, or the lack thereof, errs.") (internal quotation marks omitted); *see also Greenberg v. United States Dep't of Treasury*, 10 F.Supp.2d 3, 14-15 (D.D.C. 1998) (ordering that CIA to explain "more specifically" why portions of records withheld in full are not reasonably segregable).

DoD's second assertion of harm — that disclosing the FCE Video would "encourag[e] disruptive behavior" by detainees seeking "to confirm their continued resistance to the United States," JA 1310 — fails for the same reason. DoD has never explained how releasing portions of a video that does not depict detainee-FCE Team interaction — for example, the segments depicting al-Qahtani alone in his cell and the FCE team congregating outside al-Qahtani's presence — would provide detainees a platform to publicize their resistance. This overly-speculative justification also falls short of stating a "plausible" articulation of a "*reasonably* expected" harm to national security. Exec. Order 13,256 § 1.1(a)(4) (emphasis added). The frequency of forced-cell extractions evidences that there are many reasons why detainees resist leaving their cells.[28] It may be hypothetically conceivable that some future detainee could risk being injured by an FCE team, not

[28] *See, e.g.*, Inside the Force Feeding Chamber at Guantanamo, *Daily Mail*, July 1, 2013.

because he fears interrogation or wishes to make a political statement, but in order to capture the moment for posterity in the unlikely event that, after years of litigation, a court grants a FOIA request. But such far-fetched speculation does not cross the line from "conceivable to plausible." *Transhorn, Ltd. v. United Techs. Corp.*, 502 F.3d 47, 50 (2d Cir. 2007) (quoting *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007)).

In sum, DoD has failed to provide a "logical" or "plausible" justification for withholding the FCE Video in its entirety. The Court should therefore order the video's release or remand to the district court with instructions to conduct an appropriate segregability analysis.

D. None of DoD's Remaining Arguments Establish a Plausible or Logical Basis for Withholding the Responsive Records

Though the district court did not address this contention, DoD claimed below that disclosing *any* photographs or videos of detainees can reasonably be expected to cause serious harm to national security by creating a means by which detainees can covertly communicate with their associates and terrorist organizations. JA 1307-08. This argument fails for a number of reasons. First, of course, DoD's argument again does not focus on the specific records that CCR seeks, or attempt to show how mug-shots and innocuous videos of al-Qahtani in his cell could enable covert communication; instead, DoD advances a *per se* rule that would, under the government's logic, apply to any and every visual

representation. Such a rule is inconsistent with the government's own conduct, as DoD has repeatedly released detainee photographs. *See supra*. Nor does DoD explain how a detainee might convey harmful messages through the release of images that, like these, are more than a decade old. But again, even if detainees were able to communicate through some of the records sought, DoD fails to explain why it was impossible to segregate the videotapes and photographs in a manner that would eliminate such a risk. *See Nat'l Immigration Project of Nat'l Lawyers Guild v. U.S. DHS*, 842 F.Supp.2d 720, 725n.5 (S.D.N.Y. 2012) ("[W]here agencies claim that non-exempt material is not reasonably segregable from exempt material, they must provide a 'detailed justification' for that claim.").

DoD also argued below that releasing the records at issue would subject al-Qahtani to "public curiosity" in violation of the Geneva Conventions, thereby casting doubt upon the United States' compliance with its treaty obligations. JA 1308-09; *see* Geneva Convention Relative to the Treatment of Prisoners of War art. 13, Aug. 12, 1949, 6 U.S.T. 3316, 74 U.N.T.S. 135 (a detaining power must protect prisoners of war "particularly against . . . insults and public curiosity"); Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 27, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (same). But, leaving aside the irony of the same government that has admitted to torturing al-Qahtani invoking the Geneva conventions in an effort to conceal its purportedly innocuous

conduct from the public, its expressed concern for al-Qahtani's rights is irrelevant where, as here, he consented to the release of his images. JA 37-38.[29] Indeed, al-Qahtani has not just consented, he has affirmatively expressed his wish that the images be disclosed "so that the American public can see for itself" the torture he has undergone. *Id.* Given al-Qahtani's wishes, disclosing the Responsive Records is perfectly consistent with the Geneva Convention, the purpose of which is "furthering humane treatment of captives." *ACLU v. DOD*, 543 F.3d 59, 90 (2d Cir. 2008) ("[The Geneva Conventions] were designed to prevent the abuse of prisoners. Neither treaty is intended to curb those who seek information about prisoner abuse in an effort to help deter it.").

Finally, although the district court stated that it "did not reach the Government's invocation of al-Qahtani's privacy interest," it nonetheless found that his "interest in avoiding further privacy invasions is entitled to considerable weight." SPA 27. This conclusion is in error. While Exemption 6 and 7(C) permit withholding of information that constitutes an invasion of privacy,[30] it is

[29] In fact, DOD implicitly acknowledges the effect of such consent by allowing the ICRC to photograph consenting Guantánamo detainees. JA 1311.

[30] Exemption 6 exempts from disclosure information from personnel, medical, or other similar files that "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Exemption 7(C) exempts from disclosure information collected for law enforcement purposes that "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(7)(c).

well-established that a privacy interest under FOIA may be waived. *DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 763, 771 (1989) (while identity of the requesting party generally has no bearing on the merits of a FOIA request, there is an "except[ion] for cases in which the objection to disclosure is based on a claim of privilege and the person requesting disclosure is the party protected by the privilege"); *Computer Prof'ls for Soc. Responsibility v. U.S. Secret Serv.*, 72 F.3d 897, 904 (D.C. Cir. 1996) (ordering disclosure of information related to eight individuals who provided waivers of their privacy rights); *see also AP v. United States DoD*, 554 F.3d 274 (2d Cir. 2009) (Guantánamo detainees' privacy interest in concealing their names "does not empower the government to prevent such public disclosure by the detainees themselves based on this recognized privacy interest"). Again, here, al-Qahtani has waived his privacy interest by directing CCR — who are also his habeas attorneys — to pursue this FOIA action. *See* JA 37-38 (counsel's attestation that al-Qahtani is "aware that CCR is seeking the release of photographs, videotapes, and other records of him" and that he "strong supports CCR's FOIA lawsuit").

The district court faulted CCR for failing to produce a formal waiver and found that it was "highly doubtful that al-Qahtani has the legal capacity to effect such a waiver" given the habeas judge's finding April 20, 2012 finding that he is incompetent. SPA 27 (citing Minute Order, *al-Qahtani v. Obama*, No. 05 Civ.

1971 (D.D.C. April 20, 2012)). However, there is no authority requiring any particular form of waiver, and the district court's skepticism as to al-Qahtani's competency to waive his privacy interests is contradicted by the Babcock declaration, authored by a respected officer of the Court. Moreover, and significantly, al-Qahtani first consented to the FOIA action on June 1, 2011, almost a year before the D.C. court's finding that he was incompetent. JA 38.

In sum, DoD's contention that disclosing the Responsive Records would harm national security by enabling covert communication is neither a "plausible" nor "logical" justification for withholding these records. Nor, given al-Qahtani's consent, may DoD meet its burden by invoking al-Qahtani's privacy interests.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the district court granting summary judgment in DoD's favor, and remand this matter with instructions requiring that the district court grant CCR's motion for summary judgment and order the disclosure of the withheld documents. In the alternative, the Court should vacate and remand to the district court with instructions to conduct additional proceedings, including, for example, performing an appropriate segregability analysis with regard to the records at issue.

Respectfully submitted,

/s/

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Dated December 20, 2013

Counsel for Appellant

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because it contains 13,955 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface and type style requirements OF FED. R. APP. P. 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman 14 pt. for text.

Respectfully submitted,

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Dated December 20, 2013

Counsel for Appellant

SPECIAL APPENDIX

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
CENTER FOR CONSTITUTIONAL RIGHTS,

Plaintiff,

- against -

DEPARTMENT OF DEFENSE AND ITS COMPONENTS DEFENSE INTELLIGENCE AGENCY AND UNITED STATES SOUTHERN COMMAND; DEPARTMENT OF JUSTICE AND ITS COMPONENTS FEDERAL BUREAU OF INVESTIGATION AND EXECUTIVE OFFICE OF UNITED STATES ATTORNEYS; and CENTRAL INTELLIGENCE AGENCY,

Defendants.
----------X

MEMORANDUM AND ORDER

12 Civ. 135 (NRB)

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

The Center for Constitutional Rights ("CCR") commenced this action under the Freedom of Information Act (the "FOIA"), 5 U.S.C. § 552, against the United States Department of Defense (the "DOD") and its components the Defense Intelligence Agency (the "DIA") and the United States Southern Command ("SouthCom"); the United States Department of Justice (the "DOJ") and its component the Federal Bureau of Investigation (the "FBI"); and the Central Intelligence Agency (the "CIA") (collectively, the "defendant agencies" or the "Government").[1]

In its FOIA requests, CCR seeks the public disclosure of images of Mohammed al-Qahtani ("al-Qahtani"), whom the United

[1] The Executive Office of United States Attorneys was dismissed from this action on March 13, 2012. See Dkt. No. 11.

States has held at Guantánamo Bay, Cuba ("Guantánamo") since February 13, 2002. The DOD and the FBI have admitted to possessing a number of responsive videotapes and photographs, which these agencies now seek to withhold. The CIA, on the other hand, has filed a Glomar response asserting that it will neither confirm nor deny the existence of responsive records. To justify these responses, the defendant agencies invoke a number of FOIA exemptions.

Presently before the Court are CCR's motion for partial summary judgment with respect to the DOD and the FBI and the Government's cross-motion for summary judgment on behalf of all defendant agencies, including the CIA.[2] For the reasons set forth below, we find that the DOD and the FBI have properly classified the videotapes and photographs of al-Qahtani in the interest of national security, and that the CIA has appropriately declined to confirm or deny the existence of responsive records. Accordingly, we deny CCR's motion and grant the Government's cross-motion.

[2] We heard oral argument on these motions on September 3, 2013. References preceded by "Tr." refer to the transcript of oral argument.

BACKGROUND[3]

I. Al-Qahtani

Al-Qahtani is a Saudi national who is widely believed to be the intended 20th hijacker during the terrorist attacks of September 11, 2001. See First Lustberg Decl. Ex. 6, at 1 (positing that al-Qahtani "would have been on United Airlines Flight 93, the only hijacked aircraft that had four hijackers

[3] Throughout this Memorandum and Order, we rely upon Plaintiff's Statement of Material Facts Pursuant to Local Rule 56.1 ("Pl.'s 56.1"), filed October 3, 2012; the Declaration of CCR's Counsel, Lawrence S. Lustberg ("First Lustberg Decl."), filed October 3, 2012, and the exhibits annexed thereto; the Declaration of CCR's Counsel and al-Qahtani's Habeas Corpus Counsel, Sandra L. Babcock ("Babcock Decl."), filed October 3, 2012; the Declaration of the Defendant Agencies' Counsel, Emily E. Daughtry ("First Daughtry Decl."), filed December 27, 2012, and the exhibits annexed thereto; the Declaration of the Information Review Officer for the National Clandestine Service of the CIA, Elizabeth Anne Culver ("Culver Decl."), filed December 27, 2012, and the exhibits annexed thereto; the Declaration of the Section Chief of the Record/Information Dissemination Section, Records Management Division, of the FBI, David M. Hardy ("First Hardy Decl."), filed December 27, 2012, and the exhibits annexed thereto; the Declaration of the Associate Deputy General Counsel in the Office of General Counsel of the DOD, Mark H. Herrington ("First Herrington Decl."), filed December 27, 2012; the Classified Declaration of the Associate Deputy General Counsel in the Office of General Counsel of the DOD, Mark H. Herrington ("Classified Herrington Decl."), filed December 27, 2012 for the Court's in camera, ex parte review; the Declaration of the Chief of Staff of the United States Central Command of the DOD, Major General Karl R. Horst ("Horst Decl."), filed December 27, 2012; the Declaration of the Deputy Assistant Secretary of Defense for Rule of Law and Detainee Policy in the DOD, William K. Lietzau ("Lietzau Decl."), filed December 27, 2012, and the exhibits annexed thereto; the Declaration of Chief of the FOIA Services Section within the FOIA and Declassification Services Branch for the DIA, Alesia Y. Williams ("Williams Decl."), filed December 27, 2012, and the exhibits annexed thereto; the Declaration of the Commander of Joint Task Force-Guantánamo, Rear Admiral David B. Woods ("Woods Decl."), filed December 27, 2012, and the exhibits annexed thereto; Plaintiff's Statement of Material Facts Pursuant to Local Rule 56.1(b) ("Pl.'s 56.1(b)"), filed February 4, 2013; the Third Declaration of the Section Chief of the Record/Information Dissemination Section, Records Management Division, of the FBI, David M. Hardy ("Third Hardy Decl."), filed April 8, 2013, and the Descriptive Index of Video Records ("Sealed Index"), filed ex parte and under seal; and the Second Declaration of the Associate Deputy General Counsel in the Office of General Counsel of the DOD, Mark H. Herrington ("Second Herrington Decl."), filed April 8, 2013.

instead of five"). A month before the attacks, immigration officials denied al-Qahtani entry to the United States at Orlando International Airport. Id.; see also First Lustberg Decl. Ex. 31 (hereinafter "FBI-OIG"), at 78 n.46 (explaining that al-Qahtani sought to enter the United States with "no return ticket, no credit cards, and less than $3,000 cash"). On December 15, 2001, Pakistani forces captured al-Qahtani on the Pakistan-Afghanistan border and turned him over to the United States. FBI-OIG 77. Approximately two months later, on February 13, 2002, the United States transported al-Qahtani to Guantánamo, see id., where he remains to this day.

As CCR correctly notes, agency reports and Congressional hearings have revealed numerous facts concerning al-Qahtani's detention and interrogation, most frequently in the context of official inquiries into the treatment of Guantánamo detainees. See, e.g., FBI-OIG; First Lustberg Decl. Ex. 2 (hereinafter "SASC Report"); First Lustberg Decl. Ex. 3 (hereinafter "Church Report"); First Lustberg Decl. Ex. 4 (hereinafter "Schmidt-Furlow Report"); First Lustberg Decl. Ex. 7 (hereinafter "Fine Statement"). Specifically, information related to the following subjects has been disclosed:

(1) the dates, locations, and conditions of al-Qahtani's confinement, see, e.g., FBI-OIG 27-29, 77, 80-81; SASC Report 58, 60-61, 108-09; Church Report 101;

(2) the involvement of the DOD and the FBI in al-Qahtani's interrogation, see, e.g., FBI-OIG 78, 80-83, 102; SASC Report 57-58, 60; Fine Statement 6;

(3) the techniques the interrogators used, see e.g., FBI-OIG 83-84, 87, 102-03, 197; Fine Statement 6-7; SASC Report 60, 109; Schmidt-Furlow Report 13-21; First Lustberg Decl. Ex. 5, at 1-2;

(4) al-Qahtani's mental and physical state during his interrogations, see, e.g., First Lustberg Decl. Ex. 20, at 111-12; FBI-OIG 103; First Lustberg Decl. Ex. 15 (hereinafter "Harrington Letter"), at 2; and

(5) al-Qahtani's ultimate cooperation with interrogators, including the information he provided, see, e.g., FBI-OIG 118-19; First Lustberg Decl. Ex. 6, at 1-2.

Furthermore, the New York Times has published a photograph of al-Qahtani. See First Lustberg Decl. Ex. 28. However, the Government maintains that "the United States did not release" this image. Tr. 29:23.

The foregoing disclosures reveal that, between August 2002 and November 2002, FBI and military personnel subjected al-Qahtani to both "intense isolation," see Harrington Letter 2, and "aggressive" interrogation techniques, see FBI-OIG 84 (internal quotation marks omitted); see also Fine Statement 6 (disclosing that "FBI agents saw military interrogators use increasingly harsh and demeaning techniques, such as menacing Al-Qahtani with a snarling dog during his interrogation"). During this time, al-Qahtani lost significant amounts of weight, see First Lustberg Decl. Ex. 20, at 112, and exhibited symptoms of "extreme psychological trauma," including "talking

to non-existent people, reporting hearing voices, [and] crouching in a corner of the cell covered with a sheet for hours on end," see Harrington Letter 2.

On November 23, 2003, military interrogators implemented the first "Special Interrogation Plan" against al-Qahtani. SASC Report 74, 88. Over the next 54 days, interrogators subjected al-Qahtani to "stress positions" and "20-hour interrogations, tying a dog leash to his chain and leading him through a series of dog tricks, stripping him naked in the presence of a female, repeatedly pouring water on his head, and instructing him to pray to an idol shrine." Fine Statement 6-7; see also SASC Report 82, 88. In December 2002, these practices resulted in al-Qahtani's hospitalization for "low blood pressure" and "low body core temperature." FBI-OIG 103; see also First Lustberg Decl. Ex. 22, at "07 December 2002." On January 14, 2009, the Convening Authority for Military Commissions Susan J. Crawford reached the conclusion that the treatment of al-Qahtani "met the legal definition of torture." First Lustberg Decl. Ex. 1, at 1.

CCR, its counsel in this matter, and others currently represent al-Qahtani in a habeas corpus action stayed in the United States District Court for the District of Columbia before the Honorable Rosemary M. Collyer (the "Habeas Action"). See al-Qahtani v. Obama, No. 05 Civ. 1971 (D.D.C.). In

connection with their representation of al-Qahtani in the Habeas Action, counsel have viewed certain materials of which CCR now seeks public disclosure. Mem. of Law in Supp. of Pl.'s Mot. for Partial Summ. J. ("Pl.'s Br.") 10; see also Mem. & Op. Order 3-4, al-Qahtani v. Obama, No. 05 Civ. 1971, Dkt. No. 192 (D.D.C. Oct. 5, 2009) (granting discovery with respect to audio/video recordings of al-Qahtani made between November 15, 2002 to November 22, 2002).

II. The FOIA Requests and Responses

A. CCR's FOIA Requests and Litigation

On March 4, 2010, CCR submitted FOIA requests to the DOD, the DIA, SouthCom, the DOJ, the FBI, and the CIA. See Woods Decl. ¶ 5; Williams Decl. ¶ 5; First Hardy Decl. ¶ 5; Culver Decl. ¶ 9.[4] In its requests, CCR sought three categories of records: (1) videotapes of al-Qahtani made between February 13, 2002, when he arrived at Guantánamo, and November 30, 2005; (2) photographs of al-Qahtani taken between February 13, 2002 and November 30, 2005; and (3) any other audio or visual records of al-Qahtani made between February 13, 2002 and November 30, 2005. See, e.g., Woods Decl. Ex. 1, at 2. The defendant agencies failed to issue timely responses to CCR's

[4] As the Government notes, "[t]he Woods, Williams, Culver, and First Hardy Declarations describe the administrative process in detail. The facts of the administrative process are not in dispute." Mem. of Law in Opp'n to Pl.'s Mot. for Partial Summ. J. and in Supp. of the Government's Cross-Mot. for Summ. J. ("Gov't Br.") 3, n.2.

requests. Pl.'s 56.1 ¶ 3. Accordingly, on January 9, 2012, CCR filed the instant action, seeking, inter alia, the immediate processing and release of all responsive records.

B. The Defendant Agencies' Responses

After the filing of this action, the defendant agencies each provided CCR with a declaration detailing their searches and bases for withholding responsive records, or, in the case of the CIA, a Glomar response asserting that it would neither confirm nor deny the existence of responsive records. Id. ¶ 5. In addition, the DOD offered supplemental declarations in opposition to CCR's motion for partial summary judgment and in support of the Government's cross-motion. See infra Section II(A)(2).

1. The DOD's and the FBI's Responses

The DOD and the FBI collectively identified four categories of responsive records: (1) fifty-three videotapes that depict al-Qahtani's activities within his cell, as well as his interaction with DOD personnel (the "FBI Videotapes"); (2) one videotape showing forced cell extractions (the "FCE Videotape"); (3) two videotapes depicting intelligence debriefings (the "Debriefing Videotapes"); and (4) six photographs of al-Qahtani (the "Photographs") (collectively, the "Withheld Videotapes and Photographs"). As detailed below, the DOD and the FBI resist disclosure of the Withheld

Videotapes and Photographs on the basis of several FOIA exemptions.

a. *The FBI Videotapes: Exemptions 1, 3, 6, 7(A), and 7(C) of the FOIA and Section (j)(2) of the Privacy Act*

The FBI Videotapes depict al-Qahtani's activities within his cell, as well as his interaction with DOD personnel at Guantánamo between August 2002 and November 2002. First Hardy Decl. ¶ 29. The FBI has provided an individualized description of the 53 FBI Videotapes in an index filed ex parte for in camera review. See Third Hardy Decl. ¶ 2; Sealed Index; see also Dkt. No. 55 (granting the Government's request to file the sealed index ex parte for in camera review).

As pertinent here, the DOD and the FBI seek to withhold the FBI Videotapes in their entirety based on FOIA Exemption 1, 5 U.S.C. § 552(b)(1), which applies to information that is properly classified in the interest of national defense or foreign policy. See Woods Decl. ¶ 29; First Hardy Decl. ¶ 4.[5] The DOD and the FBI also seek to withhold the FBI Videotapes pursuant to FOIA Exemption 3, 5 U.S.C. § 552(b)(3), which applies to documents specifically exempted from disclosure by statute; FOIA Exemption 6, id. § 552(b)(6), which protects

[5] Although the FBI maintains the original FBI Videotapes, the DOD classified these records pursuant to its classification authorities. First Hardy Decl. ¶ 30. Accordingly, the FBI refers the Court to the DOD's declaration in support of withholding the FBI Videotapes pursuant to FOIA Exemption 1. Id. ¶¶ 30, 38.

privacy interests in all records held by the Government; FOIA Exemption 7(A), id. § 552(b)(7)(A), which provides for the withholding of law enforcement records when disclosure would reasonably be expected to interfere with enforcement proceedings; FOIA Exemption 7(C), id. § 552(b)(7)(C), which protects privacy interests in law enforcement records; and Section (j)(2) of the Privacy Act, id. § 552a(j)(2). Woods Decl. ¶¶ 16, 32; First Hardy Decl. ¶ 4.[6]

b. *The FCE Videotape: FOIA Exemptions 1, 3, and 6*

The FCE Videotape, which was located by the DOD, depicts two forced cell extractions ("FCE") of al-Qahtani, at least one of which occurred on September 8, 2004. First Herrington Decl. ¶ 5; Woods Decl. ¶ 11. According to the DOD's declarations, the recording of the first FCE lasts approximately 10 minutes and 41 seconds. First Herrington Decl. ¶ 5(a). The recording begins with a DOD officer identifying the reason for the FCE, the name of the official who authorized the operation, and the current date and time. First Herrington Decl. ¶ 5(a); Woods Decl. ¶ 11. FCE team members then state their name, rank, and function, and start toward al-Qahtani's cell. Id. After an interpreter speaks with al-Qahtani, the FCE team begins and

[6] The FBI refers the Court to the DOD's declaration in support of withholding the FBI Videotapes pursuant to FOIA Exemptions 3, 6, and 7(C). Id. The FBI only discusses FOIA Exemption 7(A) and Section (j)(2) of the Privacy Act in its own declaration. Id. ¶¶ 32-37.

successfully completes the FCE. First Herrington Decl. ¶ 5(a). Thereafter, medical personnel check al-Qahtani, and the FCE team transfers al-Qahtani to a separate room. Id. During the first FCE, al-Qahtani is not independently visible (i.e., outside the presence of military personnel) for more than one second. Id.

The recording of the second FCE lasts approximately 5 minutes and 12 seconds. Id. ¶ 5(b). Unlike the recording of the first FCE, the recording of the second FCE does not depict any events prior to the FCE. Id. Rather, the recording begins with FCE team members staged at al-Qahtani's cell door. Id. The recording shows the FCE team extracting al-Qahtani from his cell and moving him to a separate room. Id. During the final 9 seconds of the video, al-Qahtani is alone and visible, outside the presence of military personnel. Id. The DOD seeks to withhold the FCE Videotape in its entirety pursuant to Exemptions 1, 3, and 6 of the FOIA. Woods Decl. ¶ 16.

c. *The Debriefing Videotapes: Exemptions 1, 3, and 6*

The Debriefing Videotapes document intelligence debriefings of al-Qahtani taken in July 2002 and April 2004. Id. ¶ 14. The DOD has described the Debriefing Videotapes in greater detail in a classified declaration submitted to this Court ex parte for in camera review. See generally Classified Herrington Decl; see also infra n.10 (finding it appropriate to

consider the Classified Herrington Declaration). The DOD seeks to withhold the Debriefing Videotapes in their entirety on the basis of FOIA Exemptions 1, 3, and 6. Woods Decl. ¶ 16.

d. *The Photographs: Exemptions 1, 6, 7(A), and 7(C)*

The Photographs, which were located by the DOD,[7] were taken between 2002 and 2005. Id. ¶¶ 9, 12. Four of the Photographs are forward-facing mug shots, and two of the Photographs show al-Qahtani in profile. Id. The DOD seeks to withhold the Photographs pursuant to Exemptions 1, 6, 7(A), and 7(C) of the FOIA. Id. ¶ 16.

C. The CIA's Response

On March 24, 2010, the CIA issued a Glomar response to CCR's FOIA request, explaining that the CIA could "neither confirm nor deny the existence or nonexistence" of records responsive to CCR's request, because the "fact of the existence or nonexistence of requested records is currently and properly classified." Culver Decl. Ex. A. On May 26, 2010, CCR appealed the CIA's response on the basis that the "CIA's involvement in Mr. al Qahtani['s] interrogations is publically known." Culver Decl. ¶ 11. On August 17, 2011, the CIA denied CCR's appeal. Culver Decl. Ex. C, at 2.

[7] The FBI also identified two responsive photographs that originated with the DOD. First Hardy Decl. ¶ 28. The FBI referred these photographs to the DOD for a direct response. Id.

III. Subsequent Procedural History

On July 18, 2012, the Court stayed briefing in this matter pending the outcome of a motion al-Qahtani filed in the Habeas Action seeking to modify the applicable protective orders governing the use of classified information in that case. See Dkt. No. 13. Specifically, al-Qahtani sought to amend the protective orders in the Habeas Action to permit his counsel to file a classified declaration in this action concerning information counsel learned in the course of representing al Qahtani in the Habeas Action. Id. On August 30, 2012, Judge Collyer denied al-Qahtani's motion. See First Daughtry Decl. Ex. A.

According to Judge Collyer, al-Qahtani failed to demonstrate that this Court has a "need to know" the classified information from the Habeas Action. Id. Judge Collyer wrote:

> Because the Government bears the burden of proof in a FOIA case and can meet that burden based on a sufficiently detailed agency affidavit, the only question that a FOIA court addresses is whether the affidavit adequately demonstrates the adequacy of the search and the propriety of the FOIA exemptions claimed . . . . Courts are unwilling to give any weight to a FOIA requester's personal views regarding the propriety of classification or the national security harm that would result from the release of classified information.

Id., at 2. Despite Judge Collyer's ruling, CCR persists in urging this Court to "consider a sealed submission from

Plaintiff's counsel." Pl.'s Br. 14; see also Mem. of Law in Opp'n to Defs.' Cross-Mot. for Summ. J. ("Pl.'s Opp'n") 18-20.

DISCUSSION

I. Legal Standards

The "FOIA represents Congress's balance 'between the right of the public to know and the need of the Government to keep information in confidence.'" N.Y. Times Co. v. U.S. Dep't of Justice, 872 F. Supp. 2d 309, 314 (S.D.N.Y. 2012) (quoting John Doe Agency v. John Doe Corp., 493 U.S. 146, 152 (1989)). Therefore, although the FOIA "strongly favor[s] public disclosure of information in the possession of federal agencies," Halpern v. Fed. Bureau of Investigation, 181 F.3d 279, 286 (2d Cir. 1999), the statute recognizes "that public disclosure is not always in the public interest," Cent. Intelligence Agency v. Sims, 471 U.S. 159, 166-67 (1985), and mandates that records need not be disclosed if they fall within "one of the specific, enumerated exemptions set forth in the Act," Long v. Office of Pers. Mgmt., 692 F.3d 185, 190 (2d Cir. 2012) (internal quotation marks omitted); see also Wilner v. Nat'l Sec. Agency, 592 F.3d 60, 68 (2d Cir. 2009) (describing the Glomar standards).

"Summary judgment is the preferred procedural vehicle for resolving FOIA disputes." Nat'l Immigration Project of Nat'l Lawyers Guild v. U.S. Dep't of Homeland Sec., 868 F. Supp. 2d

284, 290 (S.D.N.Y. 2012) (internal quotation marks omitted). Where, as here, a plaintiff challenges an agency's decision to withhold responsive records and/or to file a Glomar response, the agency bears the burden of establishing the applicability of a FOIA exemption. Long, 692 F.3d at 190; Wilner, 592 F.3d at 68. The agency may satisfy this burden through reasonably detailed affidavits, which "are accorded a presumption of good faith." Long, 692 F.3d at 190-91 (quoting Carney v. U.S. Dep't of Justice, 19 F.3d 807, 812 (2d Cir. 1994)) (internal quotation marks omitted). The FOIA expressly provides for de novo review of an agency's decision. 5 U.S.C. § 552(a)(4)(B). In the context of national security, however, a court "must accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record." Am. Civil Liberties Union v. Dep't of Justice, 681 F.3d 61, 69 (2d Cir. 2012) ("ACLU") (internal quotation marks omitted). "Ultimately, an agency may invoke a FOIA exemption if its justification 'appears logical or plausible.'" Id. (quoting Wilner, 592 F.3d at 73).

"[O]nce the agency has satisfied its burden, the plaintiff must make a showing of bad faith on the part of the agency sufficient to impugn the agency's affidavits or declarations or provide some tangible evidence that an exemption claimed by the agency should not apply or summary judgment is otherwise

inappropriate." Amnesty Int'l USA v. Cent. Intelligence Agency, 728 F. Supp. 2d 479, 497 (S.D.N.Y. 2010) (quoting Carney, 19 F.3d at 812) (internal quotation marks omitted). To meet this burden, the plaintiff must offer more than "bare allegations." Carney, 19 F.3d at 813. Therefore, "[p]urely speculative claims of bad faith will not suffice." Plunkett v. Dep't of Justice, 924 F. Supp. 2d 289, 306 (D.D.C. 2013) (internal quotation marks omitted).

II. Analysis

As noted supra, CCR challenges in its motion for partial summary judgment the DOD's and the FBI's refusal to disclose the Withheld Videotapes and Photographs. In its cross-motion, the Government not only contends that the DOD and the FBI have appropriately withheld the responsive records, but also maintains that the CIA properly declined to confirm or deny the existence of responsive records. For the reasons set forth below, we agree with the Government's positions.

A. The DOD and the FBI Have Satisfied Their Burden of Establishing the Applicability of FOIA Exemption 1 to All of the Withheld Videotapes and Photographs

1. Analytical Framework

FOIA Exemption 1 permits agencies to withhold any records that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in

fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). In this case, the DOD has classified all of the Withheld Videotapes and Photographs as SECRET pursuant to Executive Order 13,526, Exec. Order No. 13,526 § 1.2(a)(2) (Dec. 29, 2009).[8] See Woods Decl. ¶ 29; Horst Decl. ¶ 17; Lietzau Decl. ¶ 4. To justify these classifications, the DOD must demonstrate, inter alia, that (1) the Withheld Videotapes and Photographs "fall[] within one or more of the categories of [classifiable] information," Exec. Order No. 13,526 § 1.1(a)(3), and (2) "the unauthorized disclosure of that information reasonably can be expected to result in damage to the national security," id. § 1.1(a)(4).[9]

To satisfy this burden, the DOD asserts that the Withheld Videotapes and Photographs are properly classified as "military plans, weapons systems, or operations," id. § 1.4(a), "intelligence activities (including covert action), intelligence sources or methods, or cryptology," id. § 1.4(c), or "foreign relations or foreign activities of the United States," id. § 1.4(d). See Woods Decl. ¶ 29; Horst Decl. ¶ 8; Lietzau Decl. ¶ 6, and that the release of these materials can

[8] As noted supra, the FBI also asserts Exemption 1 protections. See supra n.5. However, the FBI refers the Court to the DOD's declarations in support of withholding. Id.; see also First Hardy Decl. ¶¶ 30, 38.

[9] In this context, "damage to the national security" is defined as "harm to the national defense or foreign relations of the United States from the unauthorized disclosure of information, taking into consideration such aspects of the information as the sensitivity, value, utility, and provenance of that information." Exec. Order No. 13,526 § 6.1(l).

reasonably be expected to damage national security, see generally Woods Decl.; Horst Decl.; Lietzau Decl.; Classified Herrington Decl. Although CCR purports to challenge whether the Withheld Videotapes and Photographs fall within the categories of classifiable information the DOD has invoked, see, e.g., Pl.'s Br. 19, CCR centers its attack on the DOD's assertion that release of these materials would visit harm upon national security. As noted supra, the Government need only demonstrate that it is logical or plausible that such harm reasonably could occur. ACLU, 681 F.3d at 69.

2. The DOD's Declarations

To demonstrate the potential harm to national security attendant to disclosure, the DOD offers the public declarations of original classification authorities Major General Karl R. Horst ("General Horst"), Rear Admiral David B. Woods ("Admiral Woods"), and Deputy Assistant Secretary of Defense William K. Lietzau ("DASD Lietzau"), and the classified declaration of Mark H. Herrington ("Herrington"), filed ex parte for in camera

review.[10] As detailed below, General Horst, Admiral Woods, and DASD Lietzau set forth independent justifications for the DOD's assertion that disclosure of any portion of the Withheld Videotapes and Photographs could reasonably be expected to damage national security. Admiral Woods and DASD Lietzau provide additional rationales for withholding the FCE Videotape, while Herrington provides "further information regarding damage to national security that could reasonably be expected to result from disclosure of the Debriefing Videos." Gov't Br. 17.

a. *General Horst*

General Horst is responsible for the oversight of approximately 200,000 U.S. military personnel in Iraq, Afghanistan, and the surrounding region. Horst Decl. ¶ 1. According to General Horst, disclosure of any portion of the Withheld Videotapes and Photographs could reasonably be

[10] Plaintiff urges the Court to refrain from considering the Classified Herrington Declaration in the absence of further development of the public record. Pl.'s Opp'n 18; see also Wilner, 592 F.3d at 68 (stating that a "court should attempt to create as complete a public record as is possible" before accepting an ex parte submission (internal quotation marks omitted)). As plaintiff contends, courts are generally disinclined to rely on ex parte submissions. See, e.g., Wilner, 592 F.3d at 76 (recognizing "our legal system's preference for open court proceedings"). However, such reluctance "dissipates considerably" where, as here, national security concerns are at issue. Order at 2, Am. Civil Liberties Union v. Dep't of Defense, 09 Civ. 8071 (BSJ) (S.D.N.Y. Jan. 23, 2012), Dkt. No. 102. Having independently reviewed the Classified Herrington Declaration, we find that "the risk associated with disclosure of the document in question outweighs the utility of counsel, or adversary process, in construing a supplement to the record." Id. at 3. Accordingly, we properly consider the DOD's ex parte submission. We note, however, that the contents of that submission were not necessary to our resolution of the instant motions. See Tr. 17:7-21.

expected to harm national security by "endangering the lives and physical safety" of U.S. military personnel, diplomats, and aid workers serving in Afghanistan and elsewhere. Id. ¶ 10. To substantiate this claim, General Horst states that "enemy forces in Afghanistan" and elsewhere "have previously used videos and photographs out of context to incite the civilian population and influence government officials." Id. ¶ 12. For example, General Horst notes that the Taliban and associated forces have used "published photographs of U.S. forces interacting with detainees" to "garner support for attacks" against U.S. forces. Id.

According to General Horst, disclosure of the Withheld Videotapes and Photographs could also aid in the "recruitment and financing of extremists and insurgent groups." Id. ¶ 10. General Horst notes that any released portion of the Withheld Videotapes and Photographs could be "easily manipulated" to attract new members to join the insurgency, as has occurred in the past. Id. ¶¶ 15-16. General Horst states that extremist groups could "pixelate[]" disclosed images of al-Qahtani "to show physical signs of mistreatment, such as bruising or bleeding," id. ¶ 15(c); overlay "staged audio" on released video segments to "falsely indicate the[] mistreatment" of al-Qahtani where no mistreatment occurred, id. ¶ 15(b); and/or "splice released footage" of al-Qahtani "to change the

chronology or combination of events," id. ¶ 15(a). General Horst states that extremists have previously used these tactics to recruit, raise funds, and encourage solidarity. Id. ¶ 16.

b. *Admiral Woods*

Admiral Woods is the Commander of Joint Task Force-Guantanamo ("JTF-GTMO"). Woods Decl. ¶ 1. In his declaration, Admiral Woods maintains that disclosure of any portion of the Withheld Videotapes and Photographs could reasonably be expected to damage national security by "chilling" intelligence collection efforts at JTF-GTMO and elsewhere. Id. ¶ 25. According to Admiral Woods, the public release of al-Qahtani's image will "make it substantially less likely that the detainee will cooperate and provide information in the future" because such release could provide "the appearance of cooperation with the United States," regardless of whether al-Qahtani has actually cooperated. Id. ¶ 25 (emphasis omitted). Admiral Woods notes that, "in some cases," the appearance of cooperation has led to "retribution" against the detainee and his family. Id. ¶ 24. Therefore, Admiral Woods submits that release of the Withheld Videotapes and Records will "exacerbate" al-Qahtani's "fears of reprisal and make it substantially less likely" that he will cooperate in the future. Id. ¶ 25.

According to Admiral Woods, disclosure of the Withheld Videotapes and Photographs could also be expected to dissuade the cooperation of human sources other than al-Qahtani. Id. ¶ 26. Admiral Woods writes: "If a potential source has any doubts about the government's ability to protect cooperative relationships, that is, if he or she were to learn that the government has disclosed the identity of another source -- or the identity of a person suspected to be a source -- his or her desire to cooperate would likely diminish." Id. Admiral Woods states that "[t]he loss of such sources, and the accompanying critical intelligence they provide, would seriously affect the national security of the United States." Id. Accordingly, Admiral Woods contends that the United States' "policy to classify images of current and former detainees must be consistently applied." Id. ¶ 27.

c. *DASD Lietzau*

DASD Lietzau is "responsible for developing policy recommendations and coordinating policy guidance relating to individuals captured or detained" by the DOD. Lietzau Decl. ¶ 1. In his declaration, DASD Lietzau states that disclosure of any portion of the Withheld Videotapes and Photographs could reasonably be expected to damage national security by "providing a means for detainees to communicate outside of approved channels, including with enemy forces." Id. ¶ 7.

DASD Lietzau notes: "If images of detainees were to be released to any member of the public who requests them, detainees would quickly learn that these videos and photographs are a useful means for communicating with others, potentially including al-Qaeda and associated enemy forces." Id. ¶ 7(a). According to DASD Lietzau, "[d]etainees have attempted to communicate with al-Qaeda affiliates in the past," including through such "covert or surreptitious means." Id.

DASD Lietzau notes that release of the Withheld Videotapes and Photographs could also cause "international partners to question the U.S. commitment to its longstanding policy and practice of shielding detainees from public curiosity, consistent with the Geneva Conventions." Id. ¶ 7. DASD Lietzau maintains that public disclosure of the Withheld Videotapes and Photographs would subject al-Qahtani to "public curiosity in ways that could be seen as humiliating or degrading." Id. ¶ 7(b). Accordingly, DASD Lietzau posits that disclosure of the Withheld Videotapes and Photographs "could affect the practice of other states in this regard, which could, in turn, dilute protections afforded U.S. service personnel in future conflicts." Id.

d. *The DOD's Additional Justifications for Withholding the FCE Videotape and the Debriefing Videotapes*

As noted supra, Admiral Woods and DASD Lietzau each provide additional reasons for withholding the FCE Videotape, and Herrington offers further, classified information concerning the Debriefing Videotapes. Admiral Woods maintains that disclosure of the FCE Videotape "could result in the development of tactics and procedures to thwart the actions of the FCE team, thereby placing the safety and welfare of the members in jeopardy." Woods Decl. ¶ 28. Similarly, DASD Lietzau notes, inter alia, that disclosure of the FCE Videotape could harm national security by "encouraging disruptive behavior" by DOD detainees "simply to confirm their continued resistance to the United States in the ongoing armed conflict." Id. ¶ 8(a).

3. Analysis

"Recognizing the relative competencies of the executive and judiciary," we find it both logical and plausible that the disclosure of any portion of the Withheld Videotapes and Photographs could reasonably be expected to harm national security. ACLU, 681 F.3d at 70 (internal quotation marks omitted). CCR contends that many of the DOD's justifications are questionable in light of the Government's extensive disclosures concerning al-Qahtani. See, e.g., Woods Decl.

¶¶ 24-25 (positing that al-Qahtani would fear retaliation on account of the "appearance of cooperation" that disclosure might produce, rather than the actual cooperation the Government has confirmed). In addition, CCR contends that other DOD justifications sweep far too broadly in the absence of more specific detail. See, e.g., Lietzau Decl. ¶ 7 (alleging that disclosure of any portion of the Withheld Videotapes and Photographs would provide a means for detainees to covertly communicate with their associates but failing to describe how a mug shot could be used for this purpose).

Ultimately, however, we find that the DOD's submissions provide adequate justification for the Government's invocation of FOIA Exemption 1. In particular, we find it both logical and plausible that extremists would utilize images of al-Qahtani (whether in native or manipulated formats) to incite anti-American sentiment, to raise funds, and/or to recruit other loyalists, as has occurred in the past. See Horst Decl. ¶¶ 15-16; accord Int'l Counsel Bureau v. U.S. Dep't of Defense, 906 F. Supp. 2d 1, 7 (D.D.C. 2012) (finding it plausible that "release of even solo images" of FCE videotapes could be

"manipulated and/or used as a propaganda tool").[11] Such misuse is particularly plausible in this case, which involves a high-profile detainee, the treatment of whom the Convening Authority for Military Commissions Susan J. Crawford determined "met the legal definition of torture." First Lustberg Decl. Ex. 1, at 1.

Moreover, we find it entirely plausible that disclosure of the Withheld Videotapes and Photographs could compromise the Government's cooperative relationships with other Guantánamo detainees. Woods Decl. ¶ 26; see also Associated Press v. U.S. Dep't of Defense, 462 F. Supp. 2d 573, 576 (S.D.N.Y. 2006) (deeming it plausible that "official public disclosure" of detainee photographs would "exacerbate the detainees' fears of reprisal, thus reducing the likelihood that detainees would cooperate in intelligence-gathering efforts").[12] Accordingly, we conclude that the Government has satisfied its burden of establishing the applicability of FOIA Exemption 1.

In its effort to avoid this result, CCR notes that the Government has "safely released" (1) images of other detainees and (2) extensive factual information concerning al-Qahtani.

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[11] See also Judicial Watch, Inc. v. U.S. Dep't of Defense, 857 F. Supp. 2d 44, 61 (D.D.C. 2012) (upholding the CIA's application of FOIA Exemption 1 to photographs and/or video records of Osama bin Laden based on the CIA's declaration that "release of any of the records reasonably could be expected to inflame tensions among overseas populations," "encourage propaganda," or "lead to retaliatory attacks against the United States" (internal quotation marks omitted)), aff'd, 715 F.3d 937 (D.C. Cir. 2013).

[12] Although we need not reach the issue, we note that the DOD has provided other plausible reasons for withholding the FCE Videotape and Debriefing Videotapes. See supra Section II(A)(2)(d).

Pl.'s Opp'n 17. Thus, CCR contends that it is "highly suspect that every image of al-Qahtani" will cause harm to national security. Id. However, the facts about image release are far more nuanced than CCR acknowledges. With the limited exceptions of (1) photographs used for border control and military commission trials and (2) photographs taken by the International Committee of the Red Cross ("ICRC") and released to a consenting detainee's family,[13] the Government has not disclosed any images in which a specific detainee is identifiable. Second Herrington Decl. ¶ 5; see also First Lustberg Decl. Exs. 19, 25, 26, 30, 32. Further, the Government's release of written information concerning al-Qahtani does not diminish its explanations for withholding images of al-Qahtani. To the contrary, the written record of torture may make it all the more likely that enemy forces would use al-Qahtani's image against the United States' interests. See Judicial Watch, 857 F. Supp. 2d at 48 ("A picture may be

[13] We do not reach the Government's invocation of al-Qahtani's privacy interests. Nonetheless, we note that al-Qahtani, unlike many other detainees, has not permitted the ICRC to take his photograph. Second Herrington Decl. ¶ 6. Given the extensive public record in this case, we believe that al-Qahtani's interest in avoiding further privacy invasions is entitled to considerable weight. Although CCR suggests that al-Qahtani has (or will) waive his privacy interests in the Withheld Videotapes and Photographs, see Babcock Decl. ¶¶ 2-4; Pl.'s Opp'n 34, CCR has not produced any such waiver. In light Judge Collyer's reason for staying the Habeas Action (i.e., al-Qahtani's incompetence), it is highly doubtful that al-Qahtani has the legal capacity to effect such a waiver. See Minute Order, al-Qahtani v. Obama, No. 05 Civ. 1971 (D.D.C. April 20, 2012) ("continuing the stay in this case because Petitioner is currently incompetent and unable to assist effectively in this case").

worth a thousand words. And perhaps moving pictures bear an even higher value.").

In any event, the Government's prior disclosures are "of limited legal relevance" in the context of FOIA Exemption 1. Azmy v. U.S. Dep't of Defense, 562 F. Supp. 2d 590, 598 (S.D.N.Y. 2008). As the Court of Appeals has made clear, the "application of Exemption 1 is generally unaffected by whether the information has entered the realm of public knowledge." Halpern, 181 F.3d at 294. There is a "limited exception" to this rule "where the government has officially disclosed the specific information the requester seeks." Id. This exception applies only when the requested information "(1) is as specific as the information previously released, (2) matches the information previously disclosed, and (3) was made public through an official and documented disclosure." Wilson v. Cent. Intelligence Agency, 586 F.3d 171, 186 (2d Cir. 2009) (internal quotation marks and alterations omitted). As CCR concedes, the Withheld Videotapes and Photographs were not previously disclosed. Pl.'s Opp'n 9. Therefore, the Government may properly withhold the records pursuant to FOIA Exemption 1. See, e.g., Wolf v. Cent. Intelligence Agency, 473 F.3d 370, 378 (D.C. Cir. 2007) ("[T]he fact that information exists in some form in the public domain does not necessarily

mean that official disclosure will not cause harm cognizable under a FOIA exemption.").

Finally, we note that, contrary to CCR's speculative suggestion, there is no evidence that any of the Withheld Videotapes or Photographs depict illegal conduct, evidence of mistreatment, or other potential sources of governmental embarrassment. We have personally reviewed the FBI's individualized description of the FBI Videotapes.[14] See Third Hardy Decl. ¶ 2; Sealed Index. Having done so, we can confirm the Government's public representation that these records "do not document any abuse or mistreatment." Reply Mem. of Law in Further Supp. of the Government's Mot. for Summ. J. 4.

For the foregoing reasons, we conclude that the Government has satisfied its burden of establishing the applicability of FOIA Exemption 1, while CCR has failed to proffer any "tangible evidence" that this exemption should not apply. Carney, 19 F.3d at 812. In reaching this conclusion, we are mindful of "the uniquely executive purview of national security." ACLU, 681 F.3d at 76 (quoting Wilner, 592 F.3d at 76) (internal quotation marks omitted). As the Court of Appeals has cautioned, "it is bad law and bad policy to second-guess the

[14] Based on this review, we are satisfied that we do not have a "need to know" classified information from the Habeas Action. And yet even if we did have such a "need to know," we would be reluctant to overrule Judge Collyer's decision. Thus, we deny plaintiff's request to file a classified declaration for in camera review.

predictive judgments made by the government's intelligence agencies." Id. at 70-71 (quoting Wilner, 592 F.3d at 76) (internal quotation marks omitted). And we decline to do so here.

B. The CIA Appropriately Issued a Glomar Response

"To properly employ the Glomar response to a FOIA request, an agency must 'tether' its refusal to respond to one of the nine FOIA exemptions -- in other words, a government agency may refuse to confirm or deny the existence of certain records if the FOIA exemption would itself preclude the acknowledgment of such documents." Wilner, 592 F.3d at 68 (internal quotation marks, citations, and alterations omitted). As with FOIA responses more generally, "[i]n evaluating an agency's Glomar response, a court must accord substantial weight to the agency's affidavits, provided that the justifications for nondisclosure are not controverted by contrary evidence in the record or by evidence of bad faith." Id. (internal quotation marks and alteration omitted).

Here, the CIA contends that the existence of any responsive records must be withheld under FOIA Exemptions 1 and 3. Culver Decl. ¶¶ 6-7. With respect to Exemption 1, the CIA argues that either confirming or denying the existence of responsive records would necessarily reveal whether the CIA has ever had any interest in al-Qahtani or his affiliates, id.

¶¶ 36-38; whether the agency uses interrogation as a means of collecting intelligence, id. ¶¶ 47-48; and whether the CIA cooperates with other agencies, such as the DOD, for intelligence purposes, id. The CIA maintains that disclosure of this information could reasonably be expected to damage national security by, inter alia, aiding terrorist organizations and extremist groups in avoiding CIA surveillance and exploiting existing intelligence gaps, id. ¶¶ 37-39, and/or harming the United States' relationship with al-Qahtani's home country (i.e., Saudi Arabia), id. ¶ 42.

We are satisfied that the agency has provided sufficient detail to justify its invocation of FOIA Exemption 1.[15] See, e.g., Am. Civil Liberties Union v. Dep't of Defense, 752 F. Supp. 2d 361, 368 (S.D.N.Y. 2010) (upholding the CIA's Glomar response to a FOIA request seeking records related to Bagram detainees); Wolf, 473 F.3d at 376-77 (finding it "plausible that either confirming or denying an Agency interest in a foreign national reasonably could damage sources and methods by revealing CIA priorities, thereby providing foreign intelligence sources with a starting point for applying countermeasures against the CIA and thus wasting Agency resources").

[15] Therefore, we need not reach the CIA's arguments concerning FOIA Exemption 3.

CCR's sole argument to the contrary is that "official acknowledgements" have already detailed the CIA's involvement in detaining and interrogating al-Qahtani. Pl.'s Opp'n 38-39; see also Pl.'s 56.1(b) ¶ 6. However, the referenced statements cannot satisfy the "strict test" for official disclosure, Wilson, 586 F.3d at 186, because they were not made by the CIA itself, see Culver Decl. ¶ 54 ("[N]o authorized CIA or Executive Branch official has officially and publicly confirmed (or denied) whether CIA personnel participated in the interrogations of al Qahtani at Guantánamo Bay or provided details regarding how, and what type, of information other agencies share with CIA regarding detainees at Guantánamo Bay."); see also Wilson, 586 F.3d at 186-87 (stating that "the law will not infer official disclosure of information classified by the CIA from (1) widespread public discussion of a classified matter, (2) statements made by a person not authorized to speak for the Agency, or (3) release of information by another agency, or even by Congress" (internal citations omitted)). Furthermore, the official acknowledgments are not as specific as the classified information at issue here -- namely, the existence or nonexistence of videotapes, audiotapes, and photographs of al-Qahtani from the period 2002 to 2005. Therefore, we find that the CIA's Glomar response is proper and sufficient.

CONCLUSION

For the foregoing reasons, CCR's motion for partial summary judgment (Dkt. No. 17) is denied and the Government's cross-motion for summary judgment (Dkt. No. 36) is granted.

Dated: New York, New York
September 12, 2013

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

Copies of the foregoing Memorandum and Order have been mailed on this date to the following:

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CENTER FOR CONSTITUTIONAL RIGHTS,
Plaintiff,

-against-

DEPARTMENT OF DEFENSE AND ITS COMPONENTS DEFENSE INTELLIGENCE AGENCY AND UNITED STATES SOUTHERN COMMAND; DEPARTMENT OF JUSTICE AND ITS COMPONENTS FEDERAL BUREAU OF INVESTIGATION AND EXECUTIVE OFFICE OF UNITED STATES ATTORNEYS; and CENTRAL INTELLIGENCE AGENCY
Defendants.

----------X

12 **CIVIL** 0135 (NRB)

JUDGMENT

Whereas before the Court are CCR's motion for partial summary judgment with respect to the DOD and the FBI and the Government's cross-motion for summary judgment on behalf of all defendant agencies, including the CIA, and the matter having come before the Honorable Naomi Reice Buchwald, United States District Judge, and the Court, on September 12, 2013, having rendered its Memorandum and Order denying CCR's motion for partial summary judgment and granting the Government's cross-motion for summary judgment, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Memorandum and Order dated September 12, 2013, CCR's motion for partial summary judgment is denied and the Government's cross-motion for summary judgment is granted.

Dated: New York, New York
September 17, 2013

RUBY J. KRAJICK

Clerk of Court

BY:

Deputy Clerk

THIS DOCUMENT WAS ENTERED
ON THE DOCKET ON

5 USC § 552 - Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

* * *

(3)

(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which

(i) reasonably describes such records and

(ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

(D) For purposes of this paragraph, the term "search" means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.

(E) An agency, or part of an agency, that is an element of the intelligence community (as that term is defined in section 3(4) of the National Security Act of 1947 (50 U.S.C.401a (4))) [1] shall not make any record available under this paragraph to—

(i) any government entity, other than a State, territory, commonwealth, or district of the United States, or any subdivision thereof; or

(ii) a representative of a government entity described in clause (i).

(4)

* * *

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency

concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

(7)

* * *

(b) This section does not apply to matters that are—

(1)

(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and

(B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute—

(A)

(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information

(A) could reasonably be expected to interfere with enforcement proceedings,

(B) would deprive a person of a right to a fair trial or an impartial adjudication,

(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy,

(D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source,

(E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or

(F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells. Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

(c)

(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and—

(A) the investigation or proceeding involves a possible violation of criminal law; and

(B) there is reason to believe that

(i) the subject of the investigation or proceeding is not aware of its pendency, and

(ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

(2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.

(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

(d) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

* * *

(f) For purposes of this section, the term—

(1) "agency" as defined in section 551 (1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency; and

(2) "record" and any other term used in this section in reference to information includes—

(A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and

(B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.

(g) The head of each agency shall prepare and make publicly available upon request, reference material or a guide for requesting records or information from the agency, subject to the exemptions in subsection (b), including—

(1) an index of all major information systems of the agency;

(2) a description of major information and record locator systems maintained by the agency; and

(3) a handbook for obtaining various types and categories of public information from the agency pursuant to chapter 35 of title 44, and under this section.

* * *