UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CENTER FOR CONSTITUTIONAL RIGHTS, Plaintiff, v. 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.	Civil Action Docket No. 12 Civ. 01335 (NRB) **ORAL ARGUMENT REQUESTED**

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

TABLE OF EXHIBITS[1]

Exhibit	Description
Ex. 1	Bob Woodward, Detainee Tortured, *Says Official Overseeing Military Trials*, Wash. Post, Jan. 14, 2009.
Ex. 2	S. Armed Servs. Comm., 110th Cong., *Inquiry Into the Treatment of Detainees in U.S. Custody* (Comm. Print 2008) ["SASC Report"].
Ex. 3	Vice Admiral Albert T. Church, *Review of Department of Defense Detention Operations and Detainee Interrogation Techniques* (March 7, 2005) ["Church Report"].
Ex. 4	Executive Summary of Lt. Gen Randall Schmidt & Brig. Gen. John Furlow, *Army Regulation 15-6: Final Report: Investigation Into FBI Allegations of Abuse At Guantanamo Bay, Cuba Detention Facility* (amended June 9, 2005) [Schmidt-Furlow Report].
Ex. 5	Exhibit 63 to Lt. Gen Randall Schmidt & Brig. Gen. John Furlow, *Army Regulation 15-6: Final Report: Investigation Into FBI Allegations of Abuse At Guantanamo Bay, Cuba Detention Facility* (amended June 9, 2005).
Ex. 6	U.S. Department of Defense, Office of the Assistant Secretary of Defense (Public Affairs), Release, *Guantanamo Provides Valuable Intelligence Information* (June 12, 2005) ["DOD June 12, 2005 News Release"]
Ex. 7	Statement of Glenn A. Fine Inspector General, U.S. Department of Justice before the Senate Committee on the Judiciary Concerning Detainee Interrogation Techniques (June 10, 2008) ["Fine Statement"]
Ex. 8	Department of Defense, *Review of Department Compliance with President's Executive Order on Detainee Conditions of Confinement* (2009) ["DOD Review"].
Ex. 9	Declaration of David M. Hardy, Section Chief, Record/Information Dissemination Section, Federal Bureau of Investigation, and accompanying Exhibits A through L (June 4, 2012).
Ex. 10	Declaration of Rear Admiral David B. Woods, Commander, Joint Task Force – Guantanamo, and accompanying Exhibits 1 through 3 (June 12, 2012).
Ex. 11	Declaration of Mark H. Herrington, Associate Deputy General Counsel, Department of Defense (July 5, 2012).
Ex. 12	Email from Tara LaMorte, Counsel for the Defendants, to Alicia Bannon, Counsel for the Plaintiff (June 27, 2012).
Ex. 13	U.S. Armed Forces, Photographs Depicting Forced Cell Extractions a) Photo No. 110805-N-TR214-002

[1] All exhibits are attached to the Declaration of Lawrence S. Lustberg filed in support of the present motion.

b) Photo No. 051007-F-NB951-007

c) Photo No. 051004-F-NB951-003

d) Photo No. 040116-F-QS639-029

Ex. 14 Headquarters, Joint Task Force – Guantanamo, *Camp Delta Standard Operating Procedures* (March 1, 2004) ["Camp Delta SOP"].

Ex. 15 Letter from T.J. Harrington, Deputy Assistant Director, Counterterrorism Division, Federal Bureau of Investigation, to Major General Donald R. Ryder, Criminal Investigation Command, Department of the Army (July 14, 2004) ["Harrington Letter"].

Ex. 16 Carol Rosenberg, *Admiral: Red Cross to take fresh portraits of Guantánamo captives*, Miami Herald, June 4, 2012.

Ex. 17 Department of Defense, Detainee Biographies (undated), *available at* http://www.defense.gov/pdf/detaineebiographies1.pdf.

Ex. 18 Department of Defense, Unclassified Correspondence Submitted to Administrative Review Board on Behalf of Enemy Combatant Fawzi Khaled Abdullah Fahad Al Odah, *filed as* Exhibit 24 to Plaintiff's Motion for Partial Summary Judgment, *International Counsel Bureau v. U.S. Dep't of Defense,* No. 1:08-cv-01063-JDB (D.D.C. Feb. 17, 2009).

Ex. 19 Associated Press, Photographs of Guantanamo Detainees (various dates), *filed as* Exhibit 26 to Plaintiff's Motion for Partial Summary Judgment, *International Counsel Bureau v. U.S. Dep't of Defense,* No. 1:08-cv-01063-JDB (D.D.C. Feb. 17, 2009).

Ex. 20 Department of Defense, Measurement of Heights and Weights of Individuals Detained by the Department of Defense at Guantanamo Bay, Cuba: ISN 058-121 (Mar. 16, 2007).

Ex. 21 Adam Zagorin & Michael Duffy, *Inside the Interrogation of Detainee 063*, Time, June 20, 2005.

Ex. 22 Department of Defense, Interrogation Log, Detainee 063 (Nov. 23, 2002 through Jan. 11, 2003).

Ex. 23 Associated Press, *Guantanamo Interrogation Tape Released* (July 5, 2008).

Ex. 24 Notice of Defense Motion to Compel Production of Video and/or Audio Recordings of Interrogations of the Accused and Photos of the Accused, *United States of America v. Omar Ahmed Khadr*, U.S. Military Commission (Mar. 4, 2008).

Ex. 25 Department of Defense Photographs of Guantanamo Detainees (various dates)

a) Photo No. 110301-N-BN334-051

b) Photo No. 110210-N-KP312-024

c) Photo No. 110210-N-KP312-086

d) Photo No. 101112-N-BN334-067

e) Photo No. 100617-N-QU233-157

f) Photo No. 100608-N-QU233-036

g) Photo No. 100608-N-QU233-041

Ex. 26 Joint Task Force – Guantanamo, Featured Photos (Jan. 2008 and Sept. 2007),

Ex. 27 Defendant's Combined (1) Reply in Support of Motion for Summary Judgment and (2) Opposition to Plaintiff's Cross Motion for Partial Summary Judgment, *International Counsel Bureau v. Dep't of Defense*, No. 1:08-cv-01063-JDB (May 15. 2009) (ECF No. 22).

Ex. 28 N.Y. Times, Photograph of Mohammed al-Qahtani (undated).

Ex. 29 Amnesty International, *The Army Field Manual: Sanctioning Cruelty?* (Mar. 19, 2009).

Ex. 30 Department of Defense Photograph 100707-F-MQ656-033
A detainee sits down during breakfast inside Camp Delta at Guantanamo Bay Naval Base, Cuba, July 7, 2010. (U.S. Air Force photo by Tech. Sgt. Michael R. Holzworth/Released).

Ex. 31 U.S. Dep't of Justice, Office of Inspector General, *A Review of the FBI's Involvement in and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan, and Iraq* (May 2008) ["FBI-OIG"].

Ex. 32 Department of Defense, GTMO Photos (Apr. 5, 2006).

INTRODUCTION

This case concerns the American public's right under the Freedom of Information Act ("FOIA") to see for itself videotapes and photographs that may depict the torture and abuse of Guantánamo detainee Mohammed al-Qahtani at the hands of the U.S. government – torture that high-level government officials acknowledge took place. Plaintiff the Center for Constitutional Rights ("CCR"), which also represents al-Qahtani in his pending habeas proceeding, submitted FOIA requests to several agencies, including the defendants Federal Bureau of Investigation ("FBI") and Department of Defense ("DOD"), requesting the release of videotapes and photographs of al-Qahtani. These agencies now both admit to possessing numerous responsive records but refuse to release any of the images of al-Qahtani in their possession, citing a host of inapplicable exemptions under FOIA. Because DOD and FBI have identified no legitimate basis for withholding the requested videotapes and photographs, CCR moves for partial summary judgment with respect to both agencies.

In refusing to release videotapes and photographs of Mr. al-Qahtani, DOD and FBI rely upon boilerplate assertions that release of these images will lead to undefined "reprisals" and interfere in unexplained ways with ongoing law enforcement proceedings. Neither agency provides a logical or plausible justification for withholding these records in light of the facts of this case, which include (1) that al-Qahtani himself has requested that his images be released; (2) that the government has been willing to release other images of Guantánamo detainees, frequently for public relations purposes; (3) that an extensive officially acknowledged public record already exists regarding al-Qahtani's detention at Guantánamo, including information about the conditions of his confinement, the abusive tactics utilized during his interrogations, the physical and psychological damage he sustained, and the government's assertion that he

cooperated after being tortured; and (4) that the videotapes and photos, which may depict illegal conduct or evidence of mistreatment, are of overwhelming public importance.

Because the DOD and FBI have not met their burden to demonstrate that any of the claimed FOIA exemptions apply to CCR's request, this Court should grant CCR partial summary judgment with respect to DOD and FBI and order the release of the withheld videotapes and photographs. In the alternative, this Court should find that DOD and FBI failed to meet their burden to provide the Court, and CCR, with adequate descriptions of the withheld videotapes and photographs, to explain why the claimed FOIA exemptions apply to each record, and to assess whether there are any segregable portions that may be disclosed.[2] Because the DOD and FBI's declarations are inadequate under FOIA, particularly in light of the likelihood that the tapes and photos depict illegal conduct or evidence of mistreatment that the agencies would have an incentive to hide from the public for illegitimate reasons, the Court should order the videotapes and photos disclosed or, at the very least (1) require FBI and DOD to submit declarations that adequately describe each photograph and videotape segment and explain the applicability of each claimed FOIA exemption, (2) review the tapes and photos *in camera*, and (3) determine whether this Court has a "need to know" such that Plaintiff's counsel may submit a classified declaration further explaining why the government's justifications for withholding fall short.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. MOHAMMED AL-QAHTANI'S DETENTION AND TORTURE AT GUANTANAMO

Mohammed al-Qahtani (Internment Serial Number 063) is a detainee in the U.S. detention camps at Guantánamo Bay, Cuba. From 2002 to 2003, while detained at Guantánamo,

[2] Plaintiff is also entitled to a fee waiver. Because DOD and FBI have refused to disclose any responsive records, the amount of any processing fees to be charged to CCR has yet to be determined. Accordingly, CCR does not raise its right to a fee waiver in this motion. In the event that DOD and FBI are ordered to produce records, CCR will seek to negotiate a fee waiver, while reserving its right to raise the issue before this Court if necessary.

al-Qahtani was subjected to sustained abused, including systematic twenty-hour interrogations, prolonged sleep deprivation, stress positions, forced nudity, sexual and religious humiliation, and other harsh interrogation tactics, which were approved at the highest levels of government. On January 14, 2009, Military Commission Convening Authority Susan Crawford conceded that this abuse was so severe as to constitute torture, and determined that as a consequence, al-Qahtani could not be subjected to prosecution before a military commission. *See* Bob Woodward, *Detainee Tortured, Says Official Overseeing Military Trials*, Wash. Post, Jan. 14, 2009 (Ex. 1) ("We tortured [Mohammed al] Qahtani. . . . His treatment met the legal definition of torture. And that's why I did not refer the case [for prosecution.]").

As described in government reports and records, al-Qahtani was first held in conditions of extreme isolation and interrogated by FBI agents and military personnel at Guantánamo from August 2002 through November 2002. Office of Inspector Gen., U.S. Dep't of Justice, *A Review of the FBI's Involvement in and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan, and Iraq* 80-90 (2009) [hereinafter FBI-OIG] (Ex. 31). In a July 2004 letter to the Director of the Army regarding "Suspected Mistreatment of Detainees," FBI Deputy Director T.J. Harrington stated that by late November 2002, 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." *See* Letter from T.J. Harrington, Deputy Ass't Dir., Counterterrorism Div., FBI, to Maj. Gen. Donald R. Ryder, Crim. Investigation Command, Dep't of the Army (2004) [hereinafter Harrington Letter] (Ex. 15). DOD records also indicate that between July 2002 and September 2002, al-Qahtani's weight fell from 157 pounds to 106 pounds. *See* Detainee Weight Information (Ex. 20) (weight information for ISN 063).

Military interrogators next implemented the first "Special Interrogation Plan" against al-Qahtani, a regime of brutal interrogation techniques approved by military and White House officials, and designed by military and CIA personnel. Staff of S. Armed Serv. Comm., *Inquiry into the Treatment of Detainees in U.S. Custody* 74-78 (2008) [hereinafter SASC Report] (Ex. 2). The FBI objected to this plan based on concerns regarding "efficacy, coercion, and possible illegality." FBI-OIG 90. U.S. officials subjected al-Qahtani to this interrogation regime for 54 days, between November 23, 2002 and January 16, 2003. SASC Report 88. As part of his interrogations, al-Qahtani was subjected to "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." Statement of Glenn A. Fine, Inspector Gen., U.S. Dep't of Justice, Before the S. Comm. on the Judiciary Concerning Detainee Interrogation Techniques (June 10, 2008) [hereinafter Fine Statement] (Ex. 7); *see also* SASC Report 82, 88, 136. These practices led to his hospitalization in December 2002. *See* FBI-OIG 103; Interrogation Log, Detainee 063 (Dec. 7, 2002) (Ex. 22).

al-Qahtani's mistreatment first drew public attention in 2005, after a leaked log of his interrogations was published in Time Magazine. *See Inside the Interrogation of Detainee 063*, Time, June 20, 2005 (Ex. 21). In subsequent official disclosures, including DOD and FBI reports, declassified records, and other public statements, the U.S. government has acknowledged extensive facts regarding al-Qahtani's detention and abuse at Guantánamo, including (a) the dates, locations, and conditions of his confinement, *see, e.g.*, FBI-OIG 27-28, 77, 80-81; SASC Report 58, 60 & n.434, 61, 108-09; Vice Admiral Albert T. Church, *Review of Department of Defense Detention Operations and Detainee Interrogation Techniques* 101 (Mar.

7, 2005) [hereinafter Church Report] (Ex. 3);[3] (b) the involvement of the DOD and FBI in interrogating him, *see, e.g.*, FBI-OIG 78, 80-82, 83 & n.53, 101-02; SASC Report 57-58, 60; Fine Statement; *Army Regulation 15-6: Final Report: Investigation Into FBI Allegations of Abuse at Guantanamo Bay, Cuba Detention Facility* 17 (June 9, 2005) [hereinafter Schmidt-Furlow Report] (Ex. 4); (c) the abusive interrogation tactics used against him by FBI and military interrogators, including sleep deprivation, threats using military dogs, isolation, the use of stress positions, and religious and sexual humiliation, *see* FBI-OIG 83-84, 87, 102-03, 197; Fine Statement; SASC Report 60, 108-109; Schmidt-Furlow Report 14-17, 19-21; Ex. 63 of Schmidt-Furlow Report (Ex. 5); (d) al-Qahtani's mental and physical state during his period of interrogation, including severe weight loss and evidence of psychological trauma, *see, e.g.*, Detainee Weight Information (Ex. 20); FBI-OIG 103; Harrington Letter; and (e) the government's assertion that he cooperated with his interrogators after being subjected to these abusive tactics, including details about the information he provided. *See* FBI OIG 118-19; U.S. Department of Defense, Office of the Assistant Secretary of Defense (Public Affairs), News Release, *Guantanamo Provides Valuable Intelligence Information* (June 12, 2005) [hereinafter DOD June 12, 2005 News Release] (Ex. 6).

Despite this extensive public record, the government has refused to release any videotapes or photographs of al-Qahtani taken during this time period – this notwithstanding their obvious public importance to the debate on Guantánamo and the use of torture, and even though the government has been willing to release images of Guantánamo detainees in other circumstances.

[3] DOD has also released official photos of Camp Delta, one of the locations of al-Qahtani's detention, including images of cell blocks and the interior cells. *See* Dep't of Defense, GTMO Photos (Apr. 5, 2006) (Ex. 32).

II. CCR'S FOIA REQUEST AND LAWSUIT

More than two years ago, Plaintiff CCR, which also represents al-Qahtani in his habeas proceeding, *see al-Qahtani v. Obama*, No. 05-cv-1971 (D.D.C. filed Oct. 5, 2005), filed FOIA requests with a number of government agencies, including the DOD and FBI, seeking the disclosure of videos, photographs, and other recordings of al-Qahtani that were created from February 13, 2002 through November 30, 2005, during which period he was detained at Guantánamo.[4] As described in the declaration of al-Qahtani's habeas attorney Sandra Babcock, who is also counsel for CCR in this lawsuit, al-Qahtani supports CCR's FOIA suit and the public release of these records. *See* Declaration of Sandra L. Babock [hereinafter Babock Decl.].

None of the agencies issued a final decision in response to CCR's FOIA within the statutory time period, and after waiting almost two years for a response, on January 9, 2012, CCR filed a lawsuit against the DOD and FBI, as well as against the other agencies that had failed to meet their statutory deadlines – CIA, DIA, DOJ, SouthCom, and EOUSA – seeking the immediate processing and release of records responsive to their FOIA requests, as well as a fee waiver. CCR subsequently voluntarily dismissed its claims against EOUSA.

Pursuant to a schedule negotiated by the parties, 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

[4] Specifically, on March 4, 2010, CCR submitted FOIA requests to the Central Intelligence Agency ("CIA"), DOD, Defense Intelligence Agency ("DIA"), United States Southern Command ("SouthCom"), the Department of Justice ("DOJ"), and the FBI. DOJ forwarded CCR's request to its components the Executive Office of United States Attorneys ("EOUSA") and the National Security Division ("NSD"). NSD forwarded CCR's request to DOD. On September 15, 2010, CCR resubmitted an identical FOIA request to the FBI. CCR sought three categories of records: (1) videotapes of Mr. al-Qahtani made from February 13, 2002 through November 30, 2005; (2) photographs of Mr. al-Qahtani taken from February 13, 2002 through November 30, 2005; and (3) any other audio or visual recordings of Mr. al-Qahtani made from February 13, 2002 through November 30, 2005. CCR also sought expedited processing and a fee waiver or limiting of processing fees.

existence of responsive records.[5] As described in greater detail below, both the DOD and FBI identified responsive records in their searches, which they seek to withhold pursuant to numerous Exemptions under FOIA. It is these withholdings by the DOD and FBI, summarized below, as well as the inadequate descriptions of the responsive records in their declarations, that CCR challenges in this motion for partial summary judgment.

Agency	Responsive Records	FOIA Exemptions Claimed
FBI	53 videotapes, "depict[ing] the activities of detainee al-Qahtani within his cell as well as his interaction with DoD personnel at Guantanamo Bay, Cuba."	Exs. 1, 3, 6, 7(A), & 7(C) and Privacy Act (j)(2) (FBI declaration only discusses Ex. 7(A) and Privacy Act; refers to DOD declaration for discussion of remaining exemptions)
DOD	5 "mug shot" photos (Joint Intelligence Group)	Exs. 1, 6, 7(A) & 7(C)
	1 "mug shot" photo (Criminal Investigative Task Force)	Exs. 1, 6, 7(A) & 7(C)
	53 videotapes in possession of FBI	Exs. 1, 6, 7(A) & 7(C)
	1 videotape depicting 2 forced cell extractions (Joint Detainee Group)	Exs. 1, 3 & 6
	2 videos "document[ing] intelligence debriefings of Al-Qahtani taken in July 2002 and April 2004." (Office of General Counsel	Exs. 1, 3 & 6

A. FBI's Response

On June 4, 2012, the FBI provided CCR with a declaration by David M. Hardy (the "Hardy Declaration"), which detailed the FBI's search and stated that the FBI had identified 53 videotapes (the "FBI videotapes") responsive to CCR's request, which it was withholding in their entirety based on Exemptions 1, 3, 6, 7(A), and 7(C) of FOIA, *see* 5 U.S.C. § 552(b)(1), (3),

[5] The DIA submitted a declaration stating that it had no responsive records in its possession. The DOJ, Civil Division, submitted a declaration stating that it had identified four potentially responsive photographs and eighteen potentially responsive video recordings in its possession, and that it had referred these videos to the other defendant agencies for a direct response to CCR's FOIA request.

(6), (7)(A), (7)(B), as well a Section (j)(2) of the Privacy Act, *see* 5 U.S.C. § 552a(j)(2).[6] Hardy Decl. ¶¶ 28, 30 (Ex. 9). The FBI explained that it maintained the originals of these 53 videotapes in its Miami Field Office file, but that the DOD also was relying on these records as "as it considers whether to move forward with Military Commission proceedings involving al-Qahtani and/or co-conspirators," and that DOD had classified this material pursuant to its classification authority. Hardy Decl. ¶ 30. Because of these "intermingled" equities in the 53 videotapes, the Hardy Declaration explained that it addressed only the applicability of Exemption 7(A) and the Privacy Act to the 53 videotapes, but that DOD would also be asserting Exemptions 1, 3, 6, and 7(C) with respect to these videotapes.[7] Hardy Decl. ¶ 30.

Notably, the only description of the 53 videotapes provided in the Hardy Declaration is as follows: "The videotapes depict detainee al-Qahtani at the Naval Station Brig in Guantanamo Bay, Cuba between August 2002 through November 2002. The videos consist of video footage with audio; not all videos contain audible sound. The videos depict the activities of detainee al-Qahtani within his cell as well as his interaction with DoD personnel at Guantanamo Bay, Cuba." Hardy Decl. ¶ 29.[8] The FBI provided no individualized descriptions of the 53 videotapes, such as their date, length, what the videos portray, whether they depict abuse or other illegal conduct, and who is present. Nor did it provide an explanation as to why any of the claimed exemptions applied to specific records or why no portions of the videotapes were segregable from other portions so as to allow them to be disclosed. Following review of the

[6] The FBI also identified two responsive photographs that originated with the DOD. The FBI therefore referred these two photographs to the DOD for a direct response to CCR and only discussed the 53 videotapes in its declaration. Hardy Decl. ¶ 28.

[7] In fact, DOD's declaration does not explicitly assert Exemption 3 with respect to the 53 videotapes, Woods Decl. ¶ 16, although it states that "Exemption 3 also applies to protect from public disclosure all of the DoD personnel who appear in all of the other videotapes," Woods Decl. ¶ 32.

[8] The Declaration further asserts that "Providing a description in this public declaration which is any more detailed would reveal the very content of the material which defendants are trying to protect pursuant to FOIA Exemptions (b)(1) and (b)(7)(A)." Hardy Decl. ¶ 29 n.3.

Hardy Declaration, CCR requested that the FBI provide a supplemental declaration with a description of the individual tapes it identified as responsive to CCR's FOIA, and an explanation as to why the claimed exemptions apply to each individual record. The FBI refused to provide a more detailed declaration, arguing that "we provided enough information to justify the invocation of the exemptions we are claiming, which satisfies our burden." Email from Tara M. LaMorte to Alicia Bannon, June 27, 2012 (Ex. 12).

B. DOD's Response

The DOD provided CCR with a declaration by Rear Admiral David B. Woods (the "Woods Declaration") (Ex. 10) on June 11, 2012, and a supplemental declaration by Mark H. Herrington (the "Herrington Declaration") (Ex. 11) on July 5, 2012, which detailed DOD's search.[9] The DOD located six responsive "mug shot" photographs of al-Qahtani,[10] as well as a videotape depicting two forced cell extractions of al-Qahtani (the "FCE videotape"), and two videotapes documenting "intelligence debriefings of Al-Qahtani taken in July 2002 and April 2004" (the "debriefing videotapes").[11] Woods Decl. ¶¶ 9, 11-12, 14 (Ex. 10); Herrington Decl. ¶¶ 4-5 (Ex. 11). DOD asserted that the six photographs and the 53 FBI videotapes are exempt from release pursuant to FOIA Exemptions 1, 6, 7(A) and 7(C), and that the FCE videotape and

[9] The Herrington Declaration clarified that the Woods declaration also described SouthCom's search for responsive records. Herrington Dec. ¶ 7.

[10] Specifically, DOD's Joint Intelligence Group (JIG) located 5 responsive "mug shot" photographs of al-Qahtani. The photographs are "from the mid-chest up. One (1) is dated August 23, 2002 and is posed in the basic frontal mug shot position. Three (3) are dated March 27, 2002, of which 2 are front mug shots and one is a profile picture. The last is dated May 5, 2005, and is a forward facing mug shot." Woods Decl. ¶ 9. DOD Defense Criminal Investigative Task Force (CITF) located an additional profile photograph, which was taken on August 23, 2002. Woods Decl. ¶ 12; Herrington Decl. ¶ 4.

[11] The Woods and Hardy declarations describe each forced cell extraction depicted in the FCE videotape, but do not provide any description of the 2002 and 2004 intelligence debriefing videotapes. Herrington Decl. ¶ 5; *see also* Woods Decl. ¶ 11. The Woods declaration also notes that DOD located 16 other videotapes that "are controlled by the FBI" and addressed in the FBI's Hardy Declaration as part of the 53 FBI videotapes. Woods Decl. ¶ 14.

the 2002 and 2004 videotapes (collectively, the "DOD videotapes") are exempt from release pursuant to FOIA exemptions 1, 3, and 6. Woods Decl. ¶ 16.

Following receipt of the Woods Declaration, CCR asked the DOD, like the FBI, to provide a supplemental declaration providing more detailed descriptions of the videotapes in its possession. CCR also asked DOD to provide an adequate description of the 53 videos in the possession of the FBI, for which DOD also claimed FOIA exemptions. Finally, CCR sought an explanation as to why the DOD's claimed exemptions applied to each individual record. DOD refused this request except as applied to the FCE videotape, for which it provided additional descriptions in the supplemental Herrington Declaration. Email from Tara M. LaMorte.

C. CCR's Request to Submit Classified Declaration in Secure Facility

Pursuant to protective orders filed in connection with al-Qahtani's habeas action, which is pending in the United States District Court for the District of Columbia before the Honorable Rosemary M. Collyer, some of al-Qahtani's habeas attorneys with security clearance have viewed certain videotape(s) that are also at issue in this FOIA action, specifically the records responsive to the Court's discovery order. *See* Order at 5, *al-Qahtani v. Obama*, No. 05-cv-1971, Dkt. No. 192 (D.D.C. Oct. 5, 2009) (granting discovery with respect to audio/video recordings of Mr. al-Qahtani made November 15, 2002 to November 22, 2002). CCR therefore sought to file a classified declaration before this Court in support of its summary judgment motion in the FOIA action, discussing the videotape(s) that the habeas attorneys have viewed. In CCR's view, this declaration would have provided the Court with information critical to a fair and reasoned assessment of the Defendants' claimed exemptions under FOIA.

Because under the terms of the protective order, habeas counsel is not permitted to discuss the videotape(s) outside of the habeas action, on June 22, 2012, CCR sought consent from the Government to modify the protective orders in order to enable CCR to submit a

declaration in connection with this FOIA case. In emails on June 29 and July 6, 2012, the Government opposed this request. On July 12, 2012, CCR filed a motion before Judge Collyer, seeking a modification of the protective orders to remove restrictions that would potentially prevent habeas counsel from filing a classified declaration in the FOIA action. *See al-Qahtani v. Obama*, No. 05-cv-1971, Dkt. No. 271 (D.D.C. motion filed July 12, 2012).

That motion has now been denied by Judge Collyer, principally on the basis of her finding that Plaintiff had not demonstrated that this Court has a "need to know" the classified information. *See* Order at 1-2, *al-Qahtani v. Obama*, No. 05-cv-1971, Dkt. No. 284 (D.D.C. Aug. 30, 2012) ("Petitioner has made no showing that the New York district judge has a 'need to know' the classified information."). Plaintiff, however, respectfully submits that this Court, which is responsible for adjudicating this FOIA case, and is familiar with the issues in the case, is in a far better position to judge whether it has a "need to know" than was the United States District Court for the District of Columbia, which, of course, did not receive full briefing on the merits of the Government's withholdings that this Court is now in the process of receiving.

Judge Collyer also ruled that "the sealed classified declaration that Petitioner's counsel proposes to file "is not relevant or necessary to the resolution of the FOIA case" because "the only question that a FOIA court addresses is whether the [agency's] affidavit adequately demonstrates the adequacy of the search and the propriety of the FOIA exemptions claimed" and because "[c]ourts 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 1-2. This view of the law, which seems to regard Plaintiff's submissions in FOIA litigation as superfluous, is simply wrong, and is certainly inconsistent with the law in this Circuit, where FOIA courts routinely consider full, adversarial

arguments from the parties in adjudicating withholdings, even where the government invokes FOIA Exemption 1 or other national security exemptions. For example, courts in this district consider arguments from FOIA plaintiffs addressed to issues beyond the adequacy of the agency's affidavit, including arguments that dispute the propriety of classification and the contest the asserted harms of disclosure, or that otherwise introduce new substantive evidence that controvert or otherwise go beyond the materials presented by the government. *See, e.g.*, Opinion at 12-13, *ACLU v. Dep't of Defense*, No 09-cv-8071 (S.D.N.Y. Mar. 20, 2012) (Dkt. No. 106) ("[T]he Court finds it necessary to consider the classified portions of the [government declaration] *and the sealed portions of Plaintiffs' opposition papers*, which address [whether the withheld document had been officially disclosed].") (emphasis added); *Wilner v. NSA*, 592 F.3d 60, 68 (2d Cir. 2009) (holding that while "a court must accord 'substantial weight' to the agency's affidavits" it should do so only if "the [agency's] justifications for nondisclosure are not controverted by contrary evidence in the record or by evidence of bad faith" introduced by the plaintiff.") (internal quotation and alterations omitted); *Halpern v. FBI*, 181 F.3d 279, 291-92 (2d Cir. 1999) (recognizing a FOIA plaintiff's ability to challenge "the government's assertions [with] contrary evidence or a showing of agency bad faith"). Indeed, far from endorsing the notion that a FOIA plaintiff's submissions are "not relevant or necessary" when national security exemptions have been invoked, the Second Circuit has directed district courts to "attempt to create as complete a public record as is possible," holding that "[t]he agency's arguments should . . . be subject to testing by plaintiff, who should be allowed to seek appropriate discovery when necessary." *Wilner*, 592 F.3d at 60 (internal quotation and alteration omitted).[12]

[12] Indeed, even the precedents cited by Judge Collyer in her opinion contradict the sweeping assertion that "Courts are unwilling to give any weight" to a FOIA plaintiff's arguments. *See Gardels v. CIA*, 689 F.2d 1100, 1105-06 & n.5 (D.C. Cir. 1982) (considering plaintiff's submissions, including the affidavit of an former CIA employee, before adjudicating the propriety of classification); *Diamond v. FBI*, 707 F.2d 75, 79 & n.6 (2d Cir. 1983) (considering

Accordingly, there is no question but that this Court is entitled – indeed, obligated – to consider full arguments from both parties and potentially information beyond the Government's affidavits when adjudicating withholdings, even where the Government invokes national security exemptions. Judge Collyer's ruling undermines this Court's ability to fulfill that responsibility. Under the unique circumstances presented here, in which Plaintiff and Plaintiff's counsel have seen classified information, including at least some of the records at stake and other information relevant to the propriety of the government's withholdings – and where Plaintiff's counsel is confident that a classified submission would bear upon, and potentially decisively undermine the arguments advanced by the government in favor of withholding – this Court certainly has the authority, in aid of its jurisdiction to conduct *de novo* review, to determine that it does in fact have a "need to know" such that Plaintiff's counsel should be permitted to file a sealed declaration based on the classified information to which they have access. *See, e.g.*, *ACLU*, No 09-cv-8071, Dkt. No 106 (S.D.N.Y. Mar. 20, 2012) (permitting FOIA counsel who had inadvertently received a copy of a classified document to file a sealed brief relying upon knowledge of said document, so long as the brief did not quote from or cite to the document); *El-Badrawi v. DHS*, 596 F. Supp. 2d 389 (D. Conn. 2009) (considering security-cleared FOIA plaintiff's counsel's request for access to classified materials though ultimately determining, after its own careful *in camera* review, that FOIA counsel did not have a "need to know");.

Here, a sealed declaration from Plaintiff's counsel would aid this Court's adjudication of the Government's asserted withholdings by pointing out significant flaws in its affidavits. For example, a declaration relying upon classified videotapes and other documents could effectively refute the FBI's assertions that release of the tapes would "interfere with a pending enforcement

---

plaintiff's views on necessity for classification, although finding that they were insufficient to overcome the government's arguments).

proceeding." *Cf. North v. Walsh*, 881 F.2d 1088, 1097 (D.C. Cir. 1989) (agency must show that disclosure "would, in some particular, discernible way, disrupt, impede, or otherwise harm the enforcement proceeding"). Similarly, a sealed declaration would permit counsel to demonstrate that disclosure of the tapes would not "threaten the integrity of [the agency's] enforcement efforts by enabling [the subject of the investigation] to engage in any inappropriate means to undermine it." *Goodrich Corp. v. United States EPA*, 593 F. Supp. 2d 184, 194 (D.D.C. 2009).

This Court should therefore conduct its own determination of whether it has a "need to know" for the purposes of hearing full adversarial argument, and in that context consider a sealed submission from Plaintiff's counsel.[13] Moreover, in order to make this determination, the Court should, at the very least, conduct its own *in camera* review of the records. *Id.*

ARGUMENT

I. FREEDOM OF INFORMATION ACT

"The basic purpose of FOIA is 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." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (internal citation omitted). FOIA "adopts as its most basic premise a policy strongly favoring public disclosure of information in the possession of federal agencies." *Halpern v. FBI*, 181 F.3d 279, 286 (2d Cir. 1999). While there are nine exemptions pursuant to which an agency may withhold information, see 5 U.S.C. §§ 552(a)(4)(B) & (b)(1)-(9), these exemptions "are narrowly construed with doubts resolved in favor of disclosure," *Halpern*, 181 F.3d at 287 (internal

[13] Nothing in Judge Collyer's order suggests that the protective orders in that case cannot be modified where a sister Court has found that it has a "need to know." Indeed, if this Court makes a favorable "need to know" determination, Plaintiff, in an abundance of caution, anticipates returning to the District Court for the District of Columbia on a renewed motion to amend the protective order in light of this Court's determination. *But see Tucker v. Ohtsu Tire & Rubber Co.*, 191 F.R.D. 495, 499-500 (D. Md. 2000) (characterizing principles of judicial comity as "not absolute" and citing cases where courts have modified discovery orders issued by another court).

quotation marks omitted), and "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). For this reason, even when an exemption to FOIA is applicable, any reasonably segregable portion of any record must be released to the FOIA requester. *See* 5 U.S.C. § 552(b).

FOIA expressly provides for *de novo* review of agency decisions to withhold records and places the burden of persuasion on the agency. *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 755 (1989); § 552(a)(4)(B). Moreover, while "courts must accord 'substantial deference' to agency affidavits that implicate national security," it is well-established that "deference is not equivalent to acquiescence, and the Court must not relinquish[] its independent responsibility to review agency determinations *de novo*." *ACLU v. Office of the Dir. of Nat'l Intelligence*, No. 10-cv-4419, 2011 U.S. Dist. LEXIS 132503 (S.D.N.Y. Nov. 15, 2011) (internal quotation marks omitted).

In order to meet its burden of proving that the records at issue have been properly withheld, the Government must submit a declaration and index setting forth the bases for its claimed exemptions under FOIA. *See Vaughn v. Rosen*, 484 F.2d 820, 826-28 (D.C. Cir. 1973). This "*Vaughn* declaration" "serves three functions: [1] it forces the government to analyze carefully any material withheld, [2] it enables the trial court to fulfill its duty of ruling on the applicability of the exemption, [3] and it enables the adversary system to operate by giving the requester as much information as possible, on the basis of which he can present his case to the trial court." *Halpern*, 181 F.3d at 291 (internal citations omitted). In light of the tendency of federal agencies to "claim the broadest possible grounds for exemption for the greatest amount of information," defendant 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." *Vaughn,* 484 F.2d at 826-27. With respect to videotapes, the agency must "subdivide the recordings into manageable parts cross-referenced to the relevant portion of the claimed exemption" to "permit the Court to assess whether it has complied with its segregability obligations" under FOIA. *Int'l Counsel Bureau v. DOD*, 723 F. Supp. 2d 54, 65 (D.D.C. 2010); *see also* 5 U.S.C. § 552(b) ("Any reasonably segregable portion of a record shall be provided."); *Int'l Counsel Bureau v. DOD*, No. 08-cv-1063, 2012 U.S. Dist. LEXIS 71521 (D.D.C. May 23, 2012) (declaration must indicate "the actual lengths of the video, when certain segments begin and end, or how long such subdivided segments run"). The declarations must also explain why the withheld information "logically falls within the claimed exemption." *Lesar v. DOJ*, 636 F.2d 472, 481 (D.C. Cir. 1980); *see also Halpern*, 181 F.3d at 293; *New York Times Co. v. DOJ*, No. 11-cv-6990, 2012 U.S. Dist. LEXIS 74977 (S.D.N.Y. May 17, 2012), (agency's justification for invoking a FOIA exemption must "appear[] logical or plausible"). And while a "good faith presumption" ordinarily attaches to agency affidavits, this presumption "only applies when accompanied by reasonably detailed explanations of why material was withheld. Absent a sufficiently specific explanation from an agency, a court's *de novo* review is not possible and the adversary process envisioned in FOIA litigation cannot function." *Halpern*, 181 F.3d at 295.

Finally, pursuant to FOIA, the Court "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 [FOIA] exemptions. 5 U.S.C. § 552(a)(4)(B). *In camera* review is appropriate where "the record showed the reasons for withholding were vague or where the claims to withhold were too sweeping or suggestive of bad faith, or where it might be possible that the agency had exempted whole documents simply because there was some exempt material in them." *Halpern*, 181 F.3d

at 292. *In camera* review is particularly appropriate when there is evidence that the records may depict illegal or embarrassing conduct. Thus, "where it becomes apparent that the subject matter of a request involves activities which, if disclosed, would publicly embarrass the agency or that a so-called 'cover up' is presented, government affidavits lose credibility." *Jones v. FBI*, 41 F.3d 238, 243 (6th Cir. 1994) (quoting *Ingle v. DOJ*, 698 F.2d 259, 267 (6th Cir. 1983)). However, *in camera* review can only supplement, not be a substitute for, detailed public *Vaughn* declarations: "[R]esort to *in camera* review is appropriate only after the government has submitted as much detail in the form of public affidavits and testimony as possible." *Lion Raisins, Inc. v. USDA*, 354 F.3d 1072, 1083 (9th Cir. 2004).

Here, the DOD and FBI's declarations provide "merely conclusory statements" in support of withholding, *United Am. Financial Inc. v. Potter*, 531 F. Supp. 2d 29, 38 (D.D.C. 2008) (internal quotation marks omitted), and the undisputed facts, including the government's own extensive official acknowledgements regarding al-Qahtani's detention and interrogation at Guantánamo, demonstrate that DOD and FBI have improperly withheld records. The Court should therefore grant CCR summary judgment and order the release of the al-Qahtani videotapes and photographs. At the very least, the Court should require FBI and DOD to submit significantly more detailed declarations that discuss both the applicability of the claimed FOIA exemptions to each record and whether there are any segregable portions thereof; the Court should also review the photographs and videotapes *in camera*.

II. THE DOD AND FBI HAVE NOT MET THEIR BURDEN TO WITHHOLD THE REQUESTED PHOTOS AND VIDEOTAPES UNDER EXEMPTION 1.

FOIA Exemption 1 allows agencies to withhold from disclosure any record that has been "properly" classified pursuant to an Executive Order. 5 U.S.C. § 552(b)(1). Here, the DOD and

FBI[14] seek to withhold all responsive records under Exemption 1, pursuant to DOD's classification authority, because the release of any image of any Guantánamo detainee allegedly concerns "intelligence activities (including special activities), intelligence sources or methods, or cryptology" and/or "military plans, weapons systems, or operations," and threatens national security. *See* Woods Decl. ¶¶ 27-29; Exec. Order 13526, at § 1.4(a), (c). DOD further asserts that the FCE videotape depicts information about forced cell extractions that is also classified because it concerns "military plans, weapons systems, or operations." *See* Woods Decl. ¶ 28; Exec. Order 13526, at § 1.4(a).

Under FOIA, this Court is "charged with the responsibility of reviewing *de novo* the substantive as well as procedural propriety of the [DOD's] classification" decision. *Allen v. CIA*, 636 F.2d 1287, 1295 (D.C. Cir. 1980); *see also Halpern*, 181 F.3d at 291 (Congress "clarified that *de novo* review should apply in all cases, and specifically extended the language of FOIA's provision for *in camera* inspection to encompass Exemption 1"). Pursuant to the applicable Executive Order, Exec. Order 13526, in order for the government's Exemption 1 claim to be upheld, DOD must show (1) that the withheld materials fall within an "authorized withholding categor[y]" (here, "intelligence activities (including special activities), intelligence sources or methods, or cryptology" or "military plans, weapons systems, or operations"), and (2) that the "unauthorized disclosure of the information reasonably could be expected to result in damage to the national security," which the DOD must be "able to identify or describe." Exec. Order 13526, at § 1.1.[15] Information may not be classified to "conceal violations of law" or to "prevent

[14] DOD, as the original classification authority, asserts Exemption 1 with respect to the records in its possession as well as to the 53 tapes in the FBI's possession. The FBI asserts that the tapes in its possession are exempt under Exemption 1 but refers to the DOD's declaration without providing any separation justification. Hardy Decl. ¶ 38.

[15] "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 13526, at § 6.1(l).

embarrassment." Exec. Order No. 13526, at § 1.7(a)(1)-(2). As discussed below, DOD fails to meet its burden to establish that the requested videotapes and photographs fall within an authorized withholding category or that disclosure of these materials could reasonably be expected to result in damage to the national security.

A. The DOD and FBI Have Not Met Their Burden to Withhold All Images of al-Qahtani Under Exemption 1 as a Means to Protect Cooperators.

DOD argues that all images of al-Qahtani, including the videotapes and photographs at issue here, are classified and exempt from disclosure because of the need to encourage Guantánamo detainees to cooperate as human intelligence sources. Woods Decl. ¶¶ 23-27. But DOD's conclusory assertion that the release of *any* detainee images would potentially compromise the "cooperation of human intelligence sources" and thereby threaten national security is neither "logical nor plausible," *Wilner*, 592 F.3d at 73, and is flatly contradicted by DOD's own conduct in making numerous detainee images publicly available. Because DOD fails to offer any reasonable explanation as to why the release of al-Qahtani's videotapes and photographs would threaten the cooperation of human intelligence sources and harm national security, particularly where, as here, al-Qahtani consents to the release of his images, the records should be released.

DOD's basis for withholding records pursuant to Exemption 1 is that "[p]hotographs and videotapes depicting past and present Guantánamo detainees, including the images of Al-Qahtani contained in each responsive record," must be classified because the release of any images would compromise the "cooperation of human intelligence sources" and harm national security. Woods Decl. ¶ 22. DOD asserts that release of these images "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," and to "exacerbate the detainee's

fears of reprisal and make it substantially less likely that the detainee will cooperate and provide information in the future." Woods Decl. ¶ 25.

Yet DOD fails to explain why the mere release of a photograph or video of a detainee, regardless of the image's content, would lead anyone to infer that he was a cooperator and therefore create a risk or fear of reprisals. Nor does DOD explain how detainee images, as a category, will allow hostile persons to link the detainee to family or associates. While arguing that current and future sources must be confident "that the government will do everything in its power to prevent the disclosure of any information that suggests their cooperation with the United States," Woods Decl. ¶ 24, DOD is entirely silent as to why this concern requires the withholding of *all* images of detainees – including images that the detainee himself consents to have released, images that do not depict cooperation, such as mug shot photographs or videos of detainee abuse, and images where the detainee's face is not visible or can be redacted.

Indeed, the government's purported rationale of protecting cooperating detainees is wholly inapplicable where, as here, the detainee *consents* to having his images released. *See* Babcock Decl. ¶ 2-4. As discussed in the Babcock declaration, counsel for al-Qahtani in his habeas case have discussed CCR's FOIA action with him, and he strongly supports the release of all videotapes, photos, or other recordings of him, so that the U.S. public can see for itself how he has been treated at Guantánamo. al-Qahtani does not fear reprisals for himself or his family or associates in connection with the release of his images; to the contrary, he affirmatively wishes for the world to see how he has been treated.[16] Under these circumstances, the DOD's

[16] As discussed in the declaration, Ms. Babcock represents al-Qahtani in his habeas proceeding and has discussed CCR's FOIA action with him. Because al-Qahtani is currently detained at Guantánamo, it was not possible to obtain a declaration from him in this action. However, as his counsel and as an officer of the Court, Ms. Babcock represents that al-Qahtani strongly desires all videotapes and photographs of him be released to CCR in this FOIA action. Should the Court wish to confirm al-Qahtani's views directly, Plaintiff respectfully suggests that the Court order DOD to authorize al-Qahtani to fill out a questionnaire to express wishes, as was required by the Honorable Jed. S. Rakoff in *AP v. U.S. DOD*, 410 F. Supp. 2d 147, 149-50 (S.D.N.Y. 2006).

expressed concerns for protecting informants is simply inapplicable: when the government releases images on the consent of a detainee, there is no likelihood that their release will cause the detainee to fear retaliation or discourage this or any other detainee from cooperating. This is particularly so for al-Qahtani, whom the FBI and DOD have already publicly described as having cooperated with his interrogators after he was tortured. *See* FBI OIG 118-19; DOD June 12, 2005 News Release. Despite this public "outing" as an alleged cooperator – which makes even more suspect DOD's rationale for withholding the photos and tapes as a way of *protecting* cooperators[17] – al-Qahtani wants his images made public, because he believes it is important for the American public to see how he has been treated.

DOD's justification for its classification decision is also belied by its own conduct. DOD's sole explanation for the blanket classification of all al-Qahtani images is that "the policy to classify the images of current and former detainees must be consistently applied" and that it would "frustrate the purposes of the policy" if "JTF-GTMO released images of current and former detainees on a case-by-case basis." Woods Decl. ¶¶ 25, 27. Yet DOD has in fact repeatedly released images of Guantanamo detainees to the public and declassified images of Guantánamo detainees, often to serve public relations purposes.[18] For example:

- DOD has published numerous images of Guantánamo detainees engaged in various activities, including receiving medical treatment, playing soccer, and getting haircuts. These images appear on both JTF-GTMO's website, *see* Ex. 26,

[17] The timing of DOD's description of al-Qahtani as a cooperator is also suspect. DOD publicly identified al-Qahtani as a cooperator in 2005, after the interrogation logs describing his brutal treatment were leaked to the public. DOD's press release acknowledged the release of the logs and described in detail the allegedly "valuable intelligence information" he provided. *See* DOD June 12, 2005 News Release. This timing strongly suggests that DOD identified him as a cooperator to help diffuse public outcry about the conduct depicted in the logs and to justify the use of the brutal interrogation techniques described in the logs – the same conduct that may be depicted in the records requested by al-Qahtani and that he now wishes to make public.

[18] DOD's purported desire to protect detainees' identifying information is further belied by its decision to release other identifying information about Guantánamo detainees, including nationality, aliases, and in some cases the home addresses of their families. *See, e.g.*, Detainee Biographies (Ex. 17); Correspondence Submitted on Behalf of Enemy Combatant (Ex. 18). This conduct is inconsistent with DOD's professed reason for withholding photographs of all detainees as necessary to protect identifying information about informants from being made public.

and the military's defenseimagery.mil website. *See* Ex. 25. One photograph's caption makes clear that it had been released for public relations purposes: "A detainee sits down during breakfast inside Camp Delta at Guantanamo Bay Naval Base, Cuba, July 7, 2010. Joint Task Force Guantanamo provides safe, humane, legal and transparent care and custody of detainees, including those convicted by military commission and those ordered released by a court." Ex. 30.

- With the permission of DOD, the Associated Press has taken and published a large number of photographs of Guantánamo detainees, some of which include images of detainees' faces. *See* Ex. 19.

- In another FOIA suit seeking images of four Guantánamo detainees, DOD acknowledged that the requested photographs of the detainees had been declassified and DOD was subsequently ordered by the Court to release the images, which it has since done. *See Int'l Counsel Bureau v. DOD*, No. 08-1063-JDB, Reply Br. 3 (Docket No. 17-1) (D.D.C. Feb. 17, 2009) (Ex. 27); *Int'l Counsel Bureau v. DOD*, 723 F. Supp. 2d 54 (D.D.C. 2010).

- The government has also 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. *See* Guantanamo Interrogation Tape Released (Feb. 11, 2009) (Ex. 23). The government apparently provided the videotape through discovery in the detainee's Military Commission proceeding. *See* Mar. 4, 2008 Notice of Defense Motion at 2 (Ex. 24) (stating that the government had agreed to release a video).

- DOD has permitted the International Committee of the Red Cross ("ICRC") to take photographs of detainees to be provided to detainee families. The ICRC has explained that 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." In fact, several of these images have been widely disseminated, including on the website of the Miami Herald. DOD recently announced that ICRC would be permitted to take photographs of detainees again in October 2012. *See Admiral: Red Cross to Take Fresh Portraits of Guantánamo Captives* (June 6, 2012) (Ex. 16), http://www.miamiherald.com/2012/06/04/2832562/us-navy-admiral-red-cross-to-take.html.

Under these circumstances, DOD's conclusory assertion that "national security interests require that the government protect detainee images from public disclosure" is simply not "logical or plausible." *Wilner*, 592 F.3d at 73. The government cannot rationally claim that national security requires the consistent classification of detainee images when it has so frequently released these images to the public. The fact that the al-Qahtani videotapes and

photographs may depict illegal conduct, evidence of mistreatment, or may otherwise be embarrassing to DOD makes their illogical claim particularly suspect.[19]

Because the government's justification for classifying al-Qahtani's images is neither logical nor plausible, this Court should find that the government has failed to meet its burden under Exemption 1, and the requested records should be released.

B. DOD Has Not Met Its Burden to Withhold the Forced Cell Extraction Video Under Exemption 1 as a Military Plan or Operation.

DOD also claims a separate basis for classification with respect to the FCE videotape, asserting that it is properly classified because it "depicts the operations of the FCE Team, the function each member performs, and the actions they take to complete the FCE." Woods Decl. ¶ 28. DOD relies upon the claim that "[d]ivulging this information 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, but fails to address the extensive official disclosures that have already been made regarding forced cell extractions, disclosures that already provide extensive detail as to the operations of FCE teams, the function each member performs, and the actions they take to complete forced cell extractions. These extensive disclosures make the DOD's blanket withholding of the FCE videotape unsupportable under Exemption 1, because "[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." *Wash. Post v. DOD*, 766 F. Supp. 1, 9 (D.D.C. 1991) ("In other words, if the

[19] CCR's request is therefore unlike the request at issue in *AP v. U.S. DOD*, 462 F. Supp. 2d 573, 576 (S.D.N.Y. 2006), where the court allowed the withholding of photographs when the government provided "particularized detail" regarding how their release would reduce the likelihood that detainees would cooperate in intelligence-gathering efforts. In that case, the government provided "reasonably specific detail" about how and why the requested photographs logically raised national security concerns, something it has failed to do in this case. Indeed, there was no indication in that case that the government had already officially released detainee photographs for other purposes, or that the detainees at issue consented to the release of their images.

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."); *see also Halpern*, 181 F.3d at 294 (Exemption 1 claims are not supported when "the government has officially disclosed the specific information the requester seeks").

For example, public DOD materials provide extensive detail about the function that each FCE team member plays. *See, e.g.*, Joint Task Force-Guantanamo, Camp Delta Standard Operating Procedures (March 1, 2004) at 24-1 [hereinafter Camp Delta SOP] (Ex. 14) (Team Organization) (explaining each member's role; for example, that the "Number Two Man is responsible for securing the detainee's right arm with the minimal amount of force necessary. He will also have the handcuffs and keys for the cuffs. He is responsible for proper shackling of the detainee's wrist."); *see also* FBI-OIG at 195; Dep't of Def., *Review of Department Compliance with President's Executive Order on Detainee Conditions of Confinement* 42 (2009) [hereinafter DOD Review] (Ex. 8). Likewise, DOD has already officially acknowledged extensive details about the operations and actions of FCE teams, including the equipment they use, the orders and instructions they give to detainees before entering the cell, and their use of pepper spray as a show of force. *See* DOD Review 42; Camp Delta SOP at 24-2, 24-3, 24-7. The government has also officially acknowledged that the FCE practices in Guantánamo are "[s]imilar to procedures used in detention facilities throughout the United States," DOD Review 42, and has released 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. *See* Ex. 13. Because of the extensive official public records about the conduct and processes of FCEs, the DOD's blanket withholding, without any specific detail as to what elements of the video depict information that is not already known and

that could reasonably aid detainees in developing tactics to thwart future FCEs, does not meet DOD's burden under FOIA. The FCE videotape should accordingly be disclosed; alternatively, DOD should be required to submit a supplemental declaration setting forth those portions of the FCE videotape which reflect information that has already been officially disclosed. This Court may also review the videotape *in camera* for this purpose.

Moreover, even absent this extensive public record, DOD's declaration also suggests that there are likely segregable portions of the videotape that do not depict information that could result in the "development of tactics and procedures to thwart the actions of the FCE team." For example, in *Int'l Counsel Bureau v. DOD*, 723 F. Supp. 2d 54 (D.D.C. 2010), the district court held that the DOD had failed to meet its burden under FOIA to show that there were no segregable portions of an FCE video, explaining that "[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." *Id.* at 63-64. As in *Int'l Counsel Bureau*, the DOD's description of the FCE videotape indicates that portions show activities by the FCE team outside of the presence of al-Qahtani. Herrington Decl. ¶ 5(a). Likewise, there are portions of the videotape in which al-Qahtani is visible without military personnel present. Herrington Decl. ¶ 5(b). Because it is not logical or plausible that either of these portions – and likely others – could be used to help detainees develop FCE counter-tactics, DOD has failed to meet its burden, and these portions of the FCE videotape should be released.

III. THE DOD AND FBI HAVE NOT MET THEIR BURDEN TO WITHHOLD THE SIX PHOTOGRAPHS AND 53 FBI VIDEOTAPES UNDER EXEMPTION 7(A).

The DOD and FBI also fail to establish a basis for withholding al-Qahtani's records pursuant to Exemption 7(A), which exempts "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records

or information . . . could reasonably be expected to interfere with enforcement proceedings." Here, the FBI seeks to withhold the 53 FBI videotapes and the DOD seeks to withhold the six photographs in its possession pursuant to Exemption 7(A).[20] Because the DOD and FBI both fail "[to] show, by more than conclusory statement, how the particular kinds of investigatory records requested would interfere with a pending enforcement [p]roceeding," they have not met their burden. *Campbell v. Dep't of Health and Human Serv.*, 682 F.2d 256, 259 (D.C. Cir. 1982).

A. The FBI Has Failed to Show that Release of the 53 FBI Videotapes Could Reasonably Be Expected to Interfere with Enforcement Proceedings.

Exemption 7(A) allows agencies to refuse to release records when doing so could reasonably be expected to diminish their ability to effectively develop their case, such as when information in the records could lead to the "destruction of evidence, chilling and intimidation of witnesses, and revelation of the scope and nature of the Government's investigation." *Solar Sources v. United States*, 142 F.3d 1033, 1039 (7th Cir. 1998); *see also Goodrich Corp. v. United States EPA*, 593 F. Supp. 2d 184, 194 (D.D.C. 2009) (Exemption 7(A) allows agencies to withhold records that would "threaten the integrity of [the agency's] enforcement efforts by enabling [the subject of the investigation] to engage in any inappropriate means to undermine it"). But the FBI's declaration "makes only conclusory statements" that release of the tapes would impact enforcement actions against alleged co-conspirators involved with the terrorist attacks on September 11, 2001, *Voinche v. FBI*, 46 F. Supp. 2d 26, 31 (D.D.C. 1999), without showing that disclosure "would, in some particular, discernible way, disrupt, impede, or otherwise harm the enforcement proceeding." *North*, 881 F.2d at 1097.

For example, the FBI asserts that release of the tapes could lead to "manipulation of evidence in advance of trial by Military Commission." Hardy Decl. ¶ 37. But CCR seeks only

[20] The DOD does not assert Exemption 7(A) with respect to the 2002 and 2004 debriefing videos or the FCE video.

copies of videotapes, the originals of which are indisputably in the possession of the government. As the Court of Appeals for the Ninth Circuit found under similar circumstances, there is no reasonable possibility of evidence tampering when a FOIA requester "seeks only copies of [agency]-retained original[]" records. *Lion Raisins, Inc. v. USDA*, 354 F.3d 1072, 1085 (9th Cir. 2004) (also rejecting the "speculative and farfetched concern" that the FOIA recipient would "forge or falsify those copies in an attempt to cast doubt on the authenticity" of the originals, explaining that "the government's argument would justify withholding of virtually any document by any government agency on the ground that the recipient might tamper with the disclosed copy"). Likewise, while the FBI argues that there will be "undue prejudice to the United States's case by providing defense counsel for detainees facing trial by Military Commission with information that may not otherwise be discoverable," Hardy Decl. ¶ 37, the mere fact that FOIA may permit the release of records that are not otherwise discoverable is not, as a matter of law, an independent basis for withholding, absent indication that their release would actually interfere with law enforcement proceedings – which the Hardy Declaration fails to show. Thus, "[a]lthough the FOIA was not principally intended to be a device enlarging the scope of private discovery in litigation, the statute compels disclosure of nonexempt documents to 'any person' without regard to the limitations on discovery by parties to civil or criminal litigation." *John Doe Corp. v. John Doe Agency*, 850 F.2d 105, 108 (2d Cir. 1988), *rev'd on other grounds*, 493 U.S. 146 (1989); *see also NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10 (1975) (plaintiff's rights under FOIA "are neither increased nor decreased by reason of the fact that it claims an interest in [the requested materials] greater than that shared by the average member of the public."). Nor does the FBI's cursory description of the tapes indicate that their contents would not in fact be discoverable. Indeed, al-Qahtani's habeas counsel have already been

permitted to view videotape(s) of al-Qahtani created between November 15, 2002 and November 22, 2002 – tape(s) that fall within the scope of CCR's FOIA request – subject to protective orders. *See* Order at 5, *al-Qahtani v. Obama*, No. 05-cv-1971, Dkt. No. 192 (D.D.C. Oct. 5, 2009) (granting discovery with respect to audio/video recordings of Mr. al-Qahtani made November 15, 2002 to November 22, 2002).

The FBI's argument that release of the tapes would "prematurely reveal[] the focus of the Government's ongoing investigation" is similarly without merit. Hardy Decl. ¶ 37. As an initial matter, the FBI is completely silent as to how the videotapes' content has any potential to reveal the focus of its investigation, much less why any such harm could not be addressed by, for example, redacting audio portions of videotapes that might concern the subject matter of interrogations. *See Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106 (D.C. Cir. 2007) ("[I]t is not sufficient for an agency merely to state that disclosure would reveal the focus of an investigation; it must rather demonstrate how disclosure would reveal that focus."). Thus, the FBI cannot simply rely on the fact that the videotapes are in its files without making a showing that their release would cause "particular, discernible" harm to their investigation. *North*, 881 F.2d at 1097. Indeed, Exemption 7 was amended in 1974 to "make clear that the Exemption did not endlessly protect material simply because it was in an investigatory file." *Robbins*, 437 U.S. 214, 230 (1978) (explaining that prior to the amendment, all law enforcement "files" were exempt from disclosure). Thus, the law is clear that "courts ha[ve] to consider the nature of the particular document as to which exemption was claimed, in order to avoid the possibility of impermissible 'commingling' by an agency's placing in an investigatory file material that did not legitimately have to be kept confidential," and must look "to the reasons for allowing withholding of investigatory files before making their decisions." *Id.* at 229-230 (internal

quotation marks omitted). Here, the FBI provides no basis whatsoever for concluding that the videotapes would, in fact, prematurely reveal the basis of the government's investigation. Indeed, the fact that the public record already contains information about the subject matter of his interrogations at least suggests – if it does not conclusively establish – they would not.[21] The FBI's claim is particularly incredible given that al-Qahtani's habeas counsel have already been given access to certain videotape(s) that fall within CCR's FOIA request. With respect to these videotape(s), the Hardy Declaration is silent as to the basis for believing that there is a risk that the government's strategy will be revealed when counsel have already viewed the requested tape(s) and seek only to make them publicly available.

The FBI also argues the videotapes could lead to "undue prejudice to the United States's case generated by an early release to the public which could be employed to depict an incomplete picture of events surrounding the detention and questioning of detainee al-Qahtani." Hardy Decl. ¶ 37. But in addition to failing to describe how the videotapes "depict an incomplete picture of events," the declaration offers no explanation as to how this "incomplete picture" would "in some particular, discernible way, disrupt, impede, or otherwise harm [an] enforcement proceeding." *North*, 881 F.2d at 1097. Of course, if by "undue prejudice" the FBI means that release of the videotapes could lead to public outcry about al-Qahtani's torture or other mistreatment at the hands of the U.S. government, such public accountability for malfeasance is at the very heart of FOIA and certainly cannot provide a basis for *exempting* the government from scrutiny. *See DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773 (1989) (FOIA's "basic policy of full agency disclosure unless information is exempted under clearly delineated statutory language . . . focuses on the citizens' right to be informed about 'what their

[21] This extensive public record likewise undercuts many of the other harms identified by the FBI, such as the claim that release of the videotapes could reveal "details of [al-Qahtani's] detention," Hardy Decl. ¶ 16(b), or create "undue prejudice" to the Government's case, Hardy Decl. ¶ 37.

government is up to.' Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose.") (internal citation and quotation marks omitted). Similarly, the FBI's conclusory claim that release of the videotapes could lead to "undue influence of prospective members of the Military Commission who may hear the case," Hardy Decl. ¶ 37, without any explanation as to what it means by "undue influence" or how or why the videotapes could lead to such undue influence, is inconsistent with FOIA's purpose in shedding light on government activities.

Nor do the "speculative and farfetched concern[s]" raised by the FBI about the impact of the videotapes on national security support withholding. *Lion Raisins*, 354 F.3d at 1085. The FBI asserts, without explanation, that the release of the tapes could lead to "retribution by terrorist organizations," the "alteration of plans and activities by overseas individuals associated with terrorist groups," and the "reinforcement and facilitation of the teachings of the Al-Qaeda manual," including the risk that persons would "concoct stories of torture and mistreatment at the hands of U.S. government officials." Hardy Decl. ¶ 16. Not only are these alleged harms completely speculative, but none of them are cognizable under Exemption 7(A), which requires the FBI to show how release of the records "would, in some particular, discernible way, disrupt, impede, or otherwise harm [a pending] enforcement proceeding." *North v. Walsh*, 881 F.2d 1088, 1097 (D.C. Cir. 1989). Thus, as discussed above, Exemption 7(A) allows agencies to refuse to release records when it would impair their ability to effectively develop their case, such as when release of records could lead to the "destruction of evidence, chilling and intimidation of witnesses, and revelation of the scope and nature of the Government's investigation." *Solar Sources v. United States*, 142 F.3d 1033, 1039 (7th Cir. 1998); *see also Robbins*, 437 U.S. at 224 ("Foremost among the purposes of [exemption 7] was to prevent harm to the Government's case

in court." (internal quotation omitted)); *Cudzich v. U.S. INS*, 886 F. Supp. 101, 106 n.1 (D.D.C. 1995) (listing harms that have been recognized under Exemption 7(A)). It does not provide for withholding on the basis of nebulous harms to national security, unmoored from any actual risk that the records would "interfere with enforcement proceedings." This is particularly so because, as the Second Circuit has explained in interpreting the scope of the law enforcement exemption under Exemption 7(F), "FOIA . . . provides a separate exemption[, Exemption 1,] specifically tailored to the national security context," and the applicable Executive Order "sets forth limits on what maybe classified, by what authority, and for how long," including prohibitions "against classifying information in order to 'conceal violations of law, inefficiency, or administrative error' or 'prevent embarrassment to a person, organization, or agency.'" *ACLU v. DOD*, 543 F.3d 59, 72 (2d Cir. 2008) (finding that "[t]he existence of separate standards for information threatening harm to national security severely undercuts the defendants' asserted construction of exemption 7(F)"), *vacated and remanded on other grounds*, 130 S. Ct. 777 (2009). Exemption 7(A) is likewise a limited exemption to protect law enforcement prerogatives, not a means to bypass the procedures and safeguards embodied in the government's classification authority.

Finally, in addition to inadequately describing the "harms" to enforcement proceedings from release of the videotapes, the FBI also fails to meet its burden under FOIA because its cursory declaration does not "describe[] the application of the exemption to the [53 FBI videotapes] with sufficient specificity." *Voinche v. FBI*, 46 F. Supp. 2d 26, 31 (D.D.C. 1999). The FBI's description of the tapes could encompass everything from tapes of al-Qahtani sleeping in his cell or receiving meals to tapes depicting abuse by guards or illegal torture. This description of the videotapes is plainly inadequate to demonstrate that any of the withheld tapes

would have any relevance to, much less would harm, an enforcement proceeding, or to establish that there are no reasonably segregable portions. *See Lion Raisins, Inc. v. USDA*, 354 F.3d 1072, 1082 (9th Cir. 2004) ("Because the court and the plaintiff do not have the opportunity to view the documents themselves, the submission must be 'detailed enough for the district court to make a *de novo* assessment of the government's claim of exemption.'") (discussing Exemption 7(A)).

Moreover, while the government may group records into categories when asserting a withholding under Exemption 7(A), these categories must be "sufficiently distinct to allow a court to grasp 'how each . . . category of documents, if disclosed, would interfere with the investigation.'" *Cudzich*, 886 F. Supp. at 106 (quoting *Campbell*, 682 F.2d at 265); *see also Ayyad v. U.S. DOJ*, No. 00-cv-960, 2002 U.S. Dist. LEXIS 6925 (S.D.N.Y. Apr. 18, 2002) (if agency seeks to withhold an entire category of records under Exemption 7(A), the categorization must be "sufficient to allow the court 'to trace a rational link between the nature of the document and the alleged likely interference [with law enforcement proceedings].'"). But there is nothing about tapes, as a category of records, that indicates that their release would "generally interfere with [law enforcement] proceeding[s]." *Radcliffe v. IRS*, 536 F. Supp. 2d 423, 437 (S.D.N.Y. 2008). *See also Lawyers' Comm. for Civ. Rights of S.F. Bay Area v. U.S. Dep't of the Treasury*, No. 07-cv-2590, 2008 U.S. Dist. LEXIS 87624, at *27-28 (N.D. Cal. Sept. 30, 2008) ("In order to apply an exemption categorically, there must be some indicia that the individual documents within the class of documents are similar; and that the agency has reviewed and ensured that the individual documents it seeks to include in the class of documents are indeed similar.").

Because the FBI has failed to provide a meaningful description of the content of the tapes or explain why such content would interfere with an enforcement proceeding, the government has failed to meet its burden under FOIA and the tapes should be released. In the alternative, the

FBI should be required to submit detailed declarations, describing the content of the tapes into segregable portions, and explaining how each portion is reasonably likely to interfere with enforcement proceedings. If necessary, this Court should also review the videotapes *in camera*.

B. The DOD Has Failed to Show that Release of the Six DOD Photographs Could Reasonably Be Expected to Interfere with Enforcement Proceedings.

Like the FBI, the DOD also fails to meet its burden to establish that the six DOD photographs at issue "could reasonably be expected to interfere with enforcement proceedings," as required under FOIA. The DOD's discussion of the applicability of Exemption 7(A) is limited to a single sentence: "While the original purpose for taking the photographs may have been for reasons other than law enforcement, the photographs have since been compiled for the purpose of potential prosecution, whether by military commission or domestic criminal proceeding, and are therefore exempt under (b)(7)(a)." Woods Decl. ¶ 34. But this analysis is patently incomplete – the Woods declaration is silent as to how the photographs of al-Qahtani "could reasonably be expected to interfere with enforcement proceedings," the other essential element of Exemption 7(A). DOD has thus failed to meet its burden on FOIA to exempt the photos on this basis. *See Ferguson v. FBI*, 957 F.2d 1059, 1065 (2d Cir. 1992) ("Exemption 7 . . . protects 'investigatory records compiled for law enforcement purposes,' but only to the extent that one of the six enumerated harms could also be demonstrated.").[22]

Moreover, the limited description of the photos provided by DOD indicates that they are "mug shots" of al-Qahtani. Woods Decl. ¶¶ 9, 12. DOD is entirely silent as to how release of a "mug shot" could interfere with enforcement proceedings, and it is not logical or plausible to assume that they would do so. Nor does the Woods Declaration even address segregability, let

[22] Nor does the FBI's declaration even purport to address the photos in DOD's possession. *See* Hardy Decl. ¶ 28 ("[T]his declaration will focus only on the 53 videotapes[.]").

alone "demonstrate that it has released all segregable information that is not exempt from disclosure under Exemption 7(A)." *See Voinche*, 46 F. Supp. 2d at 31.

In sum, because DOD has offered no explanation as to why the six photographs would interfere with law enforcement proceedings, it has no basis to withhold them pursuant to Exemption 7(A), and the photographs should be released.

IV. THE DOD AND FBI HAVE NOT MET THEIR BURDEN TO WITHHOLD THE REQUESTED RECORDS UNDER EXEMPTION 6 OR EXEMPTION 7(C).

A. Disclosure of Images of al-Qahtani Does Not Constitute an Unwarranted or Clearly Unwarranted Invasion of His Personal Privacy.

DOD asserts that the six DOD photographs and 53 FBI videotapes are also exempt from FOIA pursuant to Exemption 7(C), which protects from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." Woods Decl. ¶ 34. It likewise argues that all images of al-Qahtani, including the three DOD videotapes that were not compiled for law enforcement purposes, are exempt from FOIA pursuant to Exemption 6, Woods Decl. ¶ 33, which permits an agency to withhold records about individuals in "personnel and medical files and similar files" when disclosure "would constitute a clearly unwarranted invasion of personal privacy."[23]

These exemptions are inapplicable because, as discussed *supra*, al-Qahtani has waived any privacy interest and asks that the photos and videos depicting him be released. *See* Babcock Decl. ¶¶ 2-4. It is well-established that a privacy interest under FOIA "may be waived." *Computer Prof'ls for Soc. Responsibility v. U.S. Secret Serv.*, 72 F.3d 897, 904 (D.C. Cir. 1996)

[23] Exemption 6 engenders a "heavier" burden for the government than does Exemption 7(C). *AP v. U.S. DOD*, 554 F.3d 274, 291 (2d Cir. 2009) ("Exemption 6 does not protect against disclosure of every incidental invasion of privacy – only such disclosures as constitute 'clearly unwarranted' invasions of personal privacy."). The FBI also references the DOD's assertion of Exemptions 6 and 7(C), although it does not provide separate analysis as to why these exemptions are applicable. *See* Hardy Decl. ¶ 38.

(ordering disclosure of information related to eight individuals who provided waivers of their privacy rights); *see also 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 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"); *AP*, 554 F.3d at 284-85, 291 (holding that Guantanamo detainees identified in reports of abuse had a privacy interest regarding the release of their names but explaining that "this opinion does not empower the government to prevent such public disclosure by the detainees themselves based on this recognized privacy interest"). al-Qahtani's waiver of any privacy interest in his images is dispositive: "[o]nly where a privacy interest is implicated does the public interest for which the information will serve become relevant and require a balancing of the competing interests [under Exemptions 6 and 7(C).]" *AP*, 554 F.3d at 284-85, 291.

Moreover, even absent this waiver by al-Qahtani, the overwhelming public interest in disclosure outweighs his privacy interest in these images. When a FOIA request implicates a privacy interest under Exemptions 6 and 7(C), that interest is weighed against the public interest in the disclosure, which "is determined by the degree to which disclosure would further the core purpose of FOIA, which focuses on the citizens' right to be informed about what their government is up to." *AP*, 554 F.3d at 285 ("There is only one relevant interest, namely, to open agency action to the light of public scrutiny."). "First, the citizen must show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake. Second, the citizen must show the information is likely to advance that interest." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004).

Accordingly, although it is al-Qahtani's desire that these materials be disclosed, even absent a waiver, al-Qahtani's privacy interest would not dispose of this claim. In *Int'l Counsel Bureau v. U.S. DOD*, 723 F. Supp. 2d 54 (D.D.C. 2010), for example, the district court held that photographs of four Kuwaiti Guantánamo detainees were not withholdable pursuant to Exemption 6 and should be released, emphasizing that there was only a "slight privacy interest" in the photos because "the government has already released a substantial amount of information about these detainees" and their "photographs are already publicly available." *Id.* at 66; *see also Hidalgo v. FBI*, 541 F. Supp. 2d 250, 255 (D.D.C. 2008) (privacy interest significantly lessened where information is "open and notorious"). Here, the government has likewise released vast information about al-Qahtani, including everything from his weight during interrogation, to his medical care, to his physical and psychological breakdowns as a result of his torture. *See supra*. Moreover, as in *Int'l Counsel Bureau*, images of al-Qahtani are already in the public domain; indeed his photograph is published on the website of the New York Times. *See* Ex. 28.[24]

By contrast, the public interest in the release of the photographs and videotapes of al-Qahtani is overwhelming. As the district court found in holding that photographs of four Guantánamo Bay detainees could be released in *Int'l Counsel Bureau*, images of Guantánamo detainees in general "are of significant public interest." *Int'l Counsel Bureau*, 723 F. Supp. 2d at 66-67 (noting that "[t]he press has taken a substantial interest in the Guantanamo Bay detainees, and has reported extensively on them and their condition"). But the public interest in al-Qahtani's images is even more significant, because the government has acknowledged that he

[24] Moreover, the government's assertion that the release of the images could put al-Qahtani, his family members, or other associates at risk of harm is not relevant as a privacy interest. *See* Woods Decl. ¶ 33. As the Second Circuit has made clear, in assessing the privacy interest at stake, "'the focus must be solely upon what the requested information reveals, not upon what it might lead to.' Therefore, DOD's claim that . . . [that the requested records] could put their family members at risk of retaliation by terrorists . . . is not the focus of our inquiry under Exemption 6." *AP*, 554 F.3d at 292; *see also id.* at 285 (privacy interest protected by Exemptions 6 and 7(C) "is the same for purposes of our analysis").

was tortured, and there is extensive evidence that he suffered profound physical and psychological harm as a result of his treatment – both matters of extreme public interest. *Cf. AP*, 554 F.3d at 285 (public interest in alleged illegal activity cognizable when the requester "produce[s] evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred."). Images that may include information about al-Qahtani's interrogation and torture, and his physical state during that period, are therefore at the core of FOIA's purpose and are directly related to ensuring that the citizenry is aware of "what their government is up to." Indeed, visual images are uniquely powerful, allowing for broader public dissemination and making the torture that al-Qahtani suffered more concrete, memorable, and credible. *See* Doris A. Graber, *Say It with Pictures*, 546 Annals Am. Acad. Pol. & Soc. Sci. 85, 86-89 (1996) (studies show that visual images arouse viewers' interest and attention and increase the perceived credibility of a news story); Pew Research Center, *Americans Spending More Time Following the News* (Sept. 12, 2010) (58 percent of Americans stated they watched a news program on television the previous day, while only 37 percent had read a newspaper article, either in print or on-line). For example, the reaction to the Abu Ghraib "torture photos" illustrates the power of the visual image to foster enduring public interest in the treatment of detainees. *See* W.J.T. Mitchell, *Cloning Terror: The War of Images, 9/11 to the Present* (2011) (discussing the importance of the leaked Abu Ghraib photos). This interest is further heightened by the fact that at least some of the brutal interrogation techniques utilized on al-Qahtani may still be in use pursuant to Appendix M of the Army Field Manual, which authorizes the use of isolation, sleep deprivation and sensory deprivation in interrogations of "enemy combatants." *See* Amnesty International, *The Army Field Manual: Sanctioning Cruelty?*, Mar. 19, 2009 (Ex. 29). For this reason, the records should be released.[25]

[25] Moreover, even if the DOD and FBI had claimed a plausible basis for exemption under Exemption 6 or 7(C) –

B. Disclosure of Videotapes of al-Qahtani Does Not Constitute an Unwarranted or Clearly Unwarranted Invasion of the Personal Privacy of DOD Personnel.

DOD and FBI also seek to withhold those videotapes depicting the identities of DOD personnel. As an initial matter, DOD and FBI fail to identify which tapes, other than the FCE tape, actually contain images of DOD personnel. Regardless, Plaintiff consents to the redaction of identifying information from images of DOD personnel, such as through the blurring of faces, except to the extent the images depict conduct for which the person's involvement has already been officially acknowledged so that no new personally identifying information would be disclosed. *See U.S. Dep't of State v. Ray*, 502 U.S. 164, 175-78 (1991) (finding that redaction was appropriate to safeguard personal privacy of Haitian nationals interviewed by State Department in connection with their involuntary repatriation); *Dep't of the Air Force v. Rose*, 425 U.S. 352, 354-58 (1976) , 381 (affirming redaction of personal references and other identifying information in Air Force Academy disciplinary records). Subject to these redactions, FOIA requires that all segregable portions of the videotapes be produced. *See* 5 U.S.C. § 552(b).

V. THE DOD AND FBI HAVE NOT MET THEIR BURDEN TO WITHHOLD DOD AND FBI VIDEOTAPES UNDER EXEMPTION 3

The DOD and FBI also seek to withhold all videotapes where DOD personnel appear pursuant to Exemption 3 and 10 U.S.C. § 130b, which authorizes "[withholding] from disclosure to the public personally identifying information regarding . . . any member of the armed forces assigned to an overseas unit [or] sensitive unit." Woods Decl. ¶ 31; Hardy Decl. ¶ 38. As explained *supra*, Plaintiff consents to the redaction of identifying information from images of

---

which they have not – neither has provided a sufficiently detailed *Vaughn* declaration to meet their burden under FOIA to support these claimed exemptions. The FBI and DOD declarations do not provide sufficiently detailed information about what the photos and videos portray, so as to allow the Court and Plaintiff to assess both the relevant privacy interest and the public interest in each video or tape. Indeed, the declarations are silent as to whether any of the videotapes depict abuse, torture, or other illegal activity, and they fail to describe al-Qahtani's physical appearance and whether he shows signs of abuse or mistreatment. The declarations also fail to provide sufficient information to determine whether any portions of the videotapes are segregable so that portions, if not their entirety, may be released.

DOD personnel, such as through the blurring of faces, except to the extent the images depict conduct for which the person's involvement has already been officially acknowledged, so that no new identifying information would be disclosed. Subject to these redactions, the DOD and FBI are obligated to release all segregable portions of the videotapes. *See* 5 U.S.C. § 552(b).[26]

VI. THE FBI VIDEOTAPES ARE NOT EXEMPT UNDER THE PRIVACY ACT

Finally, the FBI asserts in its declaration that the 53 FBI videotapes are exempt from disclosure pursuant to the Privacy Act. Hardy Decl. ¶ 32; *see also* 5 U.S.C. § 552a(j)(2) (providing law enforcement exemptions to the Privacy Act). However, by its very terms, Privacy Act Exemptions do not bar an otherwise viable claim under FOIA. *See* 5 U.S.C. § 552a(t)(2) ("No agency shall rely on any exemption in this section to withhold from an individual any record which is otherwise accessible to such individual under the provisions of [FOIA]."). Thus the Privacy Act "include[es] an exemption for information required to be disclosed under the FOIA." *Reporters Comm. for Freedom of Press*, 489 U.S. at 766-767. Because, as discussed above, CCR is entitled to the release of the requested records under FOIA, the Privacy Act is simply inapplicable to its claims.[27]

[26] Section 130b defines "personally identifying information" as "the person's name, rank, duty address, and official title and information regarding the person's pay." Thus, images of DOD personnel are covered under 130b to the extent they would depict such information.

[27] Moreover, neither the Privacy Act nor its exemptions apply to al-Qahtani or to records depicting his image. Under the Act, "the term 'record' means any item, collection, or grouping of information about an individual that is maintained by an agency, . . . that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph." 5 U.S.C. § 552a(a)(4). However, "the term 'individual' means a citizen of the United States or an alien lawfully admitted for permanent residence." 5 U.S.C. § 552a(a)(2). al-Qahtani is neither a U.S. citizen nor a permanent resident.

CONCLUSION

For the foregoing reasons, this Court should grant CCR partial summary judgment with respect to the DOD and FBI and order them to immediately release all responsive records, subject to the redactions to which CCR has consented. In the alternative, this Court should (1) require FBI and DOD to submit declarations that adequately describe each photograph and videotape segment and explain the applicability of each claimed FOIA exemption, (2) review the tapes and photos *in camera*, and (3) determine that this Court has a "need to know" such that Plaintiff's counsel may submit a sealed declaration responding to the Government's justifications for its withholdings based on counsel's knowledge of classified materials disclosed in Mr. al-Qahtani's *habeas corpus* action.

Respectfully submitted,

/s/Lawrence S. Lustberg
Lawrence S. Lustberg
Jonathan M. Manes
Gibbons P.C.
One Gateway Center
Newark, NJ 07102
LLustberg@gibbonslaw.com
Tel: (973) 596-4500

Sandra L. Babcock
Center for International Human Rights
Northwestern University School of Law
357 East Chicago Avenue
Chicago, Illinois 60611
s-babcock@law.northwestern.edu
Tel: (312) 503-0114
Fax: (312) 503-2798

Dated: October 3, 2012