

WASHINGTON
LEGISLATIVE OFFICE



Statement of Anthony D. Romero

Executive Director

American Civil Liberties Union

On

The Freedom of Information Act

**Before the Subcommittee on Information Policy,
Census, and National Archives**

**House Committee on Oversight and Government
Reform**

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Good afternoon Subcommittee Chairman Clay, Ranking Member Turner, and Members of the Subcommittee on Information Policy, Census, and National Archives. Thank you for the opportunity to testify today on behalf of the American Civil Liberties Union, its more than half a million members and activists, and 53 affiliates nationwide, about an issue of critical importance to us, to this Subcommittee, and to all Americans: the right of the people to know what our government is doing and to have access to documents created on the taxpayer's dime. Congress enacted the Freedom of Information Act¹ in 1966 to give ordinary people the power to compel the government to act as our servant, so that as an informed citizenry we can "hold the governors accountable to the governed."² A healthy, vital democracy requires no less.

I like to think of the Freedom of Information Act as democracy's x-ray machine, because it gives us an inside look at the internal machinery of government so we can identify the waste, fraud, abuse and corruption that leave our nation dangerously weak, inefficient, and ineffective. Unfortunately the x-ray machine is not working as well as it should, and important information about the health of our democracy is being hidden from view. Part of the problem is that the machine is old and needs a good cleaning. Backlogs clog the system and cause expensive, unnecessary delays in responding to FOIA requests. And under the "*Open America*" doctrine, agencies can use their backlogs as an excuse for failing to meet statutory deadlines for new FOIA requests.³ But the real problem is that the administration is intentionally and improperly shielding itself from view, increasingly using "national security" as a barrier to prevent Americans from seeing what's going on inside their government.

The American Civil Liberties Union is no stranger to our government's natural tendency to restrict civil liberties during periods of national insecurity. In 1920, during our first year of existence, the ACLU fought U.S. Attorney General A. Mitchell Palmer's campaign of harassment and deportation by championing the politically radical immigrants targeted by Palmer and securing the release of hundreds of activists imprisoned for their anti-war views and activities. During World War II the ACLU stood almost alone in denouncing the federal government's round-up and internment of more than 120,000 Japanese Americans. At times in our history when frightened civilians have been pressured by the authorities to trade their freedom and rights for a measure of security, the ACLU has been the bulwark for liberty. And the ACLU continues to work daily in courts, legislatures and communities to defend and preserve the individual rights and

¹ 5 U.S.C. §552 (2000)

² *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

³ See *Open America v. Watergate Special Prosecution Force*, 547 F. 2d 605 (D.C. Cir. 1976).

liberties that the Constitution and laws of the United States guarantee to everyone in this country.

The Freedom of Information Act was created during a period of national turmoil similar to today. In 1966 the U.S. military was actively engaged in an unpopular foreign war, there was a pervasive fear of ideologically-driven enemies infiltrating the country with ill intent, and the economic, social and political status quo was being threatened by a generation of Americans determined to ensure that the Constitution's promise of liberty applied to all equally. After the Pentagon Papers and Watergate scandals revealed the extent of the executive branch's cynical misuse of national security as an excuse to justify hiding potentially embarrassing and illegal activities, Congress recognized the critical role public oversight plays in protecting national security, and in 1974 voted to strengthen FOIA, overriding a presidential veto to close loopholes that had allowed the executive to circumvent the intent of the statute by simply not responding in a timely basis to FOIA requests. While national security exemptions to FOIA remain (and continue to be abused), the 1974 amendment and later amendments in 1976, 1986, and 1996, created significant improvements such as statutory deadlines for agencies to respond to FOIA requests, authorization for judicial review of classification claims, and fee waivers that have made FOIA an indispensable tool for journalists, scholars, lawyers and other interested parties to gain access to information held by our government.

ACLU FOIA LITIGATION

FOIA is the best tool Congress has created to help expose government abuse, and though exposure, help to end those abuses. ACLU litigators are now using that power with great effect to bring to light illegal and improper methods the Bush administration has pursued in its Global War on Terror. The ACLU recognizes that increased oversight is even more necessary when people are more fearful about threats to our national security.

For example, ACLU's FOIA requests have revealed abusive Pentagon and FBI surveillance targeting peaceful protest groups in the United States, such as the American Friends Service Committee, Veterans for Peace, United for Peace and Justice in the case of the Pentagon, and Greenpeace and the Catholic Workers Group in the case of the FBI.⁴ Documents turned up as a result of those requests show that the government is targeting innocent activists who dissent from government policy, not people who are dangerous terrorists. This is both wasteful and dangerous: every hour the FBI spends

⁴ See ACLU, "No Real Threat: The Pentagon's Secret Database on Peaceful Protest" January 2007, FBI Electronic Communication dated 5/23/2001 *available at* http://www.aclu.org/spyfiles/jttf/670_671.pdf and the ACLU "Spy files" at <http://www.aclu.org/safefree/spyfiles/index.html>

documenting the activities of a Quaker peace group is one less hour it can spend finding the next Mohammed Atta.

Another ACLU FOIA request demanded information about detainees held by the United States overseas. It exposed evidence of widespread and systemic mistreatment of prisoners – much of it officially sanctioned – in U.S. detention facilities in Guantanamo Bay, Cuba, Afghanistan, and Iraq. This mistreatment would be deemed to constitute torture and abuse under prevailing international legal standards. Once it came to light, both through our FOIA requests and other sources, this abuse triggered a necessary national soul searching about the use of abusive interrogation techniques in the fight against terrorism.

These two examples demonstrate how the public disclosure of government misconduct through FOIA can serve to curb such improper government activities. Those activities waste precious resources and do irreparable harm to our core values and the image of the United States government, particularly in the international community where cooperation against trans-national terrorism is an essential component of our national security strategy.

The ACLU “Torture FOIA”, filed in October of 2003, has thus far resulted in the release of over 100,000 pages of documents, mostly from the Department of Defense and the FBI. Although federal agencies continue to withhold critical documents that would shed light on high-level official responsibility for the abuse, the documents released thus far have underscored the need for further investigation and reform. The ACLU’s FOIA requests demanding information on the government’s use of powers authorized in the USA Patriot Act resulted in the release of the first significant public information about the FBI’s controversial use of National Security Letters; about the FBI’s use of the extraordinary authorities granted under Patriot Act section 215; and about the Foreign Intelligence Surveillance Court, including the rules of the FISA Court. In a FOIA request for information relating to the detention of immigrants, the ACLU’s Immigrants’ Rights Project was able to obtain a key legal document about the local enforcement of immigration laws. In the document, the Department of Justice had reversed itself regarding state and local authority to make immigration arrests even though the relevant statutes had not changed. Under the Reno Justice Department, the DOJ took the position that local law enforcement officials could not detain non-citizens based on civil violations of the immigration laws because the federal government has primary authority in this area and has not authorized such arrests. The document showed that the Ashcroft Justice Department took an opposing position -- that local law enforcement officials had the inherent authority to arrest individuals for any violation of the immigration laws. Although the DOJ had announced its new conclusion publicly, it had refused to release the legal

analysis that explained that conclusion. Obtaining the analysis allowed police officials and advocates to better understand and evaluate the Department's shift. These successes demonstrate the ACLU's willingness to invest significant time, energy, and resources to ensure that our government is accountable to the American people.

But these successes do not imply that FOIA is working the way Congress intended it to. Responses to FOIA requests are hopelessly slow, often requiring litigation to compel the government to release the documents the law requires it to release. All too often, evidence of government misconduct is redacted or entirely withheld from the public in the name of national security or agency deliberations. Indeed, part of the reason for the ACLU's success is that it has the resources needed to litigate these cases. For the average American seeking information from his or her government, the expense of litigation to force compliance with the law presents an impossible burden.

I would like to highlight a few of the problems ACLU has seen in its FOIA litigation, to illuminate the practical realities we face in attempting to ensure that this government remains, as President Lincoln prayed it would, a government of the people, by the people, and for the people.

From ACLU's Torture FOIA:

1. The ACLU filed the FOIA request for information on detainees held by the United States in October of 2003 (six months before the Abu Ghraib photos depicting detainee abuse leaked to the media), but the agencies released virtually nothing until the court required them to begin processing the documents in August of 2004. Who knows what abuse might have been prevented had the government been more forthcoming when the FOIA request was first filed?

2. The government opposed the expedited processing of our FOIA request. In rejecting any further delay, the court wrote: "The information plaintiffs have requested are [sic] matters of significant public interest. Yet the glacial pace at which defendant agencies have been responding to plaintiffs' requests shows an indifference to the commands of FOIA, and fails to afford accountability of government that the act requires. If the documents are more of an embarrassment than a secret, the public should know of our government's treatment of individuals captured and held abroad."⁵

3. The Department of Defense continues to oppose the ACLU's request for release of photographs (redacted for identifying details) depicting

⁵ *American Civil Liberties Union v. Dep't of Def.*
339 F. Supp. 2d 501, 504-05 (S.D.N.Y. 2004).

prisoner abuse at overseas locations other than Abu Ghraib even though in September 2005, the district court specifically held that:

Publication of [such] photographs is central to the purposes of FOIA because they initiate debate, not only about the improper and unlawful conduct of American soldiers, “rogue” soldiers, as they have been characterized, but also about other important questions as well—for example, the command structure that failed to exercise discipline over the troops, and the persons in that command structure whose failures in exercising supervision may make them culpable along with the soldiers who were court-martialed for perpetrating the wrongs. . . .⁶

. Remarkably, the Defense Department invoked the Geneva Conventions among other reasons for withholding these images, even though in February 2002 the President himself held that Taliban and al Qaeda detainees were not entitled as a matter of law to protection under those Conventions. Withholding the photographs only serves to deny the American people knowledge essential to their continuing understanding of the conflict, and delay accountability for this misconduct. We continue to press for the release of these photographs in a case pending before the Second Circuit Court of Appeals.

4. In opposing the release of the photographs, the Department of Defense attempted to file some of its legal arguments under seal, which would have prevented the public even from knowing why the government thought the photos should be suppressed. We opposed the filing under seal and the court ultimately ruled in our favor.

5. Agency responses to the ACLU's FOIA requests for documents on torture also demonstrate the arbitrary and capricious nature in which the various agencies respond to FOIA requirements. The Office of Legal Counsel and the CIA released virtually no documents in response to our FOIA requests. The Department of Defense released 58,010 pages, if only grudgingly, the Army contributed another 27,428 pages, the Navy, 1,929 pages, the FBI 3,818 pages, and the Defense Intelligence Agency released 207 pages. Agencies that did release documents seemed to apply different redaction standards and large portions of documents -- and entire documents -- were redacted.

6. Invoking what is known in FOIA parlance as a “Glomar response,”⁷ the CIA refused even to acknowledge the existence of critical documents let alone consider them for release. It argued that disclosure of

⁶ American Civil Liberties Union v. Dep’t of Def., 389 F. Supp. 2d 547, 578 (S.D.N.Y. 2005).

⁷ A “Glomar” response to a FOIA request is an agency’s express refusal to confirm or deny whether responsive documents even exist. Courts first recognized this type of response in *Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976), where the issue was whether the CIA could refuse to confirm or deny that it had ties to the ship, the *Glomar Explorer*.

the existence or non-existence of a Presidential directive to the CIA regarding overseas detention facilities abroad and a Justice Department memo authorizing the CIA to use abusive interrogation methods would be highly detrimental to national security. It remained steadfast in its recalcitrance despite the fact that the documents' existence had been widely reported in the news media. The President ultimately disclosed related information in a public speech in a September 2006 speech. He discussed the existence of detention centers abroad where the CIA had been holding at least 14 high-level al Qaeda operatives. In other words, the CIA invoked Exemption 1 (and Exemption 3, which incorporates the National Security Act) to withhold information that the President later felt comfortable disclosing on national TV. Following the President's speech, the CIA acknowledged that two documents did in fact exist, thereby confirming that it was all along invoking national security as a pretext for withholding the two documents, and that in fact, disclosure of the existence of these documents would not compromise national security. We are still pressing for the release of the documents themselves, which the CIA continues to withhold.

From the ACLU's NSA warrantless wiretapping FOIA:

1. The government made astonishing secrecy claims. It took the extraordinary position that even the number of documents and the total number of pages at issue was all classified.

2. Despite the fact that the D.C. Circuit has approved the use of Special Magistrates in a District Court judge's endeavor to gain some control over voluminous FOIA records for *in camera* review purposes, the government took the extraordinary position that such an activity would violate the separation of powers doctrine.

And from the ACLU's USA Patriot Act FOIA:

The Department of Justice refused to release statistics regarding the FBI's use of section 215 authorities and National Security Letters, citing exemption b(1) -- national security concerns. It said that to release even the raw numbers indicating how often these intrusive surveillance techniques had been used would do irreparable harm to national security. But those statistics were released by the administration months later for political reasons in an attempt to resist congressional efforts to require such disclosure and to revise Section 215. There was no adverse effect on the national security at all. In other words, when the ACLU sought the information and it was inconvenient politically for the government to disclose it, it was withheld on national security grounds. When secrecy became politically inconvenient, that information was released.

POLICY IMPLICATIONS

The common threads running through these anecdotal examples are the administration's disdain for the principles of open government that underpin the Freedom of Information Act — a disdain Attorney General Ashcroft articulated in a memo issued shortly after the attacks of September 11, 2001 — and its unwillingness to obey and faithfully execute the laws duly passed by Congress. To this administration, secrecy is the default response. Although the Supreme Court made clear early on that the “dominant objective” of FOIA is “disclosure, not secrecy,”⁸ U.S. Attorney General John Ashcroft issued a memorandum in October of 2001 encouraging executive branch agencies responding to FOIA requests to consider “other fundamental values,” such as “safeguarding our national security, enhancing the effectiveness of our law enforcement agencies, protecting sensitive business information, and... preserving personal privacy,” before making disclosures under FOIA. He vowed to defend any agency's discretionary decision to withhold records unless the agency lacks a “sound legal basis” and replaced it with a policy to “resist disclosure wherever legally possible.”⁹ The Ashcroft memo superseded an earlier memo by Attorney General Janet Reno that emphasized reliance on a “presumption of disclosure” to achieve the goal of “maximum responsible disclosure.” A 2003 GAO study revealed that about one-third of the FOIA officers interviewed reported a decreased likelihood of discretionary disclosure, most citing the Ashcroft memo as the primary reason for the change.¹⁰

We are at a pivotal moment in our nation's history, when our executive branch is claiming unprecedented authority to spy on ordinary Americans, to jail people indefinitely without trial, sometimes in secret prisons, and to use interrogation techniques widely regarded under international law as torture and abuse. Congress must act to reign in this abuse and restore the checks and balances that are essential to our constitutional democracy.

Secrecy is, as President John F. Kennedy once said, “repugnant in a free and open society.” Despite the almost universal recognition that the over-classification of intelligence actually harms national security by impeding information sharing, and was in fact a contributing factor in the intelligence failures that led to 9/11, more information is being classified

⁸ *Department of the Air Force v. Rose*, 425 U.S. 352 (1976).

⁹ Attorney General John Ashcroft, Memorandum for Heads of all Federal Departments and Agencies, October 12, 2001.

¹⁰ U.S. General Accounting Office, “Freedom of Information Act: Agency Views on Changes Resulting from New Administration Policy,” Report to the Ranking Minority Member, Committee on the Judiciary, U.S. Senate, September 2003.

post-9/11 than before. Hearings last March before the Subcommittee on National Security, Emerging Threats, and International Relations revealed that there were over 15 million classification decisions for fiscal year 2004, and keeping secrets cost the government \$7.2 billion.¹¹ As Judge Victor Marrero stated in ACLU's National Security Letter litigation, "democracy abhors undue secrecy."¹² Of course we do not argue that every piece of information the government has should be available to the public.

Government agencies can, of course, withhold truly secret information that is essential to national security. No one is arguing, for example, that the government has to disclose information about current troop movements in Iraq. But it appears time and time again that information is instead withheld to hide potentially embarrassing information or misconduct, where the national security of the United States would not be implicated by the release of information.

Two examples are relevant to our Torture FOIA case. In the first, the FBI released a heavily redacted series of e-mails dated May 10, 2004 in response to the ACLU's Torture FOIA request, which can be seen in Exhibit A. It was not until Senator Carl Levin (D-MI) pressed for the release of an un-redacted version of the memo for use in Senate confirmation hearings that a less redacted version was released to him, and then provided to the ACLU. It is attached as Exhibit B. As you can see from comparing Exhibits A and B, the information was deleted not for any security purpose, but rather to shield the FBI from embarrassment. In its entirety, the sentence that contained the deletion reads, "I will have to do some digging into old files (to see if we specifically told our personnel, in writing, to not deviate from Bureau policy)." The release of two versions of the May 10, 2004 FBI e-mail offers the rare opportunity to evaluate the redactions made in a FOIA release, and the evaluation clearly demonstrates excessive and unnecessary redactions.

The second example is more troubling, because it goes to the heart of how national security classification designations have been used to hide misconduct. As Steven Aftergood, Senior Researcher at the Federation of American Scientists pointed out in testimony before the Subcommittee on National Security, Emerging Threats and International Relations in August of 2004, the Department of Defense improperly classified a report written by Maj. Gen. Antonio Taguba detailing evidence of torture at the Abu Ghraib prison in Iraq.¹³ The report was classified as "secret" in violation of

¹¹ See: The Subcommittee on National Security, Emerging Threats, and International Relations briefing memo for the March 14th Subcommittee hearing, dated March 9, 2006, <http://www.house.gov/shays/news/2006/march/March14BriefingMemo.pdf>

¹² *Doe v. Ashcroft*, 334 F.Supp.2d 471 (S.D.N.Y. 2004).

¹³ See: Steven Aftergood, "Too Many Secrets: Overclassification as a barrier to critical information sharing," testimony before the Subcommittee on National Security, House

Executive Order 12958 as amended, which provides that, “In no case shall information be classified to... conceal violations of law.”¹⁴ In attempting to limit the dissemination of information revealing evidence of their reckless disregard of the law, this administration is clearly willing to violate its own official policies.

RECOMMENDATIONS FOR REFORM

Congress has amended FOIA several times over the years, demonstrating its willingness, in spite of executive branch opposition, to try and get it right. Congress needs to act again. The first order of business should be legislative action to rescind the Ashcroft memo and restore the original purpose of FOIA by emphasizing the presumption toward disclosure. Further recommendations include the following:

1. Congress should provide more funding to decrease FOIA backlogs, and require monthly reporting to Congress on the FOIA backlogs, the number of FOIA requests received each month, how many are processed.
2. Congress should task the Government Accountability Office with issuing a report analyzing claims that information is exempt from disclosure on national security grounds to determine whether agencies are improperly withholding government information by claiming security exemptions.
3. Congress should create automatic penalties against government agencies for violating the statutory deadline for responding to FOIA requests.
4. Congress should legislatively override the Open America¹⁵ doctrine.
5. Congress should require the granting of expedited processing (or create a presumption in favor of expedited processing) whenever a request

Committee on Government Reform, August 24, 2004,
<http://www.fas.org/sgp/congress/2004/082404aftergood.pdf>

¹⁴ Executive Order 13292 (March 25, 2003).

¹⁵ The FOIA authorizes courts to extend statutory deadlines for an agency to respond to FOIA requests in cases of “exigent circumstances.” *Open America v. Watergate Special Prosecution Force, Id.*, held that massive agency FOIA backlogs could constitute “exigent circumstances” justifying such extensions. Courts have interpreted this rule to authorize extensions even where the agency shows no efforts to address the backlogs (see James X. Dempsey, “Electronic FOIA Act Adopted; Will Affect Paper Records Too,” National Security Archive Special Counsel, October 22, 1996, <http://www.gwu.edu/~nsarchiv/nsa/efoiacom.html>).

concerns the potential ongoing violation of constitutional rights and the requestor presents credible allegations of constitutional violations.

6. Because courts still defer too much to Exemption (b)(1) national security claims, Congress should require *in camera* review of Exemption (b)(1) claims as a matter of course (rather than at the discretion of the court). Congress should once again clarify that courts have the obligation to independently determine whether information is properly classified.

7. Congress could also strengthen a FOIA litigant's entitlement to attorney's fees and costs by allowing fees under the "catalyst theory." This is particularly important for ACLU FOIAs because typically once we sue to enforce the FOIA deadlines, the government agrees to set a processing schedule. If the parties agree on a schedule that is then ordered by the court (which the courts seem to prefer), attorney's fees are unavailable in connection with that result. The Openness Promotes Effectiveness in our National Government Act of 2005, (S. 394, the "OPEN Government Act") introduced in the Senate last session includes a provision (Sec. 4) which accomplishes this reform, but includes a troubling definition of the "substantially prevailed" standard to require the complainant receive a "substantial part of its requested relief." This could be interpreted to require more than is intended by the spirit of this reform proposal. Often the release of only a few key documents is necessary to prevail for the purposes of the FOIA litigation, but these few documents may not reflect a "substantial part" of the requested documents. The provision should be liberalized to ensure that a party that receives the key responsive documents will be deemed to have substantially prevailed. Congress should pass this legislation, after making this necessary change.

8. Congress should amend the fee waiver standard to make clear that bloggers and organizations like the ACLU that routinely disseminate information obtained through FOIA to the public are entitled to a FOIA fee waiver.

9. Congress should refrain from adopting (b)(3) exemptions, which allow Congress to designate any records as FOIA exempt for any reason, except in truly extraordinary circumstances

CONCLUSION

Despite the Bush administration's obsession with secrecy, we have had brief glimpses of what is going on inside the "unitary executive." Conscientious whistleblowers, enterprising journalists, and effective activists and lawyers have combined to reveal unprecedented levels of government waste, fraud, abuse, and corruption that sap our national strength. The American Civil Liberties Union is proud to have played an important role in

bringing some measure of accountability to this government. But much more needs to be done.

The photographs from Abu Ghraib alone should be enough to convince this Congress that our body politic is not well. More pictures are being improperly withheld by our government as we speak. Do they show that the abuse pre-dated Abu Ghraib, or perhaps that it continued after the events that we know about? The CIA has refused to say whether it is continuing to use abusive interrogation techniques, making a mockery of the concept of a government that answers to the people. Congress needs to restore and even improve democracy's x-ray, so that the American people can correctly diagnose the problems, and make informed decisions about how to improve their government. A robust Freedom of Information Act will not make us weak; it will demonstrate for all to see the unconquerable strength of a free nation dedicated to the supremacy of the rule of law.

~~SECRET~~

[redacted] (IR) (FBI) b6 -1
 [redacted] b7C -1

From: [redacted] (Div13) (FBI)
 Sent: Monday, May 10, 2004 12:26 PM b6 -1
 To: HARRINGTON, T J. (Div13) (FBI) b7C -1
 Cc: BATTLE, FRANKIE (Div13) (FBI); [redacted] (IR) (FBI); [redacted]
 (Div13) (FBI); [redacted] (Div13) (FBI); [redacted] (Div13) (FBI);
 CUMMINGS, ARTHUR M. (Div13) (FBI)

Subject: Instructions to GTMO interrogators.

~~SECRET//ORCON,NOFORN~~
RECORD 315N-MM-C99102

TJ,

I will have to do some digging into old files [redacted]
 [redacted] We did advise each supervisor that went to GTMO to stay in line with Bureau policy and not
 deviate from that [redacted] I went to
 GTMO with [redacted] early on and we discussed the effectiveness [redacted] with b5 -1
 the SSA. We (BAU and ITOS1) had also met with General's Dunlevey & Miller explaining our position (Law b6 -1, 2
 Enforcement techniques) vs. DoD. Both agreed the Bureau has their way of doing business and DoD has their
 marching orders from the Sec Def. Although the two techniques differed drastically, both Generals believed they b7C -1, 2
 had a job to accomplish. It was our mission to gather critical intelligence and evidence [redacted]
 [redacted] in furtherance of FBI cases. In my weekly meetings with DOJ we often discussed [redacted]
 techniques and how they were not effective or producing Intel that was reliable. [redacted] (SES), [redacted]
 [redacted] (SES), [redacted] (now SES [redacted] at the time) and [redacted] (SES Appointee) all from DOJ
 Criminal Division attended meetings with FBI. We all agreed [redacted] were going to be an issue in the military
 commission cases. I know [redacted] brought this to the attention of [redacted]

b5 -1
b6 -1,4,5
b7C -1,4,5
b7D -1
b7F -1

One specific example was [redacted] Once the Bureau provide DoD with the findings [redacted]
 [redacted] they wanted to pursue expeditiously their methods to get "more out of him" [redacted] I've
 were given a so called deadline to use our traditional methods. Once our timeline [redacted] was
 up [redacted] took the reigns. We stepped out of the picture and [redacted] ran the operation [redacted] FBI did not
 participate at the direction of myself, [redacted] and BAU UC [redacted] We would receive IRs on the results
 of the process. (S)

I went to GTMO on one occasion to specifically address the information coming from [redacted]
 [redacted] We (DoD 3 Star Geoff Miller, FBI, CITF [redacted] etc) had a VTC with the Pentagon Detainee Policy Committee.
 During this VTC I voiced concerns that the intel produced was nothing more than what FBI got using simple
 investigative techniques (following the trail of the detainee in and out of the US compared to the trail of [redacted]
 [redacted] was
 providing [redacted] portion of the briefing. [redacted] was present at the Pentagon side of
 the VTC. After allowing [redacted] to produce nothing, I finally voiced my opinion concerning the b1
 information. The conversations were somewhat heated. [redacted] agreed with me. [redacted] finally admitted the b5 -1
 information was the same info the Bureau obtained. It still did not prevent them from continuing the [redacted] b6 -1,2,5
 methods". DOJ was with me at GTMO [redacted] during that time. b7C -1,2,5

Bottom line is FBI personnel have not been involved in any methods of interrogation that deviate from our policy.
 The specific guidance we have given has always been no Miranda, otherwise, follow FBI/DOJ policy just as you
 would in your field office. Use common sense. Utilize our methods that are proven (Reed school, etc).

If you would like to call me to discuss this on the telephone I can be reached at [redacted] b2 -1

---Original Message---

~~SECRET~~

9/26/2004

DATE: 10-22-2004
 CLASSIFIED BY: 61529DME/3CB/bdc:04/cv:4152
 REASON: 1.3, 1.5(C)
 DECLASSIFY ON: 10-22-2008

ALL INFORMATION CONTAINED
 HEREIN IS UNCLASSIFIED EXCEPT
 WHERE SHOWN OTHERWISE

DETAINEES-2709

~~SECRET~~

From: HARRINGTON, T J. (Div13) (FBI)
Sent: Monday, May 10, 2004 9:21 AM
To: [redacted] (Div13) (FBI) b6 -1
Subject: RE: pls confirm b7C -1

SENSITIVE BUT UNCLASSIFIED
NON-RECORD

Referral/Direct

We have this information, now we are trying to go beyond did we ever put into writing in an EC, memo, note or briefing paper to our personnel our position [redacted] that we were pursuing our traditional methods of building trust and a relationship with subjects. Tom

-----Original Message-----

From: [redacted] (Div13) (FBI) b6 -1
Sent: Monday, May 10, 2004 10:52 AM b7C -1
To: HARRINGTON, T J. (Div13) (FBI)
Cc: [redacted] (Div13) (FBI); BATTLE, FRANKIE (Div13) (FBI); BOWMAN, MARION E. (Div09) (FBI)
Subject: RE: pls confirm

SENSITIVE BUT UNCLASSIFIED
NON-RECORD

BAU at the request of the then (GTMO Task Force, ITOS1) wrote an EC (quite long) explaining the Bureau way of interrogation vs. DoDs methodology. Our formal guidance has always been that all personnel conduct themselves in interviews in the manner that they would in the field. [redacted] along with FBI advised that the LEA (Law Enforcement Agencies) at GTMO were not in the practice of the using [redacted] and were of the opinion results obtained from these interrogations were [redacted] BAU explained [redacted] FBI has been successful for many years obtaining confessions via non-confrontational interviewing techniques.

Referral/Direct

We spoke to FBI OGC with our concerns. I also brought these matters to the attention of DOJ during detainee meetings with [redacted] express their concerns to [redacted]

[redacted]

[redacted] has a copy of all the information regarding the BAU LHM. I believe she has provided that to TJ Harrington.

I may have more specific information in my desk at HQ. I will search what I have when I return (5/17).

-----Original Message-----

From: HARRINGTON, T J. (Div13) (FBI)
Sent: Monday, May 10, 2004 4:33 AM
To: BATTLE, FRANKIE (Div13) (FBI); [redacted] (Div13) (FBI) [redacted] [redacted] (Div13) (FBI)
Subject: FW: pls confirm

SENSITIVE BUT UNCLASSIFIED
NON-RECORD

Please review our control files, did we produce anything on paper???

-----Original Message-----

From: Caproni, Valerie E. (Div09) (FBI)
Sent: Sunday, May 09, 2004 2:31 PM
To: [redacted] (Div09) (FBI); HARRINGTON, T J. (Div13) (FBI) [redacted]

~~SECRET~~

9/26/2004

DETAINEES-2710

~~SECRET~~

(Div13) (FBI) [redacted] (Div13) (FBI) b6 -1
Subject: pls confirm b7C -1

SENSITIVE BUT UNCLASSIFIED
NON-RECORD

I think I've heard this several times, but let me ask one more time:

b1

Has there been any written guidance given to FBI agents in either GTMO or Iraq about when they should "stand clear" b/c of the interrogation techniques being used by DOD or DHS [redacted]

(S)

[redacted]

b1

b5 -1

(S)

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9/26/2004

DETAINEES-2711



U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street, 5th Floor
New York, New York 10007

March 21, 2005

By Federal Express

Lawrence S. Lustberg, Esq.
Gibbons, Del Deo, Dolan,
Griffinger & Vecchione, P.C.
One Riverfront Plaza
Newark, N.J. 07102

Re: ACLU, et al., v. Department of Defense, et al.,
No. 04 Civ. 4151 (AKH)

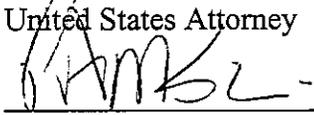
Dear Mr. Lustberg:

The Federal Bureau of Investigations has elected to release information on documents bearing bates numbers DETAINEES-2709 to DETAINEES-2711 that was previously withheld. We have enclosed a new version of these documents that contains the previously withheld information.

Very truly yours,

DAVID N. KELLEY
United States Attorney

By:


SEAN H. LANE (SL-4898)
PETER M. SKINNER (PS-9745)
Assistant United States Attorneys
Telephone: (212) 637-2737

Encl.



~~SECRET~~

[redacted] (IR) (FBI) b6 -1

From: [redacted] (Div13) (FBI) b7C -1

Sent: Monday, May 10, 2004 12:26 PM

To: HARRINGTON, T J. (Div13) (FBI)

Cc: BATTLE, FRANKIE (Div13) (FBI); [redacted] (IR) (FBI); [redacted] (Div13) (FBI); [redacted] (Div13) (FBI); CUMMINGS, ARTHUR M. (Div13) (FBI) b6 -1 b7C -1

Subject: Instructions to GTMO interrogators.

~~SECRET//ORCON,NOFORN~~
 RECORD 315N-MM-C99102

TJ,

I will have to do some digging into old files (to see if we specifically told our personnel, in writing, to not deviate from Bureau policy). We did advise each supervisor that went to GTMO to stay in line with Bureau policy and not deviate from that (as well as made them aware of some of the issues regarding DoD techniques). I went to GTMO with Andy Arena early on and we discussed the effectiveness (or lack there of) of the DoD techniques with the SSA. We (BAU and ITOS1) had also met with General's Dunleavy & Miller explaining our position (Law Enforcement techniques) vs. DoD. Both agreed the Bureau has their way of doing business and DoD has their marching orders from the Sec Def. Although the two techniques differed drastically, both Generals believed they had a job to accomplish. It was our mission to gather critical intelligence and evidence (that could be use in a DoD court of law) in furtherance of FBI cases. In my weekly meetings with DOJ we often discussed DoD techniques and how they were not effective or producing Intel that was reliable. Bruce Swartz (SES), Dave Nahmias (SES), Laura Parsky (now SES, GS15 at the time) and Alice Fisher (SES Appointee) all from DOJ Criminal Division attended meetings with FBI. We all agreed DoD tactics were going to be an issue in the military commission cases. I know Mr. Swartz brought this to the attention of DoD OGC.

One specific example was [redacted] Once the Bureau provide DoD with the findings [redacted] and other connections to [redacted] (et al) they wanted to pursue expeditiously their methods to get "more out of him" [redacted] We were given a so called deadline to use our traditional methods. Once our timeline (that DoD put into place) was up, DoD took the reigns. We stepped out of the picture and DoD ran the operation against [redacted] FBI did not participate at the direction of myself, Andy Arena, and BAU UC [redacted] We would receive IIRs on the results of the process. (S)

I went to GTMO on one occasion to specifically address the information coming from the IIRs produced by DoD re [redacted] We (DoD 3 Star Geoff Miller, FBI, CTF [redacted] etc) had a VTC with the Pentagon Detainee Policy Committee. During this VTC I voiced concerns that the intel produced was nothing more than what FBI got using simple investigative techniques (following the trail of the detainee in and out of the US compared to the trail of [redacted] based on classified info from the Penttbomb investigation). Lt. Col [redacted] was providing the DoD portion of the briefing [redacted] was present at the Pentagon side of the VTC. After allowing DoD (Lt. Col [redacted] to produce nothing, I finally voiced my opinion concerning the information. The conversations were somewhat heated. [redacted] agreed with me. DoD finally admitted the information was the same info the Bureau obtained. It still did not prevent them from continuing the "DoD methods". DOJ was with me at GTMO (Dave Nahmias) during that time.

Bottom line is FBI personnel have not been involved in any methods of interrogation that deviate from our policy. The specific guidance we have given has always been no Miranda, otherwise, follow FBI/DOJ policy just as you would in your field office. Use common sense. Utilize our methods that are proven (Reed school, etc).

If you would like to call me to discuss this on the telephone I can be reached at [redacted] b2 -1

---Original Message---

DETAINEES-2709

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9/26/2004

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 HEREIN IS UNCLASSIFIED EXCEPT
 WHERE SHOWN OTHERWISE

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 HEREIN IS UNCLASSIFIED EXCEPT
 WHERE SHOWN OTHERWISE

~~SECRET~~

From: HARRINGTON, T J. (Div13) (FBI)
Sent: Monday, May 10, 2004 9:21 AM
To: [redacted] (Div13) (FBI)
Subject: RE: pls confirm

b6 -1
b7c -1

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NON-RECORD

We have this information, now we are trying to go beyond did we ever put into writing in an EC, memo, note or briefing paper to our personnel our position [redacted] that we were pursuing our traditional methods of building trust and a relationship with subjects. Tom

Referral/Direct

-----Original Message-----

From: [redacted] (Div13) (FBI)
Sent: Monday, May 10, 2004 10:52 AM
To: HARRINGTON, T J. (Div13) (FBI)
Cc: [redacted] (Div13) (FBI); BATTLE, FRANKIE (Div13) (FBI); BOWMAN, MARION E. (Div09) (FBI)
Subject: RE: pls confirm

b6 -1
b7c -1

SENSITIVE BUT UNCLASSIFIED
NON-RECORD

BAU at the request of the then (GTMO Task Force, ITOS1) wrote an EC (quite long) explaining the Bureau way of interrogation vs. DoDs methodology. Our formal guidance has always been that all personnel conduct themselves in interviews in the manner that they would in the field. [redacted] along with FBI advised that the LEA (Law Enforcement Agencies) at GTMO were not in the practice of the using [redacted] and were of the opinion results obtained from these interrogations were suspect at best. BAU explained to DoD, FBI has been successful for many years obtaining confessions via non-confrontational interviewing techniques.

Referral/Direct

b6 -2
b7c -2

We spoke to FBI OGC with our concerns. I also brought these matters to the attention of DOJ during detainee meetings with Laura Parsky and Dave Nahmias. DOJ express their concerns to DoD OGC.

b6 -1
b7c -1

[redacted] has a copy of all the information regarding the BAU LHM. I believe she has provided that to TJ Harrington.

I may have more specific information in my desk at HQ. I will search what I have when I return (5/17).

-----Original Message-----

From: HARRINGTON, T J. (Div13) (FBI)
Sent: Monday, May 10, 2004 4:33 AM
To: BATTLE, FRANKIE (Div13) (FBI); [redacted] (Div13) (FBI); [redacted] (Div13) (FBI)
Subject: FW: pls confirm

b6 -1
b7c -1

SENSITIVE BUT UNCLASSIFIED
NON-RECORD

Please review our control files, did we produce anything on paper???

-----Original Message-----

From: Caproni, Valerie E. (Div09) (FBI)
Sent: Sunday, May 09, 2004 2:31 PM
To: [redacted] (Div09) (FBI); HARRINGTON, T J. (Div13) (FBI); [redacted]

b6 -1
b7c -1

~~SECRET~~

DETAINEES-2710

9/26/2004

~~SECRET~~

b6 -1 (Div13) (FBI) [redacted] (Div13) (FBI)
b7c -1 Subject: pis confirm

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DETAINEES-2711

9/26/2004