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.

No. 12 Civ. 0135 (NRB)
ECF Case

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

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Memorandum of Law in Opposition to Plaintiff's Motion for Partial Summary Judgment and in Support of the Government's Cross-Motion for Summary Judgment, dated December 21, 2012 ("Government's Opening Brief" or "Gov't Op. Br.")

Memorandum of Law in Opposition to Defendants' Cross-Motion for Summary Judgment/Reply Brief in Support of Plaintiff's Motion for Partial Summary Judgment ("Plaintiff's Opposition Brief" or "Pl. Opp.")

PRELIMINARY STATEMENT

As shown in the Government's opening brief, all records at issue in this case have been properly withheld pursuant to FOIA Exemptions 1, 7(A), 6, and/or 7(c), and any images of DoD personnel are also protected from disclosure by Exemptions 3, 6, and/or 7(C). The Government's declarations amply justify the Government's withholdings, and are due substantial deference given the national security implications of this case.

The Court should reject Plaintiff's objections that the Government has insufficiently supported its assertion of Exemption 1, and should not be swayed by Plaintiff's speculative suggestions of Government bad faith, which supply no basis to deviate from the deference due to the Government in matters of national security.

Plaintiff also has not overcome the Government's independent invocation of Exemption 7(A); al Qahtani undisputedly is subject to ongoing law enforcement investigations and possible prosecution, and the Government has logically and plausibly explained how those matters would be compromised by release of the requested materials. Plaintiff's remaining contentions regarding the privacy interests of al Qahtani and DoD personnel also lack merit and should be rejected. Finally, Plaintiff has failed to identify any basis to reject CIA's *Glomar* response.

ARGUMENT

I. EXEMPTION 1 BARS RELEASE OF THE VIDEOTAPES AND PHOTOGRAPHS

A. Plaintiff Has Not Shown Facts That Overcome the Deference Due to the Government's Declarations

The Government's moving papers establish that Exemption 1 applies, and that the Government is due substantial deference in national security matters. *See* Gov't Op. Br. at 8-19. The Court should reject a fundamental and pervasive basis for Plaintiff's opposition, namely, that such deference allegedly is not due here due to imagined governmental bad faith.

While Plaintiff is correct that courts review *de novo* an agency's withholding of information in response to a FOIA request, *see* Pl. Opp. at 3, 6, courts must defer to agency affidavits in assessing the Government's determination of harm to national security in cases involving Exemption 1. *See, e.g., ACLU v. DOJ*, 681 F.3d 61, 76 (2d. Cir. 2012); *Wilner v. NSA*, 592 F.3d 60, 76 (2d Cir. 2009) (*citing Ctr. for Nat'l Sec. Studies v. DOJ*, 331 F.3d 918, 927 (D.C. Cir. 2003)); *Ray v. Turner*, 587 F.2d 1187, 1194 (D.C. Cir. 1978). In the national security context, *de novo* review includes substantial deference to an agency's determination, as "the executive ha[s] unique insights into what adverse effects might occur as a result of public disclosure of a particular classified record." *Ray*, 587 F.2d at 1194. Accordingly, in such cases, "courts must accord *substantial weight* to an agency's affidavit concerning the details of the classified status" of a particular record. *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007) (quotation marks omitted) (emphasis in original); *see also Diamond v. FBI*, 707 F.2d 75, 79 (2d Cir. 1983).

Plaintiff fails to overcome this law; its response consists of vociferous but unsupported skepticism regarding the potential national security harms set forth in the Government's declarations, calling them variously "conclusory," "sweeping generalization[s]," "too broad[]," "far-fetched," and even "silly." *See* Pl. Opp. at 1, 5, 6, 8, 9, 10, 12, 13, 15-18, 21-23. But whether Plaintiff agrees with the expert opinion of DoD's classification authorities is irrelevant. *See American-Arab Anti-Discrimination Comm. v. DHS*, 516 F. Supp. 2d 83, 89 (D.C. Cir. 2007) (quoting *Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982)) ("The test has never been whether the plaintiff . . . or the court 'personally agree[] in full with the [defendants'] evaluation of the danger[.]"). Rather, the question is whether the Government's justification for invoking the FOIA exemption is "logical or plausible"; if so, it "is sufficient." *Wilner*, 592 F.3d at 73.

Here, as explained below and in prior papers, the Government's declarations provide specific and detailed explanations of potential harms that easily meet the Second Circuit's "logical or plausible" standard. *Wilner*, 592 F.3d at 73.

Further, the Government's declarations are entitled to a presumption of good faith. *Id.* at 69. In an attempt to escape this well-established principle, Plaintiff repeatedly speculates that the Government has submitted its declarations in bad faith in order to conceal evidence of "agency misconduct," Pl. Opp. at 5, "detainee abuse," *id*. at 12, or "possible violations of law," *id*. at 15-16, and argues that no deference is due in this case because of such hypothesized bad faith. *See*, *e.g.*, *id*. at 6, 16. This rank speculation has no legal significance because "a finding of bad faith must be grounded in evidence," and "mere speculation" will not suffice to defeat an agency's logical or plausible justification for invoking a FOIA exemption. *Wilner*, 592 F.3d at 75.

Here, as in *Wilner*, Plaintiff provides no evidence that the Government is withholding the videotapes and photographs to conceal "illegal or unconstitutional" conduct. *Cf. id.* at 75. Indeed, the wording of Plaintiff's argument underscores its speculative nature. Pl. Opp. at 11-12 (withheld records "*may* document abuse or mistreatment" and, based solely on this conjecture, "there remains a *reasonable probability* that these records are being withheld because they document detainee abuse.") (emphasis added). This speculation is unfounded and untrue. Although not required given the sufficiency of the Government's previous submissions, the Government has submitted a supplemental index providing detailed descriptions of the 53 FBI Videotapes.[1] *See* Third Hardy Decl., Ex. A. Descriptive Index of Video Records ("Supplemental Index"). Although the Supplemental Index is unclassified, it has been submitted *ex parte*

[1] The FCE Videotape and two Debriefing Videotapes have already been described in detail in the Herrington Declaration, dated December 21, 2012, and the Classified Herrington Declaration, dated December 20, 2012.

because the descriptions would reveal the very information protected by Exemption 7(A); it establishes that the 53 FBI Videotapes do not document any abuse or mistreatment of al Qahtani and so puts to rest Plaintiff's unfounded allegations of bad faith. *Id.*

Accordingly, the Court may not second-guess the agency's facially reasonable classification decisions here. *See Wilner*, 592 F.3d at 75.

B. The Government's Declarations Provide a Logical and Plausible Basis for Withholding the Records as Classified

Plaintiff's assertion that DoD has not provided sufficient detail to justify withholding the videotapes and photographs as classified is also unfounded; Plaintiff demands far more specificity than the law requires. An agency's Exemption 1 declaration providing "reasonably detailed explanations why any withheld documents fall within an exemption are sufficient to sustain the agency's burden," and "[u]ltimately, an agency may invoke a FOIA exemption if its justification appears logical or plausible." *ACLU v. DOD*, 681 F.3d at 69. The Government has articulated not just one logical or plausible explanation why releasing these videotapes and photographs would harm national security, but multiple bases set forth in four separate DoD declarations. If the Court finds that any one of these explanations is logical or plausible, that is sufficient to sustain the Government's withholding pursuant to Exemption 1, and the Court need not consider the other explanations, nor reach the other FOIA exemptions claimed.

a. The Horst Declaration

Drawing on his experience and judgment as the Chief of Staff of the United States Central Command with oversight of the approximately 200,000 military personnel deployed across the Middle East and Afghanistan, Major General Karl R. Horst has provided a compelling explanation of the harm to national security that could reasonably be expected to result from the disclosure of the Withheld Videotapes and Photographs, including by inciting violence and

fomenting anti-American sentiment that could endanger the lives and physical safety of, among others, U.S. military personnel and diplomats, as well as Afghan civilians and military personnel. *See* Horst Decl. ¶¶ 10-14. He further notes that, if released, any portion of the Withheld Videotapes or Photographs could be manipulated, altered, or used out of context to aid in the recruitment and financing of anti-American extremists and insurgent groups. *Id.* ¶¶ 15-16.

Plaintiff's sole criticism of the Horst Declaration is that its examples of past images that triggered similar harms describe what Plaintiff characterizes as "controversial, abusive, and even illegal conduct." Pl. Opp. at 16. Plaintiff suggests that only similarly improper conduct would justify classification, and argues that the Government's descriptions here do not "allow the Court to evaluate whether such a response is likely." *Id.*; *see also id.* at 22.

Plaintiff misses the point. First, in addition to more dramatic examples, General Horst notes that mere "previously published photographs of U.S. forces interacting with detainees" have been used to "incite violence, promulgate extremists' recruiting, and garner support for attacks," resulting "in the death and injury" of U.S. and other military service members. Horst Decl. ¶12. All of these past examples were provided to help explain General Horst's conclusion, as an original DoD classification authority, that the Withheld Videotapes and Photographs could incite riots and increase anti-American sentiment, leading to injuries and death. General Horst's determination is "logical or plausible," and thus entitled to deference. *Wilner*, 592 F.3d at 73; *see also Fitzgibbon v. CIA*, 911 F.2d 755, 766 (D.C. Cir. 1990) (disapproving district court's use of "its own calculus" of potential national security harms).

Plaintiff also criticizes as "sweep[ing] far too broadly," *see* Pl. Opp. at 17, a recent decision that credited a similar declaration submitted by General Horst regarding the harm that would result from the release of images depicting 45 forced cell extractions of Guantanamo

detainees. *See ICB v. DoD*, --F.Supp.2d--, 2012 WL 6019294, at *5-6 (D.D.C. Dec. 4, 2012). But, contrary to Plaintiff's characterization, *ICB* did not hold that every detainee image necessarily jeopardizes national security, nor is that DoD's contention here. Rather, *ICB* held that DoD provided "plausible explanations of the harm to national security" that would result from the release of the particular videos at issue there, and accorded those explanations "substantial weight." *Id.* at * 6. DoD has done the same here, and this Court should defer to and credit General Horst's determination that the records at issue "could also be used to foment anti-American sentiment given that they all depict Mr. al-Qahtani in U.S. custody." Horst Decl. ¶ 14.

b. The Lietzau Declaration

Deputy Assistant Secretary of Defense William K. Lietzau persuasively explains several additional potential harms to national security, including the potential for detainees to use released videotapes of their detention to communicate with "al-Qaeda and associated enemy forces" by means of coded messages, and the possible undermining of our diplomatic and military relationships with allies and partners by subjecting individually identifiable detainees to public curiosity in contravention of the Geneva Conventions. *See* Lietzau Decl. ¶ 7.

Plaintiff does not dispute the potential for such coded messages, nor does Plaintiff dispute that such coded messages could harm the national security. Rather, Plaintiff complains that the Government insufficiently detailed why it cannot segregate and redact any such messages, and release the remainder of the responsive materials. Pl. Opp. at 13. But there is no basis to believe that the Government could identify any and all such messages. Indeed, although Plaintiff cites the May 23, 2012 *ICB* decision in arguing that the Government must explain why the detainee images are not segregable, *ICB v. DOD*, 864 F. Supp. 2d 101, 106 -107, the *ICB* court subsequently accepted DoD's explanation regarding coded messages as a reason that the

videotapes could *not* be segregated. *ICB*, 2012 WL 6019294 at *4-6. Plaintiff makes no attempt to distinguish the December 2012 *ICB* decision, because it cannot; instead it asks the Court to reject the one decision that is precisely on point.

Nor does Plaintiff dispute a second, independent basis for withholding that the Lietzau Declaration also supports, namely, that the Geneva Conventions require that detainees be protected from public curiosity and that, if the United States' commitment to upholding Geneva Conventions principles is called into question, it would harm national security by undermining our diplomatic and military relationships. Instead, Plaintiff argues that because al Qahtani's attorney in his District of Columbia habeas proceeding has submitted a declaration stating that al Qahtani has told her that he consents to the public release of the Withheld Videotapes and Photographs, the release of these images through a FOIA proceeding is not in fact contrary to the Geneva Conventions' requirements to protect detainees from public curiosity. Pl. Opp. at 11. Plaintiff also argues that DoD "implicitly acknowledges" that al Qahtani's consent negates the Geneva Convention concerns because DoD allows the International Committee of the Red Cross ("ICRC") to photograph consenting detainees. *Id.* at 14.

Plaintiff is wrong. The public release of 56 videotapes and 6 photographs depicting al Qahtani in detention is not equivalent to allowing the ICRC to take consented-to individual photographs of detainees and give them directly to their family members. Furthermore, "al Qahtani has not elected to allow the ICRC to take photographs of him." Leitzau Decl. ¶ 10. Thus, a release here "would violate the detainees' privacy and personal autonomy and undermine the purpose of the [ICRC photo] process, which permits detainees to exercise significant control over appropriate release and distribution of their images." *Id.*[2]

[2] Furthermore, counsel's purported waiver of al Qahtani's privacy interest is at least questionable given that counsel obtained *ex parte* an order staying al Qahtani's habeas case based on al Qahtani's alleged

For these additional and independent reasons, the Court should defer to DoD's reasoning for classifying the Withheld Videotapes and Photographs.

c. The Woods Declaration

Finally, the declaration of Rear Admiral David B. Woods describes yet other harms that could reasonably be expected to result from disclosing detainee images, including (1) facilitating retribution by terrorists who may attack the detainee, his family, and his associates; and (2) exacerbating detainees' fears of reprisal and thus discouraging their cooperation with intelligence efforts. *See* Woods Decl. ¶¶ 23-27. As Woods explained, the Government's policy of classifying detainee images must be "consistently applied" to avoid these harms. *Id.* ¶ 27.

The Court should not be swayed by Plaintiff's gross mischaracterizations of the Government's argument. *See, e.g.*, Pl. Opp. at 8 (wrongly characterizing Government as claiming that "the release of *any* records relating to a detainee's detention in Guantanamo would *always* reveal an intelligence source and thereby damage national security"). Rather, the Government asserts that the release of detainee *images* is reasonably likely to increase the likelihood of reprisals and chill cooperation. *See* Woods Decl. ¶¶ 25-27. Unlike a detainee's name or written personal information, an image allows terrorists to confirm the depicted detainee's identity, and then potentially link the detainee to his family and associates, and thereafter take retaliatory measures. In other words, images facilitate retribution and heighten detainees' fears of reprisal. *See also* Lietzau Decl., Att. A (Horton Decl. ¶ 13). This analysis is, at a minimum, "plausible," and so warrants substantial deference. *ACLU v. DOJ*, 681 F.3d at 69, 76.

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incompetence and inability to assist in the habeas case. *See* Second Daughtry Decl., Ex. G, *Al- Qahtani v. Bush*, 1:05-cv-01971-RMC (D.D.C.) Minute Order, dated April 20, 2012.

Indeed, in similar circumstances courts have uniformly ruled in favor of the Government. In *AP v. DOD*, 462 F. Supp. 2d 573 (S.D.N.Y. 2006), the Court deferred to the same rationales to sustain the withholding of detainee images under Exemption 1, notwithstanding that DoD by that time had produced extensive information about the detainees. *Id*. at 574, 578. As the Court explained, "photographs . . . will increase the risk of retaliation because release of photographs coupled with names (which may be common names) would specifically identify each detainee in a way that a release of names and other biographical information does not, and . . . , in any event, many detainees *believe* that harm will ensue from such disclosure and will fail to cooperate." *Id*. at 575-76; *see also id.* at 576. This remained true even despite limited disclosures of detainee photographs. *Id.* at 576. Likewise, in *Azmy v. DOD*, 562 F. Supp. 2d 590 (S.D.N.Y. 2008), this Court sustained the Government's invocation of Exemption 1 over, among other things, the detainee's "official identification photograph," even though the detainee's "'story and his picture . . . have been so widely publicized that it is unlikely the release of information about him would add to what is already known.'" *Id.* at 598 (quoting pl. mem.). The Court nonetheless upheld the Government's classification decision for the reasons set forth in *AP*. *See id*. at 598-600. Accordingly, the prior release of *written* information about al Qahtani, *see* Pl. Opp. 8-10, diminishes neither the rationales supporting the withholding of al Qahtani's images pursuant to Exemption 1, nor the Court's obligation to defer to those rationales.

Next, Plaintiff unsuccessfully accuses the Government of bad faith, based on the Government's previous release of written information about al Qahtani, and the release of photographs of other detainees generally. *See generally* Pl. Opp. 7-12. As described above, the Government's release of *written* information about al Qahtani does not undermine its showing that national security harm is likely to attend the disclosure of detainee *images*. Moreover, with

the limited exceptions of photographs taken and released to a consenting detainee's family by the ICRC, along with corresponding photographs of the detainee within the possession of DoD, and photographs to be used for border control and trial purposes,[3] the Government has not publically released images in which a specific detainee is identifiable. This is the longstanding policy of the Government, *see* Declaration of Richard Jackson, attached as Exhibit C to the Lietzau Declaration, and the Second Herrington Declaration ¶¶ 5, 6. A review of Plaintiff's photograph exhibits bears this out. *See* Pl. Exs. 19, 25, 26, 30, 32.

Thus, although the Government declassified certain photographs of the detainees at issue in *ICB*, No. 08-1063 (D.D.C.), *see* Pl. Opp. 10, those photographs were likenesses of detainees who had been photographed by the ICRC in accordance with DoD policy. Second Herrington Decl. ¶ 6. Here, by contrast, al Qahtani has not allowed the ICRC to take his photograph and provide it to family members. *See id.*; Lietzau Decl. ¶ 10. Nor, in any event, would his consent to such a process undermine the national security harms that are likely to flow from the disclosure of the materials at issue here, which depict far more than a facial image.

Accordingly, Plaintiff's charge of bad faith is meritless, and, for the independent reasons stated in the Government's declarations, Exemption 1 bars all of the requested release.

[3] Detainee images have been declassified in the context of the Guantanamo Bay detainee habeas litigation but were designated as "protected information" pursuant to the applicable protective order entered in those proceedings, *In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-1442 (D.D.C. Sept. 11, 2008) (dkt. No. 371), and thus not subject to public disclosure.

C. The Government's Submission of a Classified Declaration is Proper

The Court should reject Plaintiff's objection to submission of the Classified Herrington Declaration, which provides further information regarding the damage to national security that could reasonably be expected to result from disclosure of the two Debriefing Videos. Contrary to Plaintiff's complaint that "there has been no showing that as detailed a public record as possible has been created," Pl. Opp. at 18, the Government has created a robust public record, submitting nine public declarations. As the Government has explained previously, the explanations set forth in the Classified Herrington Declaration are themselves classified and their release would risk harm to national security. The declaration therefore must be submitted *ex parte* to protect the compelling interest in preventing public disclosure of sensitive and classified information. *Hamdan v. Rumsfeld*, 548 U.S. 557, 634–35 (2006).

In light of this compelling interest, courts have consistently recognized (and exercised) their "inherent authority to review classified material *ex parte*, in camera as part of [their] judicial review function." *Jifry v. FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004); *see also* Daughtry Decl. Ex. C, *ACLU v. DOD*, 09 Civ. 8071, slip op. at 2 ("[I]n the FOIA context, that reluctance [to rely on *ex parte* submissions] dissipates considerably when the case raises national security concerns"); *accord Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2003). While Plaintiff is unable to respond to the *ex parte* submission, in sensitive national security cases, "it is simply not possible to provide for orderly and responsible decisionmaking about what is to be disclosed, without some sacrifice to the pure adversary process." *Hayden v. NSA*, 608 F.2d 1381, 1385 (D.C. Cir. 1979); *see also In re New York Times Co.*, 577 F.3d 401, 410 n.4 (2d Cir. 2009).[4]

[4] The Court should swiftly reject Plaintiff's renewed request to submit a classified affidavit concerning information it has learned in the course of representing al Qahtani in his habeas proceeding before Judge

II. EXEMPTION 7(A) BARS RELEASE OF THE 53 FBI VIDEOTAPES

Plaintiff's contention that the Government insufficiently justified its invocation of Exemption 7(A) over the FBI Videotapes rests upon an inaccurate portrayal of the Government's declarations, and overstates the Government's burden.

The Government's burden to sustain a claim under Exemption 7(A) is not high. It is not necessary to produce a specific, record-by-record description showing that each paragraph of each record could reasonably be expected to cause harm to a pending or prospective enforcement proceeding[5]; indeed, such detailed descriptions risk revealing the very information the exemption was designed to protect. Rather, the Government need only show that "disclosure of particular *kinds* of investigatory records . . . would *generally* 'interfere with [pending or prospective] enforcement proceedings.'" *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978) (emphasis added); *Radcliffe v. IRS*, 536 F. Supp. 2d 423, 437 (S.D.N.Y. 2008), *aff'd*, 328 Fed. App'x 699 (2d Cir. 2009). In other words, categorical descriptions are sufficient. *NLRB*, 437 U.S. at 236; *Radcliffe*, 536 F. Supp. 2d at 437.

Collyer in the District of Columbia. Plaintiff's claim that it has "lawful" access to the classified records at issue is unavailing. If Plaintiff discloses the classified information it possesses outside of the habeas proceeding, it will be in violation of the habeas court's protective order -- which Judge Collyer recently refused to modify upon Plaintiff's request. Daughtry Decl. Ex. A. Finally, Plaintiff is not correct that this Court in another case assertedly "granted plaintiff's counsel . . . the right to file a sealed declaration discussing the records that counsel already viewed." Pl. Opp. at 19. To the contrary, the plaintiff there not only did not submit a classified declaration, but was *prohibited* from citing the classified document or making comparisons between it and information in the public domain; the plaintiff's submission was initially filed under seal simply as a precautionary measure to avoid further inadvertent disclosure of the classified document at issue. *See* Second Daughtry Decl., Ex. H, Transcript of Oral Argument, dated October 12, 2011, in ACLU v. DOD, 09 Civ. 8071 (BSJ) (S.D.N.Y.) at 30-34.

[5] Plaintiff agrees that the FBI Videotapes were compiled for law enforcement purposes, and that the Government's ongoing efforts to investigate and prosecute al Qahtani and other terrorists involved with the September 11 attacks qualify as prospective proceedings within the meaning of Exemption 7(A). Pl. Opp. 25.

Under these principles, the Government's invocation of Exemption 7(A) was proper. First, contrary to Plaintiff's argument, *see* Pl. Opp. 26-27, the Government sufficiently detailed the content of the FBI Videotapes to permit the Court to conclude, categorically, that public disclosure could reasonably be expected to interfere with prospective enforcement proceedings. The Government explained that the FBI Videotapes depict al Qahtani's activities in his cell and his interaction with DoD personnel between August and November 2002. First Hardy Decl. ¶ 29. This description is as specific and detailed as the descriptions of numerous other categories of information that courts have held warrant Exemption 7(A) protection. *See, e.g.*, *NLRB*, 437 U.S. at 216 (witness statements); *Dickerson v. DOJ*, 992 F.2d 1426, 1433 (6th Cir. 1993) ("information and documents provided by local law enforcement"); *Owens v. DOJ*, No. 04-1701, 2007 WL 778980, at *8 (D.D.C. Mar. 9, 2007) ("strategic documents" and "evidentiary documents"). Plaintiff is wrong to argue that an individualized description of the content of each tape is necessarily required. Pl. Opp. 26-27; *see, e.g. In re Dep't of Justice*, 999 F.2d 1302, 1309 (8th Cir. 1993) (en banc) (reversing order requiring submission of *Vaughn* to justify Exemption 7(A) invocation; "The contents of the [individual] requested documents are irrelevant."). Requiring more on the public record would jeopardize the important public interest Exemption 7(A) was enacted to effectuate. Second Hardy Decl. ¶ 7; *see In re Dep't of Justice*, 999 F.2d at 1311 (requiring document by document descriptions under Exemption 7(A) would "breach the dike" (internal quotation marks and citation omitted)).

Second, the Government has demonstrated why videotapes depicting al Qahtani's confinement and interaction with DoD personnel could reasonably be expected to undermine the Government's investigation and prosecution of al Qahtani. As the declarant explains, the FBI Videotapes constitute potential evidence in connection with any prosecution of al Qahtani.

Second Hardy Decl. ¶¶ 6b, 6c; First Hardy Decl. ¶ 36. Because the videotapes show al Qahtani in his cell and interacting with DoD personnel during the same period of time that he was being interrogated, First Hardy Decl. ¶ 29; Pl. Ex. 31, for example, those tapes may bear on any claim by al Qahtani that statements made at the time of the videotapes should be suppressed as the involuntary product of his treatment, conditions of confinement, or psychological state. *See* Daughtry Decl. Ex. F at 3. Requiring the Government to disclose this evidence now may undermine the Government's case by enabling al Qahtani to modify or tailor his claims and defenses concerning his treatment, confinement, and psychological state, and other defense witnesses to similarly adjust their testimonies. Second Hardy Decl. ¶¶ 6(b), 6(c); First Hardy Decl. ¶ 37(a) (identifying risk of "manipulation of evidence in advance of trial by Military Commission");[6] *see, e.g.*, *NLRB*, 437 U.S. at 241 ("[A] suspected violator with advance access to the Board's case could construct defenses which would permit violations to go unremedied." (internal quotation marks and citations omitted)).

Exemption 7(A) is intended to address this very type of situation:

> In originally enacting Exemption 7, Congress recognized that law enforcement agencies had legitimate needs to keep certain records confidential. . . . Foremost among the purposes of this Exemption was to prevent harm to the Government's case in court, by not allowing litigants earlier or greater access to agency investigatory files than they would otherwise have.

NLRB, 437 U.S. at 224-25 (internal quotation marks and citation omitted); *see also id.* at 228, 232; *Radcliffe*, 536 F. Supp. 2d at 437.

Plaintiff responds that law enforcement would not be prejudiced by premature disclosure of the FBI Videotapes because al Qahtani's habeas counsel already reviewed an extremely limited subset of videotapes made from November 15-22, 2002. Pl. Opp. 28. This is

[6] Plaintiff mistook the Government's assertion that public release of the FBI videotapes could result in evidence manipulation to mean physical evidence tampering. Pl. Opp. 27-28.

nonsensical because, as the court adjudicating al Qahtani's habeas petition recently reaffirmed, al Qahtani's habeas counsel are forbidden from revealing the contents of these videotapes outside of the habeas action. Daughtry Decl. Ex. A. Disclosure of the FBI Videotapes pursuant to the FOIA, however, constitutes a disclosure to the entire world, including, of course, al Qahtani himself and any witnesses who may testify in his prosecution. *See NARA v. Favish*, 541 U.S. 157, 174 (2003).[7]

Meanwhile, Plaintiff's argument that the Government insufficiently detailed the "specific kind of evidentiary or investigative purposes" the videotapes serve is simply wrong. Pl. Opp. 28-29. Again, each of the FBI Videotapes depict al Qahtani's confinement and his interaction with DoD personnel, and thus all necessarily bear on any claims or defenses which require examination of al Qahtani's treatment, conditions of confinement, or psychological state. *See supra*; Second Hardy Decl. ¶¶ 6(b), 6(c). Plaintiff's opposition completely ignores these assertions of harm. Given the obvious link between premature disclosure of the FBI Videotapes and damage to prospective Military Commission proceedings, no greater detail is required. *See NLRB*, 437 U.S. at 236; *Church of Scientology of Cal. v. IRS*, 792 F.2d 146, 152 (D.C. Cir. 1986) ("resort to a *Vaughn* index is futile" in Exemption 7(A) case). Accordingly, the Government's summary judgment motion as to the FBI Videotapes can be granted on this basis alone.

Similarly unavailing, however, are Plaintiff's challenges to the harms that the Government avers are reasonably likely to occur to its ongoing terrorism investigations if

[7] Notably, prior to instituting this FOIA action, al Qahtani's habeas counsel attempted, but failed, to obtain discovery of all of the videotapes at issue in this action through the habeas proceedings. *See* Daughtry Decl. Ex. F at 3. Yet as Plaintiff acknowledges, *see* Pl. Opp. at 27, "FOIA was *not* intended to function as a private discovery tool." *NLRB*, 437 U.S. at 242 (emphasis in original); *see also John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 153 (1989) ("FOIA was not intended to supplement or displace rules of discovery").

videotapes reflecting terrorists' detention are released – namely, inciting retribution by terrorist organizations against United States interests and enabling detainees to communicate with associates outside the prison via released videotapes. Pl. Opp. 30-31; First Hardy ¶ 16; *see also* Second Hardy ¶ 6(a). Plaintiff's bald characterization of these harms as "completely speculative" and "contradicted by record evidence" is incorrect. Pl. Opp. 31. To the contrary, the Woods and Lietzau declarations clearly set forth why it is reasonable to expect these harms to attend disclosure of the FBI Videotapes. *See* Woods Decl. ¶¶ 23-26; Lietzau Decl. ¶ 7(a); Horst Decl. ¶ 10. It is also reasonable to expect that these harms could impede the FBI's ability to effectively continue investigating al Qahtani and other terrorists. Second Hardy ¶ 6(a). For example, detainees may use coded messages to communicate with terrorist associates who may then take action against witnesses to crimes under investigation by the Government. Or terrorists, upon learning or confirming that a particular individual is in United States custody by viewing a videotape, may take action against that detainee's family or associates in order to prevent the Government from gathering evidence against the detainee or evidence that may implicate the terrorists themselves. *See* Second Hardy Decl. ¶ 6(a); First Hardy Decl. ¶ 16(c); *see also* Lietzau Decl. ¶ 7(a); Woods Decl. ¶¶ 23-26. These scenarios fall squarely within the protection of Exemption 7(A).

The Government's contentions are plausible, and insofar as they involve national security judgments, those judgments are entitled to substantial deference, notwithstanding that they are made in connection with a claim of withholding under Exemption 7(A). *See Wilner*, 592 F.3d at 73, *supra* at 1-4. As the D.C. Circuit has recognized, there is "no valid reason why the general principle of deference to the executive on national security issues" should not apply when the expected harm to the Government's active investigations turns on a matter of national security.

Ctr for Nat'l Sec'y Studies, 331 F.3d at 928 ("Judicial deference depends on the substance of the danger posed by disclosure . . . not the FOIA exemption invoked.").

Plaintiff's argument otherwise hinges upon a misleading description of *ACLU v. DOD*, 543 F.3d 59 (2d Cir. 2008). There, the Government sought to withhold photographs depicting detainee abuse pursuant to Exemption 7(F), which allows the withholding of records compiled for law enforcement purposes, but only to the extent their release could reasonably be expected to endanger "any individual." *Id.* at 63, 66. The Government contended that releasing the photographs would likely incite violence against U.S. and Coalition troops and others, and thus fell within the exemption. *Id.* at 67. The Second Circuit disagreed, holding that Exemption 7(F) requires reasonably specific identification of at least one individual, which the Government had not done. *Id.* at 71. In so holding, the Court explained that Exemption 1 was specifically designed to protect records whose disclosure could harm national security, and that Congress could not have intended to allow the Government to avoid the safeguards imposed by Exemption 1 by interpreting another FOIA exemption to accomplish the same result for the same reason, *i.e.*, that the release of records may damage national security. *See id.* at 71-74.

That is not the case here. Whereas in *ACLU v. DOD* the Government could not show harm to "any individual" as required by Exemption 7(F), here all of the requirements of Exemption 7(A) are met. That the interference with the FBI's ongoing terrorism investigations would be accomplished by so-called "national security" harms does not invalidate the Government's invocation of Exemption 7(A), or otherwise defeat the deference due the Government's national security judgments. In other words, the Government is not shoehorning what should be an Exemption 1 claim into Exemption 7(A), as it allegedly did in *ACLU v. DOD*; rather, the Government has shown that both Exemptions apply. Accordingly, Plaintiff's claim

that *ACLU v. DOD* "prohibits" this Court from deferring to the Government's national security judgments is simply wrong, and, as explained in *Center for National Security Studies*, judicial deference is warranted and required. *See* 331 F.3d at 926-28, 932.

All of these considerations disprove Plaintiff's assertion that the Government here seeks to justify its invocation of Exemption 7(A) "by merely placing [the FBI Videotapes] in an investigative file." Pl. Opp. 29. Rather, the Government has done what the law requires: describe the FBI Videotapes in a manner that establishes a "rational link" between the requested public disclosure and interference with the Government's ongoing investigations and prospective proceedings. *See Crooker v. Bureau of Alcohol, Tobacco, and Firearms*, 789 F.2d 64, 67 (D.C. Cir. 1986). Accordingly, the Court should uphold the Government's Exemption 7(A) claim.

III. EXEMPTIONS 6 AND 7(C) BAR DISCLOSURE OF VIDEOTAPES AND PHOTOGRAPHS, AND EXEMPTIONS 3, 6, AND 7(C) BAR DISCLOSURE OF DOD PERSONNEL IMAGES

The Government properly invoked Exemptions 6 and 7(C) to protect the privacy of both al Qahtani and DoD employees, and Exemption 3 as to DoD employees.

A. Al Qahtani

A third party cannot validly waive al Qahtani's privacy interest. *See* Gov't Op. Br. at 28. This is all the more clearly true here because al Qahtani has not allowed the ICRC to photograph him. *See* Lietzau Decl. at ¶ 10. Nor is al Qahtani's privacy interest in the images at issue diminished by *written* information about al Qahtani that the Government previously released. *See supra* at 8-10 and Gov't Op. Br. at 29-30. While Plaintiff speculatively asserts a public interest in possible evidence of detainee mistreatment in the Withheld Videotapes and Photographs, *see* Pl. Opp. at 36, the Government has shown that the tapes do not show any abuse or mistreatment of al Qahtani. *See* Third Hardy Declaration, Ex. A (Supplemental Index).

Accordingly, al Qahtani's privacy interest in these invasive images outweighs any public interest in their release. *See, e.g., DOJ v. Reporters Comm.*, 489 U.S. 749, 763-64 (1989).[8]

B. DoD Employees

Plaintiff's only argument in opposition to DoD's withholding of DoD employee images is that, in the abstract, DoD must release information that it has already been officially disclosed, *see* Pl. Opp. at 32-33; this argument must fail. Plaintiff has the burden of production to identify an official disclosure that is as specific as the information sought, *see Inner City Press v. Bd of Gov.*, 463 F.3d 239, 245 (2d. Cir. 2006); *Wilson v. CIA*, 586 F.3d 171, 186 (2d. Cir. 2009). Plaintiff has not met its burden to show any previously disclosed images of DoD personnel who are shown in the 56 videotapes at issue. Accordingly, the Court should uphold DoD's withholding of all images of DoD personnel pursuant to Exemptions 3, 6, and 7(C).

IV. THE CIA PROPERLY ISSUED A GLOMAR RESPONSE

Plaintiff has identified no basis to reject CIA's assertion of a *Glomar* response.

The Second Circuit has made clear that an agency "loses its ability to provide a *Glomar* response" only "when the existence or nonexistence of the particular records covered by the *Glomar* response has been officially and publicly disclosed." *Wilner*, 592 F.3d at 70; *see* Gov't Op. Br. at 18 (describing Second Circuit's "strict test" for official disclosure, *Wilson*, 586 F.3d at 186).

Plaintiff fails this strict test on every point. Plaintiff has cited a report from the Senate

[8] Plaintiff is incorrect that Second Circuit has "foreclosed" the Government's argument regarding the public interest against release of the photographs. Pl. Opp. 36. The Circuit did not consider this argument and was making the point that public interest cannot turn on "the purposes for which the request for information is made nor on the identity of the requesting party." *AP v. DoD*, 554 F.3d 274, 288 (2d. Cir. 2009). Further, in *ACLU v. DOD*, the court disallowed the Government's Exemption 7(F) claim, not an Exemption 6 and 7(C) claim, which is at issue here. *See id.; see also supra* at 17. In any event, the Court need not reach this argument, as, in the absence of any abuse or mistreatment in the Withheld Videotapes and Photographs, there is no compelling interest in public disclosure.

Armed Services Committee and the Department of Justice, as well as numerous newspaper and other media reports, which Plaintiff argues show "the CIA's involvement in al-Qahtani's detention at Guantanamo." Pl. Opp. at 38; *see id.* at 38-39. But such disclosures are not official, as they were not made by the CIA itself. *See, e.g.*, *Wilson*, 586 F.3d at 186; *Salisbury v. United States*, 690 F.2d 966, 971 (D.C. Cir. 1982) (disclosure in Senate report "cannot be equated with disclosure by agency itself"); *Earth Pledge Found. v. CIA*, 988 F. Supp. 623, 627 (S.D.N.Y. 1996), *aff'd* 128 F.3d 788 (2d. Cir. 1997) (CIA *Glomar* case; disclosure "even by another branch of the federal government" differs from disclosure by CIA); *see also* Culver Decl. ¶¶ 52-54. Furthermore, nothing in any of the reports cited by Plaintiff is "as specific as" or "matches" the classified information at issue here, namely, the existence or nonexistence of videotapes, audiotapes, and photographs of al Qahtani from the period 2002 to 2005. *See Wilson*, 586 F. 3d at 186, Pl. Opp. at 38-39 (describing Senate, DOJ, and media reports).[9]

Accordingly, the Court should uphold the CIA's assertion of a *Glomar* response here.

V. CONCLUSION

The Court should grant the Government summary judgment and deny Plaintiff's motion.

[9] A recent D.C. Circuit case rejecting, in part, the CIA's assertion of a Glomar response in a FOIA case seeking records pertaining to the use of drones is inapposite (and not controlling). *See ACLU v. CIA*, 2013 WL 1003688 (D.C. Cir. Mar. 15, 2013). That court considered whether public statements by high-ranking government officials, including the CIA Director, constituted official disclosures that vitiated the CIA's Glomar response. Here, by contrast, the FOIA request is targeted to capture only videotapes, audiotapes, and photographs of a specific individual during a narrow timeframe maintained by the CIA, and Plaintiff has not identified a single statement by any CIA official acknowledging the existence of such records.

Dated: New York, New York
April 8, 2013

Respectfully submitted,

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