**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. 0135 (NRB)

**ORAL ARGUMENT REQUESTED**

# MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT/REPLY BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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## INTRODUCTION

Plaintiff Center for Constitutional Rights ("CCR") respectfully submits this Memorandum of Law in opposition to the cross-motion for summary judgment filed by Defendants the Department of Defense ("DOD") and its components the Defense Intelligence Agency and United States Southern Command; the Department of Justice and its component the Federal Bureau of Investigation ("FBI"); and the Central Intelligence Agency ("CIA") (collectively, the "Government"), and in further support of its own motion for partial summary judgment. This case concerns the public's right to access records under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, relating to the Government's detention of Mohammed al-Qahtani, a Saudi Arabian national who has been held by the military at Guantánamo Bay since 2002, and who, as the Government has acknowledged, was tortured and abused while in United States custody. The release of CCR's requested records -- specifically, all video, photographic, and audio records of Mr. al-Qahtani at Guantánamo created between February 2002 and November 2005 -- vindicates the interest in government transparency that underlies FOIA and will serve the public interest by illuminating how the Government has treated Mr. al-Qahtani during his detention and by shedding further light on the detention system that operated at Guantánamo during the initial years of the War on Terror.

In response to CCR's FOIA request, DOD and the FBI identified a number of responsive video and photographic recordings, while the CIA filed a *Glomar* response neither confirming nor denying the existence of any such records. The agencies did not, however, disclose any records to CCR, but instead relied on declarations asserting in the most conclusory fashion that disclosure would compromise U.S. intelligence efforts, military operations, and foreign relations; would interfere with prospective law enforcement proceedings; and would ultimately damage national security. As CCR explains in this brief, these affidavits lack the reasonable specificity

to establish that the requested records -- or, in the case of the CIA, the fact of these records' existence -- fall within any of the Government's claimed FOIA exemptions, or even to allow the Court to determine whether such exemptions apply.[1] Moreover, as CCR contends, beyond being vague, the Government's justifications are contradicted by other record evidence and are suggestive of the agencies' bad faith. Accordingly, the Government has failed to carry its burden under FOIA to justify withholding the records requested by CCR, and this Court should deny Defendants' motion (Dkt. No. 36), grant CCR's motion (Dkt. No.17), and order the requested records disclosed. In the alternative, this Court should require the Government to submit new, more detailed declarations and should review the withheld documents *in camera* to determine whether any part of the requested records may be disclosed under the statute.

## I. THE FREEDOM OF INFORMATION ACT

"FOIA, as its name suggests, expresses a public policy in favor of disclosure so that the public might see what activities federal agencies are engaged in. . . . To that end, any member of the public is entitled to have access to any record maintained by a federal agency, unless that record is exempt from disclosure under one of the Act's nine exemptions." *A. Michael's Piano, Inc. v. FTC*, 18 F.3d 138, 143 (2d Cir. 1994) (citations omitted); *see also ACLU v. DOJ*, 681 F.3d 61, 69 (2d Cir. 2012) ("The Freedom of Information Act 'calls for broad disclosure of government records,'" unless those requested records fall within one of the statute's nine exemptions (quoting *CIA v. Sims*, 471 U.S. 159, 166 (1985))). Thus, FOIA "adopts as its most basic premise a policy strongly favoring pubic disclosure of information in the possession of federal agencies." *Halpern v. FBI*, 181 F.3d 279, 286 (2d Cir. 1999).

[1] For a chart summarizing the FOIA exemptions asserted for each responsive document, see CCR's Memorandum of Law in Support of Plaintiff's Motion for Partial Summary Judgment at 7, Dkt. No. 18.

Withholding of records under FOIA is reviewed *de novo*, 5 U.S.C. § 552(a)(4)(B); *Wilner v. NSA*, 592 F.3d 60, 69 (2d Cir. 2009), and it is the withholding agency's burden to prove the applicability of claimed exemptions, which it may do by filing "[a]ffidavits or declarations giving reasonably detailed explanations why any withheld documents fall within an exemption." *ACLU v. DOJ*, 681 F.3d at 69 (internal quotation and alteration omitted). These so-called "*Vaughn* declarations," require the Government to justify FOIA withholdings by including "a relatively detailed analysis in manageable segments" and by "itemizing and indexing" the documents in a way that "correlate[s] statements made in the Government's refusal justification with the actual portions of the document." *Vaughn v. Rosen*, 484 F.2d 820, 826-27 (1973). Ultimately, the agency's affidavits or declarations must "'describe the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and . . . not [be] controverted by either contrary evidence in the record nor by evidence of agency bad faith.'" *Wilner v. NSA*, 592 F.3d 60, 73 (2d Cir. 2009) (quoting *Larson v. Dep't of State*, 565 F.3d 857, 862 (D.C. Cir. 2009)).

In keeping with this policy in favor of disclosure "so that the people may 'know what their government is up to,'" *ACLU v. DOD*, 543 F.3d 59, 66 (2d Cir. 2008), *vacated and remanded on other grounds*, 130 S. Ct. 777 (2009) (quoting *U.S. DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772-73 (1989), FOIA's exemptions "are exclusive" and "'must be narrowly construed'" with all doubts resolved in favor of the requester, *ACLU v. DOD*, 543 F.3d at 66 (quoting *Jon Doe Agency v. Jon Doe Corp.*, 493 U.S. 146, 152 (1989)). Moreover, although a "good faith presumption" ordinarily attaches to the Government's affidavits, this presumption "only applies when accompanied by reasonably detailed explanations of why the material was withheld" because, absent such specific information, "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; *accord Long v. U.S. DOJ*, 703 F. Supp. 2d 84, 100 (N.D.N.Y. 2010).

Additionally, and also consistent with FOIA's policy in favor of disclosure, the Government must disclose "any reasonably segregable portion" of a requested record, 5 U.S.C. § 552(b), and must in its declarations identify those segments of each document that can be disclosed, *see Vaughn*, 484 F.2d at 827; *accord Halpern*, 181 F.3d at 290. Thus, in describing the withholding of a videotape record, the Government must provide enough factual information about the video's length and content, and cross-reference those descriptions to the particular claimed exemptions, so as to permit the Court to determine whether the Government has met its segregability obligations. *See, e.g.*, *Int'l Counsel Bureau v. U.S. DOD* ("*ICB*"), 723 F. Supp. 2d 54, 65 (D.D.C. 2010) (citing *Kishore v. DOJ*, 575 F. Supp. 2d 243, 259 (D.D.C. 2008)). The Court may also exercise its discretion to review the requested documents *in camera*, 5 U.S.C. § 552(a)(4)(B), "where the record show[s] 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, or where, as in this case, "the dispute turns on the contents of the withheld documents, and not the parties' interpretations of those documents," *Spirko v. U.S. Postal Serv.*, 147 F.3d 992, 996 (D.C. Cir. 1998) (internal quotation marks omitted). Nevertheless, *in camera* review is "'not a substitute for the Government's burden of proof'" to provide adequate declarations that facilitate the adversarial process and *de novo* review FOIA envisions, *Halpern*, 181 F.3d at 295 (quoting *Church of Scientology v. U.S. Dep't of Army*, 611 F.2d 738, 743 (9th Cir. 1980)); *see ACLU v. DOD*, 389 F. Supp. 2d 547, 567 (S.D.N.Y. 2005).

As set forth herein, the Government has failed to provide the reasonably specific detail necessary to support withholding the records requested by CCR. Rather, the Government's declarations are vague and conclusory, are contradicted by other evidence in the record, and even suggest potential bad faith to conceal agency misconduct. Because the Government has not justified its withholdings, this Court should order the requested records released. Alternatively, the Court should require the Government to submit new declarations more specifically describing the records and the bases for withholding, or it should review the records *in camera*.

## II. DOD AND THE FBI HAVE NOT MET THEIR BURDEN TO WITHHOLD RECORDS UNDER EXEMPTION 1

Exemption 1 permits withholding of information that is "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and [is] in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). DOD has classified all of the identified al-Qahtani records -- the 53 videotapes of al-Qahtani, the six mug shot photographs, the forced cell extraction ("FCE") videotape, and two de-briefing videotapes -- as SECRET pursuant to Executive Order 13,526 of Dec. 29, 2009 § 1.2(a)(2) ("Exec. Order 13,526"), 75 Fed. Reg. 707 (Jan. 5, 2010). Accordingly, to justify its classifications, DOD must demonstrate, among other factors, that the withheld records "fall[] within one or more of the categories of [classifiable] information," and that "the unauthorized disclosure of that information reasonably can be expected to result in damage to the national security," which the agency must be able to identify or describe.[2] *Id.* § 1.1(a)(3)-(4). The Executive Order further provides that "[i]n no case shall information be classified . . . in order to:

[2] "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 13,526 § 6.1(l).

(1) conceal violations of law, inefficiency, or administrative error [or] (2) prevent embarrassment to a person, organization, or agency." *Id.* § 1.7(a).

In determining whether DOD is justified in withholding documents under Exemption 1, the Court conducts *de novo* review, but accords "'substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.'" *ACLU v. DOJ*, 681 F.3d at 69 (quoting *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007)) (emphasis omitted). Although the Court owes deference to a classifying agency's judgments, "'deference is not equivalent to acquiescence.'" *Azmy v. U.S. DOD*, 562 F. Supp. 2d 590, 597 (S.D.N.Y. 2008) (quoting *Campbell v. U.S. DOJ*, 164 F.3d 20, 30 (D.C. Cir. 1998)). Thus, the Court may not accept an agency's conclusory or categorical assertions to support its classifications. *See, e.g.*, *Halpern*, 181 F.3d at 293 (holding that "vague and conclusory" affidavits are insufficient to sustain Government's burden in justifying withholding under Exemption 1); *Campbell*, 164 F.3d at 30-31 (holding that categorical description of withheld material and categorical description of harm likely to ensue from its release is inadequate to justify withholding under Exemption 1); *ACLU v. ODNI*, 2011 U.S. Dist. LEXIS 132503, at *23-24 (S.D.N.Y Nov. 15, 2011) (holding that "blanket assertion" that requested information is properly classified under Executive Order 13,526 is insufficient to justify withholding under Exemption 1); *ICB*, 723 F. Supp. 2d at 64 (holding that agency failed to justify withholding under Exemption 1 by not describing withheld record and how releasing it would damage national security). Nor is an agency's affidavit entitled to deference if other evidence in the record contradicts it or if there has been a demonstration of bad faith. *ACLU v. DOJ*, 681 F.3d at 69; *Wilner*, 592 F.3d at 73.

### A. The Government Has Not Justified Withholding All Records Under Exemption 1

DOD asserts that all of the responsive records are properly classified as "military plans, weapons systems, or operations," *id.* § 1.4(a), "intelligence activities (including covert action), intelligence sources or methods, or cryptology," *id.* § 1.4(c), or "foreign relations or foreign activities of the United States," *id.* § 1.4(d), and that the release of any of these records reasonably can be expected to damage national security.[3] In originally justifying CCR's request for these records, DOD relied on the declaration of Rear Admiral David B. Woods, Commander of the Joint Task Force-Guantánamo (Dkt No. 20-14), as well as a declaration by Mark H. Herrington, Associate Deputy General Counsel in DOD's Office of General Counsel concerning only the requested FCE videotape (Dkt. No. 20-14). Now, in opposing CCR's partial summary judgment motion and cross-moving for summary judgment, DOD relies on additional declarations by William K. Lietzau, Deputy Assistant Secretary of Defense for Rule of Law and Detainee Policy (Dkt. No. 42), and Major General Karl R. Horst, Chief of Staff of United States Central Command ("USCENTCOM") (Dkt. No. 41), as well as a classified declaration by Herrington, which Plaintiff counsel has not seen. Plainly, and as CCR previously argued in its brief in support of partial summary judgment motion, the Woods Declaration is insufficient to support DOD's blanket withholding. DOD's new submissions are inadequate as well.

#### 1. Woods Declaration

In its first attempt to justify its withholding of the al-Qahtani records, DOD relied on the declaration of Rear Admiral Woods that the requested records constitute "intelligence activities . . ., intelligence sources or methods." Woods Decl. ¶¶ 23-27. Specifically, Woods contends that release of these records will inform the public that al-Qahtani is detained at Guantánamo, which

[3] The FBI also asserts these Exemption 1 protections from disclosure, although that agency refers the Court to DOD's declarations in support of withholding. *See* First Hardy Declaration ¶ 38.

increases the likelihood that he or his family will be subject to reprisal based on the belief -- whether true or not -- that he is cooperating with the United States. Woods Decl. ¶¶ 23-25. Further, Woods asserts that release of these records will deter current and future cooperation by detainees and other intelligence sources because those sources will be unlikely to supply information if they believe that their records may be publicly disclosed through FOIA requests. *Id.* ¶¶ 26-27. Based on these conclusory assertions and the Government's minimal descriptions of the requested records' contents, DOD urges the Court to grant its motion and deny CCR's on the ground that the release of *any* records relating to a detainee's detention in Guantánamo would *always* reveal an intelligence source and thereby damage national security, even though the requested records may have nothing to do with al-Qahtani's cooperation (such as the mug shots) or could be redacted to delete any reference to cooperation (such as the videos). *See* Mem. of Law in Support of Pl.'s Mot. for Partial Summ. J. ("CCR Br.") at 20, dkt no. 18.

Woods's assertions must be rejected for the reasons previously set forth by CCR. *See id.* at 19-23. Even assuming that a detainee is or may be an intelligence source, that interrogating or recruiting him may be an intelligence method, or that these records relate to foreign relations and activities, *see* Woods Decl. ¶ 27, DOD has not explained with reasonable specificity how the release of any portion of the requested photographs or videotapes will compromise those intelligence sources and methods or foreign relations and, thus, damage national security.

DOD's assertion that releasing these records will reveal al-Qahtani's detention at Guantánamo, and thus jeopardize his personal safety, is flatly contradicted by the record evidence submitted by CCR. DOD and other government agencies have made available extensive information about al-Qahtani, such as his name, his weight, the fact of his detention at Guantánamo, the details of his capture, his mistreatment while in detention, and, most

importantly for purposes of the Woods Declaration, the fact of his cooperation. *See* Pl.'s Statement of Material Facts Pursuant to Local Rule 56.1 ¶ 18 ("CCR L.R. 56.1 Statement"), Dkt. No. 21; CCR Ex. 2 at 58, 60, 108-09 (Senate Armed Services Committee Report documenting dates, times, and locations of al-Qahtani's confinement, as well as interrogation methods employed against him), Dkt. No. 20-2; CCR Ex. 6 (DOD press release about "valuable intelligence" obtained from "Mohamed al Kahtani"), Dkt. No. 20-10; CCR Ex. 20 (detainee weight information), Dkt. No. 20-16; Ex. 31 at 118-19, (FBI OIG report describing conditions of al-Qahtani's detention and his cooperation with the government), Dkt. No. 20-19.

The Government responds that these disclosures are irrelevant because the records that CCR seeks have not themselves been the subject of prior official disclosures. *See* Mem. of Law in Opposition to Pl.'s Mot. for Partial Summ. J. & in Support of the Gov't's Cross-Mot. for Summ. J. at 18 ("Gov't Br."), Dkt. No. 37. Respectfully, the Government misses the point. CCR does not contend that DOD has waived the right to withhold the requested videotapes and photographs because *these* records were previously officially disclosed. *See Wilson v. CIA*, 586 F.3d 171, 186 (2d Cir. 2009) (holding that agency has waived right to withhold only when the information sought "is as specific as the information previously released, . . . matches the information previously disclosed, and . . . was made public through an official and documented disclosure'" (quoting *Wolf*, 473 F.3d at 378)). Rather, CCR challenges that DOD's conclusory assertions in favor of withholding are "controverted by . . . contradictory evidence in the record," and, thus, provide neither a logical nor plausible basis for withholding under Exemption 1. *Wilner*, 592 F.3d at 73 (internal quotation marks omitted). Specifically, DOD cannot rely on a categorical description of the withheld records (*i.e.*, that they visually document al-Qahtani's detention) and, even more significantly, a categorical description of the harm to national security

(*i.e.*, that any disclosure will expose al-Qahtani and subject him to possible reprisal) when, in fact, DOD and other federal agencies have previously released this same information. *See Campbell*, 164 F.3d at 30; *accord ICB*, 723 F. Supp. 2d at 64.

Similarly, other evidence in the record contradicts DOD's assertion that releasing these photographs and videotapes will dissuade current and future detainees from cooperating. As CCR has shown, *see* CCR L.R. 56.1 Statement ¶ 20, DOD has made numerous detainee images publicly available by releasing photographs of Guantánamo detainees receiving medical treatment, playing soccer, and getting haircuts, *see* CCR Ex. 26, Dkt. No. 20-17; by allowing the Associated Press and International Committee of the Red Cross ("ICRC") to photograph detainees, *see* CCR Ex. 19, Dkt. No. 20-16; and by declassifying images of other Guantánamo detainees, *see* CCR Ex. 27, Dkt. No. 20-18. This record evidence contradicts DOD's conclusory assertions that it must "consistently app[y]" its policy of withholding detainee images because the disclosure of any such information would damage the Government's credibility with current intelligence sources and undermine its ability to recruit new sources. Woods Decl. ¶ 27. Moreover, DOD's concern is further undermined by al-Qahtani's consent to having the images released and the fact that he has told counsel that he "strongly supports" CCR's effort to have these records disclosed to the public, Babcock Decl. ¶ 3, Dkt. No. 19, which establishes that al-Qahtani does not fear the records' release and negates the concern that detainees who do not consent will, as a result of this disclosure, refuse to cooperate with the authorities.

Nevertheless, despite this evidence contradicting Rear Admiral Woods's assertions, the Government cites two cases in which, it contends, the court accepted the same argument that detainee records must be withheld to maintain the secrecy of DOD's sources. *See* Gov't Br. at 17. But in each of these decisions, the district court did not accept the Government's blanket

assertion that DOD must maintain a policy of withholding *all* detainee records in order to protect detainees' safety and maintain the trust of current and future intelligence sources. Thus, in *AP v. U.S. DOD*, 462 F. Supp. 2d 573 (S.D.N.Y. 2006), the court expressed its doubt that this blanket assertion established the "reasonably specific detail" required under Exemption 1, and was only convinced that withholding was appropriate once the Government filed "supplemental evidence . . . under seal, which the Court reviewed *ex parte*." *Id.* at 576. Further, unlike in this case, there was no indication in *AP* that any detainee consented to releasing the requested records. *Azmy v. U.S. DOD*, 562 F. Supp. 2d 590 (S.D.N.Y. 2008), is similarly distinguishable. There, after conducting an "exhaustive, *in camera* review," *id.* at 596, the district court concluded that the Government was justified in withholding the requested documents to prevent publicly revealing "who has cooperated with interrogators at Guantánamo (and elsewhere) and what information these cooperators have provided, thereby placing human intelligence sources at risk and dissuading others from cooperating." *Id.* at 598. That concern is not present here, where al-Qahtani's cooperation is already known to the public and where no DOD representative has averred that any other cooperator's identity is at risk of being revealed.

The Government also asserts that it is not withholding records to conceal government misconduct or to prevent embarrassment. Woods Decl. ¶ 30, But CCR is not arguing that the information is improperly withheld under § 1.7(a) of the Executive Order -- in fact, CCR could not presently support such a contention without reasonably specific details as to the withheld records' contents, which the Government has failed to provide. Instead, CCR continues to argue that the Court ought not defer to the Government's vague declarations because the withheld records may document abuse or mistreatment of detainees and the agency may therefore have withheld the records in bad faith. *See* CCR Mem. at 19. That is, because DOD has failed to

support its withholdings with reasonably specific details about the records' contents, there remains a reasonable probability that these records are being withheld because they document detainee abuse, and the Court should therefore release the requested records or, at a minimum, demand greater specificity from the Government and conduct an *in camera* review. *See Spirko*, 147 F.3d at 996 ("*[I]n camera* inspection may be particularly appropriate when either the agency affidavits are insufficiently detailed to permit meaningful review of exemption claims or there is evidence of bad faith on the part of the agency" (internal quotation marks omitted)); *Halpern*, 181 F.3d at 292.

**2. Lietzau and Horst Declarations**

Perhaps because the original Wood Declaration is so conclusory and inconsistent with the record evidence, DOD now relies on two new declarations to justify its claims that release of the identified videos and photographs would harm the national security. But neither of these new declarations provides the Court with reasonably specific detail or establishes that the withheld records logically or plausibly fall within Exemption 1.

First, DOD contends that disclosing any photographs or videos of detainees can reasonably be expected to cause serious harm to national security by creating a means by which detainees can covertly communicate with their associates and terrorist organizations. Lietzau Decl. ¶ 7(a). That is, according to Lietzau, if detainees know that videos and photographs will be disclosed to the public, terrorist and extremist organizations will develop visual or audio codes and teach them to their members in the event they are detained, in which case future detainees will be able to communicate back to the organizations through publicly released records. *Id.* Although this argument was accepted by the district court in *Int'l Counsel Bureu v. U.S. DOD*, 2012 U.S. Dist. LEXIS 171969, at *17 (D.D.C. Dec. 4, 2012), it should be rejected here, where DOD has failed to offer any specific information explaining what these records contain and how

these types of records could be used as vehicles for covert communication. It cannot be merely because they are photographic representations. Indeed, DOD has released photographic images of detainees in the past. Nor does DOD exclude the possibility that there is a way to segregate or redact the records in a manner that would eliminate detainees' ability to engage in covert communications. *See Nat'l Immigration Project of Nat'l Lawyers Guild v. U.S. DHS*, 842 F. Supp. 2d 720, 725 n.5 (S.D.N.Y. 2012) ("[W]here agencies claim that 'non-exempt material is not reasonably segregable' from exempt material, they must provide a 'detailed justification' for that claim." (quoting *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977))). That is, on this record, the Government's blanket statement that *any* visual representation of a detainee will cause the specific harm at issue still "fails to supply anything more than [a] 'vague and conclusory' assertion[]" regarding the national security harm that would follow from the records' release. *ACLU v. ODNI*, 2011 U.S. Dist. LEXIS 132503, at *25 (quoting *Halpern*, 181 F.3d at 293). To the contrary, to sustain its burden the Government must either (1) provide more detail about what these records contain, such as in the case of the 53 videotapes and de-briefing videos for which there is almost no description, and explain with greater particularity how this kind of covert communication could be maintained via a mug shot photograph or during a forced cell extraction, *see Halpern*, 181 F.3d at 293 (criticizing agency affidavit for giving no "contextual description" of requested documents); and (2) establish that appropriate segregation or redaction could not address the national security concern expressed, *see ICB*, 723 F. Supp. 2d at 63-64 (criticizing agency affidavit for not explaining in reasonably specific detail why no portion of detainee video was segregable); *Int'l Counsel Bureau v. U.S. DOD*, 864 F. Supp. 2d 101, 107 (D.D.C. 2012) (determining that *in camera* review was necessary because agency still failed to explain why images were not segregable).

Second, Lietzau contends that releasing these videos will damage national security by suggesting to the international community that America does not respect detainees' rights under the Geneva Conventions, because disclosing these records would subject detainees to "public curiosity." Lietzau Decl. ¶ 7(b); *see* Geneva Convention Relative to the Treatment of Prisoners of War art. 13, Aug. 12, 1949, 6 U.S.T. 3316, 74 U.N.T.S. 135 ("Third Geneva Convention") (providing that detaining power must protect prisoners of war "particularly against . . . insults and public curiosity"); Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 27, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 ("Fourth Geneva Convention") (providing that civilian detainees shall be "protected against . . . insults and public curiosity"). Lietzau emphasizes that it is current DoD policy not to allow the media to take photographs of detainees, Lietzau Decl. ¶ 7(c), out of concern that such images violate international law and in order to protect American detainees from these sort of privacy invasions, *see id.*, Ex. C ¶¶ 8-10. But there is no such national security concern in this case where the detainee consents to the release of photographs and videotapes and, thus, to the "public curiosity" that will follow.[4] Insofar as DOD objects that al-Qahtani relies on the third-party affidavit of his counsel rather than on his own affidavit, the agency conflates DOD's internal policies for distributing detainee photographs, *see id.* ¶ 11, with whether release of these records would violate the Geneva Conventions. DOD has cited no legal principle under the Geneva Conventions that prevents a detainee from consenting through his attorney to the public distribution of his image, and to the extent that there is any doubt about al-Qahtani's genuine wishes, notwithstanding the sworn statement of an esteemed officer of the Court, CCR requests that this Court permit al-Qahtani to

[4] DOD implicitly acknowledges the effect of such consent by allowing the ICRC to photograph consenting Guantánamo detainees, Lietzau Decl. ¶ 10; if anything, such consensual release may in fact further the Geneva Conventions' purpose by "rais[ing] public awareness about violations of the Conventions and . . . pressur[ing] state party to abide by their obligations under the Conventions," *id.*, Ex. A ¶ 12.

supplement the record with an affidavit or other appropriate writing. *Cf. AP v. U.S. DOD*, 410 F. Supp. 2d 147, 149-50 (S.D.N.Y. 2006) (permitting plaintiff's counsel to obtain detainees' consent to release of records via questionnaire).

It bears noting, of course, that the Government's invocation of the Geneva Conventions is extremely ironic in a case in which the record reveals detainee abuse that is a far more egregious violation of international law than is the privacy invasion that the Government purports to seek to avoid. The details of al-Qahtani's abuse while in DOD custody at Guantánamo is well-documented, *see, e.g.*, CCR Ex. 2 at 60, 108-09 (Senate Armed Services Committee Report); CCR Ex. 31 at 83-84, 87, 102-03, 197 (FBI OIG Report); as Military Commission Convening Authority Susan Crawford stated, the United States "tortured al-Qahtani" and "his treatment met the legal definition of torture," CCR Ex. 1 (Bob Woodward, *Detainee Tortured, Says Official Overseeing Military Trials*, Wash. Post (Jan. 14, 2009)), Dkt. No. 20-1. And torture, of course, violates Common Article III the Geneva Conventions. *See* Third Geneva Convention art. 3; Fourth Geneva Convention art. 3. More to the point, however, the Government's invocation of the Geneva Conventions in this case certainly "raise[s] concern" that the purpose of the government's conclusory declarations "is less to protect intelligence activities, sources or methods than to conceal possible violations of law" or other "embarrassment." *ACLU v. DOD*, 389 F. Supp. 2d at 564-65 (internal quotation marks omitted).

Finally, DOD has submitted a declaration by Major General Karl R. Horst asserting that release of these records will endanger the lives and physical safety of American citizens and allies within USCENTCOM's area of responsibility. Horst Decl. ¶ 10. According to Horst, previous experience -- including public dissemination of the Abu Ghraib photographs in 2004, details about alleged mishandling of the Koran at Guantánamo in 2005, the 2012 release of a

video depicting Marines urinating on Taliban corpses, and details about a Koran burning incident in February 2012 -- shows that release of photographs or videos of detainee abuse has resulted in violence. Horst Decl. ¶¶ 11-12. From this, Horst concludes that the release of any videos and photographs showing forcible interaction between DOD personnel and al-Qahtani will likely be used to foment anti-American sentiment, increase extremist groups' recruitment, destabilize relations between the United States and countries in USCENTCOM's area of responsibility, and incite violence in the region. *Id.* ¶¶ 12, 14. All of the examples that Horst cites, however, are of controversial, abusive, and even illegal conduct. The Government has been extremely parsimonious in its description of the withheld videos and photographs and has not provided reasonably specific detail that would allow the Court to evaluate whether such a response is likely, particularly under circumstances where the torture at issue -- if that is what is depicted -- has already been publicly acknowledged. Rather, the Court should not defer to DOD's sweeping generalization that the release of any photograph or videotape of al-Qahtani will trigger international reprisals, but should demand a more detailed description of the records -- especially where, as here, the images may depict detainee abuse and the Government may be doing no more than seeking to conceal the full extent of its own misconduct. *See Halpern*, 181 F.3d at 292 (holding that deference under Exemption 1 is inappropriate "where the record showed the reasons for withholding were vague or where the claims to withhold were too sweeping or suggestive of bad faith").

In the alternative, Horst maintains that the release of any video or photograph of al-Qahtani will likely damage national security because any image can be spliced and edited to suggest that something criminal or abusive has taken place, and because terrorist organizations have previously manipulated images in just this way to facilitate recruitment and incite violence.

Horst Decl. ¶¶ 15-16. The Government relies on *ICB*, 2012 WL 6019294, at *15-17, where the district court held that this justification -- apparently based upon a similar declaration by Major General Horst, *see id.* at *14-15 -- was sufficient to sustain the Government's classification of video recordings of Guantánamo detainees. *See* Gov't Br. at 14. But *ICB*, which is obviously not binding upon this Court, is wrongly decided. It simply -- and incorrectly -- accepted the Government's view that an innocuous detainee image can be "manipulated and/or used as a propaganda tool" to damage national security, *ICB*, 2012 WL 6019294. at *17. Meanwhile, it insisted, contradictorily, that such an image cannot be "divorced from the context in which [it is] taken," *i.e.*, within Guantánamo's detention facility *id.* at *18, and thus is *per se* exempt from disclosure simply because it is associated with detention. This conclusion -- that every detainee image necessarily jeopardizes national security -- obviously sweeps far too broadly, for the record unequivocally shows that DOD has itself safely released some detainee images, and the wealth of public information that DOD and other federal agencies have already made available about Guantánamo detainees generally -- and about al-Qahtani in particular -- makes it highly suspect that *every* image of al-Qahtani will cause this sort of national security damage.[5] In sum, without knowing more about what these images contain and how, in contrast to the previously released DOD detainee images, releasing these records will harm national security, the Horst Declaration lacks the reasonably specific detail warranting judicial deference.

[5] This case is therefore distinguishable from *Judicial Watch, Inc. v. U.S. DOD*, 857 F. Supp. 2d 44 (D.D.C. 2012), where the district court rejected a FOIA challenge to the CIA's withholding of Top Secret records relating to the death of Osama bin Laden. Although in that case, the government made similar claims that the release of any image would inflame tensions in the Middle East region, *see id.* at 61, there was no record evidence showing that the CIA or any other federal agency had released any images related to what was described as "the most highly classified operation that this government has undertaken in many, many years," *id.* at 63 (internal quotation marks omitted). Here, by contrast, there is record evidence in the form of previous, similar government disclosures that contradicts the government's sweeping assertion that the release of any image of any detainee will threaten the national security.

### 3. Classified Herrington Declaration

The Government has also submitted *ex parte* a classified declaration by Mark Herrington for the court's *in camera* review. *See* Notice of Classified Filing, Dkt. No. 47. Before the Court accepts this *ex parte* submission, however, it must establish as detailed a public record as possible, *i.e.*, by requiring the Government to file public declarations and allowing plaintiff the opportunity to address them through discovery, *see Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976); *accord Wilner*, 592 F.3d at 68; *El Badrawi v. DHS*, 596 F. Supp. 2d 389, 393 n.6 (D. Conn. 2009). Further, because *ex parte* declarations do not allow the plaintiff to respond, they should be employed "only where absolutely necessary." *Allen v. CIA*, 636 F.2d 1287, 1298 n.63 (D.C. Cir. 1980); *see also Spirko*, 147 F.3d at 997 (observing that "absent some 'adversary testing,' the district court may be at a disadvantage in evaluating the government's characterizations of the withheld documents" (quoting *Vaughn*, 484 F.2d at 825, 828)); *Quinon v. FBI*, 86 F.3d 1222, 1228 (D.C. Cir. 1996) (stating that *in camera* review "should not be resorted to as a matter of course" because it deprives FOIA requester of opportunity to respond). Here, there has been no showing that as detailed a public record as possible has been created; indeed, as set forth above, the Government's submissions are entirely conclusory. Unless, however, it is "absolutely necessary" for them to have been so sparse, the Court should order the Government to provide new public declarations describing in the required specific detail the contents of the withheld records and how their release will disclose an intelligence source, an intelligence method, or secret foreign relations information, and thus damage national security.

Nevertheless, should the Court consider the Classified Herrington Declaration, it should also allow CCR's counsel to submit an affidavit under seal relating to classified information that it has learned in the course of representing Mr. al-Qahtani in his *habeas* proceedings. *See* CCR Br. at 10-14. That is, in the event that this Court concludes that the parties have succeeded in

creating a full public record and, therefore, that consideration of the Government's submissions *in camera* is appropriate, the Court should also assess whether it has a "need to know" the classified information that CCR's counsel has obtained about the requested records in the course of al-Qahtani's *habeas* action. This is a unique case where Plaintiff counsel -- who have the necessary security clearances -- have obtained access, albeit in a different proceeding and subject to a protective order, to some of the very records in dispute. This case is therefore distinguishable from a FOIA requester seeking to participate in *in camera* review of the documents sought to be released. *See Arieff v. U.S. Dep't of Navy*, 712 F.2d 1462, 1469 (D.C. Cir. 1983) (holding that court may not permit FOIA requester to access withheld information submitted for *in camera* review, but "is limited to the stark choice of receiving it *ex parte* and *in camera*, or receiving it not at all"). Rather, this is an unusual -- perhaps even "unprecedented," Gov't Br. 6 n.3 -- instance where counsel has lawfully obtained access to the classified records at issue in the instant FOIA litigation and is attempting to file a sealed submission for *in camera* review concerning what counsel already knows about the withheld classified records, rather than attempting to gain access to records to which it has so far been denied.

In arguably the closest case on point, *ACLU v. DOD*, No. 09-cv-8071 (S.D.N.Y. Mar. 20, 2012), *see* Daughtry Decl., Ex. B, Dkt. No. 46-2, the district court permitted plaintiff's counsel, to whom the government had inadvertently disclosed a classified document, to file a sealed submission in opposition to the government's motion to withhold that classified document from the public. There, the Court granted plaintiff's counsel exactly what CCR requests here: the right to file a sealed declaration discussing the records that counsel already viewed. *See id.*, slip op. at 12. CCR does not seek to file the classified record itself or to file its declaration publicly; thus, the Government's separation of powers concerns are overstated. *See* Gov't Br. at 6 n.3. To

the contrary, CCR's counsel only wishes to discuss under seal information that it has lawfully acquired in the course of representing Mr. al-Qahtani in the United States District Court for the District of Columbia, and thus provide the Court with the advantages of the full adversarial process that FOIA envisions. *See Wilner*, 592 F.3d at 68 (holding that agency's arguments should be subject to testing by plaintiff); *Halpern*, 181 F.3d at 291-92 (holding that FOIA was drafted to permit requesters the opportunity to contest "the government's assertions . . . [with] contrary evidence"). In sum, should this Court exercise its discretion to consider the Classified Herrington Declaration, it should also conclude that is has a need to know the classified information that CCR's counsel has learned so that it may conduct a full, independent *de novo* review of the Government's justifications for withholding the requested records.

### B. DOD Has Not Justified Withholding the Forced Cell Extraction ("FCE") Videos

In originally justifying its withholding of the FCE videotape, DOD relied upon the Woods Declaration, which alleged that releasing the FCE videos would reveal a "military plan . . . or operation" -- specifically, "the operations of the FCE Team, the function each member performs, and the actions they take to complete the FCE" -- that would lead to "the development of tactics and procedures to thwart the actions of the FCE team," thereby damaging national security. Woods Decl. ¶ 28. But, as CCR demonstrated in its partial summary judgment brief, there have been previous disclosures about the operation of FCE teams and the function each member performs. *See* CCR Br. at 24-25; CCR Ex. 8, at 42 (DOD review of FCE procedures for Guantánamo detainees), Dkt. No. 20-10; CCR Ex. 13 (photographs published by military website of FCE trainings and demonstrations), Dkt. No. 20-10; CCR Ex. 14 at 24-1, 24-2, 24-3, 24-7 (DOD standard operating procedures for FCEs), Dkt. No. 20-14. Accordingly, the information that the Government purportedly wants to keep classified -- the operational details of the FCE

teams -- has already been officially disclosed, and the Woods Declaration does not provide a logical or plausible basis for classifying the FCE videos.

What has arguably not been officially disclosed, however, are records reflecting the application of those FCE methods to al-Qahtani or any other detainee. DOD now posits, seeking support from the Lietzau and Horst Declarations, that there are three ways in which disclosing any such visual depiction of an FCE will damage national security. But, like the Woods Declaration, these new submissions fail to establish a reasonably specific national security harm that logically and plausibly supports withholding the FCE videos under Exemption 1.

First, DOD asserts that, because the FCE videos display a detainee resisting military personnel and "[t]he subject of U.S. detainee operations . . . at JTF-GTMO is extremely sensitive with the . . . governments whose nationals we detain," these records will likely be used as "propaganda" to "foment anti-American sentiment and inflame Muslim sensitivities," which will endanger Americans and others in USCENTCOMs' area of responsibility. Horst Decl. ¶¶ 13-14; Gov't Br. 13. In support, the Government relies on *ICB*, 2012 U.S. Dist. LEXIS 171969, at *17-18, which determined that a similar declaration by Horst was sufficient to justify DOD's withholding of other FCE videos. Here, however, Horst's assertions are entirely conclusory and, unsupported by anything beyond his own say-so, must be rejected.

Horst's conclusion that releasing the FCE videos will harm national security is based upon (1) past incidents in which the distribution of images of gross abuse of detainees and enemy forces, as well as allegations of religious insensitivity, have triggered violence abroad, *see* Horst Decl. ¶ 11, and (2) his own blanket statement that "enemy forces . . . have previously used videos and photographs out of context to incite the civilian population and influence government officials," *id.* ¶ 12. But there is, of course, no reason whatsoever to believe that the recorded

FCEs rise to anywhere near the same level of abuse as was documented in the 2004 Abu Ghraib photographs, to which Horst alludes. *See id.* ¶ 11. To the contrary, DOD's declarations describe an almost clinical procedure beginning with "extraction of the detainee," followed by "medical personnel then checking the detainee," and concluding with "the detainee subsequently being moved to and secured in a separate room." Herrington Decl. ¶ 5(a). Because there is no indication that these videos' contents are on par with the records of detainee abuse that Horst references, the Government must rely instead upon the unsupported statement that records like these have been edited and taken out of context before and can be expected to be edited and taken out of context again. Horst, however, does not provide even a single concrete example of this happening, but merely asserts that it has occurred. This sort of conclusory assertion is insufficient to sustain the Government's burden, *Halpern*, 181 F.3d at 293, especially where there is "contrary evidence in the record," *Wilner*, 592 F.3d at 73, suggesting that past official disclosure of FCE information -- including photographs of FCE demonstrations that could be manipulated in the way Horst describes -- has not resulted in the harms that Horst foresees.

Next, DOD maintains that the FCE videos will likely encourage future detainees to resist DOD personnel because they will know that these records will be publicly released and will therefore "confirm their continued resistance to the United States in the ongoing conflict.". Lietzau Decl. ¶ 8(a); Gov't Br. at 16. But even if the Court "must accord substantial weight to the agency's affidavits" under Exemption 1, *Wilner*, 592 F.3d at 73 (internal quotation marks omitted), and even if "any affidavit or other agency statement of threatened harm to national security will always be speculative to some extent," *Wolf*, 473 F.3d at 374 (internal quotation marks omitted), DOD's unsupported assertion here is so lacking in factual support as to exceed FOIA's logic-and-plausibility standard. *See Wilner*, 592 F.3d at 73; *Larson*, 565 F.3d at 862.

According to Lietzau, future detainees will be moved to risk injury by resisting leaving their cells not because they are frightened of future interrogation or possible abuse, are protesting their detention, or are simply recalcitrant, but in order to ensure that their resistance is captured for posterity in the event that a FOIA request is filed and, at the close of lengthy litigation, the Court rules in the requester's favor. This is, put generously, far-fetched, especially because DOD offers no factual basis beyond Lietzau's bare assertion that detainees will resist leaving their cells not because they genuinely do not wish to leave, but because they want to perform for a camera. By offering such a conclusory justification, lacking a common sense rationale, for withholding, DOD has mistaken the deference this Court owes for blind acquiescence, in contravention of the independent *de novo* review that this Court is bound to perform under FOIA. *See ACLU v. ODNI*, 2011 U.S. Dist. LEXIS 132503, at *15; *Azmy*, 562 F. Supp. 2d at 597.

DOD's last contention is if it is compelled to release the FCE videos, the agency might be deterred from videotaping FCEs in the future, which would result in DOD losing a valuable tool for ensuring accountability and training new team members, and ultimately lead to a greater risk of injury during FCEs. Lietzau Decl. ¶ 8(b); Gov't Br. at 16. The Court should reject this silly justification as out of hand. Indeed, the assertion that the *Department of Defense* would act to harm national security should it lose this FOIA suit sounds petty and is, in any event, troubling. But even assuming that an agency's threat to change its own policy -- and, in doing so, to compromise what it believes to be necessary recordkeeping -- in the interest of national security were enough to sustain an Exemption 1 withholding, DOD does not explain why, in fact, it would elect to cease videotaping FCEs. Rather, Lietzau merely asserts that any release of the FCE videos will "caus[e] JTF-GTMO to reconsider its current policy" without saying anything more. Lietzau Decl. ¶ 8(b) This justification is therefore just as conclusory as is the rest of the

Government's arguments for withholding. DOD has simply not given the Court sufficient information about why it would be logical or plausible to expect these videos to damage national security and, by extension, why the agency would terminate its videotaping policy if they were released. And, of course, if the reason DOD will stop videotaping is because it does not want the agency or its personnel to suffer embarrassment, then the videotapes should never have been classified in the first place. *See* Exec. Order 13,562 § 1.7(a)(2). In any event, if the Court is willing to entertain this argument -- which it should not -- then it should demand much greater factual clarity as to why the agency would be compelled to reconsider its existing policies.

Finally, even if the Court were to accept one or more of these arguments in favor of withholding the FCE videotape, it does not follow that the record must be withheld in their entirety. According to DOD's filings, there are portions of the videos where al-Qahtani is visible without the presence of other DOD personnel. *See* Herrington Decl. ¶ 5(a)-(b). This indicates that at least some portions of the videotape may be segregated and disclosed, *see ICB*, 723 F. Supp. 2d at 63-64 (holding that government had failed to justify withholding portions of FCE videos not featuring forcible interaction); *ICB*, 864 F. Supp. 2d at 107 (same). As set forth above, the Government has not offered any reasonably specific detail as to how these images are likely to be manipulated or used to damage national security. Accordingly, any segregable portions of the FCE videos must be released.

## III. DOD AND THE FBI HAVE NOT JUSTIFIED WITHHOLDING THE 53 VIDEOTAPES AND SIX MUG SHOT PHOTOGRAPHS UNDER FOIA EXEMPTION 7(A)

Exemption 7(A) prevents disclosure of "records or information compiled for law enforcement purposes" the production of which "could reasonably be expected to interfere with [law enforcement] proceedings." 5 U.S.C. § 552(b)(7)(A). To withhold records under this exemption, the Government must demonstrate that the information was compiled for law

enforcement purposes, that there is a pending or prospective law enforcement proceeding, and that releasing the record would interfere with that proceeding. *See Azmy*, 562 F. Supp. 2d at 605 (citing *Manna v. U.S. DOJ*, 51 F.3d 1158, 1164 (3d Cir. 1995)). Here, it is not disputed that the FBI's investigation of the September 11th attacks and al-Qahtani's role in them might lead to such prospective law enforcement proceedings, or that the requested records were compiled for law enforcement purposes. *See Ctr. for Nat'l Sec. Studies v. U.S. DOJ*, 331 F.3d 918, 926 (D.C. Cir. 2003) (holding that possibility of prosecution based on September 11th investigation is sufficient to establish pending or prospective law enforcement proceeding); *accord Azmy*, 562 F. Supp. 2d at 605. Nonetheless, this exemption does not apply because the Government has not carried its burden to establish with reasonable specificity that releasing the 53 videotapes and six mug shot photographs of al-Qahtani "would in some particular, discernible way, disrupt, impede, or otherwise harm" any prospective law enforcement proceeding. *North v. Walsh*, 881 F.2d 1088, 1097 (D.C. Cir. 1989).

In order to justify withholding records under Exemption 7(A), the Government must describe in reasonably specific detail how the release of the records "could reasonably be expected perceptibly to interfere with an enforcement proceeding," *id.*, and, to that end, must offer "more than mere conclusory statements" demonstrating this probable interference, *Radcliffe v. IRS*, 536 F. Supp. 2d 423, 437 (S.D.N.Y. 2008), *aff'd*, 328 F. App'x 699 (2d Cir. May 27, 2009). Nor may the Government simply rely on the fact that the requested documents are part of an open investigatory file. *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978). Here, the FBI represents that the 53 videotapes of al-Qahtani in his cell are part of an open investigation file in the agency's Miami office, which the agency anticipates will lead to

a civilian or military prosecution. First Hardy Decl. ¶ 36, Dkt. No. 43. The FBI's description of the 53 videos is minimal, however, and consists of only the following three sentences:

> The videotapes depict detainee al Qahtani at the Naval Station Brig in Guantánamo 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 Guantánamo Bay, Cuba.

First Hardy Decl. ¶ 29. In response to CCR's FOIA request, FBI Section Chief David M. Hardy further contends that the release of these videotapes would lead to "manipulation of evidence in advance of trial by Military Commission"; would "undu[ly] influence" Military Commission members who might hear the case; would "undu[ly] prejudice" any potential case by prematurely releasing information to the public and defense counsel; and would prematurely reveal the focus on the Government's ongoing investigation of those responsible for the September 11, 2001 attack. *Id.* ¶ 37. Meanwhile, the FBI has offered absolutely no explanation as to how disclosure of the six mug shot photographs would interfere with a pending law enforcement proceeding, and DOD has not even attempted to describe any such interference, instead relying on the insufficient bare assertion that, because those "photographs have since been compiled for the purpose of potential prosecution," they cannot be disclosed, Woods Decl. ¶ 34.

As CCR argued in its brief in support of partial summary judgment, *see* CCR Br. at 26, the government's declarations amount to nothing more than a litany of conclusory statements that insufficiently demonstrate how release of any or all of the videos will interfere with a pending investigation. *See Radcliffe*, 536 F. Supp. 2d at 437 (holding that such conclusory statements are insufficient for withholding under Exemption 7(A)); *Voinche v. FBI*, 46 F. Supp. 2d 26, 31, (D.D.C. 1999) (same). The First Hardy Declaration lacks sufficient particularity in two key respects. First, it fails to provide reasonably specific detail with regard to the videos'

contents as to allow the Court to determine whether they fall within Exemption 7(A). Rather, as CCR argued in its brief in support of partial summary judgment, the FBI's description of those records is so sparse that the videos could depict everything from tapes of al-Qahtani sleeping in his cell or receiving meals, to recordings of al-Qahtani speaking with investigators, to videos of abuse by guards or illegal torture. *See* CCR Br. at 31-32. As a result, the FBI's vague general description of the videos does not permit CCR or the Court to grasp why, as a categorical matter, disclosure of any portion of these videotapes is likely to interfere with an ongoing law enforcement investigation, *see Radcliffe*, 536 F. Supp. 2d at 437; *Ayyad v. U.S. DOJ*, 2002 U.S. Dist. LEXIS 6925, at *7 (S.D.N.Y. Apr. 18, 2002) (holding that declaration must be sufficiently detailed "'to trace a rational link between the nature of the document and the alleged likely interference'" (quoting *Bevis v. Dep't of State*, 801 F.2d 1386, 1389 (D.C. Cir. 1986))), or why the videotapes lack any segregable portions, *see Lawyers' Comm. for Civil Rights of S.F. Bay Area v. U.S. Dep't of Treasury*, 2008 U.S. Dist. LEXIS 87624, at *41-42.[6]

Second, the FBI's assertions that any disclosure of these vaguely described video recordings will interfere with the agency's open investigation are either conclusory or, in many cases, nonsensical. *See* CCR Br. at 27-30. Thus, for example, because CCR is only asking for copies of these records, there can be no real concern that disclosure will lead to evidence manipulation, as there is no way that the evidence contained therein could actually be altered. *See Lion Raisins Inc. v. U.S. Dep't of Agric.*, 354 F.3d 1072, 1085 (9th Cir. 2004) (holding that

[6] The government is incorrect when it suggests that the FBI has no segregability obligations under Exemption 7(A). *See* Gov't Br. at 20. Although an agency may categorize documents to be withheld and, thus, need not provide a "specific factual showing" that each withheld document will interfere with an investigation, *Barney v. IRS*, 618 F.2d 1268, 1273 (8th Cir. 1980); *accord Radcliffe*, 536 F. Supp. 2d at 437, the agency is still subject to the segregability requirement of 5 U.S.C. § 552(b) and must provide the "reasons -- as opposed to its simple conclusion -- for its inability to segregate non-exempt portions of the documents," *Lawyers' Comm.*, 2008 U.S. Dist. LEXIS 87624, at *42; *see also Juarez v. DOJ*, 518 F.3d 54, 60-61 (D.C. Cir. 2008) (confirming that the segregability requirement applies to Exemption 7(A) and that withholding agency must "show with reasonable specificity why documents withheld . . . cannot be further segregated").

there is no possibility of evidence tampering where FOIA requester "seeks only copies of the [agency]-retained original"). Likewise, although the FBI complains that disclosure of these videotapes will unduly prejudice the Government by influencing Military Commission members, this contention assumes that those Commission members will fail to fulfill their duty of objectively evaluating the evidence introduced in the proceeding before them. Nor, even, does the agency supply any specifics regarding how its fear of prematurely revealing the subject of the its investigation could interfere with either that investigation or any prosecution that might follow. Indeed, other evidence in the record, such as al-Qahtani's *habeas* counsel's receipt pursuant to protective order of videotapes recorded between November 15 and 22, 2002, indicates that there is little chance that disclosing these videotapes will prejudice law enforcement's interests. *See* CCR Br. at 28-29.

The Second Hardy Declaration, intended to shore up the deficiencies in his first filing, still offers no further description of the contents of the 53 videotapes. *See* Second Hardy Decl. ¶ 7 (refusing to "more fully describe the detail of this videotape evidence" in order to avoid "identif[ying] its content"), Dkt. No. 44. Instead, the Second Hardy Declaration simply asserts that the 53 videotapes are "evidentiary/investigative materials," without defining what that label means or what specific kind of evidentiary or investigative purpose these videos serve. Second Hardy Decl. ¶¶ 4-5. Indeed, the Government insists that simply because it calls the videotapes "evidentiary/investigative materials," the Court must accept that releasing them would interfere with the agency's ongoing investigation of al-Qahtani. Gov't Br. at 20. But this sort of conclusory statement, which does not describe in a discernible way what the videos contain or how release of the information would impede a prospective law enforcement proceeding, *see North*, 881 F.2d at 1097; *Voinche*, 46 F. Supp. 2d at 31, seeks to effectively insulate the matter

from judicial scrutiny. *See Halpern*, 181 F.3d at 293. This the FBI cannot do, any more than it could justify withholding records under Exemption 7(A) by merely placing them in an investigative file, *see Robbins Tire*, 437 U.S. at 229-30 (describing that congressional purpose of revising FOIA "to make clear that courts had to consider the nature of the particular document to which exemption was claimed" and "the reasons for allowing withholding of investigatory files" (internal quotation marks omitted)).

The FBI also provides several more conclusory boilerplate justifications for withholding the requested records, including that disclosure would give other persons of interest access to materials that could be analyzed to circumvent the agency's investigation and would allow al-Qahtani's affiliates to learn witnesses' identities and thereafter intimidate them. Second Hardy Decl. ¶ 6. But as with the First Hardy Declaration, because the FBI does not disclose anything reasonably specific about the videos' content, the Court simply cannot determine whether these asserted harms will logically or plausibly follow from the videotapes' release. Thus, although other courts have found the types of interference asserted in the First and Second Hardy Declarations sufficient to sustain an agency's withholding of records under Exemption 7(A), *see* Gov't Br. at 21-22 (citing cases), in those cases the agencies provided reasonably specific information about the records' contents and, thus, about how their release would logically or plausibly interfere with a prospective law enforcement proceeding. *See Dickerson v. DOJ*, 992 F.2d 1426, 1430-31 (6th Cir. 1993) (agency provided requested records for court's *in camera* review); *ACLU of Mich. v. FBI*, 2012 U.S. Dist. LEXIS 141383, at *17-19 (E.D. Mich. Sept. 30, 2012) (FBI provided "detailed descriptions" of the withheld information and "concrete illustrations" of the withheld records' contents); *Dow Jones & Co. v. DOJ*, 880 F. Supp. 145, 150 (S.D.N.Y. 1995) (government described information contained in requested records). In fact,

one of the cases that the government cites, *Owens v. DOJ*, 2007 U.S. Dist. LEXIS 21721 (D.D.C. Mar. 9, 2007), directly supports CCR's position that the 53 videotapes are insufficiently described to warrant withholding. In *Owens*, the district court determined that the FBI's declaration did not establish that a category of information should be withheld because, while it vaguely categorized the requested information, the agency did not "provid[e] so much as a bare sketch of the type of information" within that category. *Id.* at *25 (internal quotation marks omitted). Just so here, where the FBI has provided an entirely unhelpful categorization of the videotapes as "evidentiary/investigatory materials" without even a "bare sketch" of what the videotapes contain. In *Owens*, it was only after the FBI filed a new declaration clarifying the substance of the withheld information that the district court held that the government had carried its burden under Exemption 7(A). *Id.* at *26-28. In this case, the Court should not permit the FBI to withhold the 53 videotapes without, at a minimum, that same kind of clarification.

Having failed to provide the reasonably specific detail necessary to carry its burden and overcome the presumption of open government that is embodied in FOIA, the Government ultimately attempts to persuade this Court to defer in a blanket fashion to the FBI's conclusory assertions that disclosing the videotapes will harm national security by inciting "retribution by terrorist organizations," First Hardy Decl. ¶ 16(a); by inspiring individuals associated with al-Qahtani to alter their plans after learning of his detention, *id.* ¶ 16(b); and by causing terrorist organizations to instruct their members how to elude government questioning, to fabricate stories of torture and mistreatment by U.S. personnel, and to communicate with terrorists outside their detention site, *id.* ¶ 16(c). Specifically, the government contends that these national security concerns are properly considered under Exemption 7(A), and that this Court must defer to the Government's national security judgments with respect to its Exemption 7(A) withholdings.

Gov't Mem. at 25; *see Ctr. for Nat'l Sec. Studies*, 331 F.3d at 927-28 (holding that, "just as [the court has] deferred to the executive when it invokes FOIA Exemptions 1 and 3, we owe the same deference under Exemption 7(A) in appropriate cases").

Putting aside the fact that the FBI's allegations of national security damage are "completely speculative," CCR BR. at 30, and are otherwise contradicted by record evidence demonstrating that al-Qahtani's detention -- and even his torture and abuse -- is already publicly known and officially disclosed, the Government's argument is squarely foreclosed by the Second Circuit's decision in *ACLU v. DOD*, 543 F.3d 59 (2d Cir. 2008). There, the Court of Appeals held that deference to national security judgments is inappropriate under Exemption 7(F) because FOIA Exemption 1 provides the sole authority to withhold information on the basis of national security, *see id.* at 72, and that requiring such deference under a separate exemption would create "an alternative classification mechanism entirely lacking the executive's safeguards and standards" promulgated under Exec. Order 13,562, which would be fundamentally "inconsistent with the structure of FOIA's exemptions," *id.* at 73.[7] Although *ACLU v. DOD* may have concerned Exemption 7(F), and not 7(A), the Government offers no logical or principled reason as to why this Court should conclude that deference to national security judgments would be inappropriate under one exemption but appropriate under the other. To the contrary, *ACLU v. DOD* -- binding precedent in this Circuit -- was decided based on FOIA's structure, which creates "separate standards for information threatening harm to national security" under Exemption 1 that are absent from both Exemptions 7(A) and 7(F). *Id.* Because Exemption 7(A) lacks Exemption 1's unique national security standards, *ACLU v. DOD* prohibits this Court from deferring to the FBI's national security judgments, and instead requires the agency to

[7] Indeed, the government itself makes this same point about the unique deference owed under Exemption 1 in urging the Court to defer to DOD's national security judgments under that Exemption. *See* Gov't Br. at 14

demonstrate that disclosure will interfere with a pending or prospective law enforcement proceeding, which, as set forth above, it has failed to do.

Finally, in opposing CCR's partial summary judgment motion and cross-moving for summary judgment, the Government does not even seek to defend the withholding of the six mug shot photographs on Exemption 7(A) grounds. This Court should therefore deem any potential justification for withholding these photographs to have been waived. *See Packer v. SN Servicing Corp.*, 250 F.R.D. 108, 112 (D. Conn. 2008) ("It is well settled that a failure to brief an issue is grounds to deem the claim abandoned." (internal quotation marks omitted)); *First Capital Asset Mgmt. v. Brickellbush, Inc.*, 218 F. Supp. 2d 369, 392-93 & n.116 (S.D.N.Y. 2002), *aff'd sub nom. First Capital Asset Mgmt., Inc. v. Satinwood, Inc.*, 385 F.3d 159 (2d Cir. 2004) (deeming issue not raised in memorandum of law waived); *Kreindler v. Dep't of Navy*, 363 F. Supp. 611, 612 n.6 (S.D.N.Y. 1973) (deeming abandoned government's reliance on particular FOIA Exemption after government failed to brief it).

## IV. DOD MUST RELEASE OFFICIALLY DISCLOSED IDENTIFYING INFORMATION UNDER EXEMPTION 3

DOD asserts that any information in the requested records that identifies military personnel is subject to FOIA Exemption 3, which permits withholding of all information "specifically exempted from disclosure by statute," provided that the statute "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or . . . establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3). Here, DOD invokes Exemption 3 to shield identifying information of DOD personnel serving at Guantánamo that must be withheld under 10 U.S.C. § 130b. *See* Woods Decl. ¶¶ 31-32 CCR does not dispute that such identifying information is properly withheld under § 130b and consents to the redaction of any personal identifying

information, but only to the extent that these images depict conduct for which the person's involvement has not already been officially acknowledged. *See* CCR Br. at 39.

The Government, however, maintains that there is "no legal basis" for disclosing identifying information about military personnel whose involvement has been officially acknowledged. Gov't Br. at 27. Respectfully, the Government is mistaken. As the D.C. Circuit has held and as the Second Circuit has itself recognized, under the "public-domain doctrine, materials normally immunized from disclosure under FOIA lose their protective cloak once disclosed and preserved in a permanent public record." *Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999); *see Inner City Press/Cmty. on the Move v. Bd. of Governors*, 463 F.3d 239, 244 (2d Cir. 2006). This public-domain exception applies to information that would otherwise be properly withheld under Exemption 3. *See Cottone*, 193 F.3d at 554-55; *Starkey v. U.S. Dep't of Interior*, 238 F. Supp. 2d 1188, 1193 (D.D.C. 2002). The cases cited by the Government -- *see* Gov't Br. at 27 (citing *Wilner*, 592 F.3d at 72; *Kirkorian v. Dep't of State*, 984 F.2d 461, 465 (D.C. Cir. 1993)) -- do not undermine this common-sense rule. Rather, those decisions stand for the elementary holding that, in deciding whether records may be withheld under Exemption 3, the Court must confirm whether material within the withheld record falls within another withholding statute's coverage. CCR does not, of course, dispute this proposition, but merely contends that, consistent with the public-domain exception to Exemption 3 recognized in this and other Circuits, the Government must release any identifying information of DOD personnel if their conduct depicted in the records has already been officially disclosed.[8]

[8] Admittedly, under *Cottone*, CCR has the initial burden to demonstrate that there is "a permanent public record of the exact portions" of the information requested. 193 F.3d at 554 (internal quotation marks omitted). In this case, however, DOD has provided such minimal information about the contents of the FCE videos that CCR is unable to ascertain -- and the Court is unable to fulfill its function to determine -- whether there are any depicted military personnel whose involvement at Guantánamo has already been officially disclosed.

## V. THE PUBLIC INTEREST REQUIRES DISCLOSING THESE DOCUMENTS UNDER EXEMPTIONS 6 AND 7(C)

DOD and the FBI contend that releasing the requested videotapes and photographs would violate the privacy interests of both al-Qahtani and DOD personnel and that these records may therefore be withheld under both Exemptions 6 and 7(C). *See* 5 U.S.C. § 552(b)(6) (exempting from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy"); *id.* § (7)(C) (exempting from disclosure records compiled for law enforcement purposes that "could reasonably be expected to constitute an unwarranted invasion of personal privacy"). Under both exemptions, the Court must "'balance the public interest in disclosure against the [privacy] interest Congress intended the Exemption to protect.'" *AP v. U.S. DOD*, 554 F.3d 274, 284 (2d Cir. 2009) (quoting *Reporters Comm.*, 489 U.S. at 776 (discussing Exemption 7(C))); *see also id.* at 291 (applying same balancing test for Exemption 6). Here, that balance clearly weighs in favor of disclosure.

To begin, al-Qahtani has waived his privacy interests in these records. Babcock Decl. ¶¶ 2-4; *see Computer Prof'ls for Soc. Responsibility v. U.S. Secret Serv.*, 72 F.3d 897, 904 (D.C. Cir. 1996) (ordering disclosure of records relating to individuals who waived their privacy interests). Although the Government objects that counsel's affidavit does not engender a sufficient waiver under DOD policy, *see* Gov't Br. at 29, it cites nothing to support its claim that such a third-party waiver cannot be accepted under FOIA or that an agency's internal policies for record disclosure are determinative of its FOIA obligations. And to the extent there is any doubt about al-Qahtani's wishes with respect to the release of this information, CCR requests that the Court grant it leave to supplement the record with a signed declaration by al-Qahtani or another writing that clarifies his wishes. *See AP v. U.S. DOD*, 410 F. Supp. 2d at 149-50.

But should the Court conclude that the Babcock Declaration is insufficient and deny these alternative means of confirming al-Qahtani's privacy waiver, the videotapes and photographs must still be released because al-Qahtani's diminished privacy interest is, in any event, outweighed by the strong public interest in learning about the military's treatment of Guantánamo detainees. That is especially so here, where the Government's sudden solicitousness for Mr. al-Qahtani's privacy rights again stands as a stark irony given the torture he endured at its hands. More specifically, however, as described above, *see supra* at 8-10, al-Qahtani's privacy interests have already been compromised by the Government's previous disclosures about the details of his capture, detention, and mistreatment, as well as by the photographs of him that are already publicly available. *See ICB*, 723 F. Supp. 2d at 66 (holding that detainees had limited privacy interest in photographs taken of them given the government's release of "a substantial amount of information" about their detention).[9] On the other side of the scale, there is immense public interest in Guantánamo detainees generally, and al-Qahtani in particular given his acknowledged abuse. *See* CCR Br. at 36-37. The release of these records, then, will "'open agency action to the light of public scrutiny,'" which is the "only one relevant [public] interest" this Court should consider under Exemptions 6 and 7(C). *AP v. U.S. DOD*, 554 F.3d at 285 (quoting *Reporters Comm.*, 489 U.S. at 772). This case is therefore distinguishable from *AP v. U.S. DOD*, where the Court of Appeals held that the public interest in the names and other identifying information of Guantánamo detainees did not outweigh their privacy interests.

[9] *Reporters Committee*, 489 U.S. 749, which the government cites, *see* Gov't Br. at 29-30, is not to the contrary. There, the Supreme Court held that federal rap sheets, which compile a person's state and local criminal records, implicate a strong privacy interest because, although each individual item on a rap sheet is publicly known, the rap sheet's aggregation of that data was not "freely available either to the officials who have access to the underlying files or to the general public." *Id.* at 764 (internal quotation marks omitted). This case presents the opposite situation: there are easily accessible summaries of al-Qahtani's detention and the abuse he suffered, but little or no information specifically showing al-Qahatani in detention. *Reporters Committee* is distinguishable, then, because the FOIA requesters there sought records that provided information about individuals that was publicly available in piecemeal fashion but not in the aggregate, while here, the requested records confirm and corroborate information previously reported.

Unlike that case, where the requested information was found to "shed no light on what the government is up to," *id.* at 289, the records requested here -- videotapes and photographs visually documenting al-Qahtani's detention -- stand to vividly illustrate just how the Government has treated al-Qahtani while he has been in United States custody.

The Government insists, however, that the public interest cuts both ways, and that releasing these images might lead other countries to disclose similar images of American detainees in violation of their rights under the Geneva Conventions. *See* Gov't Br. at 30. But this argument is foreclosed by *AP v. U.S. DOD*, 554 F.3d at 288, in which the Second Circuit held, for purposes of these exemptions, that "there is only one relevant public interest, that of opening agency action to the light of public scrutiny" (alteration and internal quotation marks omitted), and by *ACLU v. DOD*, 543 F.3d at 72-73, which limits consideration of these sorts of national security concerns to Exemption 1. Thus, the public interest requires disclosure.

Finally, insofar as the Government argues that releasing this information would violate the privacy interests of DOD personnel, CCR consents to redacting this information but only to the extent that an individual's involvement has not already been officially disclosed, *see* CCR Br. at 38. In the event DOD personnel's involvement has been officially disclosed -- which CCR cannot ascertain without at least being provided with more specific, less conclusory descriptions of them -- the public-domain exception applies and the information must be disclosed. *See, e.g.*, *Marino v. DEA*, 685 F.3d 1076, 1082-83 (D.C. Cir. 2012) (concluding that, because records had been officially released, public-domain exception to Exemption 7(C) applied).

## VI. THE PRIVACY ACT DOES NOT WARRANT WITHHOLDING

In its declaration, the FBI contends that, because the 53 videotapes were made in the course of investigating the September 11th attacks, those records are subject to the Privacy Act, 5 U.S.C. § 552a(j)(2). First Hardy Decl. ¶¶ 32-33. But the Privacy Act does not bar an

otherwise viable claim under FOIA, *see* 5 U.S.C. § 552a(t)(2), and accordingly, the statute does not otherwise permit withholding, *see* CCR Br. at 39. Indeed, the Government does not defend its withholding under the Privacy Act in its brief, hence waiving its Privacy Act justification. *See First Capital*, 218 F. Supp. 2d at 392-93 & n.16; *Kreindler*, 363 F. Supp. at 612 n.6.

## VII. THE CIA'S *GLOMAR* RESPONSE IS INADEQUATE

The CIA provides a so-called *Glomar* response to CCR's FOIA request, asserting that the existence of any CIA video or photographic recordings of al-Qahtani during his detention in Guantánamo must be withheld under Exemptions 1 and 3. *See generally Phillippi*, 546 F.2d 1009 (holding that CIA's response neither confirming nor denying existence of records was adequate to withhold information under FOIA). As to Exemption 1, the CIA argues that this information is properly classified because either confirming or denying these records' existence would necessarily reveal whether or not the CIA has ever had any interest in Mr. al-Qahtani or his affiliates, Culver Decl. ¶¶ 36-38, Dkt. No. 45; whether or not the agency uses interrogation as a means of collecting intelligence, *id.* ¶ 47-48; and whether or not the CIA cooperates with other agencies, such as DOD, for intelligence purposes, *id.* The CIA further asserts that revealing this information could reasonably be expected to harm U.S. relations with the home countries of Guantánamo detainees, *id.* ¶ 42, and to aid terrorist organizations and extremist groups in avoiding CIA surveillance or exploiting existing intelligence gaps, *id.* ¶ 39. And as to Exemption 3, the CIA contends that the existence of these records is properly withheld under the National Security Act of 1947, 50 U.S.C. § 403-l(i)(1), and the Central Intelligence Agency Act of 1949, 50 U.S.C. § 430g, both of which protect "intelligence sources and methods from unauthorized disclosure," which the CIA interprets as requiring withholding information about the agency's use of detainees as sources or its use of certain methods in acquiring intelligence

from them, *see* Culver Decl. ¶ 51; *see also Sims*, 471 U.S. at 168-70 (discussing CIA's "very broad [statutory] authority to protect all sources of intelligence information from disclosure").

A *Glomar* response cannot be maintained, however, if the existence of the withheld information has already been officially acknowledged. *See Wilner*, 592 F.3d at 70; *Wolf*, 473 F.3d at 378-79. Here, there is already significant public knowledge, as a result of the Government's own disclosures, regarding the CIA's involvement in al-Qahtani's detention at Guantánamo. For example, the Senate Armed Services Committee's *Inquiry Into the Treatment of Detainees in U.S. Custody* (Nov. 20, 2008), reveals that representatives of the CIA were involved in developing interrogation strategies for Guantánamo detainees. That report discloses that CIA representatives were briefed about ongoing intelligence activities at Gunatánamo, *see* CCR Ex. 2 at 49; that the agency advised military personnel about interrogation tactics to be employed against Guantánamo detainees, *see id.* at 53-54, including using stress positions and a "'wet towel technique' [that] makes the body react as if it's suffocating," *id.* at 62; and that the CIA *specifically* advised military personnel with respect to interrogating al-Qahtani and using so-called "counter-resistance" techniques against him, *id.* at 61. The Department of Justice Inspector General's report on the FBI's involvement in and observation of detainee interrogations confirms this involvement by the CIA. That review notes that CIA representatives participated in meetings to plot al-Qahtani's interrogations, *see* CCR Ex. 31 at 86, and that "DOD and Intell" -- which, among the agencies whose participation is noted, can only refer to the CIA -- took "the lead" in crafting al-Qahtani's interrogation, *id.* at 89 (alteration omitted).

These official acknowledgments have since been reported in the media, and numerous news organizations have detailed the CIA's involvement in detaining and interrogating al-Qahtani and other Guantánamo detainees. *See, e.g.*, Walter P. Strobel, *CIA Advised Military on*

*Questioning at Guantanamo*, McClatchy Newspapers (June 17, 2008) (Lustberg Decl., Ex. 33) (discussing CIA's role in developing military interrogation strategy at Guantánamo); Mark Mazzetti & Scott Shane, *Notes Show Confusion on Interrogation Methods*, N.Y. Times (June 18, 2008) (Lustberg Decl, Ex. 34) (discussing the "close collaboration between" CIA and DOD in interrogating Guantánamo detainees); Marisa Taylor, *FBI Warnings About Terror Interrogations Ignored*, Miami Herald (May 21, 2008) (Lustberg Decl., Ex. 35) (same); CBS News/Associated Press, *Report: CIA Pushed Torture Envelope*, CBSnews.com (Sept. 10, 1999, 1:32 PM) (same) (Lustberg Decl., Ex. 36). And in the aftermath of Osama bin Laden's death, the media has discussed the intelligence that the CIA may have acquired from al-Qahtani and how, if it all, it contributed to the discovery of bin Laden's compound in Pakistan. *See, e.g.*, Peter Bergen, *"Zero Dark Thirty": Did Torture Really Net Bin Laden?*, CNN.com (Dec. 11, 2012, 6:47 PM) (Lustberg Decl., Ex. 37) (reporting that al-Qahtani may have supplied the CIA with "the first clue" as to the identity of the courier who led discovery of Osama bin Laden, and that al-Qahtani was subject to "abusive interrogations by the CIA"). The sum of this public record, then, reveals that the CIA was involved in al-Qahtani's detention and collaborated with the military in developing an interrogation strategy for him, which included employing abusive methods.

The CIA responds to this body of evidence by insisting that no federal official has disclosed whether CIA personnel interrogated al-Qahtani, Culver Decl. ¶ 52, or whether the CIA shares information with other agencies about individual detainees, *id.* ¶ 54. The first statement may be correct, but it is beside the point. CCR's FOIA request did not ask for visual records of any CIA *interrogation* of al-Qahtani, but instead requested all videos, photographs, and other records of al-Qahtani in Guantánamo that were created from February 13, 2002 through November 30, 2005. *See* CCR Br. at 6. The fact that there has never been any official disclosure

of CIA interrogation of al-Qahtani does not rule out the possibility that the agency has other records from his detention, given the CIA's documented history of advising DOD in interrogating al-Qahtani and other Guantánamo detainees. By contrast, the agency's claim that there has been no official public disclosure that the CIA shares information with other agencies is belied by the public record, which shows that, based on the Government's own statements and reports, the CIA and DOD collaborated with each other in developing interrogation strategies for al-Qahtani and other detainees. In light of these previous official disclosures, then, the CIA cannot justify its *Glomar* response on the grounds that it does not want to reveal whether it had an intelligence interest in al-Qahtani, Culver Decl. ¶¶ 36, 38 whether it ever recommended or used certain interrogation techniques, *id.* ¶ 37, or whether it has ever shared information with other agencies regarding detainees, *id.* ¶¶ 47-48. Rather, because it is officially disclosed and, at this point, well understood that the agency did have an intelligence interest in al-Qahtani, did recommend the use of particular intelligence methods against him, and did work with DOD to create an interrogation strategy for him, the CIA should be required to reveal whether it has any responsive records to CCR's request. At a minimum, the agency should be ordered to provide a new and adequate explanation as to why it cannot confirm or deny the existence of its records.

## CONCLUSION

Because the agencies' *Vaughn* Declarations do not justify their withholdings with reasonably specific detail, and the submitted declarations are contradicted by other record evidence, and thus suggest agency bad faith, the Government has failed to carry its burden to establish that these records may be withheld under FOIA Exemptions 1, 3, 6, 7(A), or 7(C). Accordingly, this Court should deny the Government's motion for summary judgment, grant CCR's motion for partial summary judgment, and order the requested records disclosed.

Respectfully submitted,

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