

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

AMNESTY INTERNATIONAL USA,)
CENTER FOR CONSTITUTIONAL RIGHTS, INC., and)
WASHINGTON SQUARE LEGAL SERVICES, INC.,)

ECF CASE

Plaintiffs,

v.

07 CV 5435 (LAP)

CENTRAL INTELLIGENCE AGENCY,)
DEPARTMENT OF DEFENSE,)
DEPARTMENT OF HOMELAND SECURITY,)
DEPARTMENT OF JUSTICE,)
DEPARTMENT OF STATE,)
and THEIR COMPONENTS,)

Defendants.

DECLARATION OF WILLIAM K. LIETZAU

I, William Kendall Lietzau, hereby declare under penalty of perjury that the following information is true and correct to the best of my knowledge:

1. I am the Deputy Assistant Secretary of Defense (DASD) for Detainee Policy (DTP) in the Office of the Under Secretary of Defense for Policy, United States Department of Defense (DoD). As the DASD-DTP, I am responsible for providing policy advice to the Under Secretary of Defense on matters regarding detainees in DoD custody. I also supervise the employees and the work product of the DTP office.

2. In my capacity as DASD-DTP, I am familiar with DTP office procedures for responding to requests for access to records and information pursuant to the Freedom of Information Act (FOIA). My office is also the focal point for DoD's relationship with the International Committee of the Red Cross (ICRC) on detainee issues. In my capacity as DASD-

DTP, I meet regularly with ICRC officials, and my office receives and reviews all ICRC reports regarding detainees in DoD custody.

3. I submit this declaration in support of the CIA's Motion for Summary Judgment in the above-captioned matter to assert Exemption 3, on behalf of DoD, over Documents 375 and 376 on the *Vaughn* index submitted by the CIA with its motion. This declaration is based on personal knowledge and on information disclosed to me in my official capacity.

4. This declaration is organized into three parts. Part one describes Documents 375 and 376 and indicates the information redacted from those documents by DoD. Part two provides background on the confidential dialogue between the ICRC and DoD. Part three explains why FOIA Exemption 3 applies to the information redacted by DoD in Documents 375 and 376.

PART ONE
DESCRIPTION OF DOCUMENTS

5. **Document 375.** I understand that the CIA is releasing Document 375, with redactions, as an attachment to the Second Declaration of Wendy Hilton. Document 375 is a five-page record. According to the document itself, Document 375 is a "Memorandum for the Record" prepared by a Liaison Officer in the CIA's Office of Congressional Affairs to record a closed hearing before the House Permanent Special Committee on Intelligence on July 14, 2004. According to Document 375, the former Under Secretary of Defense for Intelligence, Dr. Stephen Cambone, was a "lead witness" at the hearing. DoD is withholding two lines reflecting statements attributed to Dr. Cambone on the fourth page of the document, pursuant to Exemption 3, as explained below. The redactions made by DoD are marked on Document 375 with the term "ICRC."

6. **Document 376.** I understand that the CIA is releasing Document 376, with redactions, as an attachment to the Second Declaration of Wendy Hilton. Document 376 is a six-page record. According to the document itself, Document 376 is a "Memorandum for the Record" prepared by a Liaison Officer in the CIA's Office of Congressional Affairs to record a closed hearing before the Senate Select Committee on Intelligence on May 12, 2004. According to Document 376, Lieutenant General Keith B. Alexander, the Army Deputy Chief of Staff for Intelligence (G-2), was a "briefer" at the hearing. DoD is withholding five lines within the document that reflect statements made at the hearing, pursuant to Exemption 3, as explained below. The first withheld line appears on the fourth page of the document and reflects a statement attributed to Senator Olympia Snowe. Two additional withheld lines appear at the top of the fifth page of the document and reflect a statement attributed to Lieutenant General Alexander. The last withheld line appears in the bottom half of the fifth page of the document and reflects a statement attributed to Senator Carl Levin. The redactions made by DoD are marked on Document 376 with the term "ICRC."

PART TWO
THE CONFIDENTIAL
DIALOGUE BETWEEN THE ICRC AND DoD

7. The ICRC has requested opportunities to visit United States detention facilities in Iraq, Afghanistan, and Guantanamo Bay, Cuba in order to ascertain the conditions of confinement of detainees and to meet with officials who are responsible for the detention facilities. The United States has granted such requests. As a result of ICRC visits, its employees have communicated to DoD, verbally and in writing, the ICRC's observations and findings regarding detainees and their conditions of detention.

8. Under long-standing practice, the ICRC requires and maintains confidentiality as to its communications with governments regarding the ICRC's observations and findings to ensure that the ICRC maintains continued access to detainees and detention facilities. I understand that the ICRC does not desire to have its reports cited in any public forum, because doing so could seriously impede its ability to achieve the ICRC's organizational goals. On numerous occasions, the ICRC has informed members of my staff that disclosing confidential information would not only harm their operations – particularly during the course of an armed conflict where governments likely would restrict, or deny altogether, the ICRC's access to their facilities – but would undermine their neutrality.

9. In an operational update, dated October 26, 2009, the ICRC explained its confidentiality policy as follows:

Wherever the ICRC visits places of detention, it discusses its findings and observations about the conditions of detention and the treatment of detainees directly and confidentially with the authorities in charge. ICRC visits to US detention facilities in Afghanistan, Iraq and Guantanamo Bay are no exception. . .

The purpose of the ICRC's policy of confidentiality is to ensure that the organization obtains and, importantly, maintains access to detainees around the world held in highly sensitive situations of armed conflict or other violence. Working outside the spotlight of media attention often makes it easier for the ICRC and the detaining authorities to achieve concrete progress in places of detention.

Confidentiality is thus an important working tool for the ICRC in order to preserve the exclusively humanitarian and neutral nature of its work.

The ICRC is concerned that any information it divulged about its findings in places of detention could easily be exploited for political purposes. It deplors the fact that confidential information conveyed to the US authorities has been published by the media on a number of occasions in recent years. The ICRC has never given its consent to the publication of such information.

This update is available on the ICRC's website at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/united-states-detention?opendocument>.

10. On March 6, 2008, the ICRC Deputy Director of Operations further explained:

Confidentiality is the key that enables the ICRC to open doors that would otherwise remain shut, giving us access to people in need and places that many other organizations cannot reach.

...
The ICRC does not share confidential information with the media or other third parties, nor does it consent to the publication of such information, because there is always a risk that our observations could be exploited for political gain or instrumentalized by one side or another. By discussing serious issues, such as abuse or ill-treatment, away from the glare of public attention, governments and non-state actors are often more likely to acknowledge problems and commit to taking action.

...
It's the people we are trying to help who may suffer most when our confidential findings wind up in the public domain.

...
This interview is available at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/confidentiality-interview-010608?opendocument>.

11. Information provided by the ICRC is provided to the United States on the condition that it not be released to the public. The United States respects and adheres to this policy. The Secretary of Defense has required such treatment by issuing a directive dated July 14, 2004, entitled, "Handling of Reports from International Committee of the Red Cross." That directive provides:

Prompt evaluation and transmission of reports from the International Committee of the Red Cross (ICRC) to senior DoD leaders is of the utmost importance. Recognizing that information may be reported at various command levels and in oral or written form, I direct the following actions:

- All ICRC communications shall be marked with the following statement: "ICRC communications are provided to DoD as confidential, restricted-use documents. As such they will be safeguarded the same as SECRET . . . information using classified information channels. Dissemination of ICRC communications outside of DoD is not authorized without approval of the Secretary or Deputy Secretary of Defense."

...
[C]ompliance with the procedures in this memorandum is a matter of DoD policy and is essential to enabling the Department to continue to meet its responsibilities and obligations for the humane care and full responsibility for all persons captured or detained during military operations.

12. Disclosing ICRC information would seriously damage the DoD's long-standing relationship with the ICRC. The DoD's relationship with the ICRC is invaluable. The ICRC position is that if its representatives cannot work using their internationally recognized operating procedures, they may suspend detainee visits or terminate their relationship with the United States completely. We respect and appreciate the ICRC's input, and a suspension of its traditional activities would be detrimental to the Department's worldwide detention operations. In addition to the ICRC's input on DoD detention operations, the ICRC regularly provides services to U.S. military personnel captured in the course of armed conflict. ICRC access to U.S. military personnel helps ensure that they are treated properly in accordance with international legal obligations. Separately, through the ICRC, the captured personnel's families receive current information about their status through ICRC-provided Red Cross messages. If the United States failed to protect information that the ICRC shared with us in confidence, it could have a detrimental effect on the ICRC's willingness to provide information to us about our own personnel.

PART THREE
EXEMPTION THREE

13. The redacted portions of Documents 375 and 376 marked as "ICRC" consist of confidential information provided to DoD by the ICRC.

14. The redacted information is exempt from disclosure pursuant to FOIA Exemption 3. That exemption permits the withholding of information "specifically exempted from disclosure by statute . . . provided that such statute . . . establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3). Information "provided by, otherwise made available by, or produced in cooperation with" the ICRC is exempt from release by 10 U.S.C. § 130c. For information to be exempt under the statute, the ICRC must withhold the information from the public. To use this exemption, DoD must demonstrate that one of the following three conditions has been met: (i) that the ICRC has requested in writing that the information be withheld; (ii) that the ICRC has provided the information on condition that it not be released to the public; or (iii) that the information is covered by regulations that prescribe the release of such information would adversely affect the ability of the United States to obtain such information in the future. 10 U.S.C. § 130c(b).

15. The information withheld by DoD in Documents 375 and 376 reflects information about ICRC reports that meets the criteria of 10 U.S.C. § 130c. As an initial matter, the ICRC has represented in writing that it is withholding the information contained in those reports from public disclosure. Moreover, although only one of the three conditions listed above must be met for withholding to be proper, here, all three are met: (i) the ICRC has requested in writing that the United States withhold such information; (ii) the ICRC has provided the reports on the

condition that the United States not release the reports to the public; and (iii) the Secretary of Defense's directive, cited above, prohibits the public dissemination of such information.

16. Accordingly, DoD has properly redacted the information marked "ICRC" from Documents 365 and 367 under Exemption 3 in accordance with 10 U.S.C. § 130c.

Pursuant to 28 U.S.C 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated this 5th day of March 2010, at Arlington, Virginia.


William K. Lietzau