

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION, CENTER FOR
CONSTITUTIONAL RIGHTS, PHYSICIANS FOR HUMAN
RIGHTS, VETERANS FOR COMMON SENSE AND
VETERANS FOR PEACE,

Plaintiffs,

v.

DEPARTMENT OF DEFENSE, AND ITS COMPONENTS
DEPARTMENT OF ARMY, DEPARTMENT OF NAVY,
DEPARTMENT OF AIR FORCE, DEFENSE
INTELLIGENCE AGENCY; DEPARTMENT OF HOMELAND
SECURITY; DEPARTMENT OF JUSTICE, AND ITS
COMPONENTS CIVIL RIGHTS DIVISION, CRIMINAL
DIVISION, OFFICE OF INFORMATION AND
PRIVACY, OFFICE OF INTELLIGENCE, POLICY AND
REVIEW, FEDERAL BUREAU OF INVESTIGATION;
DEPARTMENT OF STATE; AND CENTRAL
INTELLIGENCE AGENCY,

Defendants.

CIVIL ACTION
DOCKET NO. 04-CV-4151 (AKH)

PLAINTIFFS' REPLY
MEMORANDUM IN SUPPORT
OF PRELIMINARY
INJUNCTIVE RELIEF

PRELIMINARY STATEMENT

Plaintiffs American Civil Liberties Union (ACLU), Center for Constitutional Rights (CCR), Physicians for Human Rights (PHR), Veterans for Common Sense (VCS), and Veterans for Peace (VFP), respectfully submit this reply memorandum in support of their motion for a preliminary injunction, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 et seq., compelling Defendants to immediately process Plaintiffs' FOIA request and release records related to the treatment, deaths and rendition of individuals

("Detainees") held by the United States at detention centers overseas. Plaintiffs have requested that the Court (1) order Defendants to complete the processing of Plaintiffs' request and provide a Vaughn Declaration within 14 days after the entry of the Order, and (2) set an expedited schedule for the filing of cross-motions for summary judgment.

Defendants have made two principle arguments in opposition to Plaintiffs' motion. First, Defendants claim that the Court lacks jurisdiction to adjudicate Plaintiffs' claims or to grant the remedy requested. FOIA, however, expressly confers such jurisdiction where an agency improperly withholds records or denies expedited processing. As a matter of course, courts routinely issue orders mandating the release of documents and Vaughn indices within a set schedule. Plaintiffs seek only the remedy provided by the statute itself - the timely disclosure of records - and the jurisdiction of the Court to fashion an order to compel such compliance is clear.

Defendants also deny that Plaintiffs' have a need for immediate disclosure of the requested documents, claiming that the information sought is not time-sensitive enough to warrant an expedited response. Such a position is untenable in light of the nature of the records in question, which implicate not only the ongoing detention of thousands of individuals in United States custody, but also the intensive policy debate within the country and around the world regarding the government's accountability for the torture, abuse and inhumane

treatment of Detainees. No mechanism is better suited to effect the disclosure of such records than is FOIA, and the Court is well within the scope of its authority to supervise the release of these documents within a timeframe like that requested by Plaintiffs or deemed appropriate by the Court. For these reasons, as amplified below, and those set forth in Plaintiffs' initial Memorandum of Law, the Court should grant Plaintiffs' motion for a preliminary injunction.

I. THE COURT HAS JURISDICTION TO GRANT THE REQUESTED RELIEF.

The Court's jurisdiction to consider this matter and grant appropriate relief is clear. See 5 U.S.C. § 552(a)(4)(B); 28 U.S.C. § 1331. District courts are generally empowered by FOIA to issue injunctive relief when agency records are unlawfully withheld. As stated in the statute:

On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.

5 U.S.C. § 552(a)(4)(B). See also United States Dep't of Justice v. Tax Analysts, 492 U.S. 136, 140-43 (1989) (federal courts have jurisdiction to compel disclosure where an agency has improperly withheld agency records); American Mail Line, Ltd. v. Gulick, 411 F.2d 696, 701-2 (D.C. Cir. 1969) (if agency has improperly withheld

records, action may be brought under FOIA to contest an alleged violation of any part of statute). Furthermore, agency decisions with respect to expedited processing in particular are subject to judicial review under FOIA:

Agency action to deny or affirm denial of a request for expedited processing . . . and failure by an agency to respond in a timely matter to such a request shall be subject to judicial review . . .

Id. § 552(a)(6)(E)(iii). Because the “[a]gency action to deny or affirm denial” of Plaintiffs’ expedited processing request is so clearly within the Court’s jurisdiction, Plaintiffs’ claim with respect to agencies that have denied expedited processing is appropriately before the Court. See ACLU v. United States Dep’t of Justice, __ F.Supp.2d __, 2004 WL 1162149, at *4 (May 10, 2004); Al-Fayed v. CIA, No. 00-2092, 2000 U.S. Dist. LEXIS 21476, at *7 (D.D.C. Sept. 20, 2000), aff’d on other grounds, 254 F.3d 300, 311 (D.C. Cir. 2001).

Six Defendant agencies have denied Plaintiffs’ request for expedited processing. The Department of Defense (DOD), encompassing DOD components Army, Navy, Air Force and Defense Intelligence Agency, denied Plaintiffs’ request for expedited processing by letter dated June 21, 2004, on the grounds that Plaintiffs have not established a

"compelling need" for the information requested. See Exh. 14.¹ Defendant Central Intelligence Agency (CIA), by letter dated July 29, 2004, rejected any portion of Plaintiffs' May 2004 FOIA request which overlapped with the October 2003 request, accepting the request only insofar as it involved records generated after October 2003, and administratively denied Plaintiffs' request for expedited processing. See Exh. 15 (Def. Exh. 0). The Court therefore has subject matter jurisdiction to adjudicate Plaintiffs' motion for preliminary injunctive relief with regards to DOD, its components, and CIA.

The Court also has jurisdiction to supervise the release of documents by Defendant agencies that have already granted Plaintiffs' requests for expedited processing and are currently conducting a search for records, in order to ensure that Defendants actually provide the expedited processing that the FOIA requires them to provide. For example, Defendants Department of State (DOS), Department of Justice (DOJ), and its components Criminal Division, Federal Bureau of Investigation (FBI), Office of Information and Privacy (OIP), and Office of Intelligence Policy and Review (OIPR) have all granted Plaintiffs' request for expedited processing, but have neither produced any documents nor provided a time frame for the

¹ Clearly, the statement of C.Y. Talbott, Chief of DOD's FOIA Program, that DOD is processing Plaintiffs' request "in the most expeditious manner," Talbott Decl. ¶4, and Defendants' mere assertion that they are engaged in a search for the requested documents, cannot defeat this Court's jurisdiction.

identification and disclosure of records. FOIA, however, empowers district courts to retain and thus exercise jurisdiction to supervise the release of documents. 5 U.S.C. § 552(a)(4)(B). See, e.g., Electronic Privacy Information Center (EPIC) v. Dep't of Justice, 2002 WL 1227268, at *2 (D.D.C. Mar. 25, 2002) (where agency granted expedited processing after the initiation of litigation, court retained jurisdiction to supervise release of documents and ordered release within 60 days); EPIC v. Dep't of Justice, No. 00-1849 (JR) (D.D.C. Aug. 2, 2000); ACLU v. United States Dep't of Justice, No. 03-2522 (ESH) (D.D.C. Dec. 10, 2003) (where agency granted expedited processing, court retained jurisdiction and set schedule for release of records). Thus, the exercise of the Court's jurisdiction is also appropriate with respect to these agencies.² In sum, Plaintiffs' motion for preliminary injunctive relief with respect to the Defendants that have not yet completed processing of Plaintiffs' request is therefore properly before the Court for adjudication.

² Plaintiffs withdraw their motion as it applies to the two agencies that have completed processing of their request. Defendants Department of Homeland Security (DHS) and DOJ's Civil Rights Division have informed Plaintiffs that a full search has been conducted and completed, with no responsive records located. Without ceding the Court's jurisdiction to grant relief based upon Plaintiffs' challenge to the inadequacy of the search performed by these Defendants, Plaintiffs do not press the current motion, which seeks the expedited processing and release of documents, as it applies to these agencies only.

A. Defendants Do Not Satisfy The Requirements Of Expedited Processing Merely By Asserting That They Are Processing The Request.

Were it the case, as Defendants contend, that the simple assertion by an agency that it is "currently processing" Plaintiffs' request was sufficient to meet the requirements of expedited processing under FOIA, thus shielding the agency from further judicial scrutiny, see Def. Brief at 9, the expedited processing requirement of the statute would be an unenforceable dead letter. Instead, while it is true that FOIA does not specify a time limit within which expedited requests must be processed, courts are granted broad jurisdiction to ensure that agencies comply with their obligation to process expedited requests "as soon as practicable," as the FOIA requires. (Notably, the FOIA requires agencies to process even non-expedited requests within 20 days. See 5 U.S.C. § 552(a)(6)(A).) Notwithstanding Defendants' claim to the contrary, courts routinely set schedules for the release of records. See, e.g., Judicial Watch, Inc. v. United States Dep't of Energy, 191 F.Supp.2d 138, 141 (D.D.C. 2001) (after 10 month delay in a non-expedited case, district court ordered agency to process thousands of documents in 20 days for release and Vaughn declaration). Indeed, in the two cases cited by Defendants in support of their argument that post-1996 FOIA courts have refused to set time frames for the processing of requests, see Def. Brief at 12, the district courts in fact issued orders, just as Plaintiffs seek here, compelling the

government to either disclose the requested documents or provide a schedule for release on or before a date set by the court.³ For example, in ACLU v. United States Dep't of Justice, where thousands of records were purportedly at issue, the court ordered the defendant agency to produce all documents and Vaughn indices in two phases, half within three weeks and the rest within six weeks. See Exh. 15, ACLU v. United States Dep't of Justice, 03-2522 (ESH) (May 20, 2004). Similarly, in Edmonds v. FBI, the district court "ordered defendant to either file a dispositive motion or a schedule by which defendant would produce plaintiff's requested documents." 310 F.Supp.2d 55, 56 (D.D.C. 2004). See also Natural Resources Defense Council (NRDC) v. Dep't of Energy, 191 F.Supp.2d 41, 44 (D.D.C. 2002) (granting Plaintiffs' expedited motion for processing records and ordering schedule for the initial release of non-exempt records and Vaughn index); Moye, O'Brien, O'Rourke, Hogan & Pickert v. Nat'l R.R. Passenger, 02-126 (ORL), 2002 WL 21146674, at *19 (M.D. Fla. May 13, 2003), rev'd on other grounds, 2004 WL 1566567 (July 14, 2004) (court order directed Amtrak to disclose most of requested documents within

³ Defendant's reliance on Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976), is similarly misplaced. See Def. Brief at 13, n. 1. The Open America court held that the government could obtain an extension if it had a backlog of FOIA requests. No court has ever held that the government can invoke Open America to avoid the requirements of expedited processing, especially where, as here, Defendants have not identified any request which has priority over Plaintiffs' request.

20 days); Donham v. Dep't of Energy, 192 F.Supp.2d 877 (S.D. Ill. 2002) (where agency failed to complete processing of two successive FOIA requests, district court ordered agency to complete first request and file schedule for completing the second within 24 business days); Hunter v. Christopher, 923 F.Supp. 5 (D.D.C. 1996) (ordering agencies to complete processing of requests within 60 days).

Such relief is clearly warranted here, particularly as Defendants have been processing Plaintiffs' FOIA request since October 2003. Plaintiffs have already provided Defendants with specific lists of the records they seek, including records that have emerged from numerous media and agency reports regarding the treatment of Detainees. See October 2003 FOIA Request; May 2004 FOIA Request, App. A. At the very least, the Court should compel Defendants to make an immediate initial disclosure of non-exempt records, and provide a Vaughn Declaration for those records considered exempt, see NRDC v. Dep't of Energy, 191 F.Supp.2d at 43, given that Defendants have, by their own admission, already collected and identified numerous documents responsive to Plaintiffs' request. See, e.g., Talcott Decl. ¶2. For example, Defendant DOS has been searching three records systems since before March 2004. See Def. Brief at 6. And, from as early as October 30, 2003, Defendant FBI has located potentially responsive records but has not produced them, claiming exemptions. See Def. Brief at 5. Similarly, Defendant DOD

has already concluded that "many potentially responsive records" will be "subject to restrictions related to law enforcement investigations." Def. Brief at 7. Defendants nonetheless claim that a Vaughn index would be premature at this time, Def. Brief at 15; obviously, it is not. Moreover, Defendants' "conclusory and generalized allegations of exemptions" are simply not acceptable under FOIA. Vaughn v. Rosen, 484 F.2d 820, 826 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). And, the fact that other parties, such as news organizations or Congress, are seeking the identical information is also no cause for delay. See Judicial Watch Inc. v. Dep't of Energy, 191 F.Supp.2d at 141 (multiple requests seeking identical information are not a barrier to expedited processing); NRDC v. Dep't of Energy, 191 F.Supp.2d at 43 (by "processing Plaintiffs' request in a far more expeditious manner, as this Court will order, [Defendant] will also be carrying out its FOIA responsibilities to the other 11 requesters" seeking similar records).

Finally, the mere assertion that Defendants are searching for the records in question neither removes jurisdiction nor makes Plaintiffs' claims under FOIA moot. Defendants have been processing Plaintiffs' request for nine months and have produced next to nothing. Meanwhile, they have refused to provide a processing schedule, and have failed to identify any unrelated expedited requests in front of Plaintiffs' in queue. Defendants should not be

permitted to further stonewall Plaintiffs' attempt to gain lawful access to these records of paramount public importance. The Court should therefore grant Plaintiffs' motion for preliminary injunctive relief and order Defendants to, within 14 days of the Court's order, complete processing of Plaintiffs' request and provide Plaintiffs with a Vaughn Declaration.

II. PLAINTIFFS WILL BE IRREPARABLY HARMED BY THE GOVERNMENT'S REFUSAL TO RELEASE RECORDS CONCERNING THE TREATMENT, DEATHS AND RENDITION OF DETAINEES.

The central purpose of expedited processing is, by definition, the swift and timely disclosure of information to requesters where the subject matter involves a compelling need, such as a breaking news story or a matter of widespread public interest. 5 U.S.C. § 552(a)(6)(E). Defendants ask the Court to ignore the statutory requirements of expedited processing by claiming that the records sought by Plaintiffs - already granted expedited status by a majority of Defendants - may nonetheless be obtained through "normal FOIA channels" without any loss in value. Def. Brief at 16. Defendants argue that Plaintiffs "will be able to add their very different perspective to the debate on Detainee treatment regardless of when they receive the documents they requested." Id. (internal quotations and citations omitted).

In fact, time is absolutely of the essence of the current debate surrounding the abuse of Detainees. Plaintiffs will be irreparably harmed if the requested information is not released within the requested time frame, particularly in light of the "substantial interest" in the issues at stake by the general public and media, as well as the "significant adverse consequence[s]" which will follow if the government further delays the release of the requested records. Al-Fayed, 254 F.3d at 311 (internal quotations omitted). Where matters are, like this one, of such an "extraordinary public interest," courts have not hesitated to mandate the processing of a FOIA request in an expedited timeframe. NRDC v. Dep't of Energy, 191 F.Supp.2d at 42-44. In NRDC, the district court acknowledged that the combined effect of terrorism, secrecy in a government task force dealing with energy issues and congressional policymaking was sufficient to demonstrate an "enormous public concern" compelling expedited processing. Id. The issues presented here are of at least equal public concern. Significant adverse consequences - some of which have already occurred, and will undoubtedly worsen - will also result from Defendants' refusal to release the information requested.

First, current efforts by government officials seeking clarification on the policies and practices which led to the abuse of Detainees have thus far proved unsuccessful. For example, congressional inquiries have not been effective, as "high level White House and Pentagon officials refuse to answer questions or to

disclose the relevant documents requested by Congress," and a formal or independent investigation has yet to be initiated. Floor Statement of Sen. Patrick Leahy (June 23, 2004), available at <http://leahy.senate.gov/press/200406/062304b.html>; see also Abu Ghraib, Whitewashed, N.Y. Times (July 24, 2004) (reporting that DOD has, among other stalling tactics, "misplaced" thousands of pages from the Taguba Report on conditions at Abu Ghraib). And it has also become clear that the multiple internal military probes into abuses will produce few answers about who is ultimately responsible, as demonstrated most recently by the Army's latest report, which was "unable to identify system failures that resulted in incidents of abuse," despite the existence of acknowledged documents which at least point to responsibility on the part of the Secretary of Defense. See Army Inspector General, Forward: Detainee Operations Inspection (July 21, 2004) (internal report regarding Army's conduct of detainee and interrogation operations). See also Jackie Northam, Experts: Probes May Cloud Responsibility for Abu Ghraib, Nat'l Pub. Radio (July 2, 2004).

Second, allegations continue to emerge implicating the conduct and policies of high-level officials in the abuse of Detainees and rendition of individuals. Leaked documents and statements provided by government officials in recent weeks raise still more questions regarding secret policies of detention and interrogation. High-ranking officers, for example, including the Brigadier General

formerly in charge of Abu Ghraib, have attested to the likelihood of White House and Pentagon involvement in the abuse and torture of Detainees. Iraqi Jail Chief Says Prisoner Abuse Covered Up, Reuters (Aug. 3, 2004) (quoting United States Brigadier General Janis Karpinski as stating that "specific measures were taken to ensure that I would not have access to those facilities [where abuses occurred], that information or any of the details of interrogation at Abu Ghraib or anywhere else").

Third, with an unknown number of Detainees remaining in United States custody, allegations of ongoing violations of international and domestic law persist. Media accounts have confirmed the existence of an as-of-yet unknown number of secret United States prisons, housing an unknown number of Detainees in locations such as floating warships, free from any public scrutiny. See, e.g., Mary Louise Kelly, Abuses Possible at Secret U.S. Prisons, Nat'l Pub. Radio (July 1, 2004). Immediate disclosure of the requested records is therefore the only means to ensure that the public, in a period of international and domestic political debate, will be appropriately informed as to the conduct of government officials at a time when the conduct in question is in fact being subjected to scrutiny.

Finally, the information sought by Plaintiffs is critical to current legislative debates which hinge on the very question of official knowledge and participation in the abuse of Detainees. For instance, Congress is currently considering whether the proposed

Division of National Intelligence (DNI) counter-terrorism center should include an Office of the Inspector General. See 9-11 Memorial Intelligence Reform Act, S.1520 (July 21, 2003). Such an office could be responsible for investigating claims of torture by intelligence operatives abroad. Similarly, the House Armed Services Committee is amidst the review of a congressional resolution on "Detention and Interrogation of Terrorists," H. Cong. Res. 472, which currently does not include any criticism or assessment of the abuse and inhumane treatment of Detainees or rendered individuals. Access to the records at issue in Plaintiffs' FOIA request would allow Plaintiffs to participate in this ongoing and urgent debate.

As it stands, Defendants' ongoing delay has prevented Plaintiffs from drawing attention to - and possibly preventing - numerous atrocities which have since been reported on detention facilities in Afghanistan, Iraq, and countries to which individuals have been rendered and subsequently tortured. Plaintiffs, a cross-section of national and international civil liberties and human rights groups devoted to open government and the humane treatment of individuals such as Detainees, share a significant interest in this debate and are uniquely situated to contribute their expertise to these matters. If Defendants are allowed to continue their concerted campaigns of delay, Defendants will succeed in preventing critical and timely access by advocates for fair government and human rights, as well as the public as a whole, to information which implicates the most

egregious violations of domestic and international law. For these reasons, the Court should grant Plaintiffs' motion for a preliminary injunction, ordering Defendants to, within 14 days of the Court's Order, complete the processing of Plaintiffs' request and provide a Vaughn Declaration.

CONCLUSION

For the reasons stated above, Plaintiffs' motion for a preliminary injunction should be granted.

Respectfully submitted,

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