UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| AMERICAN CIVIL LIBERTIES UNION, CENTER FOR CONSTITUTIONAL RIGHTS, PHYSICIANS FOR HUMAN RIGHTS, VETERANS FOR COMMON SENSE AND VETERANS FOR PEACE,<br><br>Plaintiffs,<br><br>v.<br><br>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,<br><br>Defendants. | DOCKET NO. 04-CV-4151 (AKH)<br><br>**Document Electronically Filed** |

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR CONTEMPT AND SANCTIONS**

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## INTRODUCTION

"Ours is a government of laws." *See Am. Civil Liberties Union v. Dep't of Def. ("ACLU I")*, 339 F. Supp. 2d 501, 502 (S.D.N.Y. 2004). "No one is above the law: not the executive, not the Congress, and not the judiciary." *Id.* In recognition of those principles, on September 15, 2004, this Court wrote that the Freedom of Information Act ("FOIA") is a law that, "no less than any other, must be duly observed," *id*., and ordered Defendant CIA and other Defendant federal agencies to produce or identify all records responsive to Plaintiffs' FOIA requests for records related to the treatment of detainees apprehended after September 11, 2001 and held in U.S. custody abroad. *Id*. *at* 502.

Notwithstanding the clear command of this Court and the CIA's continuing obligation to preserve responsive documents under FOIA, however, the CIA did not produce or even identify hundreds of hours of videotapes of harsh CIA interrogations--records that were clearly responsive and germane to Plaintiffs' FOIA requests. It destroyed the tapes instead. On December 6, 2007, in anticipation of news reports addressing the CIA's destruction of the tapes, CIA Director Michael Hayden posted a letter on the CIA's website acknowledging that (i) in 2002, the CIA videotaped the interrogations of certain high-level prisoners in its custody; (ii) during these interrogations, CIA agents used specific interrogation techniques; and (iii) the CIA destroyed the videotapes in 2005.

The CIA has circumvented FOIA and is plainly in contempt of this Court's September 15, 2004 order. Accordingly, Plaintiffs ask that this Court:

(1) hold Defendant CIA in contempt of court;

(2) order Defendant CIA to file publicly with the Court a list that identifies with specificity all responsive records that have been destroyed or removed, the date they were destroyed or removed, and the official on whose authority they were destroyed or removed, along with sworn declarations from individuals with firsthand knowledge describing how the list was compiled;

(3) order Defendant CIA to file under seal with the Court a written document ("Written Reconstruction") that describes in as much detail as possible each of the records that has been destroyed or removed, and to file publicly with the Court sworn declarations from individuals with firsthand knowledge attesting that the Written Reconstruction is accurate and as detailed as possible;

(4) allow Plaintiffs limited discovery regarding (2) and (3) above;

(5) order Defendant CIA immediately to provide plaintiffs with the Written Reconstruction or with a *Vaughn* declaration explaining why the Written Reconstruction should be withheld;

(6) prohibit Defendant CIA from destroying, removing or tampering with all remaining records currently in its possession or control that may be responsive to Plaintiffs' FOIA requests;

(7) order Defendant CIA to pay all attorneys' fees and costs associated with Plaintiffs' efforts to obtain responsive records from the CIA in this litigation, including efforts made in connection with this Motion;

(8) order such other relief as may be just and proper.

## FACTUAL BACKGROUND

This Court's Orders

Plaintiffs served Defendant CIA and other Defendant agencies with substantively identical FOIA requests on October 7, 2003, and on May 25, 2004, seeking the disclosure of records concerning (1) the treatment of detainees apprehended after September 11, 2001 and held in U.S. custody abroad; (2) the deaths of such detainees while in United States custody; and (3) the rendition of such detainees and other individuals to countries known to employ torture or illegal interrogation techniques. *See ACLU I*, 339 F. Supp. 2d at 502. By separate letters filed on the same day, Plaintiffs submitted a request for expedited processing. Having received no meaningful responses, Plaintiffs commenced this action in June 2004, and on July 2, 2004 sought a preliminary injunction requiring Defendants to expeditiously process Plaintiffs' requests and to provide Plaintiffs with all responsive non-exempt documents. On September 15, 2004, this Court ordered Defendant CIA and other defendant federal agencies to "produce or identify all responsive documents" by October 15, 2004. *See ACLU I*, 339 F. Supp. 2d at 505.

On October 15, 2004, the CIA requested partial relief from the Court's September 15, 2004 order. The CIA acknowledged that although it was statutorily exempt from searching "operational files" for records responsive to FOIA requests, "some of CIA's operational files will become searchable due to [Office of Inspector General] OIG investigations." *See Am. Civil Liberties Union v. Dep't of Def.*, (S.D.N.Y), 04-Civ-4151, Doc. # 18 at 4 (Letter to Judge Hellerstein from Sean Lane, Oct. 15, 2004). The agency claimed, however, that it could not review documents that were the subject of ongoing

investigations until the investigations were completed, and that it was unclear when the OIG investigations would be completed. *Id*. Recognizing that its request was the effective equivalent of a request for a stay, the CIA stated its intention to file papers in support of a motion for a stay. The CIA also sought an extension to log the remaining responsive documents culled from its non-operational files. *Id*.

On November 8, 2004, the CIA produced a log of its withheld non-operational files. *See* Letter from Sean Lane to Lawrence Lustberg, Nov. 8, 2007 (including as attachment CIA List of Documents Responsive to Plaintiffs' 25 May 2004 FOIA Request), attached hereto as Ex. A. The declaration contained no mention of videotapes of CIA interrogations.

On November 10, 2004, citing the CIA Information Act, Defendant CIA formally moved for a stay of the September 15 Order and Opinion. The CIA Information Act states that "[t]he Director of the Central Intelligence Agency, with the coordination of the Director of National Intelligence, may exempt operational files of the Central Intelligence Agency from the provisions of section 552 of Title 5 (Freedom of Information Act) which require publication or disclosure, or search or review in connection therewith." 50 U.S.C. § 431(a).[1] The same Act however provides an exception to this exemption for

[1] "Operational files" are defined as:

> (1) files of the Directorate of Operations which document the conduct of foreign intelligence or counterintelligence operations or intelligence or security liaison arrangements or information exchanges with foreign governments or their intelligence or security services;
> (2) files of the Directorate for Science and Technology which document the means by which foreign intelligence or counterintelligence is collected through scientific and technical systems; and

records "concerning the specific subject matter of an investigation by the congressional intelligence committees, the Intelligence Oversight Board, the Department of Justice, the Office of General Counsel of the Central Intelligence Agency, the Office of Inspector General of the Central Intelligence Agency, or the Office of the Director of National Intelligence for any impropriety, or violation of law, Executive order, or Presidential directive, in the conduct of an intelligence activity." *Id*. § 431(c) (emphasis added). The CIA acknowledged that it was required under FOIA to search "operational files" relating to the CIA's OIG investigations, but sought to delay its search of its operational files until after the OIG had completed its then-ongoing investigation into improprieties in Iraq. *See Am. Civil Liberties Union v. Dep't of Def.*, (S.D.N.Y), 04-Civ-4151, Doc. # 38 at 1-2 (Memorandum of Law in Support of the CIA's Application for Limited Relief from the September 15, 2004 Order, Nov. 10, 2004).

In a February 2, 2005 decision, the Court denied the CIA's motion for a stay. *See Am. Civil Liberties Union v. Dep't of Def. ("ACLU II")*, 351 F. Supp. 2d 265, 268 (S.D.N.Y. 2005). The Court held as a threshold matter that the CIA had failed to satisfy the statutory prerequisites for invoking the "operational files" exemption, and further denied the CIA's request for a stay pending the completion of the OIG's investigations on the grounds that "the requirement to search and review does not turn on whether the investigation continues, or has ended." *Id*. at 276. The Court concluded:

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> (3) files of the Office of Personnel Security which document investigations conducted to determine the suitability of potential foreign intelligence or counterintelligence sources;
> except that files which are the sole repository of disseminated intelligence are not operational files.

50 U.S.C.A. § 431(b).

> I deny the CIA's motion for a stay of its obligation to comply with my Opinion and Order of September 15, 2004. The CIA shall search and review in response to plaintiffs' FOIA requests, as described in my Opinion and Order of September 15, 2004.

*Id*. at 278.

On February 18, 2005, this Court denied Defendant CIA's application for a stay pending its determination whether to appeal the Court's Feb. 2, 2005 ruling on the grounds that it had failed to show that it would suffer prejudice by complying with that ruling or that it was likely to succeed on the merits. *See Am. Civil Liberties Union v. Dep't of Def.*, (S.D.N.Y), 04-Civ.-4151, Doc. # 57 at 1 (Order Denying CIA's Motion For A Stay, Feb. 18, 2005). The Court held that "the parties shall proceed in accordance with my Opinion and Order of February 2, 2005." *Id*. at 6.

Defendant CIA also moved for partial reconsideration of the February 2005 decision based on additional evidence in support of its claim that the Director of Central Intelligence had properly designated as exempt from FOIA search and review certain "operational files" that would contain information responsive to Plaintiffs' FOIA requests. In an order dated April 18, 2005, this Court held that the CIA had properly designated its files as exempt "operational files" and that in accordance with the remainder of the February 2, 2005 decision, the CIA's "obligation to search and review [extends] . . . only to relevant documents that have already been identified and produced to, or otherwise collected by, the CIA's Office of Inspector General." *See Am. Civil Liberties Union v. Dep't of Def.*, (S.D.N.Y), 04-Civ.-4151, Doc. # 86 at 3 (Order Granting CIA's Motion For Partial Relief, Apr. 18, 2005).

Defendant CIA's Processing Of Plaintiffs' Requests

By letter dated April 15, 2005, the CIA informed Plaintiffs that it had "reviewed OIG files that pertain to ongoing investigations or law enforcement proceedings" and that the "vast majority" of the files were exempt from disclosure pursuant to FOIA Exemption 7 "because their disclosure could reasonably be expected to interfere with a pending investigation or law enforcement proceeding." Letter from John L. McPherson to Jennifer Ching, Apr. 15, 2005, attached hereto as Ex. B. As to files that "no longer relate to pending law enforcement proceedings," the CIA informed Plaintiffs that it would process the files – approximately 10,000 pages in total – by July 15, 2005. By letter dated July 15, 2005, the CIA informed Plaintiffs that it had completed its review of those files but that "all of the documents [would be] withheld in their entirety pursuant to FOIA exemptions (b)(1), (b)(2), (b)(3), (b)(5), and (b)(6)." Letter from Jennifer G. Loy to Megan Lewis, Jul. 15, 2005, attached hereto as Ex. C.

After negotiations between the parties, the CIA informed Plaintiffs by letter that the OIG files that no longer related to pending law enforcement proceedings comprised 450 cables, 1250 e-mails, 100 interview reports, and 120 "documents that [did] not fit into any particular category." Letter from Michael Garcia to Megan Lewis, dated Dec. 2, 2005, attached hereto as Ex. D. It agreed to provide Plaintiffs a *Vaughn* declaration addressing a sample of these documents. Specifically, it agreed to provide a *Vaughn* declaration addressing every 10th interview report, every 30th cable, every 50th e-mail, and every other miscellaneous record. The letter made no mention of videotapes of CIA interrogations.

On January 27, 2006, the CIA produced to Plaintiffs sample *Vaughn* declarations of responsive OIG files that no longer related to pending law enforcement investigations, asserting its withholding of the underlying documents in their entirety pursuant to FOIA exemptions b(1), b(2), b(3), and b(5). *See* Seventh Declaration of Marilyn A. Dorn, Jan. 26, 2006, attached to Amended Memo. of Law in Supp. of Pls.' Third Motion for Partial Summary Judgment, Mar. 5, 2007, as CIA Ex. A. This *Vaughn* declaration makes no mention of videotapes of CIA interrogations.[2]

Defendant CIA's Destruction Of Responsive Records

On December 6, 2007, the *New York Times* reported that in 2005 the CIA had destroyed two videotapes of CIA prisoners being subjected to harsh interrogation methods in 2002. *See* Mark Mazetti, C.I.A. Destroyed 2 Tapes Showing Interrogations, N.Y. Times, Dec. 7, 2007, attached hereto as Ex. E. The *Washington Post* subsequently reported that the destruction of the tapes occurred in November 2005. Dan Eggen and Joby Warrick, CIA Destroyed Videos Showing Interrogations, Wash. Post, Dec. 7, 2007, attached hereto as Ex. F. Another *New York Times* article reported that the tapes included "hundreds of hours" of footage of severe interrogation methods being applied on CIA prisoners. Mark Mazetti, C.I.A. Was Urged to Keep Interrogation Videotapes, N.Y. Times, Dec. 8, 2007, attached hereto as Ex. G.

[2] In their Third Motion for Partial Summary Judgment currently pending before this Court, Plaintiffs challenge the CIA's withholding of the OIG records among other records, as well as the adequacy of the CIA's search for responsive records. *See Am. Civil Liberties Union v. Dep't of Def.*, (S.D.N.Y), 04-Civ-4151, Doc. # 219 at 49 (Amended Memo of Law In Support of Pls.' Third Motion for Partial Summary Judgment, Mar. 6, 2007).

In apparent anticipation of news reports on the subject of the videotape destruction, on December 6, 2007, CIA Director Mike Hayden acknowledged in a public statement posted on the CIA's website that CIA interrogations had been videotaped in 2002, that the tapes were destroyed in 2005, and that "[t]he decision to destroy the tapes was made within CIA itself." Statement to Employees by Director of the Central Intelligence Agency, General Mike Hayden on the Taping of Early Detainee Interrogations, Dec 6. 2007, *available at* https://www.cia.gov/news-information/press-releases-statements/taping-of-early-detainee-interrogations.html, attached hereto as Ex. H. According to the statement, "[t]he Office of General Counsel examined the tapes and determined that they showed lawful methods of questioning. The Office of Inspector General also examined the tapes in 2003 as part of its look at the Agency's detention and interrogation practices." *Id.*

## ARGUMENT

### I. THIS COURT SHOULD HOLD DEFENDANT CIA IN CONTEMPT OF COURT.

It is well established that "courts have inherent power . . . to enforce lawful orders by means of civil contempt." *See Armstrong v. Guccione*, 470 F.3d 89, 101-02 (2d Cir. 2006) (quoting *Shillitani v. United States*, 384 U.S. 364, 370 (1996)). The purpose of civil contempt is to ensure a party's future compliance with court orders, and to compensate victims of contempt for harms sustained as a result thereof. *See Weitzman v. Stein*, 98 F.3d 717, 718 (2d Cir. 1996); *King v. Allied Vision, Ltd.*, 65 F.3d 1051, 1062 (2d Cir. 1995).

A party may be held in civil contempt for failure to comply with a court order if "(1) the order the contemnor failed to comply with is clear and unambiguous, (2) the proof of noncompliance is clear and convincing, and (3) the contemnor has not diligently attempted to comply in a reasonable manner.'" *Paramedics Electromedicina Comercial, Ltda v. GE Med. Sys. Info. Techs., Inc.*, 369 F.3d 645, 655 (2d Cir. 2004). It need not be established that the violation was willful. *Id.* at 655 (citing *Donovan v. Sovereign Sec. Ltd.*, 726 F.2d 55, 59 (2d Cir. 1984)). As demonstrated below, all of these conditions are met in this case.

**A. This Court's September 15, 2004 Order Was Clear And Unambiguous.**

An order is "clear and unambiguous where it is specific and definite enough to apprise those within its scope of the conduct that is being proscribed or required." *Nat'l Basketball Ass'n v. Design Mgmt Consultants, Inc.*, 289 F. Supp. 2d 373, 377 (S.D.N.Y. 2003). In this case, the Court's September 2004 Opinion and Order directed that:

> [B]y October 15, 2004 defendants must produce or identify all responsive documents. Identification of documents that are not produced shall include: author; addressee; date; and subject matter. Documents that cannot be identified to plaintiffs because of their classified status shall be identified in camera on a log produced to the court, providing the document's classification status and justification thereof. Defendants shall provide the relation of all documents produced or identified to plaintiffs' specific request.

*ACLU I*, 339 F. Supp. 2d at 505. An agency's full compliance with a court order to produce or identify information responsive to a FOIA request necessarily entails preservation of responsive information possessed by the agency. *See Judicial Watch, Inc. v. United States Dep't of Commerce*, 2000 WL 33243469, at *1 (D.D.C. Dec. 5, 2000)

("*Judicial Watch II*") (finding that discovery of Department of Commerce ("DOC") email exchange with White House was warranted in light of "the possibility that the DOC may have destroyed or secreted emails," and because review of such emails "would reveal whether the DOC fully complied with the Court['s previous] order to turn over all of the relevant documents and emails" responsive to plaintiff's FOIA request).

The September 15, 2004 Order clearly and unambiguously put the CIA on notice that it could not destroy responsive documents such as the videotapes of CIA interrogations, which were subject to potential disclosure under FOIA. CIA Director Michael Hayden has acknowledged that the destroyed videotapes were created in 2002 and that these videotapes depicted the interrogation of CIA prisoners held in U.S. custody. *See* Ex. H. Accordingly, these videotapes predate and are responsive to Plaintiffs' October 7, 2003, and May 25, 2004 FOIA requests which sought disclosure of records, *inter alia*, related to the treatment of detainees apprehended after September 11, 2001 and held in U.S. custody abroad. *ACLU I*, 339 F. Supp. 2d at 502. By destroying the interrogation videotapes Defendant CIA violated its obligation to produce or identify responsive documents to Plaintiffs.

Defendant CIA's continuing obligation not to destroy responsive records was underscored by numerous subsequent orders issued by this Court. *See ACLU II*, 351 F. Supp. 2d at 267 (denying CIA motion for a stay of the September 15, 2004 order); *Am. Civil Liberties Union v. Dep't of Def.*, (S.D.N.Y), 04-Civ.-4151, Doc. # 57 at 1 (Order Denying CIA's Motion For A Stay, Feb. 18, 2005) (denying the CIA's application for a stay pending its determination whether to appeal the Court's Feb. 2, 2005 ruling); *Am. Civil Liberties Union v. Dep't of Def.*, (S.D.N.Y), 04-Civ.-4151, Doc. # 86 at 3 (Order

Granting CIA's Motion For Partial Relief, Apr. 18, 2005) (holding that CIA had to search and review documents that had already been identified and produced to, or otherwise collected by, the CIA's OIG). Defendant CIA violated these orders by destroying the interrogation videotapes.

**B. The Proof of Defendants' Non-Compliance Is Clear And Convincing.**

The standard of clear and convincing evidence requires the alleging party to demonstrate to a "reasonable certainty" that a court order was violated. *See Levin v. Tiber Holding Corp*., 277 F.3d 243, 250 (2d Cir. 2002). Plaintiffs can easily meet this burden. As demonstrated *supra*, the CIA interrogation videotapes were clearly responsive to Plaintiffs' FOIA requests, and as such were subject to potential disclosure in litigation pending before this Court. Moreover, CIA Director Michael Hayden has specifically conceded that the CIA deliberately destroyed the tapes in 2005. *See* Ex. H. News reports confirm that the tapes were destroyed in November of 2005. *See* Ex. F. Accordingly, the proof of the CIA's non-compliance with this Court's September 15, 2004 order is clear and convincing.

**C. Defendant CIA Did Not Diligently Comply With The Court's Order.**

In analyzing a respondent's diligence, courts "examine the defendant's actions and consider whether they are based on a good faith and reasonable interpretation of the court order." *Schmitz v. St. Regis Paper Co.*, 758 F. Supp. 922, 927 (S.D.N.Y. 1991). This Court's September 15, 2004 order could not possibly have been interpreted to allow for the destruction of records responsive to Plaintiffs' FOIA requests. Moreover, by the CIA Director's own admission, the destruction of the CIA interrogation tapes was not inadvertent but premeditated and deliberate. According to his statement, "the Agency

[destroyed the tapes in 2005] only after it was determined they were no longer of intelligence value and not relevant to any internal, legislative, or judicial inquiries—including the trial of Zacarias Moussaoui. The decision to destroy the tapes was made within CIA itself. The leaders of our oversight committees in Congress were informed of the videos years ago and of the Agency's intention to dispose of the material. Our oversight committees also have been told that the videos were, in fact, destroyed." Ex. H. Moreover, at no point did Defendant CIA inform Plaintiffs or the Court of its decision to destroy these responsive records, despite numerous opportunities to do so.

## II. DEFENDANT CIA HAS VIOLATED ITS OBLIGATION UNDER FOIA TO PRESERVE ALL RESPONSIVE RECORDS AFTER A FOIA REQUEST HAS BEEN FILED.

There can be no doubt that the CIA is an "agency" within the meaning of FOIA and as such is subject to the obligation to preserve responsive records. *See* 5 U.S.C. § 552(f) (including, in definition of "agency," "any executive department . . . or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency."). Moreover, as demonstrated above, the CIA interrogation videotapes were clearly responsive to Plaintiffs' FOIA requests—the tapes were created in 2002, before Plaintiffs filed their FOIA requests in October 2003 and May 2004, and destroyed in 2005, after those requests had been filed. *See* Ex. H. Defendant CIA's destruction of these tapes is therefore a flagrant violation of its obligation under FOIA to preserve responsive records after a records request has been filed. *See Judicial Watch*, 34 F. Supp. 2d. at 44 (noting that agencies are not permitted "to evade the FOIA by removing documents from their control after the filing of a FOIA

request"); *Long v. Dept. of Justice*, 10 F.Supp.2d 205, 210 (N.D.N.Y. 1998) (determining that a statement by an AUSA employee that records were destroyed six months after plaintiffs' FOIA requests "immediately brings into question good faith on the part of DOJ, the extent of DOJ's and EOUSA's search, and their ability to identify and extract relevant records before the records destruction").

Indeed, Defendant CIA's secret destruction of records subject to potential disclosure under FOIA defeats the central purpose of FOIA, which is "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co*., 437 U.S. 214, 242 (1978). This Court has itself recognized that FOIA was enacted "to illuminate government activities[,] . . . to provide a means of accountability, [and] to allow Americans to know what their government is doing." *ACLU I*, 339 F. Supp. 2d at 504 (citing *Halpern v. Fed. Bureau Of Investigation*, 181 F.3d 279, 284-85 (2d Cir. 1999)); *Am. Civil Liberties Union v. Dep't of Def*., 389 F. Supp. 2d 547, 578-89 (S.D.N.Y. 2005) (FOIA is "a means for citizens to know what 'their "Government is up to'") (quoting *Nat'l Archives and Records Administration v. Favish*, 541 U.S. 157, 171-72 (2004)).

Analogously, in the context of civil discovery, this Court has recognized that a party has a duty to preserve evidence or documents in its possession once it receives notice of the relevance of such evidence. *Telecom Intern. America, Ltd. v. AT & T Corp*., 189 F.R.D. 76, 81 (S.D.N.Y. 1999). "Usually such notice is provided when suit has been filed, 'providing the party responsible for destruction with express notice, but also on occasion in other circumstances, as for example when a party should have known that the

evidence may be relevant to future litigation.'" *Id.* (quoting *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998)). "Even without a specific discovery order, a district court may impose sanctions for spoliation of evidence, exercising its inherent power to supervise the litigation before it." *Id.* By the same logic, the filing of Plaintiffs' FOIA requests in October 2003 and May 2004 as well as the filing of the instant FOIA suit in June 2004 surely placed Defendant CIA on notice of its obligation to preserve responsive records.

## III. THIS COURT SHOULD IMPOSE CIVIL SANCTIONS ON DEFENDANT CIA FOR VIOLATING THIS COURT'S ORDERS AND CIRCUMVENTING FOIA.

Sanctions are warranted in this case not only on grounds of civil contempt, but also because the CIA's destruction of responsive records after Plaintiffs had filed their records request is a blatant attempt to circumvent agency obligations under FOIA.

In assessing sanctions for civil contempt, district courts have "wide discretion in fashioning a remedy." *Weitzman v. Stein*, 98 F.3d 717, 719 (2d Cir. 1996). This Court, moreover, has recognized that "[d]istrict courts have broad discretion in crafting an appropriate sanction for the spoliation or destruction of evidence." *Telecom Intern. America*, 189 F.R.D. at 81. A sanction imposed on a party held in civil contempt may serve either or both of two purposes: to coerce the contemnor into complying in the future with the court's order, or to compensate the complainant for losses resulting from the contemnor's past non compliance. *See Perfect Fit Indus. v. Acme Quilting Co. Inc.*, 673 F.2d 53, 56 (2d Cir. 1982); *New York State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1351, 1352 (2d Cir. 1989).

Sanctions are not, however, contingent on a finding of contempt alone. Courts routinely impose sanctions in the FOIA context when an agency destroys responsive records after a FOIA request is filed. *See Piper v. U.S. Dept. of Justice*, 294 F. Supp. 2d 16, 21 n.1 (D.D.C. 2003) ("Allegations of government officials destroying documents germane to a FOIA request *after* that request has been initiated would compel judicial intervention on behalf of the requester."); *Jefferson v. Reno*, 123 F. Supp. 2d 1, 2 (D.D.C. 2000) (describing previous court order appointing counsel for plaintiff "for the purpose of assisting plaintiff in this Freedom of Information Act claim and, in particular, in investigating and proposing what sanctions should be imposed, if any, on individuals responsible for the destruction of documents responsive to plaintiff's FOIA request"); *id.* at *6 (referring prosecutor "to the Department of Justice's Office of Professional Responsibility to investigate whether he violated the law or engaged in professional misconduct when he destroyed records responsive to Plaintiff's FOIA request while this litigation was pending"); *McNamera v. U.S. Dept. of Justice*, 974 F. Supp. 946, 953 (W.D.Tex. 1997) (explaining prior court order to an agency to show cause under what authority it destroyed records, where potentially responsive records may have been destroyed *after* filing of plaintiff's FOIA request).

Reconstruction of the destroyed documents to the extent possible is an appropriate remedy for document destruction. *See Jefferson*, 123 F. Supp. 2d at 2 (describing court order issued upon status conference with parties, requiring reconstruction of the destroyed records, discovery on the circumstances surrounding destruction of documents, further status reports and the withdrawal of pending motions for summary judgment); *Landmark Legal Foundation v. E.P.A.*, 272 F. Supp. 2d 59, 67 (D.D.C. 2003); *see also id.*

at 69 (noting that the EPA had made efforts to "reconstruct [erased] hard drives, and . . . made available for deposition various EPA officials whose potentially responsive information was destroyed."); *cf. Cal-Almond, Inc. v. Dep't of Agriculture*, 960 F.2d 105, 109 (9th Cir. 1992) ("Absent a showing that the government has improperly destroyed 'agency records,' FOIA does not require these records to be recreated.").

Courts have also permitted discovery on the destruction or removal of responsive documents against the agency as well as third parties. *See Judicial Watch I*, 34 F. Supp. 2d. at 46 (authorizing discovery on the destruction or removal of documents against the Department of Commerce (DOC), and against non-parties who "can be shown to have acted in concert with the DOC in the removal of documents or to be currently in possession of the documents"); *Judicial Watch II* , 2000 WL 33243469, at *1-2 (permitting discovery against the White House, a non-party, where such discovery could reveal whether the DOC engaged in destruction); *Lowery v. Fed. Aviation Admin.*, 1994 WL 912632, at *8 (E.D.Cal. April 11, 1994) ("Reasonable grounds exist for believing that the letter [responsive to plaintiff's FOIA request] might have been destroyed. As such, plaintiffs are permitted reasonable discovery, for example, as to the contents of the letter, whether it was destroyed, and any motivation for its destruction."); *Jefferson*, 123 F. Supp. 2d at 2; *see also Citizens For Responsibility and Ethics in Washington v. Nat'l Indian Gaming Comm'n*, 467 F. Supp. 2d 40, 56 (D.D.C. 2006) (noting that "limited discovery has been allowed" in cases where "there is evidence of some wrongdoing such as illegal destruction of documents") (internal quotation omitted).

In the analogous context of spoliation or destruction of evidence, this Court has observed that:

> [A]ny sanction issued by a district court should be designed to: (1) deter parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (3) restore "the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party."

*Telecom Intern. America,* 189 F.R.D. at 81 (quoting *West v. Goodyear Tire & Rubber Co*., 167 F.3d 776, 779 (2d Cir.1999)).

Plaintiffs seek both coercive and compensatory sanctions in this case. Plaintiffs seek an order from this Court requiring the CIA to identify with specificity all records responsive to Plaintiffs' FOIA requests that have been destroyed, and to preserve all FOIA records currently in its possession that are responsive to Plaintiffs' FOIA requests. Furthermore, where, as here, the agency has admitted that it has destroyed documents that are responsive to Plaintiffs' FOIA requests, it is appropriate for the Court to order limited discovery relating to such destruction and for the agency to reconstruct the destroyed records to the maximum extent possible. *See supra*. To the extent that the government intends to claim that these records would have been properly withheld under FOIA, Plaintiffs are entitled to *Vaughn* declarations relating to descriptions of the contents of these records.

Plaintiffs are also entitled to be made whole by an award of attorneys fees and costs associated with Plaintiffs' efforts to obtain the disclosure of responsive CIA records in this litigation, including efforts made in connection with this Motion. *See Jefferson*, 123 F. Supp. 2d at 4-5 (awarding, after government destroyed documents responsive to a FOIA request, attorney fees and costs "based on [the court's] inherent authority to impose monetary sanctions to maintain control of the litigation . . . [because] [c]ounsel was necessary to monitor and verify Defendant's reconstruction and production of responsive

records . . . [and] the efforts of Plaintiff's counsel in conducting discovery and briefing the motion for sanctions were necessitated by the actions of Defendant's employees"); *Landmark Legal Foundation v. E.P.A.*, 272 F. Supp. 2d 70 (D.D.C.2003) (holding federal agency in contempt and imposing attorneys fees and costs for violating Court's anti-tampering order intended to protect documents responsive to a FOIA request); *see also Judicial Watch v. Dept. of Commerce*, 470 F.3d 363, 371 (D.C. Cir. 2006) (upholding award of attorneys fees incurred during discovery "required to give effect to the [district] court's order granting Judicial Watch a full and fair opportunity, through additional discovery, to reconstruct or discover documents . . . destroyed or removed" by the DOC).

## CONCLUSION

The CIA has circumvented FOIA and is plainly in contempt of this Court's September 15, 2004 order. Accordingly, Plaintiffs ask that this Court:

(1) hold Defendant CIA in contempt of court;

(2) order Defendant CIA to file publicly with the Court a list that identifies with specificity all responsive records that have been destroyed or removed, the date they were destroyed or removed, and the official on whose authority they were destroyed or removed, along with sworn declarations from individuals with firsthand knowledge describing how the list was compiled;

(3) order Defendant CIA to file under seal with the Court a written document ("Written Reconstruction") that describes in as much detail as possible each of the records that has been destroyed or removed, and to file publicly with the Court sworn

declarations from individuals with firsthand knowledge attesting that the Written Reconstruction is accurate and as detailed as possible;

(4) allow Plaintiffs limited discovery regarding (2) and (3) above;

(5) order Defendant CIA immediately to provide plaintiffs with the Written Reconstruction or with a *Vaughn* declaration explaining why the Written Reconstruction should be withheld;

(6) prohibit Defendant CIA from destroying, removing or tampering with all remaining records currently in its possession or control that may be responsive to Plaintiffs' FOIA requests;

(7) order Defendant CIA to pay all attorneys' fees and costs associated with Plaintiffs' efforts to obtain responsive records from the CIA in this litigation, including efforts made in connection with this Motion;

(8) order such other relief as may be just and proper.

Respectfully submitted,

/AS/

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