

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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AMERICAN CIVIL LIBERTIES UNION, et al. :

Plaintiffs, :

-against- :

DEPARTMENT OF DEFENSE, et al. :

Defendants. :

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USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 5/8/08

**ORDER GRANTING
PLAINTIFFS' MOTION FOR
RECONSIDERATION**

04 Civ. 4151 (AKH)

ALVIN K. HELLERSTEIN, U.S.D.J.:

On January 16-17, 2008, the parties appeared before me for oral argument on three sets of pending motions in this case. I ruled on some of the issues presented to me, and reserved my decision on others until an in camera review of certain documents could be conducted. On February 15, 2008, plaintiffs filed a "supplemental brief," requesting, in part, that I reconsider my decision to decline to conduct an in camera review of the Office of Legal Counsel ("OLC")'s August 1, 2002 memorandum on interrogation techniques (Item 29). During oral argument, I held that the memorandum was properly withheld under the attorney-client privilege and therefore exempt from plaintiffs' FOIA request. See Jan. 17, 2008 Oral Argument Tr. at 76:14-15. Defendants filed a brief opposing reconsideration, and arguing that my oral ruling was correct.

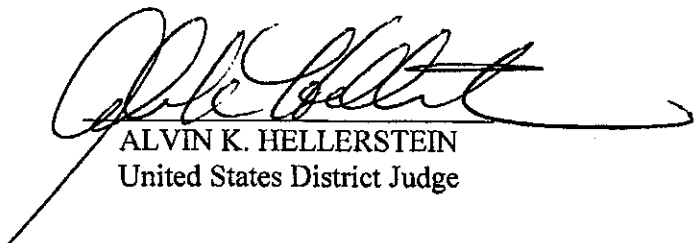
I have read the materials submitted by the plaintiffs, and realize that I did not give sufficient consideration either to Nat'l Council of La Raza v. Dep't of Justice, 411 F.3d 350 (2d Cir. 2005), or to the evidence submitted by plaintiffs to the effect that all or parts of Item 29 may have been incorporated into official practice and policy, or as justification of the same.

Accordingly, I grant plaintiffs' motion for reconsideration. The Government shall

produce Item 29 for in camera review, along with the selected sample of documents, at the previously scheduled CIA documents in camera review on May 12, 2008, at 11 a.m. in my chambers, at the United States Courthouse for the Southern District of New York, 500 Pearl Street, Room 1050, New York, NY 10007. The protocol for the in camera review shall be in the format previously described to the parties during the February 6, 2008 conference call. A copy of that protocol is attached to this order.

SO ORDERED.

New York, New York
May 8, 2008



ALVIN K. HELLERSTEIN
United States District Judge

MEMORANDUM

**Chambers of Alvin K. Hellerstein
500 Pearl Street, Room 1050
New York, NY 10007
Tel. No. (212) 805-0152**

Date: February 6, 2008

To: Parties in ACLU v. DOD, 04 Civ. 4151

From: Hon. Alvin K. Hellerstein

Re: Proposed Protocol for Examining CIA documents where Exemption 1 is Claimed

The following is a tentative procedure for the in camera review of the remaining disputed CIA documents that both parties should review before the conference call scheduled for early this evening. There are also a few additional questions I would like feedback on from you, in light of recent testimony by senior government officials before Congress.

1. Plaintiff will identify the documents, by sequence number taken from the Dorn Declaration, that are to be sampled.
2. Defendants will bring all documents (not only those to be sampled) to chambers.
3. Persons to be present: Judge, Law Clerk, Court Reporter, Gov't counsel, CIA representatives.
 - a. Only the Judge will conduct document reviews where Exemption 1 (national security) is claimed.
 - b. Only non-classified information, as determined by Gov't counsel or CIA, will be related and transcribed onto the record.
 - c. Hence, law clerk can be present, and court reporter does not have to be cleared; neither will have access to documents claimed as exempt for purposes of national security.
4. Judge will review sampled documents sequentially.
5. Judge will identify document being reviewed:
 - a. By sequence number in Dorn Declaration, date, and number of paragraphs and pages;
 - b. By authors and recipients;
 - c. By general description, non classifiable, of each sentence in each paragraph.

6. Judge will express rulings regarding availability of exemption, and presence of any segregable matters, immediately following each reviewed document, again without disclosing anything classifiable.
7. Depending on rulings, court reserves right to expand the field of samples.
8. Since the record will not contain any classifiable matter, transcript will be filed on the docket and available publicly. The CIA will be permitted to review the transcript before it is placed on the public record.
9. Questions the Judge would like comments on:
 - a. If an interrogation practice that was formerly used is no longer in use, do the relevant exemptions still apply? For example, if the subject of a document to be exempted is the practice of waterboarding, and in light of recent testimony by the Director of the CIA indicating that the practice is no longer in effect, should the exemption still be considered?
 - b. Should interrogation practices that continue to be practiced be subjects of exemption, and should it be assumed that our enemies are aware of these practices, so that secrecy should be limited only to practices that may not be used?