

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

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

) *Plaintiffs,*)

) v.)

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

) *Defendants.*)

ECF CASE

07 CV 5435 (LAP)

**DECLARATION
OF MARK
HERRINGTON**

I, Mark Herrington, hereby declare, pursuant to 28 U.S.C. § 1746, as follows:

1. I am an Associate Deputy General Counsel in the Office of General Counsel of the United States Department of Defense (“DoD”). In that capacity, I am responsible for, among other things, overseeing litigation involving the DoD. I have held this position since March 2007. In connection with that responsibility, I have supervised DoD’s consultations with the Central Intelligence Agency (the “CIA”) concerning certain documents located by the CIA in response to the Freedom of Information Act (“FOIA”) requests submitted to the CIA by Plaintiffs in the above-captioned case. I understand that the documents referred to DoD for consultation under my supervision are referred to in the CIA’s Motion for Summary Judgment as Documents 237 and 247. I submit this declaration in support of the CIA’s Motion for Summary Judgment to assert certain FOIA exemptions, on behalf of DoD, over those documents. This declaration is based on personal knowledge and on information disclosed to me in my official

capacity.

PART I
DESCRIPTION OF DOCUMENTS

2. **Document 237.** Document 237 is 28 pages in length and consists of a fax cover sheet and a 27-page section of the report by Vice Admiral Albert T. Church of his investigation into DoD detention operations and interrogation techniques in the global war on terror (“Church Report”) entitled “DoD Support to Other Government Agencies.” The Church Report was prepared at the direction of the Secretary of Defense, and was completed and delivered to the Secretary of Defense on March 7, 2005. An unclassified Executive Summary of the final report was released by DoD in 2005 and is available on the DoD website. Moreover, a properly redacted version of this section of the final Church Report is available at http://www.dod.mil/pubs/foi/detainees/church_report_3.pdf. Document 237 is a draft section of the Church Report and is marked accordingly. The date on the document indicates that it was drafted on October 7, 2004. The document contains the classification marking “SECRET.” DoD is withholding this document from release in its entirety, pursuant to FOIA Exemption 5, and, in addition, is asserting FOIA Exemption 1 over certain portions of the document, as explained below.

3. **Document 247.** Document 247 is 54 pages in length and consists of a 54-page section of a copy of the report on the AR 15-6 Investigation of the 800th MP Brigade, prepared by Army Major General Antonio M. Taguba (the “Taguba Report”). DoD has previously released this document substantially in full, with the exception of the names of DoD personnel, which are being withheld pursuant to Exemptions 6 and 7(c) as explained below. A copy of Document 247, as redacted, is available at

http://www.dod.mil/pubs/foi/detainees/taguba/TAGUBA_REPORT_CERTIFICATIONS.pdf. I

have compared the document located by the CIA to the released version of the Taguba report, and the two documents appear identical, except that the CIA version has minor formatting errors, which caused the CIA version of the document to span 54 pages, while the released version spans 53 pages. However, the two documents do not otherwise differ in content.

PART II
EXEMPTION 5 – DOCUMENT 237

3. The deliberative process privilege protects the internal deliberations of the government by exempting from release pre-decisional documents that reflect advisory opinions, recommendations, analyses, opinions, and discussions prepared to inform, or in anticipation of, decision-making. Document 237 is an October 7, 2004, draft of a section of the Church Report, which Vice Admiral Albert T. Church sent to the CIA General Counsel, Mr. John Rizzo. The final version of the Church Report was delivered to the Secretary of Defense on March 7, 2005. Document 237 is protected from release by the deliberative process privilege because it contains information that reflects the pre-decisional deliberations of DoD and other Executive Branch officials.

4. Public disclosure of Document 237 would reveal the pre-decisional deliberations of Executive Branch officials. The DoD personnel involved in the pre-decisional deliberations reasonably would have expected that their candid discussions and recommendations regarding sensitive national security issues would remain confidential. Release of this document would discourage open and frank discussions among Executive Branch officials in the future, thereby threatening the confidence needed to ensure the candor of future DoD deliberations. As a non-final draft from October 2004, this document is exempt from disclosure under Exemption 5.

PART III
EXEMPTION 1 – DOCUMENT 237

5. FOIA Exemption 1 permits the withholding of records that are "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). Section 1.1 provides that information may be classified if "(1) an original classifying authority is classifying the information; (2) the information is owned by, produced by or for, or is under the control of the United States Government; (3) the information falls within one or more of the categories of information listed in section 1.4 of this order; and (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, which includes defense against transnational terrorism, and the original classification authority is able to identify or describe the damage." Section 1.4(d) of Executive Order 12958, as amended, is entitled "Classification Categories" and provides, in relevant part, that "[i]nformation shall not be considered for classification unless it concerns: (a) military plans, weapons systems, or operations; . . . [or] (c) intelligence activities (including special activities), intelligence sources or methods."

6. Certain information contained in Document 237 is currently and properly classified under Executive Order 12958. Such information was classified by an original classifying authority, and is owned by, produced by, and under the control of the U.S. Government. Moreover, such information comes within categories (a) and (c) of Section 1.4 of Executive Order 12958, because the information concerns intelligence activities, including intelligence sources and methods, and military operations related to detainees. Furthermore, an

original classifying authority has determined that the unauthorized disclosure of this information could reasonably be expected to result in damage to the national security because hostile entities could discover information revealing details about intelligence sources and methods which could be used to counter intelligence activities and military operations. Therefore, portions of Document 237 are exempt from disclosure under Exemption 1.

PART IV
EXEMPTIONS 6 AND 7(C) – DOCUMENT 247

7. Exemption 6 exempts from disclosure records or information in “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” The exemption protects individuals from the injury that may result from the unnecessary disclosure of personal information, including individual’s names, addresses, and other personal identifying information. To determine whether Exemption 6 applies, we balance the individual’s right to privacy against the public purpose to be served by disclosure, *i.e.*, shedding light on the government’s performance of its duties and letting citizens know about the activities of the government.

8. Exemption 7(C) exempts from disclosure information “compiled for law enforcement purposes, . . . to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy.” Exemption 7(C) is more protective of privacy information than Exemption 6. Under Exemption 7(C), personal identifying information will only be released if there is a significant public interest at stake and if the privacy information is likely to advance that interest.

9. Pursuant to Exemptions 6 and 7(C), DoD has redacted from Document 247 the names of, or identifying information about, DoD employees, for various reasons. As an initial

matter, DOD has redacted the names of all DoD personnel appearing in the documents pursuant to the policies identified in the Declaration of James P. Hogan, submitted in this action.

10. Moreover, DoD has redacted personal identifying information of DoD personnel appearing in the documents – specifically, the names of DoD personnel below the rank of Colonel, who are named as investigated individuals and/or witnesses – because revealing that information would constitute a clearly unwarranted invasion of personal privacy. Document 247 is an investigatory record, and disclosure of identifying information would associate the named individuals with the investigation of allegations of detainee abuse. Such disclosure would invade the named individuals’ privacy and might subject them to, among other things, harassment. Disclosure of this personal identifying information would not, however, shed any light on the government’s performance of its duties. Consequently, because the privacy interests involved outweigh the negligible public interest in disclosure, DoD has determined that the information is properly withheld from release pursuant to Exemptions 6 and 7(C)

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11. I have carefully reviewed Documents 237 and 247 for segregation of non-exempt information, and I have determined that there all reasonably segregable information has been released.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 22, 2009.



MARK H. HERRINGTON, ESQ.