

IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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AMERICAN CIVIL LIBERTIES UNION, )  
et. al. )  
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Plaintiffs, )  
 )  
v. ) Civ. Action No. 04-CV-4151 (AKH)  
 )  
DEPARTMENT OF DEFENSE, et. al )  
 )  
Defendants. )

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**THIRD DECLARATION OF PHILLIP J. MCGUIRE**

I, Phillip J. McGuire, declare as follows:

(1) I am the Director of the United States Army Crime Records Center (“USACRC”), U.S. Army Criminal Investigation Command (“CID”) Fort Belvoir, Virginia. My first declaration in this matter was signed on October 14, 2004 (hereinafter “First McGuire Declaration”) and my second declaration was signed on March 30, 2005 (hereinafter “Second McGuire Declaration”). This third declaration incorporates and supplements the information provided in my previous declarations.

**PURPOSE OF THIS DECLARATION**

(2) This declaration describes the process used to further refine the number of photos and movies previously identified as the “Darby photos” (see

Second McGuire Declaration, paragraphs 2-3), and provides justification for the assertion of FOIA Exemption 7(F) to responsive photos and movies.

### **IDENTIFICATION OF RESPONSIVE DOCUMENTS**

(3) The Second McGuire Declaration at paragraphs 3-4 describes the process that was used to identify all photographs that were "arguably responsive" to Plaintiffs' request for records concerning individuals held at detention centers overseas ("Detainees"). The initial review process identified 144 photos and four movies that appeared to contain images of foreign nationals under the control of the United States.

(4) Samples of the photos at issue were provided to Judge Alvin Hellerstein at an *in camera* hearing on May 26, 2005 by representatives of the U.S. Army, including this declarant. Judge Hellerstein made specific rulings on 19 photos and provided general processing guidance to assist the Army in further review and processing of the photos/movies.

(5) Using the processing guidance provided by Judge Hellerstein, the Army reviewed each photograph in detail. CID agents assigned to the corresponding criminal investigation provided information regarding the individuals and circumstances depicted in the photos, to further assist in the

identification and categorization of the photos.

(6) The resulting detailed review of each photo determined that 57 photos were not responsive (see Exhibit A for an itemized accounting of photos determined nonresponsive). Nine of the photos were specifically ruled nonresponsive *in camera* (See Exhibit A “specific ruling” citations) and 48 were determined to be nonresponsive after application of the criteria articulated by Judge Hellerstein *in camera* (See Exhibit A “applied ruling” citations). Of the 48 applied rulings, three photographs were eliminated via application of the *in camera* criteria that they do not depict a detainee-related event or there is nothing in the picture to suggest detention. Twenty-two photos were eliminated by applying the *in camera* criterion that no value remained after meaningful redaction. Twenty-three photos were eliminated by application of multiple criteria (Exhibit A). Accordingly, 87 directly responsive photos, and four movies are now considered as responsive Darby photos. It is these 87 photos and four movies that are the subject of this declaration and attachments.

**JUSTIFICATION OF  
FOIA EXEMPTIONS ASSERTED**

(7) The First McGuire Declaration was drafted early in the process of production of documents. Even though CID had only begun processing its

documents at the time of the First McGuire Declaration, the declaration was drafted and filed in order to allow the Court and Plaintiffs to understand the documents as they were provided. Although there was no way to know exactly what exemptions would be claimed throughout the processing of the thousands of CID documents, a good faith effort was made to identify all expected withholdings and the exemptions that would be asserted. CID is asserting FOIA exemptions (b)(6), (b)(7)(C) and (b)(7)(F) to support the withholding of the 87 responsive pictures and four movies. All of these exemptions were asserted and preliminarily defended in the First and Second McGuire declarations. Specific justification of the assertion of Exemption (b)(7)(F) to the Darby photos and movies is provided below.

**EXEMPTION (b)(7)(F)**  
**INFORMATION WHICH COULD ENDANGER**  
**THE LIFE OR SAFETY OF THIRD PARTIES**

(8) 5 U.S.C. §552(b)(7)(F) permits the withholding of law enforcement-related information, the release of which "could reasonably be expected to endanger the life or physical safety of any individual". The information allowed to be withheld by the agency is not limited to personally identifying information, such as with Exemption (b)(7)(C), but extends to any "records or information compiled for law enforcement purposes" (10 U.S.C. §552(b)(7) (2000)). The photos and movies at issue were identified in the Second McGuire Declaration at paragraph 3. As explained, the Darby discs were first received

by CID agents in January 2004. These agents immediately opened a criminal investigation to begin inquiry into the apparent criminal activity depicted therein. While the photos have been viewed by other individuals within the government, the primary purpose of the maintenance of these discs has been to allow for the proper and thorough investigation and prosecution of criminal behavior. These discs continue to be controlled by CID Command, they are maintained as evidence in an open criminal investigation and requests to use or view the discs are channeled through law enforcement officers. The Darby discs have been "law enforcement-related information" since the time of their collection by government representatives until the present.

(9) As the agency representative tasked with determining the proper applicability of FOIA exemptions to CID law enforcement information, I am aware that the applicability of Exemption (b)(7)(F) requires me to evaluate whether the release of information within my control could reasonably be expected to endanger the life or safety of any individual. In order to make this assessment, I may need to consult with CID agents assigned to specific cases, or other officials who are privy to information that allows me to determine if a threat to third parties is a reasonable concern.

(10) In this specific instance, I have received information from General

Richard B. Myers, the Chairman of the Joint Chiefs of Staff (“CJCS”), and Mr. Ronald Schlicher, Minister-Counselor in the Senior Foreign Service, United States Department of State, which leads me to believe that there is a very real threat to the lives and physical safety of many individuals, if images contained in the Darby discs are released. This information is specifically elaborated in the declarations of General Richard B. Meyers (“Meyers Declaration”) and the declaration of Mr. Ronald Schlicher (“Schlicher Declaration”). Exhibit A to this declaration indicates which photos are addressed by the Meyers and Schlicher declarations. Because Exhibit A contains information drawn from these declarations which has been submitted under seal, I respectfully request that Exhibit A also be maintained under seal.

(11) As I understand it, my obligations under Exemption (b)(7)(F), unlike my obligations under (b)(6) and (b)(7)(C), do not involve an assessment of the public interest or a balancing of the public right to know. It is my obligation to review the evidence and information available to me and make a determination as to whether there is a legitimate risk to third parties. If I find such a risk, I consider it my obligation to protect those third parties by withholding the documents at issue.

(12) General Myers and Ronald Schlicher are extremely qualified to

assess and opine on the threat to the lives and safety of U.S. and Coalition partner personnel serving worldwide, to include accompanying contractors; and the danger posed to Iraqi and Afghani military, police, and government officials as well as Iraqi and Afghani civilians at large. By law, as CJCS, General Myers is the senior military advisor to the President, the Secretary of Defense, and the National Security Council. General Myers regularly consults with the Secretary and senior U.S. and foreign government officials and commanders in the field, to include General John P. Abizaid, Commander, U.S. Central Command; and General George W. Casey, Jr., Commander, Multi-National Forces, Iraq. Mr. Schlicher served until recently as the Deputy Assistant Secretary and Coordinator for Iraq in the Bureau of Near Eastern Affairs within the U.S. Department of State. He has spent his career in positions that have given him a unique and extensive expertise in Middle Eastern culture and ideology. As a result of their respective backgrounds and positions, these men are best qualified to assess the U.S. and Coalition efforts in the war on terror worldwide and the specific operational posture of U.S. and Coalition efforts in Iraq and Afghanistan. Accordingly, I am persuaded by the opinions of General Myers and Ronald Schlicher that the release of the images identified in their declarations will pose a threat to the lives and safety of third parties.

(13) Exemption (b)(7)(F) was originally asserted in the First McGuire

Declaration at paragraph 37. At that time, the exemption was asserted to protect the identities of citizens of Iraq or Afghanistan who may have cooperated with CID or other U.S. forces. In this third declaration the breadth of the exemption is being expanded to protect the citizens of Iraq and Afghanistan in general, as well as the lives of United States service members and attached personnel.

(14) I am convinced that there is a great risk to civilians within the countries of Iraq and Afghanistan, as well as to U.S. forces and citizens located within those countries, if the photos and movies at issue are released. I base this determination upon the expertise of General Meyers and Ronald Schlicher, and upon my knowledge of the content of the pictures and movies.

### **CONCLUSION**

(15) For the foregoing reasons, I submit this declaration in support of the decision to refine the number of responsive Darby photos to 87 photos and four movies and in support of the assertion of FOIA Exemption (b)(7)(F) with respect to the images identified in the declarations of General Myers and Mr. Schlicher, the release of which I believe would pose a threat to the lives and safety of third parties. I continue my previous assertion of exemptions (b)(6) and (b)(7)(C) as further justification for the withholding of all Darby photos and movies.



Pursuant to 28 U.S.C. § 1746, I declare the foregoing to be true and correct.

Executed this 20th day of July, 2005.

A handwritten signature in black ink, appearing to read "Phillip J. McGuire", written over a horizontal line.

**Phillip J. McGuire**  
**Director**  
**U.S. Army Crime Records Center**