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

PLAINTIFFS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs submit this reply memorandum of law in further support of their motion for partial summary judgment with respect to the Darby images of abuse. Defendant Department of Defense ("Defendant" or "the government") seeks to withhold these images under a novel and expansive construction of Exemption 7(F) of the Freedom of Information Act ("FOIA") that, if adopted, would justify the suppression of virtually all records relating to the government's misconduct in its treatment of detainees. Indeed, taken to its logical conclusion, the government's position would insulate from FOIA disclosure precisely those documents about which the public would care most, and as to which disclosure is most appropriate.

In their opposition to the government's argument, Plaintiffs established that the government's construction of Exemption 7(F) is wholly unprecedented and contrary to legislative intent in amending this provision, that the government had not met its burden under the plain language of the statute, and that permitting the government to withhold evidence of its own misconduct on grounds of adverse reaction would eviscerate the principles of democracy and government accountability enshrined in FOIA. The government has failed to provide any meaningful response to those arguments. It has not met its burden of showing under the plain language of Exemption 7(F), that release of the Darby images "could reasonably be expected to endanger the life or safety of any individual." Nor is it able to propose any principle for limiting its construction of Exemption 7(F), urging instead a construction that is wholly contrary to Congressional intent. This Court should reject the government's attempts to shield its own misconduct from public scrutiny and order the release of the Darby images.

ARGUMENT

I. THE GOVERNMENT HAS NOT SHOWN THAT RELEASE OF THE DARBY IMAGES "COULD REASONABLY BE EXPECTED TO ENDANGER THE LIFE OR SAFETY OF ANY INDIVIDUAL."

As set forth in Plaintiffs' opposition brief, the expansive construction of Exemption 7(F) that the government presents is wholly unprecedented. See Plaintiff's Memorandum of Law, dated Aug. 3, 2005 ("Pls.' Mem. of Law"), at 3-6. Indeed, the government cannot cite to a single case that permits responsive records to be withheld on grounds of a potential adverse reaction to their release. Id. Unlike all of the other cases relied upon by the government, the harm that the government fears in this case does not directly flow from information disclosed in the records (e.g., information identifying an individual, or technical information), but rather, as the government itself admits, from the anticipated violent reaction to the information or its value as "propaganda" which can be exploited by the insurgents. See Defendant's Supplemental Memorandum of Law, dated Aug. 10, 2005 ("Def.'s Supp. Mem. of Law"), at 6; Declaration of Michael E. Pheneger, dated Aug. 2, 2005 ("Pheneger Decl.") ¶¶ 7-11. The causal link between the disclosure of the Darby images and the ensuing harm is, however, too attenuated to meet the "could reasonably be expected to endanger" standard set forth in the plain language of Exemption 7(F).

The government never addresses this issue head on. Instead, it takes issue with tangential factual claims. For example, in an effort to discredit Plaintiffs' declarant, retired Army Colonel Michael Pheneger, and to "demonstrate the limits of his knowledge," Defendant's Supplemental Reply Memorandum of Law, dated Aug. 10, 2005 ("Def.'s Supp. Reply Mem."), at 4, the government disputes his statement that he has seen no convincing evidence that publication of the Abu Ghraib images in 2004 caused loss of life, Pheneger Decl. ¶ 12.

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[redacted] Def.'s Supp. Reply Mem. at 4. But this does not address Pheneger's central claim– namely, that the government has pointed to no evidence of any *causal* connection between release of the photos and the increase in violence. See also Declaration of Khaled Fahmy, dated Aug. 4, 2005 ("Fahmy Decl."), ¶ 6 ("[I]t is impossible to find a clear correlation between the public release of the photos in Spring of 2004 and the insurgency incidents. The increase in the number of insurgency incidents could be seen to be connected to the first anniversary of the occupation in April 2004, to the Battle of Falluja in November 2004, and to the Iraqi general elections in January 2005.").

In addition, the government seeks to undermine Pheneger's declaration by arguing that he is "recasting the issue based upon his own value judgments." Def.'s Supp. Reply Mem. at 2. But Pheneger's statement that "the long-term benefits of openness and freedom of information outweigh the short-terms costs that the dissemination of information may impose" is not simply a reflection of his own personal value judgments or an attempt to "impose a balancing test upon a statute that does not require one." Def.'s Supp. Reply Mem. at 2. Rather, his statement is a recognition of the balance Congress itself struck when it enacted FOIA, and thus of the context within which Exemption 7(F) must be construed.[1]

The government also continues to put great weight on the riots in Afghanistan, Iraq and elsewhere in the Middle East that it now contends were "ignited" by *Newsweek*'s article about abuse of the Koran in Guantanamo. See Def.'s Supp. Reply Mem. at 4-5. Quite apart from whether this constitutes the kind of causal connection sufficient to withhold documents under Exemption 7(F), there is no basis for assuming that release of the Darby images would provoke a

[1] As demonstrated below, it is not Pheneger's reasoning that would "eviscerate the protections of Exemption 7(F)," Def.'s Supp. Reply Mem. at 2, but rather the government's reasoning that would eviscerate the basic purpose of FOIA, with respect to the most important controversial issues of the time, whether related to a war on terrorism or otherwise.

similar reaction. As set forth in the attached Fahmy Declaration, "there is no parallel between alleged desecration of the Koran and the photographs of prison abuse." Fahmy Decl. ¶ 7. Indeed,

> [t]here is nothing that approaches the holiness of the Koran in Islam. The Koran is believed by Muslims to be the literal word of God. They believe that it contains the eternal and unchanging message from God to humanity. There is nothing in Islam that approaches the Koran's sanctity, not even the position of the Prophet Muhammad who is believed to have been only the messenger through whom God chose to reveal this eternal and unchanging message. To compare Muslim's feelings about reports of alleged desecration of the Koran to their feelings about abuse of Iraqi prisoners by US troops is to misunderstand a fundamental tenet of Islam, namely, the sanctity of the Word of God. This comparison also confuses feelings of anger, frustration and/or hostility that some Iraqis may have towards what they consider a foreign occupation of their country with a basic religious feeling that millions of Muslims around the world have regarding what they consider their Holy Book.

Id.

The government's further claim that the **REDACTED** Def.'s Supp. Reply Mem. at 8 (citing the declarations of Schlicher and Myers), is similarly unfounded. Rather, as set forth in the Fahmy Declaration, it is just as likely that "[a]n official release of the photographs, and official action to hold perpetrators accountable, will be seen by many Muslims, as by many Americans, as significant progress." Fahmy Decl. ¶ 11.

II. THE GOVERNMENT'S CONSTRUCTION OF EXEMPTION 7(F) IS FUNDAMENTALLY AT ODDS WITH THE VALUES THAT FOIA WAS MEANT TO PROTECT

In creating discrete exceptions to FOIA's general rule of full disclosure, Congress struck a careful balance between the public's right to information about government conduct and the need to protect against disclosure in certain discrete circumstances. See ACLU v. Dep't of

Defense, 339 F. Supp. 2d 501, 504 (S.D.N.Y. 2004) ("In enacting FOIA, 'Congress emphasize[d] a preference for the fullest possible agency disclosure of information consistent with a responsible balancing of competing concerns." (alteration and omission in original)); Dep't of Air Force v. Rose, 425 U.S. 352, 360-61 (1976) ("[FOIA's] basic purpose reflected 'a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.'" (quoting S. Rep. No. 89-813, at 3 (1965)). The government's construction of Exemption 7(F) in this case would undo this balance. Under the government's construction of Exemption 7(F) any information about its misconduct could be withheld under FOIA if its release would damage the image of the United States and could thereby be exploited for its propaganda value in a way that could endanger lives. Indeed, the more egregious the misconduct revealed by the documents, the more compelling would be the government's basis for shielding these documents from disclosure.[2] See generally, Pls'. Mem. of Law at 13-15.

The government fails to engage this argument in any meaningful way. Instead, it asserts that it has invoked the exemption "only in the most limited circumstances, based upon a real and substantive concern about violence against members of the U.S. military as well as civilians." *See* Def.'s Supp. Reply. Mem. at 13. But the government offers no guiding principles for when a "concern about violence" is sufficiently "real and substantive" to warrant withholding under 7(F), and thus no means to limit application of the exemption. Indeed, the concerns that the government cites could as easily be invoked for a myriad of other documents that the government has released pursuant to this lawsuit, and still other documents that Plaintiffs continue to seek.

[2] That Exemption 7(F) applies only to records compiled for law enforcement purposes would offer little protection: All the government would have to do is refer the documents for investigation, and they would be protected from disclosure under Exemption 7(F). See John Doe Agency v. John Doe Corp., 493 U.S. 146, 162-64 (1989) (Scalia, J., dissenting) (noting the potential for abuse of Exemption 7's requirement of compilation for law enforcement purposes).

For example, a number of FBI documents released in this case to Plaintiffs contained allegations of Koran abuse. The government does not respond to Plaintiffs' concern that its construction of 7(F) would have allowed the withholding of these records. *See* Pls.' Mem. of Law at 12. Instead, it points to the fact that it has processed over 100,000 pages of documents in response to Plaintiffs' FOIA request, contrasting that number to the less than 100 images it now seeks to withhold. *See* Def.'s Supp. Reply. Mem. at 13. Under the government's current construction of Exemption 7(F), however, Plaintiffs would not be entitled to *any* document that depicts the abuse of detainees by U. S. forces since any such document could "reasonably be expected" to trigger an angry response and thereby "endanger the life or physical safety of any individual." Plaintiffs submit that there is no limit to the construction urged by the government, which is the very reason why it must be rejected.[3]

III. THIS COURT CAN LOOK TO LEGISLATIVE HISTORY BECAUSE THE GOVERNMENT'S CONSTRUCTION IS PLAINLY AT VARIANCE WITH THE POLICIES UNDERLYING FOIA AND EXEMPTION 7(F).

Remarkably, the government adds that the overbreadth of its construction of Exemption 7(F), assertedly rooted in the plain language of that provision, is "irrelevant to the straightforward statutory inquiry" and "should be addressed to Congress, not this Court." Def.'s Supp. Reply Mem. at 13-14. Leaving aside that the government has not satisfied the elements set forth in the plain language of the statute, it is well-established, however, that where a plain text reading of a statute produces a result "'*plainly at variance* with the policy of the legislation as a whole,'" courts "construe the language so as to give effect to the intent of Congress" rather than to "literal words." United States v. Am. Trucking Ass'ns, 310 U.S. 534, 542-45, 553 (1940) (emphasis added) (ignoring the plain meaning of "employees" in favor of a narrow construction

[3] Notably, the government has not responded to Plaintiffs' argument that it should not be permitted to circumvent established constraints on withholding records on national security grounds by invoking Exemption 7(F).

consistent with the legislative history); United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242 (1989) (acknowledging that the "intention of the drafters . . . controls" where the "literal application of a statute will produce a result demonstrably at odds with the intention of the drafters," but employing a plain text reading where that condition was not met). This principle is aptly described in the words of Judge Learned Hand, who cautioned against making "a fortress out of a dictionary" in applying the literal meaning of words in a statute. Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945) (Hand, J.); see also, Pub. Citizen v. United States Dep't of Justice, 491 U.S. 440, 454-55 (1989) (adopting the non-literal reading of the word "utilized" given, *inter alia*, congressional intent evidenced by the legislative history).

In assessing the propriety of a particular construction, the Supreme Court has looked at both the underlying statute as a whole and the legislative history. See Rector of Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892) ("frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act"); Pub. Citizen, 491 U.S. at 455-65 (looking to legislative history to interpret "utilized"); Watt v. Alaska, 451 U.S. 259, 266 (1981) (noting that "[t]he circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect," and construing "minerals" not in accordance with the plain language of the statute because of, *inter alia*, legislative history suggesting otherwise). Thus, in numerous instances, courts have looked to statutory context or legislative history in construing phrases similar to "any individual." In United States v. Palmer, for example, Justice Marshall considered the meaning of "any person or persons" in the context of a piracy statute:

> The words of the section are in terms of *unlimited* extent. The words "any person or persons," are broad enough to comprehend every human being. But general words must not only be limited to

> cases within the jurisdiction of the state, but also to those objects to which the legislature intended to apply them.

16 U.S. (3 Wheat.) 610, 631 (1818) (Marshall, J.) (emphasis added). Justice Marshall ultimately adopted a limited interpretation of "any person or persons" in order to align the meaning of the statute with the intent of Congress. Id. at 631-34; see also, Small v. United States, 125 S. Ct. 1752, 1754-55 (2005) (interpreting "any court" not to include foreign courts in a felon-in-possession statute on the basis of a lack of any legislative history to upset the presumption against extraterritoriality).

Defendant urges this Court to ignore the legislative history of Exemption 7(F) because its language is "clear and unambiguous." Def.'s Supp. Reply Mem. at 10. However, Defendant's limitless reading of this Exemption is "plainly at variance with the policy [of FOIA] as a whole," Am. Trucking Ass'ns, 310 U.S. at 543-44,[4] and with the legislative intent behind Exemption 7(F) specifically. See Pls.' Mem. of Law at 7-9.

As previously set forth in Plaintiffs' opposition brief, the legislative history of Exemption 7(F) demonstrates that Congress intended this provision to be far narrower than the government's construction. First, Exemption 7(F) was intended to apply only when release of records would endanger individuals with a nexus to law enforcement interests. See Pls.' Mem. of Law at 7-9. Second, and relatedly, the same legislative history supports a narrower construction of the phrase "could reasonably be expected to endanger" than the one proposed by the government here. This history demonstrates that Exemption 7(F) was intended to provide a basis for withholding records that by identifying an individual would endanger his or her life. [5]

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[4] See Dep't of Interior v. Klamath, 532 U.S. 1, 16 (2001) ("In FOIA . . . a new conception of Government conduct was enacted into law, 'a general philosophy of full agency disclosure'"); Halpern v. FBI, 181 F.3d 279, 286 (2d Cir. 1986) (The Act's "most basic premise [is] a policy strongly favoring public disclosure."); id. at 287 (narrow construction of FOIA exemptions); John Doe Agency v. John Doe Corp., 493 U.S. 146, 152 (1989) (same).

[5] The government challenges Plaintiffs' assertion that Brady Lunny v. Massey, 185 F. Supp. 2d 928 (C.D. Ill. 2002), and Sanders v. Department of Justice, No. CIV.A.91-2263-0, 1992 WL 97785 (D. Kan. Apr. 21, 1992), fit into their "nexus to law enforcement argument." *See* Def.'s Supp. Reply Mem. at 12. The government conflates the court's characterization of defendant's argument in Sanders as the holding in that case. In that case, the court "agree[d] that disclosure of the withheld information could reasonably be expected to endanger the personal safety of *individuals who released information to the FBI.* Accordingly [it held] that the defendant properly invoked Exemption 7(F)."

Thus, the causal connection between record disclosure and alleged harm as envisaged by Congress was far more direct than the kind of attenuated causal connection that the government posits here. Indeed, the government's construction of Exemption 7(F) would justify suppressing the kind of information that is published daily on the front pages of national newspapers.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant Plaintiffs' Cross Motion for Partial Summary Judgment, and order Defendant Department of Defense to release the Darby images of abuse.

Respectfully submitted,

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Sanders, 1992 WL 97785, at *5 (emphasis added). Similarly, in Brady-Lunny, the court rested its holding on possible danger to inmates and informants likely to result from disclosure of inmates' names. 185 F. Supp. 2d at 932. Both these cases differ from the instant case in two respects. First, the potential danger in these cases was to individuals who bore a nexus to law enforcement interests. Second, the causal link between disclosure and the potential harm was not based on an adverse reaction to the disclosure of records, as it is in the instant case, but on a more direct link between disclosure and the anticipated harm.

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Dated: August 12, 2005

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