UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

STEPHEN H. OLESKEY, ON BEHALF OF GUANTANAMO INTERNEES LAKHDAR BOUMEDIENE, MOHAMED NECHLA, MUSTAFA AIT IDIR, SABER LAHMAR, HADJ BOUDELLA, AND BELKACEM BENSAYAH, Plaintiff, v. UNITED STATES DEPARTMENT OF DEFENSE AND UNITED STATES DEPARTMENT OF JUSTICE, Defendants.	**Civil Action No. 05 10735 RGS**

PLAINTIFF'S CONSOLIDATED MEMORANDUM OF LAW IN OPPOSITION TO DEPARTMENT OF DEFENSE'S MOTION FOR SUMMARY JUDGMENT, AND REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR *IN CAMERA* REVIEW AND TO COMPEL PRODUCTION OF CERTAIN KEY DOCUMENTS

(LEAVE TO FILE MEMORANDUM OF LAW IN EXCESS OF 20 PAGES GRANTED ON JUNE 16, 2010)

PRELIMINARY STATEMENT

Plaintiff's motion for *in camera* review concerns a narrow set of documents that the Government is improperly withholding contrary to the Freedom of Information Act ("FOIA"). Exemptions from disclosure under FOIA "are to be construed narrowly, with any doubts resolved in favor of disclosure. The government bears the burden of proving that withheld materials fall within one of the statutory exemptions." *Carpenter v. DOJ*, 470 F.3d 434, 438 (1st Cir. 2006) (citations omitted). Plaintiff respectfully submits that the Government has failed to meet its burden with respect to, at a minimum, the following documents:

(1) **A video recording of the beating of Requester Ait Idir**. The Government's reliance on Exemption 1 (national security) is utterly unsupported, as it offers no explanation of how release of such a video recording (with appropriate removal of identifying information) could possibly harm national security. Its invocation of Exemption 2 is also meritless, as release of the recording would not lead to the circumvention of any agency regulation.

(2) **A series of exculpatory e-mails describing allegations against the Requesters as "bullshit."** The Government relies on Exemption 5 (deliberative process), but offers no basis for concluding that the e-mails ever played a role in any deliberative process. Exemption 7(A) is likewise inapplicable, as there is no concrete, prospective proceeding with which release of the e-mails could possibly interfere.

(3) **PowerPoint presentations referring to Requesters as "the Algerian Six."** The Government again invokes Exemption 7(A), even though there is no longer even an allegation that a group called "the Algerian Six" ever existed.

The documents targeted by Plaintiff's motion for *in camera* review are limited and manageable, consisting only of seventy-three pages and one video recording. Plaintiff respectfully requests that this Court review these documents *in camera* and compel their production. *See infra* § II.

Additionally, in reviewing the affidavits and accompanying *Vaughn* indices attached to the Government's summary judgment brief ("Govt. Br."), as well as the documents that have been produced by the Government in redacted form, Plaintiff has identified certain documents for which the Government has not adequately justified its withholding or redaction. Specifically,

there are numerous documents withheld or redacted under Exemption 7(A), and a smaller number under Exemptions 2, 5, and 6, with respect to which the justification offered by the Government is either insufficient or implausible. Plaintiff respectfully requests that this Court order the Government to reprocess these documents and either produce them in their entirety, produce them with more narrowly targeted redactions, or provide adequate justification for not doing so. *See infra* § III.

BACKGROUND

Requesters Lakhdar Boumediene, Mohamed Nechla, Mustafa Ait Idir, Saber Lahmar, Hadj Boudella, and Belkacem Bensayah ("Requesters") were first seized in October 2001, when the U.S. Embassy in Sarajevo demanded that Bosnian authorities arrest them for their involvement in an alleged plot to bomb the Embassy. When neither requests to the U.S. government by Bosnian authorities nor the Bosnian government's own ninety-day investigation uncovered any evidence to support that allegation, the highest court of Bosnia, at the recommendation of the Chief Prosecutor, ordered the Requesters released.

Instead of being released, the Requesters were seized by U.S. and Bosnian forces and transported to the military detention center at Guantanamo Bay, Cuba ("Guantanamo"), where they spent the next seven years. There, the Requesters all suffered severe physical and psychological abuse, including, among other inhumane treatment, two attacks on Mr. Ait Idir by rogue guards; over 24 months of isolated imprisonment of Mr. Lahmar; and 29 months of hunger strike and twice-daily forced feeding through a nose tube for Mr. Boumediene.

When forced to defend its position in a *habeas* proceeding, the government dropped all allegations that there had ever been a bomb plot. On November 20, 2008, Judge Richard Leon of the U.S. District Court of the District of Columbia ruled that the detention of Requesters

Boumediene, Ait Idir, Boudella, Lahmar, and Nechla was unlawful, and ordered their release. *Boumediene v. Bush*, 579 F. Supp. 2d 191, 197-98 (D.D.C. 2008). Judge Leon held that Requester Bensayah's detention was lawful, but the U.S. Court of Appeals for the D.C. Circuit reversed and remanded that decision two days ago. *Bensayah v. Obama*, No. 08-5537 (D.C. Cir. June 28, 2010).[1]

Plaintiff sent the underlying FOIA requests ("Requests") to the Department of Defense ("DOD") and Department of Justice ("DOJ") on September 28, 2004. *See* Dkt. No. 1, Ex. 4. In October 2004, DOD granted Plaintiff's request for expedited processing of the Requests. However, it had not produced a single document by April 13, 2005, at which point Plaintiff filed this action. Thereafter, the Government searched for and produced responsive documents, accompanied by *Vaughn* indices asserting the exemptions under which it withheld thousands of documents. On April 19, 2010, the Government moved for summary judgment, asserting that each withheld document, though responsive, is appropriately withheld.

ARGUMENT

I. Legal Standard.

"FOIA's basic aim [is] sunlight." *Aronson v. IRS*, 973 F.2d 962, 966 (1st Cir. 1992). Accordingly, the Government may not withhold a document unless it demonstrates that the document meets one of the nine statutory exemptions to FOIA, each of which is to be narrowly

[1] While the D.C. Circuit's judgment is public, the opinion is not, as of this date. Plaintiff reserves the right to address the opinion in more detail in his surreply brief, by which point an unclassified version will have been released. Separately, in January 2009, President Obama established an Inter-Agency Task Force ("Task Force"), which he charged with reviewing the cases of the 220-plus men then held at Guantanamo. The Task Force made recommendations about which men should be released, prosecuted by Military Commissions, or otherwise detained. Requester Bensayah's case was reviewed in that process. The Task Force completed its work and disbanded on January 22, 2010. *See* Guantanamo Review Task Force Final Report at 28 (Jan. 22, 2010), *available at* http://media.washingtonpost.com/wp-srv/nation/pdf/GTMOtaskforcereport_052810.pdf ("The review process established pursuant to the Executive Order is now complete."). Around this time, Bensayah's counsel was contacted by attorneys for the government. The government has directed that Bensayah's counsel not disclose the substance of that discussion. Since that conversation occurred, Bensayah's counsel has discussed with representatives of a foreign government the possible resettlement of Bensayah to that country. Plaintiff reserves the right to submit a sealed filing to this Court addressing the result of the Task Force process with respect to Mr. Bensayah.

construed. *See, e.g.*, *Church of Scientology Int'l v. DOJ*, 30 F.3d 224, 228 (1st Cir. 1994) ("The policy underlying FOIA is . . . one of broad disclosure, and the government must supply any information requested by any individual unless it determines that a specific exemption, narrowly construed, applies. The government bears the burden of demonstrating the applicability of a claimed exemption, and the district court must determine *de novo* whether the queried agency has met this burden." (citations omitted)). Additionally, even if portions of a document are exempt, the Government must produce any non-exempt portion that is not "inextricably intertwined with exempt portions." *Mead Data Ctr., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977).

II. The Government Has Failed To Demonstrate That the Documents Identified in Plaintiff's Motion for *In Camera* Review Are Exempt.

On April 7, 2010, Plaintiff filed a motion focusing on three categories of documents. *See* Plaintiff's Motion for *In Camera* Review and To Compel Production of Certain Key Documents ("Key Doc. Br."). Plaintiff requested that this Court review those documents *in camera* and compel their production, noting that "[t]he Court's authority to conduct an *in camera* review is exceedingly broad." *Id.* at 5. *In camera* review is especially appropriate given the limited number of documents in question – one video recording and seventy-three pages of e-mails and PowerPoint presentations – and the generalized rationale offered by the Government to support withholding them.

In its opposition to Plaintiff's April 7 motion, *see* Govt. Br. at 41-46, the Government does not contend that *in camera* review would be problematic or improper. Rather, the Government simply argues that it has provided sufficient information about the documents in its affidavits and *Vaughn* indices to justify the exemptions claimed. This argument fails. As explained below, *see infra* §§ II.A-C, the exemptions claimed are not justified by the information

provided to Plaintiff. Accordingly, *in camera* review is appropriate to determine whether the exemptions claimed are supportable. *See, e.g., Ray v. Turner*, 587 F.2d 1187, 1214 (D.C. Cir. 1978) (*in camera* review is appropriate where the government "fails to demonstrate . . . that . . . material is *clearly* exempt" (emphasis added)). If they are not, the documents should be produced.[2]

A. The Government Has Failed To Demonstrate That the Video Recording of the Beating of Requester Ait Idir and Related Documents Are Appropriately Withheld Under Exemptions 1, 2, 3, or 6.

(1) Video Recording

One night in early 2004, a block of prisoners including Requester Ait Idir was ordered to relinquish their pants to prison guards. Ait Idir said he was willing to do so as long as guards would assure him that he could have his pants back for prayers, since Muslim men must cover their legs during prayer. The guards' orders did not allow them to provide that assurance. Instead, a Forced Cell Extraction Team ("Extraction Team") entered Ait Idir's cell and forcibly removed his pants. When he defended himself, the Extraction Team sprayed his face with chemicals and physically subdued him. After shackling Mr. Ait Idir, guards severely beat him on two occasions.[3] One such incident was recorded, in connection with standard Extraction Team practice, and the recording has been maintained on a DVD (hereinafter, "the DVD"). *See*

[2] Plaintiff is willing to provide a security-cleared attorney to participate in a closed session in which that attorney, counsel for the Government, and the Court may review the classified documents at issue and discuss the appropriateness of the exemptions claimed by the Government. This would afford an opportunity for the Court to hear exemption-related argument from both parties in an environment, unlike the present one, in which each side would have equal information about the documents in question. *Cf. Teich v. FDA*, 732 F. Supp. 17, 19 (D.D.C. 1990) (noting that district courts may exercise their discretion to grant a FOIA plaintiff's attorney access to *in camera* submissions "where warranted by the circumstances").

[3] The second attack, also occurring when Mr. Ait Idir was shackled, was so vicious that it left one side of Mr. Ait Idir's face paralyzed for several months. Guantanamo medical records obtained in this case show that medical personnel at Guantanamo characterized Mr. Ait Idir's condition as "Bell's Palsy." That was not accurate. While the symptoms are similar, Bell's Palsy is not a condition resulting from blunt force trauma to the head. Requester's counsel has consulted with neurological experts at a Boston teaching hospital about Mr. Ait Idir's condition. That consultation supports Mr. Ait Idir's statement that his head suffered a severe blow in 2004.

Key Doc. Br. at 12-13; Buzby Decl. ¶¶ 7-14.[4] The Government claims that Exemptions 1, 2, 3, and 6 apply to the DVD. Buzby Decl. ¶¶ 15-17.

With respect to Exemptions 3 and 6, Plaintiff agrees that to the extent the DVD contains "personally identifiable information" of Extraction Team members, Govt. Br. at 45-46, the information should not be made public. That, however, is not a reason to withhold the DVD in its entirety. The initial portion, in which "[t]he Team [members] . . . line up in front of the camera operator and state their name(s), rank, position, show that their equipment is in working order and state that they will use the minimum amount of force necessary," Buzby Decl. ¶ 12, can be redacted. During the remainder of the recording, the "ballistic vests, helmet with face shield, neck guard and latex gloves" worn by Extraction Team members, *id.* ¶ 7, are sufficient to prevent any personal identification. If identifying characteristics are still somehow discernible, the techniques of pixelization and/or audio garbling can be used to conceal them. Especially in light of the significance of the recording, Exemptions 3 and 6 at most justify excising portions of the DVD – not withholding it. *See, e.g.*, *Ray v. Turner*, 587 F.2d at 1214 (government bears burden of demonstrating that withheld documents contain no segregable, non-exempt portions); *ACLU v. DOD*, 389 F. Supp. 2d 547, 572 (S.D.N.Y. 2005) (conducting *in camera* review of photographs and videos of detainee abuse, and requiring that they be produced in redacted form except in a few limited instances where "individual recognition could not be prevented without redaction *so extensive as to render the images meaningless*" (emphasis added)).

As for Exemption 1 – which allows the Government to withhold materials that have been properly classified "in the interest of national defense or foreign policy," 5 U.S.C. § 552(b)(1) – the Government's sole support is paragraph 15 of the Buzby Declaration:

[4] "Buzby Decl." refers to the Declaration of Admiral Mark H. Buzby (July 11, 2007), which appears on the docket in this case as Document No. 65 (filed Apr. 20, 2010).

> All video and still imagery of detained enemy combatants is properly classified SECRET IAW the classification guidance issued in 2002 by the Office of the Deputy Assistant Secretary of Defense (Security and Information Operations). It is also consistent with the current Joint Task Force Guantanamo Security Classification Guide, dated 1 December 2006, which is classified SECRET/NOFORN. It is therefore exempt from release under FOIA, 5 USC § 552(b)(1), Sec. 1.4a and c. I have reviewed the records and the response, and concur that this is an appropriate response given the information contained on the video; and the video should continue to be withheld. I have further determined that no information was classified in order to conceal violations of law, inefficiency, or administrative error; prevent embarrassment to a person, organization or agency; or prevent or delay the release of information that does not require protection in the interests of national security.

Buzby Decl. ¶ 15. What this boilerplate declaration paragraph boils down to is that the DVD is covered by Exemption 1 because Admiral Buzby says so. Missing is any explanation of how releasing the DVD could prove harmful to national security. Without such an explanation, the well-established law makes clear, the Government fails to meet its burden. *See King v. DOJ*, 830 F.2d 210, 224 (D.C. Cir. 1987) ("To support its Exemption 1 claims, the agency affidavits must . . . explain how disclosure of the material in question would cause the requisite degree of harm to the national security."); *Wiener v. FBI*, 943 F.2d 972, 981 (9th Cir. 1991) (criticizing affidavit for failing to "describe the injury to national security that would follow from . . . disclosure"); *Bay Area Lawyers Alliance for Nuclear Arms Control v. Dep't of State*, 818 F. Supp. 1291, 1298 (N.D. Cal. 1992) (criticizing affidavit for "never explain[ing] what information in the [withheld document] could harm national security, or how, or whether it is segregable"); *Elec. Privacy Info. Ctr. v. DOJ*, 511 F. Supp. 2d 56, 71 & n.10 (D.D.C. 2007) ("While the court is certainly sensitive to the government's need to protect classified information and its deliberative processes, essentially declaring 'because we say so' is an inadequate method for invoking [Exemptions 1, 3, or 5]."); *Coldiron v. DOJ*, 310 F. Supp. 2d 44, 53 (D.D.C. 2004) ("[E]ven in Exemption 1 situations, the court is not to be a wet blanket. No matter how much a court defers

to an agency, its review is not vacuous. An agency cannot meet its burden of justifying disclosure simply by invoking the phrase 'national security.'" (internal quotations and citations omitted)). The Government's affidavits must provide sufficient detail to enable the Court to fulfill its obligation, under FOIA, to conduct a *de novo* review. 5 U.S.C. § 552(a)(4)(B). As Judge Lasker explained in *Times Newspapers of Great Britain, Inc. v. CIA*, 539 F. Supp. 678 (S.D.N.Y. 1982),

> It is the Court's duty to determine whether there is a "logical" fit between the government's justification for nondisclosure and the national security. . . . The problem here, a problem common in this type of case, is that the replying agency is generally so convinced (undeniably sincerely) of the exemptability of the documents and so anxious to disclose the minimum that the law requires – believing it to be their duty not to do more – that the result quite regularly is that the agency puts before the court conclusions without the requisite degree of fact to permit the court to determine whether the conclusions are sound. In effect, the agency says, "trust me to make the decision," but the law requires that the court make the decision. While the court should give "substantial weight" to the agency's determinations, it does not follow that the court is required to accept or would even be justified in accepting the agency's conclusions simply because the agency explains what its theory is. The court must agree that the theory is sound, and it cannot do so without adequate exposure to the facts.

Id. at 683 (citations omitted). In short, the fact that Admiral Buzby invokes the phrase "national security" cannot substitute for a reasoned explanation of how our national security would be jeopardized if the DVD were disclosed.

Finally, the Government's Exemption 2 claim also fails. Exemption 2 allows a document to be withheld if (1) it relates to "'trivial administrative matters of no genuine public interest,'" or (2) disclosure would "'significantly risk[] circumvention of agency regulations or statutes.'" *Com. of Mass. v. U.S. Dep't of Public Health*, 727 F. Supp. 35, 38 (D. Mass. 1989) (quoting *Founding Church of Scientology v. Smith*, 721 F.2d 828, 830 n.4 (D.C. Cir. 1983); *Crooker v. Bureau of ATF*, 670 F.2d 1051, 1074 (D.C. Cir. 1981) (*en banc*)). The Government does not

(and could not) suggest that the DVD concerns trivial administrative matters of no public interest. Rather, it argues that disclosing the DVD would significantly risk circumvention of agency regulations, as its release "would permit hostile entities to gain specific knowledge of the operational methods employed in certain circumstances, which would provide them an opportunity to develop countermeasures or resistance tactics that could also be used in other US military detention facilities." Buzby Decl. ¶ 16.

The Government's Exemption 2 claim must fail. The Government has not identified a specific agency statute or regulation that could be circumvented through disclosure of the DVD. It is not enough to baldly assert that disclosure would permit the circumvention of agency standards generally. *See, e.g.*, *Globe Newspaper Co. v. FBI*, 1992 WL 396327, at *3 n.8 (D. Mass. Dec. 29, 1992) (rejecting the government's "extreme proposition that 'the circumvention test can be satisfied by a showing that disclosure risks circumvention of agency standards or legal requirements generally, even in the absence of a particular regulation or statute'").

Even if the Government *had* identified a specific statute or regulation, its characterization of Extraction Teams' methods as a guarded operational secret is inaccurate. Admiral Buzby himself describes Extraction Teams' standard operating procedures at length in his publicly filed declaration. He notes, for instance, that Extraction Teams' use-of-force guidelines "are modeled on the rules of force in military corrections facilities and the Federal Bureau of Prisons," and he cites a 22-page Bureau of Prisons document (available at http://www.bop.gov/policy/progstat/5566_006.pdf) that sets forth those rules in detail. Buzby Decl. ¶ 10 (citing Federal Bureau of Prisons Program Statement Number P5566.06). He also describes the protective gear worn by Extraction Team members, *id.* ¶ 7, and the personnel typically involved in a cell extraction, *id.* ¶ 11. Moreover, very precise information about Extraction Team technique is contained in a

document that the DOD released to the public in December 2007. *See generally* Camp Delta SOP ch. 24 (Mar. 23, 2003), *available at* http://www.dod.gov/pubs/foi/detainees (detailing standard operating procedures for Extraction Teams); *see, e.g.*, *id.* § 24-1(b)(2) ("The Number Two Man is responsible for securing the detainee's right arm with the minimal amount of force necessary. He will also have the handcuffs and keys for the cuffs. He is responsible for proper shackling of the detainee's wrist."); *id.* § 24-7(g) ("The PL or SOG will administer a one to three second burst of OC into the face of the detainee if the detainee still fails to comply."). This level of voluntary disclosure lays base the self-serving nature of the Government's recent claim that Extraction Teams' operational methods must be kept hidden from the public.

Lastly, even if Extraction Teams' standard operating procedures *were* a closely guarded secret, and revealing them *would* significantly risk the circumvention of a specific statute or regulation, that would still only support redacting portions of the DVD in which the procedures were being followed. According to eyewitnesses including Ait Idir, and as *in camera* review will confirm, the Extraction Team in question used a greater level of physical force than allowed by the guidelines in place then or now. Unless the Government is claiming that intentionally injuring a prisoner after he was shackled and subdued was in accordance with DOD regulations, disclosing the portion of the DVD depicting that conduct runs no risk that regulations will be revealed and thus more easily circumvented in the future.

(2) Related Documents

The Government's document search, performed only after express prodding by Plaintiff,[5] identified not only the DVD but also related logs and written materials regarding the beating of

[5] As noted in Plaintiff's motion for *in camera* review, *see* Key Doc. Br. at 13, the Government did not even acknowledge the existence of the DVD – despite it being clearly responsive to Plaintiff's initial Requests – until Plaintiff sent a supplemental request specifically seeking a "video or digital recording of the events involving Requester Ait Idir in February or March 2004 – an incident when JTF required him and 40+ other prisoners to turn in their pants to camp authorities." E-mail from Rob Kirsch to Mark Quinlivan (Apr. 21, 2006).

Requester Ait Idir. *See* Key Doc. Br. at 13; Husta Decl. ¶ 13.[6] The Government still has the DVD but claimed, in 2006, that it could no longer locate the related documents. Husta Decl. ¶ 13. The Government stated that it would "conduct[] an additional search to locate the responsive documents," and that "[a]dditional information will be provided as it becomes available," *id.*, presumably in order to alleviate potential doubts about the adequacy of its search.

Since then, however, no additional information has been provided. Plaintiff's motion for *in camera* review noted this and asked that this Court order the Government to either find and produce the documents or at least "explain in writing the additional effort made to locate them." Key Doc. Br. at 13. In response, the Government stated that "the Declaration of Captain Peter A. Husta already explains that the additional documents, as a result of changing JTF-GTMO personnel, cannot be located, but that further efforts to locate that material have been taken. Consequently, this request . . . is misplaced and should be rejected." Govt. Br. at 46 (citation omitted).[7] The Government, in effect, answered a request for a description of the additional efforts taken by stating "we already told you, additional efforts were taken." That fails to meet the Government's burden. Given that responsive documents were gathered, compiled, and then vanished, Plaintiff is entitled to know what was done to try to recover them. A conclusory statement that "further efforts . . . have been taken," *id.*, is not adequate in this context.

B. The Government Has Failed To Demonstrate That Exculpatory E-mails Referencing Requesters Are Appropriately Withheld Under Exemptions 5 or 7(A).

According to the Government, the documents within the Bates-ranges 1353-63 and 1857-64 "consist of e-mail messages among CITF Special Agents and between three Special Agents

[6] "Husta Decl." refers to the Declaration of Captain Peter A. Husta (July 7, 2006), which appears on the docket in this case as Document No. 67 (filed Apr. 20, 2010).

[7] The fact that such damaging documents have disappeared further supports the Plaintiff's position that – with respect to Guantanamo – it is appropriate for this Court to examine the Government's claims with greater scrutiny. Guantanamo lacks the reliable and historically maintained files of a typical "agency." There are no long-term agency employees there, only transient military personnel.

and intelligence analysts at other agencies, which involve candid discussions of the evidence collected, the quality of that evidence, and possible future investigative activities and leads." Govt. Br. at 42. Based on a careful review of the *Vaughn* indices, Plaintiff's counsel believes – but cannot be certain – that these e-mails include the e-mails referred to in an unclassified brief which noted that in the days leading up to the Requesters' *habeas* hearing, "exculpatory emails surfaced indicating that military intelligence officers knew by 2002 that allegations regarding their involvement with a plot to blow up the U.S. embassy in Sarajevo were 'bullshit.'" Brief for Petitioner-Appellant Belkacem Bensayah at 9, *Bensayah v. Obama*, No. 08-5537 (D.C. Cir. June 3, 2009) (unclassified version filed Sept. 11, 2009).[8]

The Government contends that these e-mails (hereinafter, "the Exculpatory E-mails") are properly withheld in their entirety under Exemptions 5 and 7(A). *See* Govt. Br. at 41-43. However, the information provided by the Government about these documents fails to support a conclusion that they fall within either exemption, especially since the exemptions "are to be construed narrowly, with any doubts resolved in favor of disclosure." *Carpenter*, 470 F.3d at 438.[9]

(1) Exemption 5

Exemption 5 allows the Government to withhold documents that would not be obtainable by a private litigant in an action against the agency under normal discovery rules and privileges, such as the attorney-client, attorney work product, and deliberative process privileges. *See, e.g.*,

[8] To the extent that the exculpatory e-mails referenced in Bensayah's unclassified brief are not contained within the Bates-ranges 1353-63 and 1857-64, Plaintiff requests that the Government identify the Bates-ranges under which such e-mails do fall. These e-mails are particularly susceptible to being challenged as non-exempt. As explained in § II.B(1), *infra*, e-mails among military intelligence officers characterizing allegations as "bullshit" can hardly be understood to have been a meaningful part of a deliberative process.

[9] The Government also claims that certain redactions are appropriate under Exemptions 2, 6, and 7(C). This does not preclude production of the documents. *See Church of Scientology*, 30 F.3d at 228 (requiring production of non-exempt portions of document unless they "'are inextricably intertwined with exempt portions'" (quoting *Krikorian v. Dep't of State*, 984 F.2d 461, 466 (D.C. Cir. 1993))). If the documents are ultimately produced in redacted form, Plaintiff reserves the right to contest the appropriateness of those redactions.

United States v. Weber Aircraft Corp., 465 U.S. 792, 799 (1984). The Government claims that the Exculpatory E-mails fall under the ambit of the deliberative process privilege, which protects "confidential intra-agency advisory opinions and materials reflecting deliberative or policy-making processes." *Judicial Watch, Inc. v. DOJ*, 365 F.3d 1108, 1113 (D.C. Cir. 2004) (internal quotations omitted).

In order to properly claim the deliberative process privilege, the Government must show that the documents withheld are both (1) "predecisional" and (2) "deliberative." *Providence Journal Co. v. U.S. Dep't of the Army*, 981 F.2d 552, 557 (1st Cir. 1992). To satisfy the first prong, the Government must "(i) pinpoint the specific agency decision to which the document correlates, (ii) establish that its author prepared the document for the purpose of assisting the agency official charged with making agency decisions, and (iii) verify that the document precedes, in temporal sequence, the decision to which it relates." *Id*. (citations and internal quotations omitted). To meet the second prong, the Government must demonstrate that the document withheld "(i) formed an essential link in a specified consultative process, (ii) reflects the personal opinions of the writer rather than the policy of the agency, and (iii), if released, would inaccurately reflect or prematurely disclose the views of the agency." *Id.* at 559 (internal quotations omitted).

The Government has not met either prong. Instead, it offers the following boilerplate about each of the Exculpatory E-mails:

> [1353-62]: The documents are e-mail messages between a CITF Special Agents [*sic*] and individuals at other DoD offices concerning criminal investigation of the detainees who are the subject of the FOIA request. They were intended to allow coordination between agents and intelligence personnel to assess the merits of the case and to guide future investigative efforts. As such they are intra-agency documents, within DoD. They were created prior to completion of the investigation to aid in determining whether further investigative efforts were warranted and

> if so, the direction of these efforts. This would lead to the adoption of a policy towards the further investigation/prosecution of these cases. . . .
>
> [1363 (and other e-mails)]: The documents are internal e-mail messages between a CITF Special Agents [*sic*] and other CITF personnel concerning criminal investigation of the detainees who are the subject of the FOIA request. They were intended to allow discussion and coordination between agents and other CITF personnel, who are agents and analysts, to assess the merits of the case and to guide future investigative efforts. As such they are intra-agency documents. They were created prior to completion of the investigation to aid in determining whether further investigative efforts were warranted and if so, the direction of these efforts. This would lead to the adoption of a policy towards the further investigation/prosecution of these cases. . . .
>
> [1857-64]: [These documents and others] are e-mail messages among CITF special agents and between these special agents and intelligence analysts at other agencies. These documents are candid discussions of the evidence collected thus far, the quality of this evidence and possible future investigative activities and leads. . . .

Ethridge Decl. ¶¶ 27-28, 58.[10] This is all of the factual information that the Government offers in support of its claim that the Exculpatory E-mails were generated as part of a deliberative process. It is not nearly enough to satisfy the Government's burden at this juncture.

First, the Government has utterly failed to meet the requirement that it "pinpoint" a specific decision and demonstrate that the Exculpatory E-mails formed an "essential link" in the process of making that decision. *Providence Journal*, 981 F.2d at 557-59; *see also Judicial Watch, Inc. v. U.S. Postal Serv.*, 297 F. Supp. 2d 252, 259 (D.D.C. 2004) ("[A]n agency must . . . pinpoint an agency decision or policy . . . or identify a decisionmaking process to which a document contributed." (citations and internal quotations omitted)). The vague notion that the information in the Exculpatory E-mails might someday "lead to the adoption of a policy towards the further investigation/prosecution of these cases," Ethridge Decl. ¶ 27, hardly qualifies as identifying a *specific* decision, policy, or decision-making process, let alone demonstrating that

[10] "Ethridge Decl." refers to the Declaration of Col. Joe E. Ethridge, Jr. (June 16, 2006), which appears on the docket in this case as Document No. 68 (filed Apr. 20, 2010).

the e-mails were an essential link in that process. *Cf. Senate of Com. of P.R. v. DOJ*, 823 F.2d 574, 585 (D.C. Cir. 1987) ("We search in vain through the . . . material submitted by the DOJ for any identification of the specific final decisions to which the advice or recommendations contained in the withheld documents contributed . . . ."); *ICM Registry, LLC v. U.S. Dep't of Commerce*, 2007 WL 1020748, at *8 (D.D.C. Mar. 29, 2007) ("[T]he fact that a document expresses its authors[']views is not dispositive if the agency has neither identified the deliberative process to which the document contributed nor explained how the materials are pre-decisional.").

Second, in determining whether a document played an essential role in decision-making, courts frequently consider the authority of the individual to whom the document was directed. *See, e.g., Stromberg Metal Works, Inc. v. Univ. of Md.*, 854 A.2d 1220, 1227 (Md. 2004) (finding deliberative process privilege claim "exceedingly remote and tenuous" where recipient of documents was low in the chain of command and there was nothing in the record to indicate that he had decision-making authority or that the documents "were used, or ever seen, by anyone up the line for their decision-making"). Typically, the deliberative process privilege is applied to documents directed from subordinate to superior. *See Schlefer v. United States*, 702 F.2d 233, 238 (D.C. Cir. 1983) (citing cases). Here, in contrast, the Exculpatory E-mails appear to be exchanges between individuals at roughly the same level, as demonstrated by (among other things) the use of the word "bullshit." Nothing in the record suggests that the e-mail recipients possessed decision-making authority, or that the e-mails were ever used or seen by a policy-maker in the course of deliberating over a policy decision. Indeed, the record suggests that the documents in question are not carefully considered policy recommendations from subordinate to superior, but rather the electronic equivalent of a "water-cooler conversation" among coworkers.

Finally, the deliberative process privilege does not encompass documents in which the author sets forth his view as to what the facts are, or whether a particular allegation is accurate. This type of factual analysis is distinct from a policy discussion. *See LeMaine v. IRS*, 1991 WL 322616, at *7 (D. Mass. Dec. 10, 1991) (deliberative process privilege applies to documents that "make[] recommendations or express[] opinions on legal or policy matters," not to "compilations of factual data or investigative matters"); *Adams v. United States*, 686 F. Supp. 417, 420 (S.D.N.Y. 1988) (privilege does not apply to "factual findings and conclusions (*including conclusions that allegations are or are not borne out*)" (emphasis added)); *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 939 (D.C. Cir. 1970) ("[F]actual reports . . . cannot be cloaked in secrecy by an exemption designed to protect only those internal working papers in which opinions are expressed and policies formulated and recommended." (internal quotations omitted)); *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Homeland Security*, 648 F. Supp. 2d 152, 159 (D.D.C. 2009) (rejecting deliberative process claim for emails in which "no agency policy is being debated or discussed"). The Exculpatory E-mails discussed life-altering factual allegations; nothing remotely suggests they contained opinions on what a particular law or policy ought to be. Even if they did, that legal or policy discussion can be redacted and the rest of the document must be produced. *See Providence Journal*, 981 F.2d at 562.

(2) Exemption 7(A)

To invoke Exemption 7(A), an agency must establish that a document was "compiled for a law enforcement purpose and that disclosure would interfere with enforcement proceedings." *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 337 F. Supp. 2d 146, 179 (D.D.C. 2004). The enforcement proceedings, moreover, cannot be hypothetical or speculative – they must be "prospective" and "concrete." *Scheer v. DOJ*, 35 F. Supp. 2d 9, 12 (D.D.C. 1999).

A threshold question, relevant not only to this Exemption 7(A) claim but to many of the Government's 7(A) claims, is whether this Court should consider the fact that none of the Requesters is currently the subject of a concrete, prospective investigation or enforcement proceeding. The Government contends that it should not:

> [A] court reviewing a denial of a FOIA request must judge the agency's decision as of the time the agency responded to the FOIA request, not at the time of the court's review. . . . "To require an agency to adjust or modify its FOIA responses on post-response occurrence could create an endless cycle of judicially mandated reprocessing."

Govt. Br. at 43-44 (quoting *Bonner v. U.S. Dep't of State*, 928 F.2d 1148, 1152-53 (D.C. Cir. 1991)). *Bonner*, however, explicitly recognized that "[i]n certain limited situations, such as the publication of a document after an agency has decided to withhold, it may be appropriate for a court to review the agency decision in light of post-decision changes in circumstances." *Bonner*, 928 F.2d at 1153 n.10. The termination of law enforcement proceedings against the Requesters is precisely the kind of "limited situation" in which "post-decision changes in circumstances" should be considered. *See Inst. for Justice & Human Rights v. Executive Office of U.S. Attorney*, 1998 WL 164965, at *4 (N.D. Cal. Mar. 18, 1998) ("*Bonner* appears to contemplate that where the grounding for the exemption has plainly changed, it is appropriate to review the agency decision in light of the new circumstances. The *Bonner* court gave the example of the publication of a document after the decision to withhold it. The termination of law enforcement proceedings that formed the basis of an exemption [is] an equally apparent and substantial change in circumstances.");[11] *see also Computer Professionals for Social Responsibility v. U.S. Secret Serv.*, 72 F.3d 897, 906-07 (D.C. Cir. 1996) ("[B]ecause the [agency] has terminated its

[11] The Government argues that *Institute for Justice* arrives at a result "contrary" to *Bonner*, Govt. Br. at 43, and insists that *Institute for Justice* should be disregarded because *Bonner* represents the "majority" view. *Id.* at 44. In fact, however, *Institute for Justice* is perfectly compatible with *Bonner*. It simply noted that under *Bonner* there are certain "limited situations" in which post-decision changes in circumstances should be considered, and that termination of enforcement proceedings constitutes one such situation.

investigation, it must disclose all information that it has withheld pursuant to Exemption 7(A) that is not protected by other exemptions . . . .").

Any argument about "judicially mandated reprocessing" is misplaced here. The Government, having promised that "[i]nformation in the documents withheld . . . under [Exemption 7(A)] will be released . . . when it is determined that release will not have an effect on pending law enforcement proceedings," Ethridge Decl. ¶ 54, agreed in November 2009 to withdraw its 7(A) claims with respect to five Requesters (all but Bensayah) and reprocess all withheld or redacted documents to determine whether additional information could be produced. *See* Joint Proposed Schedule ¶ 2 (Nov. 23, 2009).[12] Shortly thereafter, the Task Force evaluating the situation of the remaining Guantanamo detainees completed its work and disbanded, and Bensayah since has been the subject of active resettlement efforts. *See supra* note 1. Given that the Government *itself* reprocessed all of its Exemption 7(A) claims at a time when there was no concrete, prospective law enforcement proceeding against any Requester, it is improper and illogical to permit the Government to withhold documents simply because such a proceeding may have existed once upon a time.

Returning to the Exculpatory E-mails, the Government has proffered two different – and contradictory – justifications for continuing to withhold them under Exemption 7(A) despite dramatically changed circumstances. It argues first that "the information withheld under Exemption 7(A) related only to other individuals, not the Six Requestors." Govt. Br. at 35 (citing Cox Decl. ¶¶ 4-7).[13] Later, it asserts that disclosing the e-mails "would reasonably be expected to interfere with the future investigation of Bensayah's case and its prosecution, allow Bensayah to analyze the investigative activities and attempt to interfere with future investigative

[12] The Joint Proposed Schedule appears on the docket in this case as Document No. 51 (filed Nov. 23, 2009).

[13] "Cox Decl." refers to the Supplemental Declaration of David T. Cox (Feb. 17, 2010), which appears on the docket in this case as Document No. 69 (filed Apr. 20, 2010). David Cox is a civilian attorney employed by the Air Force.

efforts, and allow others to take active steps to block access to further evidence and begin preparing a defense before charges are formally brought." *Id.* at 42-43 (citing Ethridge Decl. ¶ 58).

The fact that the *Vaughn* index attached to the Ethridge Declaration describes certain of the Exculpatory E-mails as "E-mail . . . forwarding information pertinent to the investigation of requesters" and "E-mail string concerning information developed on requesters," *see* Ethridge Decl. at 64, 77,[14] raises serious questions about the accuracy of the suggestion that these e-mails may have "related only to other individuals, not the Six Requestors." Govt. Br. at 35.

As for the suggestion that disclosure of the Exculpatory E-mails would interfere with the "investigation of Bensayah's case and its prosecution," Govt. Br. at 42, this ignores Bensayah's current status. Documents may only be withheld if they are reasonably expected to interfere with a "concrete prospective law enforcement proceeding." *Scheer*, 35 F. Supp. 2d at 12 (internal quotations omitted). This Court should be exceedingly reluctant to assume any such proceeding exists here: Bensayah has spent the better part of a decade in Guantanamo without ever being charged with anything; his case has never come before a judge except on his own *habeas corpus* petition; he is the subject of active resettlement efforts; and the Government's submissions to this Court nowhere suggest that it plans to charge or further investigate Bensayah. *Cf. M.A. Schapiro & Co. v. SEC*, 339 F. Supp. 467, 470 (D.D.C. 1972) ("[A]lthough arguably these documents are investigatory files compiled for law enforcement purposes, the agency has not proffered any facts that would show it contemplated within the reasonably near future . . . a law enforcement proceeding based upon the materials sought. Six years have elapsed and these documents have not been, nor is it alleged that they will be, the basis for either a criminal or civil action against

[14] Cites to particular pages of Declarations refer to the page number listed in the top-right corner of the document as filed with this Court. For example, this citation is to pages 64 and 77 of 118.

anyone."); *Durrani v. DOJ*, 607 F. Supp. 2d 77, 89 (D.D.C. 2009) ("[Agency's] claim of an ongoing investigation, without any evidence of a pending or potential 'enforcement proceeding,' fails to provide a sufficient basis for withholding records under exemption 7(A), particularly because at least some charges against plaintiff were dismissed . . . .").

Furthermore, disclosing the portions of the Exculpatory E-mails that discuss the bomb plot allegation – which has been dropped – could not interfere with an enforcement proceeding against Bensayah even if such a proceeding *were* contemplated. That certain individuals thought he was innocent of an alleged crime that he knows he did not commit and of which he has not been and never will be charged is hardly a fact that will enable him "to establish defenses or fraudulent alibis or to destroy or alter evidence" or otherwise engage in activities that Exemption 7(A) seeks to prevent. *Maydak v. DOJ*, 218 F.3d 760, 762 (D.C. Cir. 2000). There is nothing to suggest that this material is appropriately withheld under Exemption 7(A).

Ultimately, then, the information provided by the Government about the Exculpatory E-mails fails to justify withholding them under Exemption 5 or Exemption 7(A). Rather, it seems likely that the Government's reluctance to produce the e-mails stems from a desire to avoid any embarrassment that might result. This is precisely the type of scenario that should be addressed by *in camera* review. *See Ingle v. DOJ*, 698 F.2d 259, 267 (6th Cir. 1983) (listing factors that may necessitate *in camera* review, including "where it becomes apparent that the subject matter of a request involves activities which, if disclosed, would publicly embarrass the agency"), *abrogated on other grounds*, *DOJ v. Landano*, 508 U.S. 165 (1993). In short, given the likelihood that the Government would not want the public to see documents showing that it detained men for almost a decade on grounds so pejoratively characterized, its claim that the

documents fall under Exemptions 5 and 7(A) should, at the very least, be put to the test of *in camera* review.

C. The Government Has Failed To Demonstrate That PowerPoint Presentations Referring to "The Algerian Six" Are Appropriately Withheld.

The documents in Bates-ranges 1376-79 and 9815-64 are PowerPoint presentations regarding the Requesters. Plaintiff believes that among these documents are one or more presentations (hereinafter, "the Algerian Six Presentations") which formed the basis of determinations by military combatant status review tribunals that the Requesters belonged to a terrorist group known as the "Algerian Six" and were enemy combatants. *See* Key Doc. Br. at 10.[15] Such documents would help the Requesters determine, for the first time, what the misguided basis was for keeping them in Guantanamo for so many years.

(1) Document Bates-Numbered 1376-79

The *Vaughn* index accompanying the Ethridge Declaration titles this document "Power-point Presentation concerning Algerian 6," and describes the document as a "CITF presentation on status of certain aspects of and leads in the investigation of the requesters." Ethridge Decl. at 66. According to the *Vaughn* index, the Government is withholding this document under Exemptions 2, 6, 7(A), and 7(C). *Id.*

Plaintiff does not object to the redaction of ID numbers, file numbers, and the like under Exemption 2, or to the redaction of private third-party information under Exemptions 6 and 7(C). Such redactions, however, should be narrowly focused and would not preclude releasing the remainder of the document. The question, then, is whether Exemption 7(A) justifies withholding the document in its entirety. The Government has failed to demonstrate that it does.

[15] Plaintiff's motion for *in camera* review also listed the documents in Bates-range 5600-29 (in addition to those in Bates-ranges 1376-79 and 9815-64) as documents that could be the Algerian Six Presentations. Key Doc. Br. at 11. Upon further review, however, the documents in Bates-range 5600-29 – which were produced in redacted form – appear to be strategy reviews and other documents that are not the Algerian Six Presentations. Plaintiff therefore withdraws the request that the Court review those documents *in camera*.

In support of its claim that this document is appropriately withheld, the Government cites paragraphs 28 and 59 of the Ethridge Declaration. *See* Govt. Br. at 45. Paragraph 28, however, discusses a different set of documents (those in the Bates-range 1363-75) and offers nothing to suggest that *this* document falls under Exemption 7(A) or any other exemption. *See* Ethridge Decl. ¶ 28. Paragraph 59, for its part, states the following:

> Documents at bates numbers 01376 through 0379 [*sic*] . . . are power-point presentations prepared by CITF special agents concerning detainees who are the subject of this FOIA request. These documents summarize known affiliations and investigative leads. They primarily contain an analysis by CITF special agents. Release of these documents would reasonably be expected to interfere with the further investigation of these cases and their prosecution. Releasing the statements at this time would allow the suspects to analyze the investigative activities to this point and attempt to interfere with future investigative efforts. It would also allow others to take active steps to block access to further evidence and to begin preparing a defense before charges are formally brought. It would allow detainees to conform their answers to the information known by CITF special agents.

Ethridge Decl. ¶ 59. The concern about interference with "these cases and their prosecution" is baseless and outdated. Five of the six Requesters have been freed after the Government declined to appeal Judge Leon's grant of *habeas*. The Government has dropped any allegation that any Requester ever belonged to a group called "the Algerian Six" or was ever engaged in a plot to bomb the U.S. Embassy in Sarajevo. As noted above, the Government has promised to release any documents withheld under Exemption 7(A) "when it is determined that release will not have an effect on pending law enforcement proceedings." *Id.* ¶ 54. That time has long passed. There is no suggestion in any government filing that a law enforcement proceeding is "pending" with respect to any Requester. Indeed, all inferences point to a contrary conclusion.

(2) Documents Bates-Numbered 9815-64

The *Vaughn* index accompanying the Hoeing USNIC Declaration titles each of the nine documents in this Bates-range "PowerPoint presentation," and describes each document as

"PowerPoint slides that refer to [Requesters]." Hoeing USNIC Decl. at 10-11.[16] According to the *Vaughn* index, the Government is withholding these documents under Exemption 1. In support of its withholding, the Government cites paragraph 5 of the Hoeing USNIC Declaration, which states the following:

> [Documents 9815-64] are indexed as "PowerPoint presentations". This information is properly classified at the TOP SECRET level under Section 1.4(c) of Executive Order 12958, as amended, which provides for the protection of intelligence activities, sources, methods or methodology. The release of this information would compromise ongoing intelligence operations and would disclose classified operational details regarding the Joint Interagency Task Force for Counterterrorism in Bosnia. Information from sensitive sources, including human sources, is included in these documents. Release of this information would not only damage ongoing efforts to target extremists and associated NGOs but may endanger the life of the sources referenced within the documents as they clearly identify who provided information on persons and organizations of interest. Additionally, some slides (9847, 9852) include information that is withheld under Section 1.4(a) and (d) as the information discloses military plans, weapons systems, or operations . . . and foreign relations or foreign activities of the United States, including confidential sources . . . .

Hoeing USNIC Decl. ¶ 5. Plaintiff and Requesters do not object to redaction of information that would reveal sources' identities, military plans, and the like. However, the Government has proffered no evidence suggesting that such information is "inextricably intertwined" with non-exempt information. As such, these documents should, at a minimum, be produced in redacted form. *Church of Scientology*, 30 F.3d at 228. Plaintiff therefore respectfully requests that this Court either (1) review these documents *in camera* to determine which portions should be produced in redacted form, or at the very least, (2) require the Government to provide a sufficient explanation as to why partial production of these documents is impossible.

[16] "Hoeing USNIC Decl." refers to the Declaration of Captain Joseph B. Hoeing, Jr. (USNIC) (July 10, 2007), which appears on the docket in this case as Document No. 78 (filed Apr. 20, 2010).

III. Other Documents Have Been Improperly Withheld or Redacted Under Exemptions 2, 5, 6, and 7(A).

Additional documents, identified below, have either been withheld or redacted by the Government without providing information sufficient to demonstrate that they are exempt from FOIA. Plaintiff respectfully requests that this Court order the Government to reprocess those documents and either produce them in full, produce them with more narrowly targeted redactions, or provide adequate justification for not doing so.

A. Improper Withholdings and Redactions Under Exemption 7(A).

As noted above, *see supra* § II.B(2), the Government agreed on November 23, 2009, to withdraw its Exemption 7(A) withholdings with respect to five Requesters (all but Bensayah), and to "review all documents previously withheld in full or in part in this case" to determine whether additional material could be produced. Joint Proposed Schedule ¶¶ 1-2. The review was to be completed "[o]n or before January 29, 20[10]." *Id.* ¶ 2. On February 17, 2010, Attorney David T. Cox executed a Supplemental Declaration stating that he had reviewed CITF records and determined that not a single additional document could be produced: "We withheld information under Exemption 7(a) only in records related to other individuals, not those listed in Paragraph 4 above [all of the Requesters but Bensayah]." Cox Decl. ¶ 6. As for the FBI's withholdings, the Government's summary judgment brief states that "[t]he FBI has likewise indicated informally that the withdrawal of claims of withholding based on Exemption 7(A) as to those five Requestors would not result in the release of any additional information." Govt. Br. at 35-36.

Thus, according to Attorney Cox's Supplemental Declaration and the FBI's "informal indication," every single document withheld under Exemption 7(A) was directly related to an

ongoing investigation of either Bensayah or other unnamed individuals besides Requesters.[17] While this claim could be true, the Government's *Vaughn* indices do not contain sufficient information to enable Plaintiff or this Court to evaluate it independently with respect to many withheld documents. *See Church of Scientology*, 30 F.3d at 231 (*Vaughn* index must "afford[] the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding" (internal quotations omitted)).

For example, a typical *Vaughn* index entry for an Exemption 7(A) claim is the entry for the document Bates-numbered 1535-38: "Personal information on Lahmar obtained from web site." Ethridge Decl. at 72. While this description was arguably sufficient to support the claim in the Ethridge Declaration that the document pertained to the "investigation of these cases," *id.* ¶ 56 – assuming "these cases" meant the six Requesters and included Lahmar – it provides no support whatsoever for the claim in the Cox Declaration that the document is somehow related to an investigation of someone other than Lahmar. This is but one of several hundred documents that the Government still is withholding or largely redacting under Exemption 7(A) despite *Vaughn* entries that in no way suggest a relationship between the document and the investigation of anyone other than Boumediene, Nechla, Ait Idir, Lahmar, or Boudella.[18] The Government should be required to either (1) produce each document in full, or (2) provide an explanation of

[17] The Government's summary judgment brief appears to foreclose the possibility that Bensayah-related documents are still being withheld under Exemption 7(A): "[T]he information withheld under Exemption 7(A) related only to other individuals, not the *Six Requestors*." Govt. Br. at 35 (citing Cox Decl. ¶¶ 4-7) (emphasis added). This may have been a misstatement, as the Cox Declaration itself leaves open the possibility that some of the withheld documents related to Bensayah. At the very least, however, this confusion illustrates the need for the Government to provide far more detail regarding its newly adopted rationale for withholding documents under Exemption 7(A).

[18] Specifically, the documents in the following Bates-ranges have been improperly withheld or largely redacted under Exemption 7(A) despite nothing to suggest a connection to an investigation of anyone other than Boumediene, Nechla, Ait Idir, Lahmar, or Boudella. **Withheld:** 1103-24, 1133-54, 1234-44, 1247-48, 1261-63, 1267-1311, 1329-52, 1363, 1374-75, 1382-94, 1398-1406, 1408-12, 1415-1520, 1524-25, 1527-70, 1575-78, 1589-1604, 1782-94, 1806-51, 1854-55, 1857-66, 1882-97, 1902, 1907-15, 1922-2016, 2057-2115, 2120-38, 2142-43, 2153-68, 2184-88, 2211-49, 2556-58, 2562-66, 2568, 2573-74, 2577-99, 2604-10, 2623-24, 2642-2715, 2770-93, 2799-2886, 2911-13, 3012-15, 3025-35, 3040-41, 3043-51, 3065-76, 3479-83, 3486-91, 3495-99, 3503-05A, 3947-48, 4498-4500, 7471-7551, 7574-81, 7585-7946, 8112-8208, 9090-98, 9114-16, and 9551-52. **Largely Redacted:** 6354-63, 10122-33, 10218-29. (Oddly, the *Vaughn* index entries for the three redacted documents do not even cite Exemption 7(A). The documents, however, contain large black boxes next to which the notation "7(A)" appears.)

how the withheld document is related to a concrete, prospective law enforcement proceeding, bearing in mind that those five Requesters have been released and are now living as free men in foreign countries.

Moreover, to the extent that Attorney Cox's Supplemental Declaration and the FBI's "informal indication" rely on the notion that Exemption 7(A) can still be applied to documents pertaining to Bensayah, that ignores Bensayah's current status. The Government has offered no basis for viewing Bensayah as the subject of a concrete, prospective law enforcement proceeding. *See supra* § II.B(2). Accordingly, with respect to each withheld document for which the *Vaughn* entry only suggests a connection to Bensayah (or Bensayah and one or more other Requesters), the Government should be required to reprocess the document and either (1) produce it in full, or (2) explain how it is related to a concrete, prospective law enforcement proceeding, bearing in mind the established absence of such a proceeding against Bensayah.[19]

B. Improper Withholdings and Redactions Under Exemption 5.

Exemption 5 only applies to portions of documents that reveal the author's opinions and policy recommendations. *See supra* § II.B(1). To the extent that factual material is not "inextricably intertwined" with deliberative material, the factual portion must be produced. *Providence Journal*, 981 F.2d at 561. However, the Government has: (1) entirely withheld documents that, based on the *Vaughn* index, appear to include segregable factual material; (2) redacted narrow portions of documents that, based on context, appear to contain factual material rather than policy recommendations; and (3) redacted broad portions of documents

[19] Specifically, the documents in the following Bates-ranges have been improperly withheld under Exemption 7(A) despite nothing to suggest a connection to an investigation of anyone other than Bensayah (or Bensayah and one or more other Requesters): 1163-68, 1249-60, 1264-66, 1312-28, 1353-62, 1372-73, 1376-79, 1395-97, 1407, 1521-23, 1801-02, 1850-51, 1856, 1872-81, 1898-1901, 1903-06, 1916-21, 2017-27, 2028-55, 2116-19, 2148-52, 2169-83, 2250, 2559-61, 2567, 2625-41, 2716-28, 2762-65, 3042, 3052-64, 7456-70, 7552-73, 7582-84, and 8107-11.

under Exemption 5 without providing sufficient information to enable Plaintiff and the Court to independently evaluate the appropriateness of those redactions.

(1) Entire Withholdings

Of the documents withheld in their entirety under Exemption 5, fifty-four have *Vaughn* index descriptions indicating that they contain factual material segregable from any deliberative material therein.[20] For example, the document Bates-numbered 1539-40 has been withheld in full under Exemption 5,[21] on the ground that it and other documents like it

> are CITF case summaries concerning detainees who are the subject of a FOIA request, prepared by a special agent with CITF. They were intended to allow supervisory agents and prosecutors to assess the merits of the case and to guide future investigative efforts. As such they are intra-agency documents. They were created prior to completion of the investigation to aid in determining whether further investigative efforts were warranted and if so, the direction of these efforts. This would lead to the adoption of a policy towards the further investigation/prosecution of these cases. It is important that special agents preparing investigative summaries feel free to express their recommendations and candid assessments of cases. If such recommendations were routinely released, it can be expected that subordinates would be dissuaded from providing candid, honest opinions due to fear that such opinions and recommendations would be used by persons outside the Agency to interfere with investigative efforts. Such a "chilling effect" goes to the very heart of the deliberative process privilege which is afforded to this agency under the FOIA.

Ethridge Decl. ¶ 31. The *Vaughn* index, however, labels the document as "Sabir [*sic*] Lahmar's Travels," and describes the document as a "[s]ummary of Lahmar's travels and associations with various organizations/NGOs; summary of possible charges." *Id.* at 72. Without conceding that a summary of possible charges constitutes deliberative material, a factual summary of a person's

[20] These fifty-four documents are Bates-numbered 1264-66, 1267-82, 1283-84, 1285-92, 1293-1302, 1303-11, 1312-28, 1329-51, 1353-55, 1356-58, 1359-61, 1362, 1363, 1364, 1365-66, 1367, 1368-69, 1370, 1371, 1372-73, 1374, 1375, 1395-97, 1425, 1426, 1427, 1428, 1429, 1430, 1431, 1432, 1433, 1434, 1435, 1436, 1437, 1438, 1439, 1440, 1441, 1442-44, 1445-52, 1453-56, 1457-60, 1506-20, 1524-25, 1526, 1539-40, 1552-57, 2315-56, 2388-89, 2432-43, 2803, and 7012-13.

[21] The only other Exemption claimed by the Government to withhold this document is Exemption 7(A). That claim is similarly improper. *See supra* § III.A.

travels and associations certainly does not. Yet the Government has never suggested that this factual material is "so inextricably intertwined with . . . deliberative material that disclosure would compromise the confidentiality of deliberative information." *Providence Journal*, 981 F.2d at 562. Accordingly, the Government should reprocess the fifty-four documents in this category and either produce the factual material or offer an explanation of how the factual portion of each is "inextricably linked" to exempt deliberative material.

(2) Narrow Redactions

In addition to the documents withheld in full, the Government has claimed the Exemption 5 deliberative process privilege for certain redacted portions of the documents it has produced. While the Government never claimed an inability to separate factual material from deliberative material with respect to the documents withheld in full, it did make that argument with respect to the redacted documents. *See* Husta Decl. ¶ 41. Plaintiff's review of the redacted documents, however, has located two documents – the document Bates-numbered 4160-61 ("Doc. 4160") and the document Bates-numbered 4482-83 ("Doc. 4482") – for which the claim that factual portions are "inextricably intertwined" with deliberative material simply makes no sense.

With respect to both documents, the Government claims that its Exemption 5 redactions withhold "observations, comments, and recommendations made by analysts and intelligence personnel . . . intended to guide ongoing intelligence collection efforts concerning extremist organizations and individuals in the [Global War on Terror]." Husta Decl. ¶ 39. To the extent that these redactions encompass facts, the Government maintains that the "factual material . . . reflects the thought process of the person making the recommendations and assessments and his or her focus on selected pieces of information obtained from a larger intelligence database." *Id.* ¶ 41.

However, the Exemption 5 redaction in Doc. 4482 cannot be reconciled with the Government's justification. Under the heading, "THE DETAINEE REQUESTED THE FOLLOWING," Doc. 4482 contains five paragraphs detailing five requests made by the detainee. One of the five paragraphs is redacted under Exemption 5. Unlike the portion of the document entitled "COLLECTOR[']S COMMENTS," it is unclear how a detainee's request itself could be considered to reflect predecisional, deliberative comments or recommendations. Nor is it clear how any detainee requests could betray the interrogator's "focus on selected pieces of information obtained *from a larger intelligence database*," Husta Decl. ¶ 41 (emphasis added), or how the content of one of a detainee's five requests could possibly reflect the thought process of the person making recommendations and assessments, especially since the other four do not.

Doc. 4160 contains a similarly dubious Exemption 5 redaction. While Doc. 4160 contains multiple redactions of varying size, only two of the redacted sections state the exemption that supposedly justifies their redaction. Those two redactions claim Exemption 5: one appears under the heading "COMMENT"; the other, immediately preceding the first, appears under the heading "SOURCE PROVIDED INFORMATION ON THE FOLLOWING PERSONS AND ORGANIZATIONS." Unlike material under "COMMENT," it is unclear how substantive information *provided by the detainee* could reflect policy advice. In sum, then, Docs. 4160 and 4482 both contain narrow redactions of what appears to be factual material with no plausible explanation of how those facts could be "inextricably linked" to any deliberative material. The Government should be required to provide a plausible explanation or to produce these documents in unredacted form.

(3) Broad Redactions

The Government has produced several documents that, unlike Docs. 4160 and 4482, contain redactions not only of substantive information but also of the explanatory headings under which that information appeared (e.g., "COLLECTOR[']S COMMENTS").[22] By redacting the headings, the Government has rendered it impossible for Plaintiff to evaluate the propriety of the Government's redactions. Because the explanatory headings do not themselves contain policy recommendations, and because they are necessary for Plaintiff to be able to analyze independently whether the Government's substantive redactions contain factual rather than predecisional, deliberative material, the Government should be required to produce these documents with unredacted headings.

C. Improper Redactions Under Exemption 2.

The Government has claimed Exemption 2 as the basis for extensively redacting several documents described as Standard Operating Procedures ("SOPs") used to "guide JMG personnel in the provision of medical care to detainees." Husta Decl. ¶ 33; Govt. Br. at 20-21. The Government has failed to show either (1) that the SOPs relate to trivial administrative matters of no genuine public interest, or (2) that disclosure would significantly risk the circumvention of a specific agency regulation or statute. *See supra* § II.A(1).

First, despite the Government's claim to the contrary, *see* Husta Decl. ¶ 33 ("[R]elease of these internal procedures would serve no public benefit and would not serve a legitimate public interest."), it is incorrect to characterize the SOPs as relating to trivial administrative matters of

[22] The following nine documents redact explanatory headings under Exemption 5: 4163-64, 4169-70, 4174, 4175, 4176, 4179-81, 4572, 4573, and 4593. Additionally, while several documents redact headings without specifying which exemption purportedly justifies the redaction (the *Vaughn* entries list Exemptions 1, 2, 5, and 6 for various portions of the documents), it appears that the headings have been redacted under Exemption 5. Those documents fall within the Bates-ranges 3933-34, 3941-42, 3947-81, 3983-85, 3999-4002, 4006-07, 4117-35, 4138, 4141-43, 4146, 4149-55, 4160-62, 4171-81, 4196-97, 4495-97, 4501-09, 4512-52, 4558-65, 4655-710, and 4714-21.

no genuine public interest. Rather, these documents guide agency personnel in the performance of their duties, which is precisely the type of information that falls squarely within the public interest as contemplated by FOIA. *DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 774 (1989) ("FOIA's central purpose is to ensure that the Government's activities be opened to the sharp eye of public scrutiny." (emphasis removed)); *see also Founding Church of Scientology*, 721 F.2d at 831 n.4 ("[A] reasonably low threshold should be maintained for determining when withheld administrative material relates to significant public interests.").

Second, the Government's vague, generalized assertion that disclosure of the information contained in the SOPs for medical services would "impede the ability of the JDG and JMG to conduct operations and fulfill their respective missions," Husta Decl. ¶ 33, is not sufficient to justify withholding the SOPs under the second prong of Exemption 2. The Government has failed to identify a "particular" statute or regulation that would be circumvented. *Globe Newspaper Co.*, 1992 WL 396327, at *3 n.8 (rejecting the government's "extreme proposition that 'the circumvention test can be satisfied by a showing that disclosure risks circumvention of agency standards or legal requirements generally, even in the absence of a particular regulation or statute'"). It has failed to demonstrate a "significant" risk of circumvention. *See Crooker*, 670 F.2d at 1074 ("We add the word 'significantly' to stress the narrow scope of our construction of Exemption 2; in all cases in which the Government relies on Exemption 2, it remains the Government's burden to prove the 'significant risk.'"). And finally, it has failed to offer anything more than conclusory statements. *See Globe Newspaper Co.*, 1992 WL 396327, at *3 ("Defendants' bare and generalized assertions of harm, unsupported by any facts, are [insufficient]. The fact that the statements are reiterated in the agents' sworn declarations makes them no less conclusory." (citation omitted)); *In Defense of Animals v. NIH*, 543 F. Supp. 2d 70,

82 (D.D.C. 2008) ("[The Government] fails to explain . . . how the redacted information . . . would allow individuals to engage in criminal activity. The Court shall not read this information into [the Government's] submissions.").

Even a cursory examination of the extensively redacted SOPs demonstrates just how tenuous the Government's Exemption 2 claims are. For example, the SOP Bates-numbered 5015-19, entitled "Detainee Weight Management and Nutrition Program," entirely redacts a number of sections regarding the evaluation and medical treatment of detainees who are underweight – even though the sections regarding the evaluation and treatment of overweight detainees (contained on pages 5017-18) have been produced without redaction. Another SOP, "Mortuary Affairs and Advance Directives," Bates-numbered 5007-10, contains two large redactions regarding procedures for the treatment of detainee remains. It is difficult to fathom how disclosure of information such as this would risk the circumvention of agency regulations. These are just two examples of several SOPs with respect to which the Government has failed to demonstrate that Exemption 2 applies.[23] The Government should be required to produce them in full, or at a minimum, to submit a random sample for *in camera* review so that the Court may determine whether there are better grounds for the Exemption 2 claim than the *Vaughn* indices and unredacted portions of the documents suggest.

D. Improper Redactions Under Exemption 6.

Exemption 6 permits the Government to withhold information "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Plaintiff does not dispute that under Exemption 6, the Government may redact names and other information that could be used to identify the personnel assigned to Guantanamo or certain other

[23] Specifically, the SOPs that fall within the following Bates-ranges are not covered by Exemption 2: 4984-95, 5007-10, 5015-19, 5030-64, 5149-52, 5156-93, 5213-32, 5336-39, 5362-74, 5393-5407, 5412-16, and 5427-34.

individuals. *See* Stimson Decl. ¶ 27;[24] Husta Decl. ¶¶ 44, 48. However, in three specific cases, the Government appears to have redacted more information in the name of Exemption 6 than the exemption permits.

First, the Government claims to have redacted the document Bates-numbered 4479-81 in order to conceal "names or other information which could be used to identify civilian and military personnel assigned to JTF-GTMO units and deployed to JTF-GTMO." Husta Decl. ¶ 44. However, the document cites Exemption 6 as justification for withholding not only names and other identifying information (e.g., on page 4479) but also for withholding (on page 4481) an entire paragraph's worth of information under the heading "OTHER INFORMATION REGARDING INVOLVEMENT WITH TERRORISM." While it is conceivable that this paragraph could contain *some* identifying information (names, I.D. numbers, etc.), it is hard to imagine that the paragraph contains no other information at all.

Similarly, the Government has cited Exemption 6 to support withholding lengthy portions of the documents Bates-numbered 4595-97 and 5502-03.[25] With respect to all three documents, the Government has used Exemption 6 not to excise narrowly targeted information but rather to shield large swaths of information. Accordingly, the Court should require the Government to reprocess these three documents and either apply Exemption 6 more narrowly or provide a more plausible explanation of why its strikingly broad application is appropriate.

E. Specific Documents Improperly Withheld or Redacted.

Finally, the Government has withheld and redacted a number of documents which do not fall neatly into any of the categories set forth above, but which, based on an inspection of the

[24] "Stimson Decl." refers to the Declaration of Charles D. Stimson (July 17, 2006), which appears on the docket in this case as Document No. 77 (filed Apr. 20, 2010).

[25] The document Bates-numbered 5502-03 is particularly unusual in that the *Vaughn* index indicates that it has been "Released," not redacted, *see* Stimson Decl. at 16, but lengthy portions of it have been redacted.

Vaughn index entry for the document and/or the unredacted portions of the document, appear to have been improperly withheld or redacted:[26]

1. Disciplinary Records Produced in Redacted Form on July 22, 2005

On July 22, 2005, the Government made a supplemental production of "disciplinary records that are responsive to plaintiff's FOIA request." Although those records were not accompanied by a *Vaughn* index, the Government indicated that "Redactions made pursuant to [Exemption 1 or 5] are noted in the margins. All unmarked redactions are made pursuant to [Exemption 6]." E-mail from Mark Quinlivan to Lynne Soutter (July 22, 2005). However, the Government's use of Exemption 1 in certain instances appears inappropriate and at the very least requires some explanation of how the material's disclosure could possibly threaten the security of our nation.

For example, on the pages Bates-numbered Supp. 1318-19,[27] the following appears during a summary of alleged detainee abuse: "[One individual] stated . . . that the floor was shaking with such force that [EXEM. 1 REDACTION] as well as the next booth over were shaking. . . . [Another individual] corroborated the intensity of the shaking of the [EXEM. 1 REDACTION]. [She] reported that she saw [EXEM. 1 REDACTION] of the detainee each time he was forced to the ground." It is not clear, and the Government nowhere explains (or even attempts to explain) why national security dictates that what was being shaken or what exactly happened to the detainee each time he was slammed to the ground should be concealed from the

[26] Plaintiff has exercised restraint in compiling this list, and has not included a number of redactions which appear to be inconsistent but inconsequential. For example, the Government has been inconsistent in redacting (1) detainee identifying numbers, *compare, e.g.*, 3933 (non-numeric portion of ISN number redacted), *with, e.g.*, 613 (non-numeric portion not redacted); (2) specific locations within Guantanamo, *compare, e.g.*, 829 (detainee cell number redacted), *with, e.g.*, 813 (cell number not redacted); and (3) detainee names, aliases, and physical descriptions, *compare, e.g.*, 4595 (aliases redacted), *with, e.g.*, 4513 (aliases not redacted).

[27] The Government applied a different page-numbering convention to documents produced in July and August of 2005 than it did to the rest of its FOIA production. As a result, there are two documents containing pages numbered 1318-19 – the disciplinary records produced on July 22, 2005 and also a Prosecution Memorandum which is being withheld in its entirety. *See* Ethridge Decl. at 63. To avoid confusion, Plaintiff herein uses "Supp. ___" to refer to the page numbers of documents produced in July and August of 2005.

public. Similarly inexplicable and unexplained Exemption 1 redactions appear on the pages Bates-numbered Supp. 1320, 1327, 1329, 1331-32, 1334, 1339, 1360, and 1376.

2. Disciplinary Records Produced in Redacted Form on August 5, 2005

The Government produced additional disciplinary records responsive to Plaintiff's FOIA request on August 5, 2005, with no accompanying *Vaughn* index. Certain of the redactions in those records are self-explanatory, such as the redaction of detainee ID numbers on the page Bates-numbered Supp. 1384. Others, however, require further explanation which is absent. Specifically, the pages Bates-numbered Supp. 1424-25 redact a full paragraph and a full sentence with nothing to suggest adequate grounds for doing so, and numerous paragraphs are redacted for no apparent reason on the pages Bates-numbered Supp. 1428-30.

3. Documents Withheld in Full Under Exemptions 6 and 7(C)

The *Vaughn* index accompanying David Hardy's declaration lists Exemption 7(A) as the basis for thousands of withholdings. *See* Hardy Decl. at 57-82.[28] However, Exemptions 6 and 7(C) are the only exemptions cited for the documents Bates-numbered 3169-78, 3192-3214, 3218-59, 3262-73, 3277-79, 3289-3306, and 3324-67, all of which have been withheld in their entirety. *See id.* at 54-57. Exemptions 6 and 7(C) permit the Government to redact names and identifying information. *See, e.g., id.* at 33-45. These documents are not mere lists of names – they discuss, for instance, "religious education, religious activities, and travel," *id.* at 55 – and as such, Exemptions 6 and 7(C) cannot support a decision to withhold them in full.

4. Documents Redacted Under Exemption 2 Without Explanation

The documents within the Bates-range 6007-27 contain several large redactions – sometimes covering entire pages – next to which the notation "(b)(2)" appears. The *Vaughn*

[28] "Hardy Decl." refers to the Declaration of David M. Hardy (June 22, 2006), which appears on the docket in this case as Document No. 81 (filed Apr. 20, 2010).

index entries for these documents do not mention Exemption 2. *See* Hoeing Decl. at 34-35. It is impossible to determine the nature of the information redacted, or how that information could possibly increase the risk that specific agency regulations would be circumvented. It is the Government's duty to provide an adequate explanation as to why this information has been withheld. This Court should demand no less.

CONCLUSION

Each Requester lost a significant portion of his adult life to Guantanamo. There are documents showing that they were detained on "bullshit" grounds (the Exculpatory E-mails) and were subject to inhumane treatment (the DVD). These documents and others have been withheld from Requesters and from the public under the guise of FOIA exemptions which, as demonstrated above, are inapplicable.

Plaintiff respectfully requests that this Court (1) review certain key documents *in camera* and compel their production, and (2) order the Government to reprocess certain other documents and either produce them in their entirety, produce them with more narrowly targeted redactions, or provide an adequate justification for not doing so. For the Court's convenience, those documents are summarized in list form in the attached Appendix A.

Respectfully Submitted,

/s/ Daniel Hartnett Norland
Robert C. Kirsch (BBO #541755)
Daniel Hartnett Norland (BBO #671576)
Wilmer Cutler Pickering Hale and Dorr LLP
60 State Street
Boston, Massachusetts 02109
Tel.: (617) 526-6000
Fax: (617) 526-5000

DATED: June 30, 2010

APPENDIX A

Documents for* in camera *review:

II.A Video Recording
10063

II.B Exculpatory E-mails
1353-63, 1857-64, and to the extent not contained therein, any other documents to which the following statement referred: "exculpatory emails surfaced indicating that military intelligence officers knew by 2002 that allegations regarding their involvement with a plot to blow up the U.S. embassy in Sarajevo were 'bullshit.'" Brief for Petitioner-Appellant Belkacem Bensayah at 9, *Bensayah v. Obama*, No. 08-5537 (D.C. Cir. June 3, 2009) (unclassified version filed Sept. 11, 2009).

II.C Algerian Six Presentations
1376-79, 9815-64, and to the extent not contained therein, the document referred to as the "Algerian Six" document in the Certified Index to the Record compiled during Requesters' Combatant Status Review Tribunals. *See* Key Doc. Br. at 10.

Documents to be reprocessed and either produced in full, produced with more narrowly targeted redactions, or accompanied by adequate* Vaughn *index entries:

III.A Exemption 7(A) withholdings or redactions with no apparent connection to a concrete, prospective law enforcement proceeding

Vaughn index reflects connection only to Requesters (not necessarily including Bensayah): 1103-24, 1133-54, 1234-44, 1247-48, 1261-63, 1267-1311, 1329-52, 1363, 1374-75, 1382-94, 1398-1406, 1408-12, 1415-1520, 1524-25, 1527-70, 1575-78, 1589-1604, 1782-94, 1806-51, 1854-55, 1857-66, 1882-97, 1902, 1907-15, 1922-2016, 2057-2115, 2120-38, 2142-43, 2153-68, 2184-88, 2211-49, 2556-58, 2562-66, 2568, 2573-74, 2577-99, 2604-10, 2623-24, 2642-2715, 2770-93, 2799-2886, 2911-13, 3012-15, 3025-35, 3040-41, 3043-51, 3065-76, 3479-83, 3486-91, 3495-99, 3503-05A, 3947-48, 4498-4500, 6354-63, 7471-7551, 7574-81, 7585-7946, 8112-8208, 9090-98, 9114-16, 9551-52, 10122-33, 10218-29

Vaughn index reflects connection only to Requesters (including Bensayah): 1163-68, 1249-60, 1264-66, 1312-28, 1353-62, 1372-73, 1376-79, 1395-97, 1407, 1521-23, 1801-02, 1850-51, 1856, 1872-81, 1898-1901, 1903-06, 1916-21, 2017-55, 2116-19, 2148-52, 2169-83, 2250, 2559-61, 2567, 2625-41, 2716-28, 2762-65, 3042, 3052-64, 7456-70, 7552-73, 7582-84, 8107-11

III.B Exemption 5 withholdings and redactions with nothing to suggest absence of segregable non-deliberative material
1264-1351, 1353-75, 1395-97, 1425-60, 1506-20, 1524-26, 1539-40, 1552-57, 2315-56, 2388-89, 2432-43, 2803, 3933-34, 3941-42, 3947-81, 3983-85, 3999-4002, 4006-07, 4117-35, 4138, 4141-43, 4146, 4149-55, 4160-64, 4169-81, 4196-97, 4482-83, 4495-97, 4501-09, 4512-52, 4558-65, 4572-73, 4593, 4655-4710, 4714-21, 7012-13

III.C Exemption 2 redactions of medical SOPs
4984-95, 5007-10, 5015-19, 5030-64, 5149-52, 5156-93, 5213-32, 5336-39, 5362-74, 5393-99, 5412-16, 5427-34

III.D Overly broad Exemption 6 redactions
4479-81, 4595-97, 5502-03

III.E Exemption 1 redactions of disciplinary records
Supp. 1318-20, 1327, 1329, 1331-32, 1334, 1339, 1360, 1376

Unexplained redactions of disciplinary records
Supp. 1424-25, 1428-30

Documents withheld in full under Exemptions 6 and 7(C)
3169-78, 3192-3214, 3218-59, 3262-73, 3277-79, 3289-3306, 3324-67

Documents redacted under Exemption 2 with no explanation
6007-27

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent out electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants.

/s/ Daniel Hartnett Norland
Daniel Hartnett Norland

DATED: June 30, 2010