05-6286-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMERICAN CIVIL LIBERTIES UNION, CENTER FOR CONSTITUTIONAL RIGHTS, PHYSICIANS FOR HUMAN RIGHTS, VETERANS FOR COMMON SENSE, AND VETERANS FOR PEACE,

Plaintiffs-Appellees,

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-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, THE HONORABLE ALVIN K. HELLERSTEIN

BRIEF FOR *AMICI CURIAE,* NATIONAL SECURITY ARCHIVE AND ELECTRONIC PRIVACY INFORMATION CENTER IN SUPPORT OF PLAINTIFFS-APPELLEES

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INTEREST OF THE *AMICUS CURIAE*

Amicus curiae submit this brief in support of Plaintiffs-Appellees American Civil Liberties Union (ACLU), Center for Constitutional Rights, Physicians for Human Rights, Veterans for Common Sense, and Veterans for Peace. This appeal stems from a judicial decision directing the Department of Defense (DOD) to release under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, redacted photographs and digital movies (the "Darby photos") depicting alleged physical and sexual abuse of Iraqi detainees by U.S. troops at Abu Ghraib prison in Baghdad, Iraq. The Government now appeals the District Court decision, arguing that FOIA Exemption 7(F) broadly justifies non-disclosure because publication of the Darby photos may incite insurgents and terrorists in Iraq to wage violence against American and Coalition forces. The Government also argues that the records should be withheld because the graphic images may cause an unwarranted invasion of the personal privacy of the detainees pictured.

The National Security Archive (the "Archive") is an independent, non-partisan, non-governmental research institute located at the George Washington University, which collects and publishes declassified documents concerning U.S. foreign policy and national security, obtained through the FOIA. The Electronic Privacy Information Center ("EPIC") is a public interest research center in Washington, DC, established in 1994 to focus public attention on emerging civil

liberties issues and to protect privacy, the First Amendment, and other constitutional values. *Amici* frequently use FOIA to seek information on important matters of significant public interest, in order to inform the public debate, ensure government accountability, and defend the rights of U.S. citizens.

Amici's interest in this case is to preserve the principle that FOIA exemptions must be narrowly construed and government secrecy claims must be viewed in light of the underlying disclosure purpose of the FOIA, particularly where such disclosure will advance the interest of the public "to be informed about 'what their government is up to.'" *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989). The Government's argument would eviscerate FOIA's purpose and prevent the type of information that most needs to be aired from ever becoming public. *Amici* contend that the law does not permit FOIA requesters' rights to be sacrificed based on speculation that third parties may respond in a violent manner to the disclosures, particularly in a case of clear public concern where the images relate to possible government wrongdoing.

This brief is filed with the consent of counsel for all parties in the case.

SUMMARY OF ARGUMENT

The United States was founded on democratic principles recognizing the importance of informed public debate concerning government activities and the

public's right to question and hold leaders responsible for their conduct. The purpose of FOIA, to allow the public to access information about the activities of the Government, weighs heavily in favor of disclosure and permits withholding only in narrowly-defined circumstances.

In this case, the Government turns FOIA on its head, arguing that information more likely to expose improper official conduct—and so more likely to incite public antagonism and outrage—is properly withheld to prevent just such a public response. The Government also argues for an excessively broad and unfounded interpretation of Exemption 7(F). No court has ever accepted a claim of harm based on a speculative future injury resulting from violent responses of unknown enemies to information released by the U.S. Government.

The Government's argument that it can withhold the photos to protect the detainees' privacy under Exemption 7(C) is also misguided. Although the detainees unquestionably have a privacy interest in shielding their identities from public view, the District Court has adequately reviewed and redacted the photos to prevent recognition of the detainees. The FOIA contemplates redaction to protect privacy and obligates the Government to release non-exempt material. The prospect that detainees themselves or others might recognize them in the photos is speculative and the potential intrusion minimal.

Furthermore, any invasion of privacy that might result cannot be considered "unwarranted" under the Exemption 7 balancing test, where the public interest in understanding the conduct of U.S. personnel and the responsibility of higher officials in the abuses at Abu Ghraib is momentous. The Government seeks to use the privacy exemptions to impede efforts that could protect individuals from grave harm or punish wrongdoing. This approach runs contrary to the fundamental principle of FOIA.

ARGUMENT

I. THE GOVERNMENT'S EXEMPTION 7(F) ARGUMENT FOR WITHHOLDING IMAGES OF ALLEGED DETAINEE ABUSE AT ABU GHRAIB PRISON EVISCERATES THE FOIA

a. The purpose of FOIA is to ensure Government is held accountable to the public for its actions.

The Freedom of Information Act is the statutory embodiment of the democratic principle that the public is entitled to call on those who govern on their behalf to account for their conduct. The ability to access information about government conduct is a basic assumption of the U.S. Constitution, which specifically provides for a public role in governance. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587 (1980) (Brennan, J., concurring) ("Implicit in th[e] structural role [of the First Amendment] is not only 'the principle that debate on public issues should be uninhibited, robust, and wide-open,' but also the

antecedent assumption that valuable public debate—as well as other civic behavior—must be informed.").

Congress enacted FOIA as the central mechanism for the public to seek information about government activities. The statute's purpose is "to promote honest and open government and to assure the existence of an informed citizenry 'to hold the governors accountable to the governed.'" *Grand Cent. Partnership, Inc. v. Cuomo*, 166 F.3d 473, 478 (2d Cir. 1999) (quoting *NLRB v. Robbins Tire & Rubber Co.,* 437 U.S. 214, 242 (1978)). FOIA establishes a *presumptive right* for any person to obtain identifiable records from federal agencies, *Dep't of State v. Ray*, 502 U.S. 164, 173 (1991), and creates "'a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.'" *Dep't of Air Force v. Rose*, 425 U.S. 352, 360-61 (1976) (quoting S. Rep. No. 89-813, at 3 (1965)).

The Supreme Court has recognized in its FOIA decisions that Congress was "principally interested in opening administrative processes to the scrutiny of the press and general public," *Renegotiation Bd. v. Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 17 (1974) (citation omitted); "enabl[ing] the public to have sufficient information in order to be able . . . to make intelligent, informed choices with respect to the nature, scope, and procedure of federal governmental activities," *id.*; ensur[ing] "'an informed electorate,'" *id.* (quoting S. Rep. No. 89-813, at 3); and

"promot[ing] honesty and reduc[ing] waste in government by exposing official conduct to public scrutiny." *Reporters Comm.*, 489 U.S. at 796 n.20. In short, Congress enacted FOIA to make democratic participation and citizen oversight a reality. Throughout the statute's forty-year history, Congress has repeatedly reaffirmed these broad purposes,[1] most recently in 1996.[2]

b. The government recasts FOIA so that the information most likely to warrant public outrage is the information that must be withheld because of the possible effects of that outrage.

The Department of Defense in its appeal asks this Court to close its eyes to well-settled conceptions of FOIA and the public's right of access to information. The Government's position is that, even where information exposes illegal conduct by U.S. personnel, it should be hidden from the public if it has the potential to cause a violent reaction. This contention is in stark contrast to the widely-recognized understanding that FOIA was intended by its drafters to serve just the purpose the Government rejects—giving the public a tool to expose corruption and government misdeeds. Moreover, the government asks the Court for deference to its opinion, contending that it should be the sole arbiter of what the public should see.

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[1] Congress amended FOIA in 1974, 1976, 1986, and 1996.
[2] H.R. Rep. No. 104-795, at 19 (1996) ("Congress enacted the FOIA to require Federal agencies to make records available to the public through public inspection and at the request of any person for any public or private use.").

Because FOIA fundamentally favors disclosure, the statute "requires the government to disclose its records unless its documents fall within one of the specific, enumerated exemptions set forth in the Act." *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 355 (2d Cir. 2005). Therefore, courts must construe narrowly the statutory exemptions, "resolving all doubts in favor of disclosure." *Wood v. FBI*, 432 F.3d 78, 83 (2d Cir. 2005) (citing *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001)); *see also Local 3, Int'l Bhd. of Elec. Workers v. NLRB*, 845 F.2d 1177, 1180 (2d Cir. 1988).

In this case, the Government relies on FOIA exemption 7(F), which permits information that has been compiled for law enforcement purposes to be withheld where disclosure would be reasonably expected to "endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7)(F). The Government argues the possibility that evidence of abusive practices at Abu Ghraib could cause a violent reaction should defeat the public's right of access. The Bush administration has emphatically supported the principle emphasized in the lower court decision, that "[o]ur nation does not surrender to blackmail, and fear of blackmail is not a legally sufficient argument to prevent us from performing a statutory command." *ACLU v. Dep't of Defense*, 389 F. Supp. 2d 547, 575 (S.D.N.Y. 2005).[3] But by allowing the

[3] President George W. Bush, Address to the Nation, World Congress Center, Atlanta, GA (Nov. 8, 2001) ("Throughout this battle, we adhere to our values. . . . In the face of this great tragedy, Americans are refusing to give terrorists the

prospect of a terrorist response to justify withholding records that the agency would otherwise be obligated to provide under FOIA, the Government has surrendered to the will of the terrorists rather than standing by our democratic principles.

Moreover, this rationale, if accepted, would eviscerate the core purpose of FOIA: ensuring an informed electorate and fostering democratic debate. Such a result would run counter to the longstanding recognition that a potentially violent reaction by an "offended" audience cannot be allowed to define the boundaries of public debate. The public oversight mechanism provided by FOIA is central to open and democratic debate on critical policy issues. As the Supreme Court has observed, FOIA is "a means for citizens to know 'what the Government is up to.' This phrase should not be dismissed as a convenient formalism. *It defines a structural necessity in a real democracy*." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171-172 (2004) (emphasis added) (citations omitted). Our constitutional jurisprudence has firmly established that a "heckler's veto"—which is essentially what the government asserts here—cannot be permitted to thwart the open and informed public debate that is essential to our democracy. *See .e.g., Brown v. Louisiana*, 383 U.S. 131, 133 n.1 (1966).

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power. Our people have responded with courage and compassion, calm and reason, resolve and fierce determination.").

More than fifty years ago, the Supreme Court squarely addressed the importance of "free debate," even when it might cause "unrest" or "stir[] people to anger":

> The vitality of civil and political institutions in our society depends on free discussion. As Chief Justice Hughes wrote in *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937), it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.
>
> Accordingly a function of free speech under our system of government is to invite dispute. *It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging*. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.

Terminiello v. Chicago, 337 U.S. 1, 4 (1949) (emphasis added). The Court has thus recognized that "[p]articipants in an orderly demonstration in a public place are not chargeable with the danger, unprovoked except by the fact of the constitutionally protected demonstration itself, that their critics might react with disorder or violence." *Brown*, 383 U.S. at 133 n.1 (citations omitted).

The principle was perhaps best summarized in *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969), where the Court held,

> in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any

> variation from the majority's opinion may inspire fear. Any word spoken . . . that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk; and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

Id. at 508-509 (citations omitted).

Rejection of the "heckler's veto" is thus firmly established in our democratic system. Indeed, this Court recently recognized that "allowing the public, with the government's help, to shout down unpopular ideas that stir anger is generally not permitted under our jurisprudence." *Melzer v. Bd. of Education*, 336 F.3d 185, 199 (2d Cir. 2003). If FOIA is to fulfill its role as a "structural necessity in a real democracy," *Favish*, 541 U.S. at 172, its disclosure requirements cannot be thwarted by the possibility that some might react negatively—even violently—to the fruits of transparency. Such a result would defeat the core purpose of the statute and run counter to the longstanding principles of openness that uniquely characterize our "hazardous freedom." *Tinker*, 393 U.S. at 508.

c. The Government's Exemption 7(F) argument is so expansive that it swallows the rights guaranteed by the FOIA.

The Government's argument also fails because it expands Exemption 7(F) well beyond the scope envisioned by Congress. The exemption protects law enforcement files from disclosure, "but only to the extent that the production of

such law enforcement records or information . . . could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7)(F). Prior to 1986, the exemption applied only if disclosure of the records would endanger law enforcement personnel. In 1986, Congress amended Exemption 7(F) to permit nondisclosure when "any individual," not merely a law enforcement officer, might be harmed by disclosure of particular records. Pub. L. No. 93-502, 88 Stat. 1561, 1563 (1974), *amended by* Pub. L. No. 99-570, § 1802, 100 Stat. 3207, 3207-48 (1986).

The legislative history of the new Exemption 7 language, enacted in the midst of the 1980s War on Drugs, shows that both Congress and the Executive Branch intended the exemption to function as a domestic law enforcement tool by extending protection to informants and others who made it possible for the government to investigate and prosecute crime. According to President Reagan, the amendments "contain[] several important provisions reforming [FOIA] that will considerably enhance the ability of Federal law enforcement agencies such as the Federal Bureau of Investigation and the Drug Enforcement Administration to combat drug offenders and other criminals." Statement by President Ronald Reagan Upon Signing H.R. 5484, P.L. 99-570, 22 Weekly Compilation of Presidential Documents 1463, November 3, 1986; *see also* 132 Cong. Rec. 26,768 (1968) (statement of Sen. Hatch) ("This section will protect a few narrow law

enforcement files from mandatory disclosure" and "will directly improve drug enforcement.").

Since 1986, a number of courts in this Circuit and elsewhere have regularly used Exemption 7(F) in precisely the way Congress intended when it enacted the amendment—"to protect all those put at risk through their participation in law enforcement proceedings, whether as sources of information or as witnesses." *ACLU*, 389 F. Supp. 2d at 576; *see Garcia v. Dep't of Justice, Office of Info. & Privacy,* 181 F. Supp. 2d 356 (S.D.N.Y. 2002) (allowing agency to withhold investigatory records where requestor convicted of robbery and murder had previously attempted retaliation against individuals who testified against him); *Manna v. Dep't of Justice*, 815 F. Supp.798 (D.N.J. 1993) (upholding agency's invocation of Exemption 7(F) where organized crime leader requested FBI reports that contained information about other suspects, crime victims, and members of the public).

The decisions of two isolated district courts have deviated from this settled approach to Exemption 7(F), permitting a broader application to protect from danger a group of unnamed individuals or members of the public. *Living Rivers, Inc. v. U.S. Bureau of Reclamation*, 272 F. Supp. 2d 1313 (D. Utah 2003); *Larouche v. Webster*, 1984 WL 1061 (S.D.N.Y. 1984) (unreported case). These cases do not bind the Second Circuit, but if this Court were to recognize a similarly

broad interpretation of Exemption 7(F), both cases are nonetheless clearly distinguishable. In *Living Rivers*, the court held that the Bureau of Reclamation could withhold inundation maps that showed flooding areas and described potential loss of life and property damage that would occur in the event of a dam failure. 272 F. Supp. 2d 1313 In *Larouche*, the court permitted the Government to withhold "an FBI laboratory report containing a description of a home-made machine gun," 1984 WL 1061 at *8, under the presumption that criminals could employ this information to build similar weapons and use them against law enforcement officials. *Id.*

The courts in *Living Rivers* and *Larouche* applied the exemption where the Government's release of information would have *facilitated* the commission of a crime, by effectively providing individuals with instructions for carrying out or maximizing the lethality of their illicit activities. In contrast, the Darby images cannot be used as a roadmap for criminals or terrorists or otherwise reveal information that would aid in criminal activity. The potential harm the Government asserts is that the photographs, if released, could cause some unnamed individuals to become angry and violent. There is no indication that this response would be enabled or assisted by the images, but only stimulated by them. No court has held that such a speculative future injury, the result of an emotional chain reaction set off by the released records, can justify withholding material that

otherwise would be releasable under FOIA. Publicizing information that could assist the enemy in a concrete or physical way is plainly different than releasing information that might arouse rage, antagonism, or vengeance in the mind of the enemy.

Further, the current situation in Iraq betrays the weakness of the government's argument: violence is pervasive and ongoing. As Judge Hellerstein observed, sadly, the terrorists do no need these photographs as "pretexts for their barbarism; they have proved to be aggressive and pernicious in their choice of targets and tactics." *ACLU,* 389 F. Supp. 2d at 576. The Bush administration has similarly characterized our enemy in Iraq and in the global war on terrorism as irrational, incapable of reasoned negotiation, and unrelenting in its objective:

> Some have . . . argued that extremism has been strengthened by the actions of our coalition in Iraq, claiming that our presence in that country has somehow caused or triggered the rage of radicals. I would remind them that we were not in Iraq on September the 11th, 2001—and al Qaeda attacked us anyway. The hatred of the radicals existed before Iraq was an issue, and it will exist after Iraq is no longer an excuse.

President George W. Bush, Address on War on Terror at the National Endowment for Democracy, Washington, D.C. (Oct. 6, 2005).

In fact, the statistics related to security in Iraq over the past several years portray such intense violence that it would be virtually impossible to identify specific events that might have prompted particular indicents. It seems improbable

that anyone, including Government officials involved in conducting the war, could accurately assess the propriety of an assertion that release of certain records "could reasonably expected to endanger the life or physical safety" of U.S. troops. Absent the influence of these photos, nearly 1,800 U.S. troops have been killed in hostile incidents in Iraq since 2003,[4] along with more than 200 Coalition troops,[5] 4,000 Iraqi police and guardsmen,[6] and an estimated 30,000 or more Iraqi civilians.[7]

According to recent statistics issued by the Government Accountability Office (GAO), the insurgents carried out more than 34,000 attacks in 2005, compared to 26,500 in 2004—an increase of nearly thirty percent; the number of roadside bomb incidents rose from 5,607 to 10,953 between 2004 and 2005.[8] The statistics show the number of attacks rising substantially overall between June

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[4] Dep't of Defense, Directorate for Information Operations and Reports, Military Casualty Information (2006), http://www.dior.whs.mil/mmid/casualty/castop.htm.
[5] Icasualties.org, Iraq Coalition Casualty Count, http://icasualties.org/oif/ (last visited Mar. 9, 2006).
[6] *Id.*
[7] Iraq Body Count, Reported civilian deaths resulting from the US-led military intervention in Iraq, http://www.iraqbodycount.org/database (last visited Mar. 9, 2006).
[8] Government Accountability Office, *Rebuilding Iraq: Stabilization, Reconstruction, and Financing Challenges, Statement of Joseph A. Christoff, Director International Affairs and Trade* (2006), *available at* http://www.gao.gov/new.items/d06428t.pdf.

2003 and December 2005; the number of attacks in December 2005 (almost 2,500) was nearly 250 percent of the number of attacks in March 2004.[9]

The Government argues that release of the Darby photos would give terrorists justification for renewed violence and acts of terrorism (Appellants' Br. 16-17) But some photos depicting abuse and torture by U.S. soldiers have already been leaked to the media. The fact that detainees in U.S. custody have been mistreated is no secret. Subsequent releases therefore are unlikely to add substantially to the vast array of perceived grievances that are suspected of causing the current violence, if indeed we can even speculate that the actions of terrorist groups are rational enough to be linked to specific, identifiable grievances. The significance of the Darby photos in the context of the public debate in the United States, however, cannot be underestimated. *See* discussion *infra* Part II.b.

The Government's argument is that the courts should simply defer to its assessment of the situation. Such deference, however, is not supported by FOIA. The statute gives courts the authority to conduct a *de novo* review of government withholding determinations. Congress provided for *de novo* review "in order that the ultimate decision as to the propriety of the agency's action is made by the court and [to] prevent [review] from becoming meaningless judicial sanctioning of agency discretion." S. Rep. No. 89-813, at 8. It is thus inappropriate for courts to

[9] James Glanz, *Report Says Number of Attacks By Insurgents in Iraq Increases*, N.Y. Times, Feb. 9, 2006.

defer to the agency's interpretation of the law or acquiesce in the agency's application of the law to the facts.

II. RELEASE OF THE REDACTED PHOTOS WOULD NOT CONSTITUTE AN UNWARRANTED INVASION OF THE PRIVACY OF THE DETAINEES DEPICTED IN THE PHOTOS UNDER EXEMPTION 6 OR 7(C)

The Government also invokes two FOIA exemptions that speak to the impact of information disclosure on personal privacy. Exemption 6 permits nondisclosure of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," 5 U.S.C. § 552(b)(6), and Exemption 7(C) allows withholding of "investigatory records compiled for law enforcement purposes," but only to the extent that production of such records "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C).

Because the records at issue are "law enforcement records," *ACLU*, 389 F. Supp. 2d at 570, the more protective privacy standard of Exemption 7(C) applies.[10] The Government claims this standard justifies its withholding of the Darby photos, which "depict human beings often in the most humiliating and degrading of circumstances." (Appellant's Br. 44). The Government argues that because the

[10] Courts analyzing claims under Exemption 7(C), however, routinely look to cases applying the slightly narrower Exemption 6 provision. *See, e.g., Reporters Comm.*, 489 U.S. at 768.

Constitution has been held to establish a privacy interest in one's naked or partially-clothed body, FOIA Exemption 7(C)'s more expansive breadth must incorporate these narrower protections.

In enacting FOIA, Congress recognized that it was striking a delicate balance: "[t]he right of the individual to be able to find out how his Government is operating can be just as important to him as his right to privacy and his right to confide in his Government." H.R. Rep. No. 89-1497 (1966), *as reprinted in* 1966 U.S.C.C.A.N. 2418, 2423. When a court finds that there is a protected privacy interest in requested records, it must then balance that interest against the public interest in disclosure, which consists of "the extent to which the disclosure would serve the 'core purpose of the FOIA,' which is 'contribut[ing] significantly to public understanding of the operations or activities of government.'" *Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994) (quoting *Reporters Comm.*, 489 U.S. at 775).

a. FOIA contemplates redaction of identifying information in order to permit release of any non-exempt material, and does not permit the broad withholding that the Government demands where the redacted records can be released without harm.

The drafters of FOIA never intended the statute to be used to obtain private information not clearly relevant to the public interest, and so included provisions permitting the government to redact such private information while still releasing

information pertinent to the public interest.[11] Thus, FOIA does not permit agencies to withhold records in their entirety when portions contain identifying information that may result in an invasion of privacy. Rather, the statute requires the Government to release "[a]ny reasonably segregable portion of a record . . . after deletion of the portions which are exempt." 5 U.S.C. § 552(b); *see also Arieff v. Dep't of the Navy*, 712 F.2d 1462, 1466 (D.C. Cir. 1983) ("[T]he exemptions to the FOIA do not apply wholesale. An item of exempt information does not insulate from disclosure the entire file in which it is contained, or even the entire page on which it appears."). Moreover, the Supreme Court has concluded that the "redaction procedure is . . . expressly authorized by FOIA." *Ray*, 502 U.S. at 174.

The Government argues that redaction of the Darby photos to obscure identifying features and genitalia will not prevent some members of the public and the detainees themselves from recognizing individuals pictured in the photos. Judge Hellerstein approved the redactions, however, after conducting an *in camera* review of all the photos. Based on this review, he ordered additional redactions beyond the ones DOD had already made and also directed that several images be withheld in their entirety because they could not be effectively redacted to prevent

[11] *See* S. Rep. No. 89-813, at 7 (1965); H.R. Rep. No. 89-1497, at 8 (1966), *as reprinted in* 1966 U.S.C.C.A.N. 2418, 2425 ("The public has a need to know, for example, the details of an agency opinion or statement of policy on an income tax matter, but there is no need to identify the individuals involved in a tax matter if the identification has no bearing or effect on the general public.").

an invasion of privacy. On the basis of potential identification, the Government seeks to invoke the detainees' privacy interest in "avoiding the humiliation from endless republication of those images" (Appellant's Br. 48-49).

The Government's argument clearly distorts the nature of the privacy interest that FOIA protects by suggesting that information is "private" when it is unknown to the individual concerned, as well as to the outside world. Courts have generally established a privacy interest based on the potential harm from members of the public learning personal information about an individual—for example, where the information would cause embarrassment or subject the individual to potential harassment, retaliation, or other reputational harm—and have ordered redaction or withholding narrowly tailored to protect privacy on these bases. *See Dep't of State v. Washington Post Co.*, 465 U.S. 595, 599 (1982) (holding that Exemption 6 "protect[s] individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information"); *Brown v. FBI*, 658 F.2d 71, 75 (2d Cir. 1981) (facts are private "because their public disclosure could subject the person to whom they pertain to embarrassment, harassment, disgrace, loss of employment or friends"); *see also SafeCard Services, Inc., v. SEC*, 926 F.2d 1197, 1205 (D.C. Cir. 1991); *Diamond v. FBI*, 707 F.2d 75, 77 (2d Cir. 1983). If some information about a person is released, but the public has no

way of knowing whose information it is, there can be no infringement of the privacy interests that these prior cases and FOIA conceive.

FOIA specifically prescribes redaction as a remedy in cases like this one: "To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes" agency materials. 5 U.S.C. § 552(a)(2). In *Rose*, the Supreme Court gave a clear statement on adequate redaction for privacy purposes when it affirmed the Court of Appeals' finding that it was "'highly likely that the combined skills of court and Agency, applied to the summaries, will yield edited documents sufficient for the purpose sought and sufficient as well to safeguard affected persons in their legitimate claims of privacy.'" *Rose*, 425 U.S. at 358 (quoting 495 F.2d 261, 267-68 (2d Cir. 1974)). The same expert collaboration took place in this case, permitting the utmost protection of the privacy of detainees and soldiers while satisfying the disclosure goals of FOIA.

In personally reviewing and redacting each image, Judge Hellerstein sought to ensure that the identities of the detainees would not be discernable to third parties upon release of the images. After such careful redaction, photos do not pose any greater or unique threat of inadvertent identification than written documents, from which someone with intimate knowledge of an individual might recognize him or her despite a court's redaction efforts. As the Supreme Court has

stated, "redaction cannot eliminate all risks of identifiability, as any human approximation risks some degree of imperfection. . . . But redaction is a familiar technique in other contexts and exemptions to disclosure under the Act were intended to be practical workable concepts." *Rose*, 425 U.S. at 381-82 (footnote omitted).

Moreover, if the individuals pictured in the photos may recognize themselves or others may recognize them by comparing previously leaked photos, "that possibility is no more than speculative, a speculation which could apply equally to textual descriptions without pictures. . . . [T]he intrusion into personal privacy is marginal and speculative, arising from the event itself and not the redacted image." *ACLU*, 389 F. Supp. 2d at 571-72. Recently, the Southern District of New York came to a similar conclusion in rejecting an Exemption 6 argument for withholding the names of Guantanamo Bay detainees contained in military tribunal transcripts, holding that the Government's claim that the detainees would face embarrassment or retaliation from disclosure of identifying information did not present a cognizable privacy interest sufficient to justify withholding. *Associated Press v. Dep't of Defense*, 2006 WL 13042 (S.D.N.Y. 2006) ("the Department of Defense has failed to come forward on this motion with anything but thin and conclusory speculation to support its claims of possible retaliation. . . .

[S]uch a meager and unparticularized showing is inadequate to meeting the standards . . . of FOIA.").

b. The invasion of privacy in redacted photos that shield detainees' identities from public view is not "unwarranted" where the overriding interest of the public and the detainees themselves is in exposing and remedying wrongdoing.

Even if this Court were to find that the redacted photographs may constitute an "invasion of personal privacy," the considerable public interest in the photos outweighs any privacy concerns under FOIA's required "balancing of the individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny.'" *Rose*, 425 U.S. at 372. Under the balancing test, the court must conduct a two-step inquiry: first, is the public interest for which the information is being sought "significant"; and second, is release of the information "likely to advance that interest." *Favish*, 541 U.S. at 172.

In this case, the existence of a significant public interest is clearly demonstrated by the uproar of the American and global publics,[12] the impassioned

[12] *See, e.g.* Mohamad Bazzi, *Abuse of Iraqi Inmates; 'Appalling, embarrassing,'* Newsday, May 6, 2004, at A4; *The Shame of Abu Ghraib: Voices of Revulsion*, N.Y. Times, May 4, 2004, at A28; Seymour M. Hersh, *Torture at Abu Ghraib; American soldiers brutalized Iraqis. How far up does the responsibility go?*, New Yorker, May 10, 2004, at 42.

responses of Congress after the initial disclosure of the abuse at Abu Ghraib,[13] and extensive military investigations.[14] The government seeks to use the privacy exemptions to impede efforts that could in fact protect individuals from grave harm. As Judge Tatel stated in his dissent in *Ctr. for Nat'l Sec. Studies v. Dep't of Justice,* 331 F.3d 918 (D.C. Cir. 2003), arguing for the release of names of immigrants detained in the United States after the 2001 terrorist attacks,

> To be sure, detainees may have a unique interest in avoiding association with the crimes of September 11. Even so, that interest is clearly outweighed by the public interest in knowing whether the government, in investigating those heinous crimes, is violating the rights of persons it has detained. . . . [T]he private interests in this case weigh on both sides of the balance: Plaintiffs' request for disclosure of the detainees' names seeks to vindicate not only the public's right to know what its government is up to, but also the detainees' own rights, including the right to counsel and to speedy trial.

Id. at 946 (Tatel, J., dissenting).

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[13] *See* National Defense Authorization Act for FY 2005, Pub. L. No. 108-375, §§ 1091-1092, 118 Stat. 2068 (2004) (finding "the abuses inflicted upon detainees at the Abu Ghraib prison . . . are inconsistent with the professionalism, dedication, standards, and training required of individuals who serve in the United States Armed Forces."); S. Res. 356, 108th Cong. (2004) (enacted) ("A resolution condemning the abuse of Iraqi prisoners at Abu Ghraib prison, urging a full and complete investigation to ensure justice is serve, and expressing support for all Americans serving nobly in Iraq.").

[14] *See* Dep't of the Army, Lt. Gen. Anthony R. Jones & Maj. Gen. George R. Fay, *Investigation of Intelligence Activities at Abu Ghraib* (2004); James R. Schlesinger, Chairman, *Final Report Independent Panel to Review DOD Detention Operations* (2004); Dep't of the Army, Inspector General, *Detainee Operations Inspection* (2004); Dep't of the Army, Maj. Gen. Antonio M. Taguba, *Art. 15-6 Investigation of the 800th Military Police Brigade* (2004).

Public interests that have been consistently upheld in the face of privacy concerns are "shedding light on an agency's performance of its statutory duties" and "contributing significantly to public understanding of the operations or activities of the government." *Reporters Comm.*, 489 U.S. at 773, 775. With regard to the behavior of American personnel at Abu Ghraib, "the government concedes that wrongful conduct has occurred," *ACLU*, 389 F. Supp. 2d at 573. The Supreme Court has noted that "the justification most likely to satisfy [the] public interest requirement is that the information is necessary to show the investigative agency or other responsible officials acted negligently or otherwise improperly in the performance of their duties." *Favish*, 541 U.S. at 173.

The Appellees have requested the Darby photos precisely to inform the public and open debate on a highly controversial and ongoing matter. Plaintiffs in this case do not have a personal interest in the photos or identities of those pictured in them; rather, they are concerned members of the public who wish to inform the debate about government conduct of war in Iraq and detention of prisoners. This is just the type of request FOIA envisions, one with great potential to shed "the light of public scrutiny" on the Government's conduct of the people's business. *Rose*, 425 U.S. at 372.

In response, the Government claims that release of the photos now is unnecessary, because the military has already sufficiently remedied the problem by

investigating the abuses and prosecuting those responsible in military courts martial. This argument, however, is misplaced. The interest of members of the public in seeing for themselves what happened does not simply evaporate once the Government purports to have dealt with the problem internally; rather, "the public may have an interest in knowing that a government investigation itself is comprehensive, that the report of an investigation released publicly is accurate, that any disciplinary measures imposed are adequate, and that those who are accountable are dealt with in an appropriate manner." *Stern v. FBI*, 737 F.2d 84, 92 (D.C. Cir. 1984).

Moreover, DOD's offering of government reports and records of its investigations and prosecutions is inadequate for the purpose that Appellees seek to fulfill. As Judge Hellerstein observed at oral argument in this case, the Darby photos serve a function unlike any other materials the Government could offer, because they represent an impartial, complete, first-hand portrayal of what actually took place at the U.S. prison:

> Photographs present a different level of detail and different medium, and are the best evidence that the public could have as to what occurred at a particular time, better than testimony, which can be self-serving, better than summaries, which can be misleading, and better even than a full description no matter how complete that description might be.

ACLU, 389 F. Supp. 2d at 573.

This is not a case of a single crime in which the file has been closed and the perpetrator incarcerated. Rather, the wrongdoing of American personnel at Abu Ghraib and other detention facilities around the world may potentially indicate a larger failure within the military command structure or the federal Government generally, and the question of whether senior officials ordered, authorized, or turned a blind eye to the abuse of prisoners is far from settled.[15] U.S. military operations in Iraq continue without a clear end in sight, and the conduct of the larger War on Terror and detention of suspected terrorists remain indefinite in their scope and duration. As much now as two years ago, when the Abu Ghraib abuse was first disclosed, this topic is ripe for debate and the entire body of officially released Darby photos are an essential component of that debate.

CONCLUSION

For the foregoing reasons and the reasons set forth in Plaintiffs-Appellees Brief, the Court should uphold the ruling of the District Court.

[15] *See, e.g.*, Jane Mayer, *Annals of the Pentagon: The Memo*, New Yorker, Feb. 27, 2006, at 32.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned counsel for the *amicus curiae* certifies that this brief is proportionally spaced, has a typeface of 14 points or more and contains 6,502 words, and therefore complies with the word limitation imposed upon *amicus curiae* briefs by Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(B)(i). This brief was prepared using Microsoft Word 2002.

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