



June 2, 2009

VIA FACSIMILE AND FEDERAL EXPRESS

Sean Lane
Assistant U.S. Attorney
United States Attorney's Office
Southern District of New York
86 Chambers Street, 5th Floor
New York, New York 10007

RE: Information regarding prisoner abuse images responsive to
Plaintiffs' FOIA requests in *ACLU v. Dep't of Def.*, 04 Civ. 4151
(AKH) and *ACLU v. Dep't of Def.*, 06-3140-cv (2d Cir)

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
IMMIGRANTS'
RIGHTS PROJECT

PLEASE RESPOND TO:
NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2660
F/212.549.2654
WWW.ACLU.ORG

CALIFORNIA OFFICE
39 DRUMM STREET
SAN FRANCISCO, CA 94111-4805
T/415.343.0770
F/415.395.0950

OFFICERS AND DIRECTORS
NADINE STROSSEN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

RICHARD ZACKS
TREASURER

Dear Sean,

Plaintiffs write to request that the Government identify all still-withheld prisoner abuse images responsive to their Freedom of Information Act ("FOIA") requests along with any associated investigative files.

As you know, for almost six years now, Plaintiffs have sought disclosure under FOIA of records relating, *inter alia*, to the treatment and death of prisoners held in United States custody abroad after September 11, 2001. Photographs and videotapes of prisoner abuse fall squarely within the scope of Plaintiffs' FOIA requests. On September 22, 2008, a unanimous panel of the Second Circuit Court of Appeals ordered release of 21 images of prisoner abuse on grounds of FOIA exemptions 6, 7(C), and 7(F). *See Am. Civil Liberties Union v. Dep't of Def.*, 543 F.3d 59, 82, 87 (2d Cir. 2008). It is undisputed that pursuant to the district court's April 10, 2006 order, the final ruling on appeal relating to the 21 images would govern other images withheld on the same grounds. *See* Order of Apr. 10, 2006.

On April 23, 2009, the Government informed Plaintiffs and the district court that the Defense Department would by May 28, 2009, release not only the 21 photos at issue in the Second Circuit appeal, but also 23 additional photos previously identified as responsive, and a "substantial number of other images contained in Army CID [Criminal Investigation Division] reports that have been closed during the pendency of this case." Letter to Hon. Alvin K. Hellerstein from Lev. L. Dassin, Apr. 23, 2009. On May 13, 2009, after President Obama reversed that decision to release these

images, the Government summarily informed Plaintiffs and the district court that it would pursue “further options [relating to the Second Circuit’s ruling]. . . including but not limited to the option of seeking *certiorari*.” Letter to Hon. Alvin K. Hellerstein from Lev. L. Dassin, May 13, 2009.

The Government has not provided Plaintiffs with any information relating to the 23 photos or the “substantial number” of other images referenced above. Indeed, Plaintiffs have not even been informed of the total number of responsive images the Government seeks to suppress. Nor have Plaintiffs been told which investigative files relate to these particular images even though the Government has repeatedly suggested in official statements that the value of publicly disclosing these images is diminished by the public availability of the associated investigative files.

Indeed, in defending his decision to withhold the prisoner abuse images, President Obama stated that “these photos are associated with closed investigations of the alleged abuse of detainees in our ongoing war effort.” Statement By The President On The Situation in Sri Lanka And Detainee Photographs, May 13, 2009, *available at* http://www.whitehouse.gov/the_press_office/Statement-by-the-President-on-the-Situation-in-Sri-Lanka-and-Detainee-Photographs/. He observed that “this is not a situation in which the Pentagon has concealed or sought to justify inappropriate action. Rather, it has gone through the appropriate and regular processes. And the individuals who were involved have been identified, and appropriate actions have been taken. It's therefore my belief that the publication of these photos would not add any additional benefit to our understanding of what was carried out in the past by a small number of individuals.” *Id.* White House Press Secretary Robert Gibbs has similarly observed that “the existence of the detainee abuse cases is not denoted by the photos,” and further suggested that the investigations associated with photos were on “the DOD website.” Press Briefing by Press Secretary Robert Gibbs, May 13, 2009, *available at* http://www.whitehouse.gov/the_press_office/Press-Briefing-by-Pres-Secretary-Robert-Gibbs-5/13/2009/.

Notwithstanding their right under FOIA to the prisoner abuse images, whatever Plaintiffs have learned about the purported content of these images has only been through piecemeal official statements made outside the context of this litigation. For example, the President has stated that the photos at issue are “not particularly sensational.” Statement By The President On The Situation in Sri Lanka And Detainee Photographs, May 13, 2009, *available at* http://www.whitehouse.gov/the_press_office/Statement-by-the-President-on-

the-Situation-in-Sri-Lanka-and-Detainee-Photographs/. He has also said that they “were taken of detainees by U.S. personnel between 2002 and 2004.” *See* Remarks By the President On National Security, May 21, 2009, *supra*. Moreover, after the Daily Telegraph reported that the withheld images depicted rape and sexual abuse, Pentagon spokesman Bryan Whitman announced that the “news organization has completely mischaracterized the images,” and that “[n]one of the photos in question depict the images that are described in [the Daily Telegraph] article.” *See* U.S. slams British press over report of abuse photos, Reuters, May 28, 2009, *available at* <http://www.reuters.com/article/politicsNews/idUSTRE54R50K20090528>. Mr. Gibbs has similarly stated that “none of the photographs in question depict the images described in the [Daily Telegraph] article.” Press Briefing by Press Secretary Robert Gibbs, May 13, 2009, *available at* http://www.whitehouse.gov/the_press_office/Briefing-by-White-House-Press-Secretary-Robert-Gibbs-5-28-09/.

More recently, a Defense Department official reportedly acknowledged that the agency is withholding 2,000 images related to detainee abuse, none of which are from Abu Ghraib; that none of the images depict sexual abuse; and that the images include shots of possible abuse taken by soldiers as well as images created by investigators while gathering evidence. *See* Mark Benjamin, Suppressed Images Don’t Show Rape, Official Says, Salon.com, Jun. 2, 2009, *available at* http://www.salon.com/news/feature/2009/06/02/suppressed_photos/. The same official questioned the value of publicly disclosing the images in light of the fact that the ACLU had “the actual investigations” associated with those images. *See id.*

Although Plaintiffs contest the Government’s publicly stated justifications for continuing to withhold images responsive to their FOIA request, if the Government in fact believes that all relevant information relating to the prisoner abuse images has been disclosed through the associated investigative files, Plaintiffs, at a minimum, are entitled to know which investigative files already in the public domain relate to the withheld images. Disclosure of this critical information would have the added advantage of quelling needless speculation relating to the content of the images.

Accordingly, Plaintiffs submit that the Government should provide by June 10, 2009, the following information for each responsive image being withheld: (i) the date the image was created; (ii) the location to which it relates; (iii) any investigative file relating to the image; (iv) a description of the image’s content; and (v) the FOIA exemption(s) on grounds of which the

image is withheld. In making this request, Plaintiffs wish to make clear that they do not concede that the Government may withhold the images themselves.

Sincerely,



Amrit Singh
Staff Attorney
American Civil Liberties Union
Immigrants' Rights Project
125 Broad St, 18th Floor
New York, N.Y. 10004
Ph: 212 549 2609
Fax: 212 549 2654

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

Counsel for Plaintiffs-Appellees

cc: Jenny-Brooke Condon