

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR NATIONAL SECURITY
STUDIES, et al.,

Plaintiffs,

v.

U.S. DEPARTMENT OF JUSTICE, et al.,

Defendant.

Civil A. No. 01-CV-2500

DECLARATION OF SCOTT A. HODES

I, Scott A. Hodes, declare as follows:

(1) I am an Attorney-Advisor of the Federal Bureau of Investigation (FBI) and am currently assigned as the Acting Chief of the Litigation Unit, Freedom of Information-Privacy Acts (FOIPA) Section, Office of Public and Congressional Affairs at FBI Headquarters (FBIHQ) in Washington, D.C.

(2) Due to the nature of my official duties, I am familiar with the procedures followed by the FBI in responding to requests for information from its files pursuant to the provisions of 5 U.S.C. § 552, commonly known as the Freedom of Information Act (FOIA), and 5 U.S.C. § 552a, commonly known as the Privacy Act of 1974. I am aware of the treatment which has been afforded plaintiffs' FOIA requests to the FBI, in which they seek access to agency records "concerning the individuals 'arrested or detained' in the words of Attorney General Ashcroft, in the wake of the September 11 attack, and referred to by the President, the Attorney General and the FBI Director in various public

statements." Specifically, plaintiffs seek access to the following information in connection with these individuals:

- (a) the identities of each such individual, where they are being held, the circumstances of their detention or arrest, and any changes brought against them;
- (b) the identity of any lawyers representing any of these individuals;
- (c) the identities of any courts, which have been requested to enter orders sealing any proceedings in connection with any of these individuals, any such orders which have been entered, and the legal authorities that the government has relied upon in seeking any such secrecy orders; and
- (d) all policy directives or guidance issued to officials about making such public statements or disclosures about these individuals or about the sealing of judicial or immigration proceedings.

(3) The purpose of this declaration is to detail the correspondence between plaintiffs and the FBI in this matter, and provide the Court and plaintiffs with a brief justification for the withholding of certain information within the responsive material pursuant to FOIA Exemptions 7(A), and 7(C), 5 U.S.C. §§ 552 (b)(7)(A) and (b)(7)(C).¹

(4) Below is a description of the correspondence between plaintiffs and the FBI concerning Plaintiff's request to the FBI for certain records:

¹ The FBI's justification for the withholding of responsive material is further explained in the declarations of James S. Reynolds Chief, Terrorism and Violent Crimes Section, Criminal Division, DOJ ("Reynolds Declaration"), filed contemporaneously herewith. Due to the fact that the underlying investigation from which plaintiffs seek records is a multi-agency investigation, the harms that would result from revealing the FBI's information are identical to the harms articulated in the Reynolds Declaration.

Correspondence between Plaintiffs and FBI

SUMMARY OF CORRESPONDENCE				
Date	To	From	Summary	See Exhibit
October 29, 2001	John M. Kelso, Jr. FOIPA Section Chief, FBI	Kate Martin, Esq., Director, Center for National Security Studies	Ms. Martin sent a letter on behalf of certain "organizations that work to protect the public's right to know, civil liberties, and human rights," ² requesting the information set forth in paragraph 2, <u>supra</u> . This letter also sought expedited consideration of the request.	A
October 31, 2001	Kate Martin	FBIHQ	FBIHQ acknowledged plaintiffs' request and assigned it FOIPA Request number 0952485-000	B
November 1, 2001	Kate Martin	FBIHQ	FBIHQ notified Ms. Martin that the material responsive to the FOIA request was being withheld pursuant to FOIA exemption (b)(7)(A), 5 U.S.C. § 552, and provided information regarding appeal rights to the DOJ Office of Information and Privacy (OIP)	C

² These organizations were specifically identified as follows: American Civil Liberties Union, American Friends Service Committee, American Immigration Law Foundation, American Immigration Lawyers Association, American Muslim Council, Amnesty International USA, Arab American Institute, Arab-American Anti-Discrimination Committee, Center for Constitutional Rights, Center for Democracy and Technology, Center for National Security Studies, Council on American Islamic Relations, Electronic Privacy Information Center, Federation of American Scientists, First Amendment Foundation, Human Rights Watch, Lawyers Committee for Human Rights, National Immigration Project of the National Lawyers Guild, OMB Watch, and the Nation Magazine.

November 2, 2001	FBIHQ	Kate Martin	Requested the FBI add twenty additional organizations who are requesting information on those individuals who have been arrested or detained in the investigation of the September 11 attacks. ³	D
November 7, 2001	Kate Martin	OIP	Appealed the FBI's decision asserting FOIA Exemption (b)(7)(A) on an expedited basis	E
November 23, 2001	OIP	Kate Martin	OIP acknowledged the appeal and assigned it appeal number 02-0253	F
December 10, 2001	OIP	Kate Martin	OIP notified Ms. Martin that the FBI had properly withheld the requested information pursuant to both FOIA exemptions (b)(7)(A) and (b)(7)(C). The letter also notified Ms. Martin that the FBI had no records responsive to the request for policy directives issued to officials regarding the disclosure of information about detainees.	G

The PENTTBOMB Investigation

(5) As the Attorney General has publicly stated, the events of September 11, 2001 have caused the United States "to make the choice to fight terrorism -- not just for ourselves but for all

³ These organizations, which are included as plaintiffs in this action, were identified as: The Asian American Legal Defense and Education Fund, Center for Economic and Social Rights, Center for Human Rights and Constitutional Law, Electronic Frontier Foundation, Freedom of Information Center at the Missouri School of Journalism, Fund for Constitutional Government, Lawyers Committee for Civil Rights, Libertarian Party, National Black Police Association, National Association for Criminal Defense Lawyers, National Council of La Raza, Online Policy Group, Partnership for Civil Justice, People for The American Way Foundation, privacyactivism.org, Reporters Committee for Freedom of the Press, Research & Policy Reform Center, The Multiracial Activist and The Abolitionist Examiner, World Organization Against Torture USA.

civilized people. Since September 11 . . . a deliberate campaign of terrorist disruption, tighter security around potential targets, and a preventative campaign of arrest and detention of lawbreakers, America has grown stronger – and safer – in the face of terrorism.” Testimony of Attorney General Ashcroft, Senate Committee on the Judiciary, Dec. 6, 2001. DOJ has “launched the largest, most comprehensive criminal investigation in world history to identify the killers of September 11 and to prevent further terrorist attacks. Four thousand FBI agents are engaged with their international counterparts in an unprecedented worldwide effort to detect, disrupt and dismantle terrorist organizations.” Id.

(6) DOJ, in conjunction with its components, the FBI and INS, and other federal agencies, has actively been performing a criminal investigation in connection with the attacks of September 11, 2001 (“PENTTBOM”). The information to which plaintiffs seek access plays a significant role in DOJ’s investigation, as well as a significant role in numerous other pending terrorism and counterterrorism investigations.

(7) The responsive material has been denied to plaintiffs by the FBI in their entirety pursuant to FOIA Exemptions 7(A) and 7(C). These law enforcement records are from the pending law enforcement and immigration files of each of the so-called “detainees” which are the subject matter of plaintiffs’ FOIA request. The FBI has opened and maintains these law enforcement files as an active criminal law enforcement investigation. The Attorney General has stated that it would not be responsible for DOJ, in this time of war, to advertise which potential members of terrorist organizations the government has in custody. Until DOJ is ready to close these matters and potentially charge any of these “detainees” with crimes, the cases will continue to be in a pending status and no information can

be released to the public without compromising this and other related terrorism, counterterrorism and national security investigations.

JUSTIFICATION FOR WITHHELD MATERIAL

EXEMPTION (b)(7)(A)

(8) Exemption (b)(7)(A) is being asserted for withholding in their entirety all material responsive to plaintiffs' request to the FBI. 5 U.S.C. § 552(b)(7)(A) exempts from disclosure:

records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings

Application of this exemption requires the existence of law enforcement records, a pending or prospective law enforcement proceeding, and a reasonable expectation that release of the information would interfere with the enforcement proceeding.

(9) The FBI's investigation concerning PENTTBOMB is massive. The FBI is unable to search this massive file for responsive records without harming the underlying investigation. To undertake a search for responsive documents would cause the FBI to pull Special Agents and Support Personnel off of the investigation in order to search for responsive records. Further, it is my understanding that the records in the possession of DOJ and some of its other components, which have received identical FOIA requests from plaintiffs, are similar or identical to the documents located within the FBI's files.

(10) Any release of information from the responsive files would be premature due to the numerous harms which would ensue. These harms are specifically articulated in the declaration of James S. Reynolds Chief, Terrorism and Violent Crimes Section, Criminal Division, DOJ ("Reynolds Declaration") filed contemporaneously herewith.

EXEMPTION (b)(7)(C)

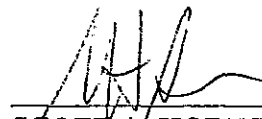
(11) 5 U.S.C. § 552 (b)(7)(C) exempts from disclosure:

records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information could reasonably be expected to constitute an unwarranted invasion of personal privacy

When withholding information pursuant to this exemption, the FBI is required to balance the privacy interests of the individuals mentioned in the documents against any public interest in disclosure. The public interest in disclosure of the information is determined by whether the information in question would inform plaintiffs or the general public about the FBI's operations, activities, or the performance of its statutory duties. In withholding the information at issue here, the FBI concurred with the Attorney General's determination that the privacy interests of the detainees outweighs any conceivable public interest in disclosure. The declaration of Melanie Ann Pustay, Deputy Director, OIP, DOJ ("Pustay Declaration"), filed contemporaneously herewith, articulates in detail the privacy interests of the detainees that would be violated in the event the information to which plaintiffs seek access would be revealed.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct, and that Exhibits A - G are true and correct copies.

Executed this 11th day of January, 2002.



SCOTT A. HODES
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Federal Bureau of Investigation
Washington, D.C.