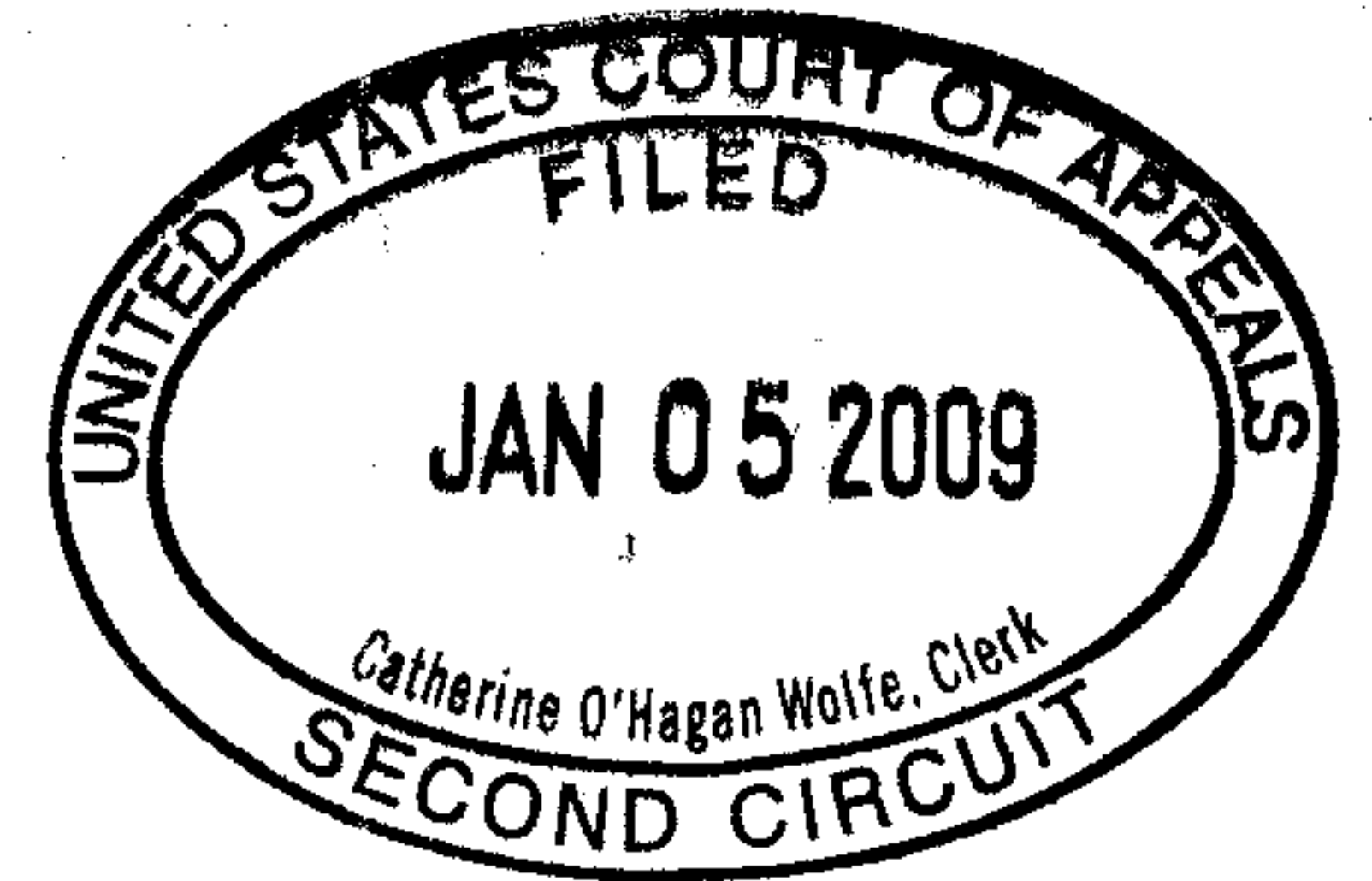


**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**



(Argued: May 5, 2008)

August Term, 2007

Decided: January 5, 2009)

Docket No. 06-5352-cv

ASSOCIATED PRESS,  
*Plaintiff-Appellee,*

-v.-

UNITED STATES DEPARTMENT OF DEFENSE,  
*Defendant-Appellant.*

BEFORE: WINTER, HALL, *Circuit Judges*, KRAVITZ, *District Judge*.\*

The Department of Defense (“DOD”) appeals from a judgment of the United States District Court for the Southern District of New York (Rakoff, *J.*) granting the Associated Press (“AP”) summary judgment in large part and ordering DOD to disclose (1) detainee identifying information contained in records of DOD’s investigations of detainee abuse at Guantanamo Naval Bay in Cuba by United States military personnel and by other detainees, and (2) identifying information of detainees’ family members contained in personal letters to two detainees submitted to an Administrative Review Board, based on the district court’s finding that

\* The Honorable Mark R. Kravitz, United States District Court Judge for the District of Connecticut, sitting by designation.

the privacy exemptions in the Freedom of Information Act (“FOIA”) did not apply. We hold that the detainees and their family members do have a measurable privacy interest in their identifying information and that the AP has failed to show how the public interest would be served by disclosure of this information. We conclude that the identifying information is exempt from disclosure under the FOIA privacy exemptions.

REVERSED.

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ELIZABETH WOLSTEIN, Assistant United States Attorney for the Southern District of New York for Michael J. Garcia, United States Attorney (James L. Cott, Sarah S. Normand, *of counsel*), New York, NY, *for Defendant-Appellant*.

DAVID A. SCHULZ (Adam J. Rappaport, *on the brief*), Levine Sullivan Koch & Schulz, LLP, New York, NY, *for Plaintiff-Appellee*.

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HALL, *Circuit Judge*:

The Department of Defense (“DOD”) appeals from a judgment of the United States District Court for the Southern District of New York (Jed S. Rakoff, J.) granting the Associated Press (“AP”) summary judgment in large part and ordering DOD to disclose identifying information of Guantanamo Bay detainees contained in DOD records documenting allegations of abuse by military personnel and by other detainees, and identifying information of family members contained in personal letters sent to two detainees and submitted by those detainees to Administrative Review Boards (“ARB”)<sup>1</sup> pursuant to the Freedom of Information Act (“FOIA”),

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<sup>1</sup> The Administrative Review Board was established to assess annually the need to continue to detain each enemy combatant during the course of the current and ongoing hostilities. This administrative review permits each enemy combatant in the control of DOD at Guantanamo Bay Naval Base to explain why he is no longer a threat to the United States and its allies in the

5 U.S.C. § 552 (2006). The district court found that the privacy exemptions in FOIA did not protect that information from disclosure, concluding that the detainees and their family members had no cognizable privacy interest and that the public interest in disclosure was great. We hold that the detainees and their family members do have a measurable privacy interest in the nondisclosure of their identifying information in these records and that the AP has failed to show how the public interest would be further served by disclosure of their identities. We conclude that the FOIA privacy exemptions protect this information from disclosure. We reverse.

### **Background**

This case arises out of two FOIA requests submitted to DOD by AP, seeking documents related to detainee treatment at Guantanamo Bay. The first was made on November 16, 2004, and requested, *inter alia*, copies of documents containing allegations or accounts of mistreatment of detainees by U.S. military personnel since January 2002, including any disciplinary action taken, and copies of documents containing allegations of detainee-against-detainee abuse. A subsequent January 18, 2005 request was made for documents related to ARB hearings, including (1) transcripts of testimony; (2) written statements and other documents provided by detainees; (3) affidavits submitted by witnesses to the ARBs; (4) allegations against the detainees; and (5) explanations of decisions made to release or transfer detainees.

AP filed a complaint on June 9, 2005 to compel DOD to produce the requested documents. DOD responded by producing 1,400 pages of documents, many of which had extensive redactions. DOD moved for summary judgment on February 23, 2006, and AP cross-

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ongoing armed conflict against Al Qaida and its affiliates and supporters or to explain why his release would otherwise be appropriate.

moved for summary judgment on March 3, 2006.<sup>2</sup> By the time the motions were addressed by the district court, the dispute had narrowed to four categories of redaction: (1) identifying information of detainees who allege abuse by DOD personnel, which DOD had redacted pursuant to FOIA Exemptions 6 and 7(C);<sup>3</sup> (2) identifying information of detainees involved in allegations

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<sup>2</sup> Although the docket and Joint Appendix reflect that DOD first moved for summary judgment and AP subsequently cross-moved for summary judgment, in its order the district court stated that: "AP's motion for summary judgment is hereby granted, and DOD's counter-motion denied."

<sup>3</sup> The FOIA exemptions are found at 5 U.S.C. § 552(b), which provides:

This section does not apply to matters that are--

(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) 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, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy,

of detainee-against-detainee abuse, which DOD had redacted pursuant to Exemptions 6 and 7(C); (3) identifying information of detainees in transfer-release documents, which DOD had redacted pursuant to Exemptions 5 and 6; and (4) identifying information of detainees' family members in correspondence sent to detainees and submitted by the detainees in their ARB proceedings, which DOD had redacted pursuant to Exemptions 3 and 6.

On September 20, 2006, the district court granted AP's motion for summary judgment in large part and denied DOD's counter-motion, holding that AP "is entitled to nearly all the information it seeks." First, it ruled that Exemptions 6 and 7(C) did not apply to identifying information of detainees who allege abuse by DOD personnel because "the privacy interest is minimal and the public interest is great" such that "disclosure of this information would

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(D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

5 U.S.C. § 552(b) (2006). The exemptions are referred to by number, e.g., "Exemption 6," which can be found at 5 U.S.C. § 552(b)(6).

constitute neither a clearly unwarranted [under Exemption 6], nor an unwarranted [under Exemption 7(C)] invasion of personal privacy.” At issue were eight files from investigations into detainee mistreatment by military personnel in which DOD had redacted the names and other identifying information of the detainees involved. The district court explained that Exemptions 6 and 7(C) require the court to balance the privacy interest and public interest; it found that it was “hard to see that any substantial privacy interest is involved” because the detainees’ identities were fully known to the personnel they accused and to the personnel who responded to the accusations. It further explained that detainees, like other prisoners, have minimal privacy rights, and surmised moreover that “individuals detained incommunicado without many procedural safeguards . . . would want their plights, and identities, publicized.” The district court based the latter conclusion on the fact that three former detainees had issued a report in 2004 alleging that they had been beaten and mistreated in Guantanamo; other detainees had conveyed such abuse allegations to the public through their attorneys; and still other detainees had participated in hunger strikes to protest alleged abuse. Against what it determined to be a minimal privacy interest, the district court weighed the “considerable public interest in learning more about DOD’s treatment of identifiable detainees, whether they have been abused, and whether such abuse has been properly investigated.” It found that AP had made a showing of evidence “that would warrant belief by a reasonable person that the alleged Government impropriety might have occurred.” Thus, it concluded that because the public interest is great and the privacy interest minimal, the redactions had to be removed and the identifying information disclosed.

Second, the district court concluded that identifying information of detainees involved in allegations of detainee-against-detainee abuse did not fall under Exemptions 6 and 7(C). The documents at issue were reports of allegations of detainee-against-detainee abuse recorded by military personnel. In considering the privacy interest of the detainees, the district court first found that the interest of the detainees alleging abuse was minimal because their purpose in making the allegations was “to bring them to light.” Although the court commented that the privacy interest of detainees against whom allegations of abuse were made “might be slightly more weighty,” it reiterated that prisoners have modest privacy rights. The district court also pointed out that the government had “failed to make a particularized showing of why any given one of [the detainees] has a material privacy interest in keeping his identity secret.” It therefore concluded that any privacy interest was “substantially outweighed by the public interest in knowing more about the context in which DOD was called upon to evaluate the allegations,” reasoning further that this inquiry could only be explored if the particulars about the person whose conduct was in question were known. Specifically, the district court explained that without the names, AP would not know the detainees’ nationalities or religions; without that information it would be impossible to scrutinize DOD’s conduct.

Third, the district court found that identifying information of detainees in transfer-release documents did not fall under Exemptions 5 and 6 and must be disclosed.<sup>4</sup> The district court reasoned that Exemption 5, which exempts “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the

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<sup>4</sup> DOD has since produced these documents, unredacted, and does not challenge this decision on appeal.

agency,” 5 U.S.C. § 552(b)(5), did not apply to the transfer-release documents because they do not fall within the scope of the deliberative process privilege. It also concluded that Exemption 6 did not apply because the government did not offer more than “conclusory speculation” that disclosure of the information could subject detainees and their family members to harm.

On the final issue, the district court held, with one exception, that the redacted identifying information of detainees’ family members contained in their letters submitted by the detainees at their ARB proceedings, did not fall under Exemptions 3 or 6. Exemption 3 protects from disclosure matters that are “specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.” 5 U.S.C. § 552(b)(3). The district court reasoned

that while 10 U.S.C. § 130c is an applicable withholding statute,<sup>5</sup> the documents did not arguably or logically fall within its scope and thus did not fall under Exemption 3.

As to Exemption 6's applicability to the family members' identifying information, the district court found this to be "a closer call." In its previous decision in *Associated Press v. U. S.*

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<sup>5</sup> 10 U.S.C. § 130c provides that a "national security official . . . may withhold from public disclosure otherwise required by law sensitive information of foreign governments in accordance with this section." The relevant requirements are:

(b) Information eligible for exemption.--For the purposes of this section, information is sensitive information of a foreign government only if the national security official concerned makes each of the following determinations with respect to the information:

(1) That the information was provided by, otherwise made available by, or produced in cooperation with, a foreign government or international organization.

(2) That the foreign government or international organization is withholding the information from public disclosure (relying for that determination on the written representation of the foreign government or international organization to that effect).

(3) That any of the following conditions are met:

(A) The foreign government or international organization requests, in writing, that the information be withheld.

(B) The information was provided or made available to the United States Government on the condition that it not be released to the public.

(C) The information is an item of information, or is in a category of information, that the national security official concerned has specified in regulations prescribed under subsection (f) as being information the release of which would have an adverse effect on the ability of the United States Government to obtain the same or similar information in the future.

10 U.S.C. § 130c(b) (2006) (footnote omitted).

*Dep't of Def.*, 410 F. Supp. 2d 147, 150, 152 (S.D.N.Y. 2006) (“*AP I*”),<sup>6</sup> the district court had stated that third parties have little expectation of privacy in information disclosed at the ARB proceedings, but it had invited DOD to make a “particularized showing” that a specific detainee had retained a reasonable expectation of privacy with respect to a specific item of information. In the current case, the district court analyzed such evidence presented by the government. As to Detainee b(1), the district court found that there was no indication that the detainee’s testimony would invite retaliation from the Taliban where he had testified that his involvement with the Taliban was at a lower level than charged. As to Detainee b(2), the court found that the government had met its burden to show that he had retained a reasonable expectation of privacy. Detainee b(2), in his testimony before the ARB, had said he “despised” the Taliban; he was also reluctant to share a letter from his wife before the ARB. Thus, as to Detainee b(2), the district court upheld DOD’s redaction of the detainee’s wife’s identifying information from her letter.<sup>7</sup>

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<sup>6</sup> In *AP I*, the district court held that identifying information of detainees in transcripts from military tribunal hearings was not exempted from disclosure under Exemption 6. *AP I*, 410 F. Supp. 2d at 151 (“Department of Defense has failed on this motion to establish, by undisputed admissible evidence, any cognizable privacy interest on the part of the detainees that would warrant the across-the-board application of Exemption 6 the defendant here seeks.”). AP had made a FOIA request for the transcripts from the military tribunals where the government had determined that detainees were enemy combatants; DOD produced redacted copies of transcripts and other related documents. *Id.* at 149. Even though the argument had not been properly raised, the court also considered DOD’s argument that the family members and other third parties whose identifying information had been redacted from the documents also had a privacy interest in nondisclosure. *Id.* at 153-54. The court concluded that these third parties did not have a cognizable privacy interest in nondisclosure of their identities because they lacked a reasonable expectation of privacy in that information. *Id.* at 156-57. Some of the documents included Red Cross Messages (“RCMs”) from detainees’ family members; upon the disclosure of these documents, the Red Cross specifically requested that DOD not release any more RCMs. DOD did not appeal from the decision in *AP I*.

<sup>7</sup> AP does not challenge the district court’s decision to uphold redaction of Detainee b(2)’s wife’s identifying information.

