

## Freedom of Information

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In 1966, Congress enacted the Freedom of Information Act (FOIA) to guarantee public access to government records and promote government accountability. Then-Representative Donald Rumsfeld welcomed the legislation, declaring on the floor of the House that the Act would “make it considerably more difficult for secrecy-minded bureaucrats to decide arbitrarily that the people should be denied access to information on the conduct of Government.” Ironically, Rumsfeld went on to become, as Defense Secretary, a key figure in the Bush administration’s campaign to mask from public view the truth about the torture and abuse of prisoners held in U.S. custody overseas in connection with the so-called war on terror. President Bush himself led this campaign, declaring that the United States was leading the fight against torture by example and repeatedly assured the world that the United States does not torture. Other senior officials, including Vice President Dick Cheney and CIA Directors George Tenet and Michael Hayden, echoed those public disavowals of torture.

Taking their cue from high-level officials, federal agencies played their own role in blocking the disclosure of information relating to the treatment of prisoners held in U.S. custody abroad. In October of 2003, the ACLU and its partners filed a FOIA request with a number of agencies including the CIA, the FBI, the Defense Department and the Justice Department, seeking records relating to the treatment of such prisoners and the U.S. practice of “rendering” prisoners to countries known to employ torture.<sup>2</sup> (Save for a handful of news reports, little on that subject was known at the time). Government agencies largely ignored the ACLU’s FOIA request. The Defense Department declined to expedite the request claiming there was no “compelling need” for release of the requested information.

In late April 2004, when photographs of U.S. military police abusing prisoners at Abu Ghraib were leaked to the press, it became all too apparent that the Bush administration had all the while been withholding records responsive to the ACLU’s FOIA request. Soon thereafter, the ACLU filed suit in federal court. In September 2004, Judge Hellerstein of the Southern District of New York issued a strongly worded opinion, observing that “[n]o one is above the law,” and that “FOIA, no less than any other law, must be duly observed.” Noting that the information requested was of “significant public interest,” the court chastised the government for the “glacial” pace of its response, which, according to the court, displayed an “indifference to the commands of FOIA, and fail[ed] to afford accountability of government that the act requires.” “If the documents are more of an embarrassment than a secret,” the court said, “the public should know of our government’s treatment of individuals captured and held abroad.”

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<sup>2</sup> The FOIA request was filed jointly by the ACLU, the Center for Constitutional Rights, Physicians for Human Rights, Veterans for Common Sense and Veterans for Peace.

It was not until after that opinion was issued that some of the defendant agencies grudgingly started turning over responsive records. Since late 2004, the ACLU and its partners have received more than 100,000 pages of documents in response to their FOIA request.<sup>3</sup>

Among the first set of records released to the ACLU were FBI emails containing eye-witness accounts of prisoner abuse at Guantánamo Bay. In one such account, an FBI agent at Guantánamo reports:

On a couple of occasions, I entered interview rooms to find a detainee chained hand and foot in a fetal position to the floor, with no chair, food, or water. Most times they had urinated and defecated on themselves, and had been left there for 18-24 hours or more[.] On one occa[s]ion, the air conditioning had been turned down so far and the temperature was so cold in the room, that the barefooted detainee was shaking with cold[.] When I asked the MP's what was going on, I was told that interrogators from the day prior had ordered this treatment, and the detainee was not to be moved[.] On another occasion, the A/C had been turned off, making the temperature in the unventilated room probably well over 100 degrees[.] The detainee was almost unconscious on the floor, with a pile of hair next to him[.] He had apparently been literally pulling his own hair out throughout the night[.]

On numerous occasions, Rumsfeld publicly dismissed Guantánamo prisoners' claims of abuse, declaring, "[t]hey're taught to lie, they're taught to allege that they have been tortured, and that's part of the training that they received." But the aforementioned document, along with scores of other FBI documents, confirm the truth of many of those claims. These documents were not only significant for vindicating accounts of prisoner abuse at Guantánamo in the face of official denials that such abuse had occurred. They were also significant for documenting details of the severe mental and physical damage caused by interrogation methods that were specifically approved for use at Guantánamo by Rumsfeld, details hard to discern from clinical descriptions of those methods contained in interrogation directives.

The FBI records had the added value of informing the ongoing debate about the effectiveness of abusive interrogation methods for producing intelligence. Proponents of the use of torture have framed this debate by employing a hypothetical "ticking time bomb scenario." This scenario purports to justify the torture of a prisoner known to possess intelligence relating to a live bomb on the grounds that the torture would surely elicit

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<sup>3</sup> A fuller exposition of the contents of these documents is contained in *Administration of Torture, A Documentary Record from Washington to Abu Ghraib and Beyond* (Jameel Jaffer and Amrit Singh) (Columbia Univ. Press 2007).

information that could be used to defuse the bomb, thereby saving countless innocent lives. But FBI documents received through the FOIA confirm that the abusive “SERE” (Survival, Evasion, Resistance, Escape) interrogation methods used by the Defense Department at Guantánamo Bay were not effective at producing valuable intelligence.<sup>4</sup> One FBI email describes these methods as “torture techniques” and complains that “these tactics have produced no intelligence of a threat neutralization nature to date and . . . [and] have destroyed any chance of prosecuting this detainee.” Indeed, the documents show that the FBI preferred “rapport-building” techniques to abusive techniques in interrogating detainees at Guantánamo, and that the Defense Department continued to employ abusive methods over the FBI’s objections.

The documents also demonstrate that the ticking time bomb hypothetical is inapposite for the added reason that the vast majority of prisoners held in U.S. custody, at least in Iraq, were not individuals who possessed intelligence of any value, but innocent bystanders swept up in military dragnets. A military commander in Iraq reports in a sworn statement:

It became obvious to me that the majority of our detainees were detained as the result of being in the wrong place at the wrong time, and were swept up by Coalition Forces as peripheral bystanders during raids. I think perhaps only one in ten security detainees were of any particular intelligence value.

The FOIA records clearly and unambiguously show that the torture and abuse of prisoners at the hands of U.S. personnel was not confined to Abu Ghraib, or indeed Guantánamo, but occurred at countless other locations in Iraq and Afghanistan. Numerous autopsy reports describe in gruesome detail the homicide deaths of prisoners in U.S. custody by “strangulation,” “asphyxia,” and “blunt force injuries.” One such autopsy report records the homicide death in Al Asad, Iraq of a forty-seven-year-old Iraqi male who was shackled to the top of a doorframe with a gag in his mouth at the time he lost consciousness and became pulseless and died. Other autopsy reports confirm that in December 2002, U.S. interrogators at Bagram Collection Point in Afghanistan killed two prisoners by subjecting them to “blunt force injuries.”

Perhaps most importantly, the records show that senior administration officials caused the widespread and systemic abuse and torture of prisoners held in U.S. custody abroad by authorizing departures from long established legal prohibitions against torture and cruel, inhuman and degrading treatment. Among such documents is a March 24, 2003 memorandum authored by Deputy Assistant Attorney General John Yoo addressed to the Defense Department’s General Counsel, William Haynes, that gave the Defense Department carte blanche authority to torture. This memorandum repeated much of the same legal analysis as a previous Office of Legal Counsel memo issued to the CIA in

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<sup>4</sup> SERE methods were traditionally applied on U.S. personnel to train them to withstand abusive interrogation by enemy forces. Under the Bush administration, these methods were employed as *offensive* tactics on prisoners held in connection with the so-called war on terror.

August 2002. Common to both memos was a definition of torture so narrow as to encompass only those methods that result in pain akin to that associated with “death, organ failure or the permanent impairment of a significant body function.” The March 2003 memo further argued without qualification that during wartime, the president’s commander-in-chief power overrides even the due process guarantee of the Fifth Amendment. Another Office of Legal Counsel memorandum—also disgorged through the FOIA litigation, albeit in heavily redacted form—authorizes the CIA to use specific interrogation methods, including “waterboarding,” which involves pouring water on the cellophane-wrapped face of a prisoner bound, with his feet raised, to an inclined board. The memo states that interrogation methods that cause severe mental pain do not amount to torture under U.S. law unless they cause “harm lasting months or even years after the acts were inflicted upon the prisoners.”

The documents also show that the chain of command specifically authorized abusive interrogation methods for use on prisoners. FBI documents confirm that harsh interrogation methods were approved for use at Guantánamo by high level Defense Department officials including Rumsfeld and Deputy Secretary of Defense Paul Wolfowitz. A September 2003 interrogation directive issued by Lieutenant General Ricardo Sanchez confirms that abusive interrogation techniques, including stress positions, sleep deprivation, exposure to extreme temperatures, and intimidation by dogs, were officially approved for use on prisoners held in U.S. custody in Iraq.

While we ultimately managed to wrest a significant number of government documents through litigation, this was from the start, and remains to date, an uphill battle. The Defense Department went to extraordinary lengths to withhold from public view photographs of U.S. forces abusing prisoners at locations *other* than Abu Ghraib in Iraq and in Afghanistan. Raising the specter of “national security,” the Defense Department advanced an unprecedented argument in court—the images had to be withheld, it argued, because the evidence of U.S. government misconduct depicted therein would generate widespread outrage, propaganda and violence directed at the United States across the world. This argument turns the FOIA—a statute enacted to ensure government accountability—on its head by seeking to afford the greatest protection from disclosure to records that depict the worst government misconduct.

Another of the government’s arguments for withholding the prisoner abuse images was couched in a newfound concern for complying with U.S. obligations under the Geneva Conventions. The government argued that disclosure of the prisoner abuse images would expose the prisoners to “insults and public curiosity” in violation of those obligations. While the administration’s apparent concern for detainees’ rights under the Geneva Convention was certainly welcome, the argument was particularly outrageous in light of its earlier disregard for those rights, documented in President Bush’s February 2002 determination that al Qaeda and Taliban prisoners were not entitled as a matter of law to the protections of the Geneva Conventions. In any event, as we argued before the court, the Geneva Conventions did not bar disclosure of the prisoner abuse images after individually identifying information had been deleted. Indeed, at the end of the Second World War, while the public curiosity provisions of the 1929 Geneva Conventions were in

effect, U.S. armed forces responsible for the liberation of a number of German and Japanese concentration and prison camps disseminated large of photographs from the camps to the media to serve the Conventions' central aim: that of ensuring that prisoners are treated humanely.

Despite its best efforts to prevent the disclosure of the prisoner abuse images, the Bush administration's arguments for withholding the prisoner abuse images were soundly rejected by the district court as well as by a unanimous panel of the Second Circuit Court of Appeals. Yet, the administration took the added and unusual step of requesting further review by the full court of appeals, a request that is pending as of this writing. The Defense Department also continues to withhold interrogation directives authorizing U.S. forces in Afghanistan to use abusive methods on prisoners, as well as details of techniques used by special operations task forces, claiming yet again that disclosure of these documents will harm national security.

The Defense Department was not the only agency to use national security as a pretext for withholding documents that could prove embarrassing. The CIA—by far the most secretive of federal agencies—has barely made any substantive disclosures to date in the FOIA litigation. Indeed, the threshold legal battles against the CIA have been over its refusal even to confirm or deny whether documents responsive to our FOIA requests exist. In particular, for more than two years, invoking what is known in FOIA parlance as the “Glomar” doctrine, the CIA refused to confirm or deny the existence of a 2001 Presidential directive authorizing it to set up overseas detention facilities. Nor would it disclose the existence of an August 2002 Office of Legal Counsel (OLC) memorandum authorizing the CIA to use harsh interrogation methods that include “waterboarding.” The CIA's remarkable argument was that it would damage national security if the agency were to admit that it had even *an interest* in detainee interrogations. But in September 2006, President Bush himself announced at a press briefing that the CIA had interrogated prisoners at overseas detention facilities. Following that press briefing, the CIA acknowledged that the two aforementioned documents did in fact exist, confirming that there was no merit to its arguments for withholding this information in the first place.

The CIA continues to withhold the presidential directive and large portions of the OLC memo authorizing the CIA to use specific abusive methods, along with numerous other documents relating to an investigation by the CIA's Office of Inspector General into prisoner abuse. And in late 2007, it emerged that the CIA had, in 2005, secretly destroyed hundreds of hours of videotapes depicting the abusive interrogation of terrorist suspects, records that were responsive to the ACLU's FOIA request. The ACLU moved the court to hold the CIA in contempt for destroying the tapes. But the CIA succeeded in staying those proceedings by claiming that they would interfere with an ongoing Justice Department investigation into the tape destruction. Meanwhile, the OLC continues to withhold still more policy memos from 2005 that secretly authorized the CIA to use abusive interrogation methods even as Congress moved to enact legislation to prohibit cruel, inhuman and degrading treatment by the agency.

Today, more than five years since we first filed our FOIA request, key documents relating to the Bush administration's illegal policies governing prisoner treatment and interrogation remain secret. Some would therefore rightly question the value of the FOIA as a tool for promoting government accountability. Yet, partial though these disclosures are, they have played an important role in exposing, through the Bush administration's own documents, the critical role played by senior officials in spawning the torture and systemic abuse of prisoners held in U.S. custody abroad. Whether the political will exists to hold those officials accountable is of course a separate question, one that remains to be answered in time to come.