UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE NEW YORK TIMES COMPANY and CHARLIE SAVAGE Plaintiffs, - against - THE UNITED STATES DEPARTMENT OF JUSTICE Defendant.	:	14 Civ. 03777 (JPO)

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT FOLLOWING REMAND

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

PRELIMINARY STATEMENT

Plaintiffs The New York Times Company and Charlie Savage (jointly, "The Times") respectfully submit this memorandum of law in support of their motion for summary judgment following remand and in opposition to the Government's motion for summary judgment.

After more than six years of litigation, only a single document remains in contention in this Freedom of Information Act ("FOIA") case: the redacted version of a preliminary review (the "Preliminary Review Memo") written by special attorney John Durham for the Department of Justice ("DOJ") as part of its investigation into the abuse of detainees in the years after 9/11. As to that document, only two issues are left to decide. The first is the meaning of the Second Circuit's remand decision when the court directed the Department of Justice to disclose sections of the memorandum and any exhibits "relating to the conclusion that a number of the detainees investigated were not in CIA custody." The second is whether, on remand, The Times is permitted to seek and obtain a part of the Preliminary Review Memo consisting of nothing more than a list of detainee names drawn from public sources but declared classified by the Government.[1]

As to the first issue, the Government attempts to rewrite the Second Circuit's decision so that the words "relating to" magically disappear. It wants to treat "relating to the conclusion" as synonymous with "the conclusion." That it cannot do. Countless judicial opinions have recognized that the phrase "relating to" (or "related to") should be given broad meaning and effect, and such a broad reading is fully consistent with the context of the Second Circuit's opinion. All non-classified parts of the Preliminary Review Memo that discuss the holding of

[1] If there is other public-source information that has been withheld under Exemptions 1 or 3, it is subject to release as well.

detainees by nations or agencies other than the CIA should to be released under the circuit's decision, not just statements of Durham's conclusion.

As for the list of names, the Government raises the "mandate rule" and claims that The Times is improperly trying to relitigate Exemptions 1 and 3. That is a red herring. In February 2017, this Court, relying on a declaration filed by the Government, identified six categories of information that could be withheld under Exemptions 1 and 3. The list of name falls in none of those categories. It is the Government, not The Times, that needs to be estopped from changing its position at this late date.

FACTUAL STATEMENT

The facts relevant to this motion are set out in the United States Department of Justice's Memorandum of Law in Support of Its Motion for Summary Judgment Following Remand ("DOJ Mem."), Dkt. No. 81.

ARGUMENT

The "basic purpose" of FOIA reflects "a general philosophy of full agency disclosure." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 360 (1976); *accord Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7–8 (2001) ("[D]isclosure, not secrecy, is the dominant objective of the Act"). FOIA exists "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co*., 437 U.S. 214, 242 (1978). To that end, FOIA requires that Government records be made available to the public unless a statutory exemption applies. 5 U.S.C. § 552(a)(3)(A), (b)(1)–(9). "FOIA exemptions are to be construed narrowly," and there is a "strong presumption in favor of disclosure [that] places

the burden on the agency to justify the withholding of any requested documents." *Assoc. Press v. Dep't of Def.*, 554 F.3d 274, 283 (2d Cir. 2009).

A court reviews de novo an agency's decision to withhold information from the public. 5 U.S.C. § 552(a)(4)(B). As a result, the agency's decision as to the applicability of a given exemption is entitled to no judicial deference. *See Bloomberg, L.P. v. Bd. of Governors of Fed. Reserve Sys.*, 601 F.3d 143, 147 (2d Cir. 2010). "Conclusory assertions of privilege will not suffice to carry the government's burden of proof in defending FOIA cases." *Assadi v. U.S. Citizenship & Immigration Servs.*, 2015 U.S. Dist. LEXIS 42544, at *5 (S.D.N.Y. Mar. 31, 2015) (quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (internal quotation marks omitted)).

I.

THE SECOND CIRCUIT'S OPINION REQUIRES THE GOVERNMENT TO RELEASE ALL INFORMATION IN THE MEMO CONCERNING THE HOLDING OF DETAINEES BY NATIONS OR ENTITIES OTHER THAN THE CIA

The Second Circuit twice set out the bounds of what must be disclosed on remand in respect to CIA detainees who were not in CIA custody. The crux of the court's decision was that certain statements by Attorney General Holder constituted a waiver of the attorney work-product privilege, thereby dictating the release of information in the Preliminary Review Memo about those detainees:

> Specifically, in his June 30, 2011 statement, Holder explained that "Mr. Durham examined any possible CIA involvement with the interrogation of 101 detainees who were in United States custody subsequent to the terrorist attacks of September 11, 2001, *a number of whom were determined by Mr. Durham to have never been in CIA custody*" (emphasis supplied). Then, in his July 11, 2012 public statement, Holder said again that Durham "determined that a number of the detainees were never in CIA custody." We find these statements to be sufficiently specific that they are tantamount to public disclosure

> of the parts of the relevant memoranda that *relate to this finding*. Accordingly, we hold that the government waived the privilege over the sections of the memoranda and exhibits *relating to* the conclusion that a number of the detainees investigated were not in CIA custody. Because Holder referenced this fact in both of his public statements, our holding applies to all five of the memoranda and associated exhibits.

New York Times Co. v. U.S. Dep't of Justice, 939 F.3d 479, 496 (2d Cir. 2019) (emphasis added).[2] Then in its conclusion, the court reiterated the point: "[t]he Department of Justice is directed to release the portions of John Durham's memoranda and associated exhibits that *relate to* the conclusion that some of the detainees were not in CIA custody." *Id.* at 498 (emphasis added).

The operative phrase is "relate to" (or "relating to"). The Government's crimped reading of the term finds no support in the context of the opinion or in the well-settled understanding of the law. The Government believes that it must disclose only those passages that set forth Durham's ultimate conclusion that a detainee was not in CIA custody. DOJ Mem. at 22–23. But the circuit's opinion requires more: all statements about non-CIA custody that are being withheld under Exemption 5 must be released, whether or not those statements express Durham's conclusion, including, for instance, facts that played a part in that determination.

The courts have repeatedly been asked to construe the term "related to" in a variety of legal contexts, and they have repeatedly found it to sweep broadly. The Second Circuit, in examining the meaning of "related to" in an insurance contract, laid out its breadth as a legal construct:

> The term "related to" is typically defined more broadly and is not necessarily tied to the concept of a causal connection. Webster's Dictionary defines "related" simply as "connected by reason of an established or discoverable relation." Webster's Third New International Dictionary, *supra*, at 1916. The word "relation," in turn, as "used especially in the phrase 'in relation to,'" is defined as a "connection" to or a "reference" to. *Id*. at

[2] Because Holder's waiver implicates only Exemption 5 (the deliberative process privilege), it does not reach information that is properly classified and withheld under Exemptions 1 and 3.

> 1916. Courts have similarly described the term "relating to" as equivalent to the phrases "in connection with" and "associated with," *see Jackson v. Lajaunie,* 270 So. 2d 859, 864 (La. 1972), and synonymous with the phrases "with respect to," and "with reference to," *see Phoenix Leasing Inc. v. Sure Broad., Inc.,* 843 F. Supp. 1379, 1388 (D. Nev. 1994), *aff'd*, 89 F.3d 846 (9th Cir. 1996), and have held such phrases to be broader in scope than the term "arising out of." *See Jackson,* 270 So. 2d at 864.

Coregis Ins. Co. v. Am. Health Found., 241 F.3d 123, 128–29 (2d Cir. 2001); *see also Collins & Aikman Prods. Co. v. Bldg. Sys.,* 58 F.3d 16, 20 (2d Cir. 1995) (interpreting arbitration clause referencing "any claim or controversy arising out of or relating to the agreement" and finding that the language was "the paradigm of a broad clause"); *Williams v. AT&T Corp. (In re Touch Am. Holdings, Inc.)*, 2017 Bankr. LEXIS 1159, at *36 (Bankr. D. Del. Apr. 25, 2017) (applying New York law to the term "related to" and applying *Coregis*).

That was no aberration. The very same issue of construction was raised in regard to an injunction that barred legal action "relating to" a certain business transaction, and the same result followed. *Cardell Fin. Corp. v. Suchodolski Assoc.*, 2012 U.S. Dist. LEXIS 188295, at *156–57 (S.D.N.Y. July 17, 2012) ("the Second Circuit has discussed the term 'relating to' as one that is broad in scope, and that it is equivalent to such phrases as 'in connection with' and 'associated with'"). Elsewhere, a court in this district was asked to construe "relation" as it was used in a securities contract:

> The word "relation," in turn, as "used esp[ecially] in the phrase 'in relation to,'" is defined as a "connection" to or a "reference" to. Courts have similarly described the term "relating to" as equivalent to the phrases "in connection with" and "associated with," and synonymous with the phrases "with respect to," and "with reference to" . . . .

In re Optimal U.S. Litig., 813 F. Supp. 2d 351, 367 (S.D.N.Y. 2011).

The same broad interpretation can be found in criminal law. The Third Circuit found that Congress, in using the term "relating to" in a statute, evidenced its intent to cast a definition in its broadest sense. *Yong Wong Park v. Att'y Gen. of the United States*, 472 F.3d 66, 72 (3d Cir.

2006) (construing the Immigration and Nationality Act, which defines "aggravated felony" to include any offense "relating to" certain enumerated crimes). While the Government here urges the Court to give a narrow reading to the term, the Supreme Court has held that "the ordinary meaning of ['relating to'] is a broad one." *Morales v. Trans World Airlines*, 504 U.S. 374, 383 (1992). The term requires no deep parsing. It is understood to mean "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with." *Id.* (quoting Black's Law Dictionary 1158 (5th ed. 1979)). Earlier, the Supreme Court reviewed the pre-emption clause in ERISA, which applies to complaints that "relate to" employee benefit plans. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45–46 (1987). The Court directed that the term was to be given its "broad common-sense meaning" to ensure that the expansive sweep of pre-emption intended by the statute was realized. *Id.* at 47–48.

Nothing about the Second Circuit's opinion in this litigation suggests that "related to" was intended to deviate from its common broad meaning and should instead to be read restrictively. In effect, the Government attempts to write the phrase out of the opinion, so that circuit's actual statement, "[t]he Department of Justice is directed to release the portions of John Durham's memoranda and associated exhibits that *relate to* the conclusion that some of the detainees were not in CIA custody" (emphasis added) should be construed to read as if the court actually said "[t]he Department of Justice is directed to release the portions of John Durham's memoranda and associated exhibits that [*are*] the conclusion that some of the detainees were not in CIA custody." Had the Second Circuit meant to say that only Durham's conclusion had to be released, it could have said that easily enough. Instead, it used the same language—"related" or "relating to"—three times.

In fact, the context of the "relating to" statements in the Second Circuit's decision leaves no doubt that the disclosure is not limited to a statement of Durham's conclusion. The court expressly mentioned that the DOJ's waiver of the privilege applied to exhibits, not just Durham's memos. *New York Times*, 939 F.3d at 496. It then repeated the very same direction in its concluding paragraph. *Id.* at 498. The court could not have believed that the exhibits, where one would find research and evidence, contained Durham's conclusions.

The clear import of the circuit's holding is that DOJ is required to release not just statements of Durham's conclusion, but also material that contributed to—that is, "related to"—that conclusion, such as the law and facts that Durham relied upon to reach that conclusion. That is the plain-English, common-sense reading of the circuit's decision.

II.

THE GOVERNMENT CANNOT RELITIGATE THE COURT'S FEBRUARY 2017 DECISION, WHICH REQUIRES THE RELEASE OF THE LIST OF NAMES

In its effort to justify the redaction of a list of detainee names contained in the Preliminary Review Memo, the Government, in effect, seeks to reopen and modify a prior decision of this Court. But law-of-the-case principles do not permit the Government to do that. In February of 2017, this Court set out six categories of information that could be withheld under Exemptions 1 and 3 of FOIA, both of which permit the withholding of classified information. *See* Decision, Feb. 21, 2017 (the "2017 Decision"), Dkt. No. 55, at 12–13. It is the application of that decision of this Court, and not the mandate of the Second Circuit, that is actually at issue, despite the Government's invocation of the "mandate rule." The list of names falls in none of the six categories and therefore must be released now.

The 2017 Decision was issued during the earlier summary judgment briefing in this case, It came after the Government submitted a declaration from Jan M. Payne (the "Payne Declaration") identifying six categories of information that could be withheld under Exemption 1 and 3 in the Preliminary Review Memo (as well as the other documents still at issue then). *Id.* The Court adopted DOJ's argument and ruled that the Government could withhold the six categories: (1) information regarding human intelligence sources; (2) details concerning foreign liaison services; (3) the identities of covert personnel; (4) the locations of covert CIA installations and former detention centers located abroad; (5) descriptions of specific intelligence methods and tradecraft that are still in operational use; and (6) classification and dissemination control markings. *Id*. Those six categories are the law of the case as a result of the 2017 Decision and set the bounds of what the Government can withhold under Exemptions 1 and 3.

The redacted name list appears on page 7 of the Preliminary Review Memo. *See* Exhibit A to the Decl. of Jeannette A. Vargas, Dkt. No. 82-1, at 7. The unredacted introduction to the list says that the list of detainees was drawn from "open-source human rights articles." *Id.* The memo then notes that a "thorough review of FBI, CIA, and DOD documents failed to confirm that these detainees were held in CIA custody." *Id.* Importantly, a similar list of detainees appears unredacted at page 3 of the memo. *Id.* at 3. That section likewise says that the list was drawn from "open-source human rights articles." *Id.* It goes on to say that "a thorough review of available FBI, CIA, and DOD documents produced no evidence of [redacted] CIA involvement with the following individuals." *Id.*

Names of detainees drawn from public articles by human rights groups do not fall in any of the six categories authorized for withholding by this Court in the 2017 Decision. The individuals are not sources, foreign intelligence services, or covert personnel, and the disclosure

of the page 7 list would not reveal the location of detention sites or control markings. The list does not constitute "descriptions of specific intelligence methods and tradecraft that are still in operational use." In 2017, the Government, of its own volition, set out the categories of information that were covered by Exemptions 1 and 3, and the Court then ruled in the Government's favor on that issue. That ruling now stands and is determinative.

The Government's newfound position is a classic attempt to circumvent law-of-the-case principles. *See Delville v. Firmenich Inc.*, 23 F. Supp. 3d 414, 425 (S.D.N.Y. 2014) (Oetken, J.). The law-of-the-case doctrine "holds that when a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case unless cogent and compelling reasons militate otherwise." *Id.* The Government offers no such cogent or compelling reasons.

First, there is no question that the Government seeks an unfair advantage here. The Government accurately notes that The Times initially noticed a cross-appeal in which it could have challenged the withholdings under Exemptions 1 and 3, but subsequently withdrew the cross-appeal. DOJ Mem. at 13. Had The Times understood that the Government intended to invoke Exemptions 1 and 3 for publicly available information, it would have had to opportunity to challenge that dubious position on appeal. But there is no way a party can challenge a stealth position that is made public only after an appeal is argued and decided.

Second, the Government's justification for why it should now be permitted to withhold a list derived from public documents is not only not logical and not plausible but absurd on its face. *See Wilner v. NSA*, 592 F.3d 60, 73 (2d Cir. 2009) (justification for withholding under FOIA must be logical or plausible). The Government first says that if the names were released, they "would appear with all surrounding information" in the memo and therefore "would

necessarily suggest that the CIA had an intelligence interest in such individuals, and specifically, that such individual were the targets of CIA intelligence-gathering activities." DOJ Mem. at 18. Somehow the Government overlooks that virtually everything around the list of names for pages and pages has been redacted. Whatever context the Government is referring to has disappeared under a tidal wave of redaction tape. Further, far from showing any "intelligence-gathering activities," the small part of page 7 that is unredacted reveals that the list came not from sophisticated secret spycraft but from reading publicly available articles. And, of course, the very same arguments could have been made about the released list of names on page 3 of the memo, but wasn't.

The Government labors hard to try to distinguish the redacted page 7 list from the disclosed page 3 list. It points out that the introduction to the released list of names on page 3 says DOJ's review found that there was "no evidence of [redacted] CIA involvement with the following individuals" whereas on page 7 the introduction says that the DOJ review "failed to confirm that these detainees were held in CIA custody." DOJ Mem. at 18–19. On that thinnest of reeds, the Government hangs its argument that release of the page 7 list, but not the page 3 list, "would tend to reveal (i) human intelligence sources who may have been associated with these detainees and (ii) specific intelligence methods and tradecraft related to the CIA's interest in and prioritization of particular targets." Declaration of Vanna Blaine ("Blaine Declaration"), Dkt. No. 80, at ¶ 13. It is impossible to see the line of logic that could, in any world, connect the revelation of the names—and nothing more—to that sweeping revelation of classified information.

Hoping to nudge her case along, Blaine invokes a parade of horribles that would befall national security through the disclosure of the names on page 7, but in its exaggeration it makes

the argument sound even more hollow: the disclosure of these names garnered from open sources, says Blaine, would "expos[e] aspects of the Agency's resources, capabilities, tradecraft, human sources, and specific intelligence interests and activities to adversaries." *Id.*

Blaine lards her declaration with thoroughly unsupported statements. She writes: "Only by virtue of Mr. Durham's access to classified CIA intelligence was he able to assign these individuals into their respective categories and draw the conclusions that were ultimately reported in the Preliminary Review Memorandum." *Id.* at ¶ 11. How exactly did Blaine know what Durham was doing nine years ago when he wrote the memorandum—which was three years before she even began working in the FOIA area? *See* Blaine Declaration at ¶ 1. She does not purport to have spoken to Durham. There is no declaration from Durham, who provided a declaration in the earlier summary judgment motion practice in this case. She points to nothing that would provide a factual foundation for that insight into Durham's thinking and research. While the Government accurately quotes a D.C. Circuit case holding that the Government has only a "light" burden to justify withholding under Exemption 1 (DOJ Mem. at 18), it appears to be operating under the misapprehension that the burden is non-existent, whether under Exemption 1 or Exemption 3.

It is telling that when Blaine finally gets around to the six categories that this Court adopted in its 2017 Decision at the Government's urging, she stops short of saying that the names in fact fit into any of the categories. *See* Blaine Declaration at ¶ 12. Instead, she says, carefully, that "pages 7–9 and 26–29 of the Preliminary Review Memorandum contain classified information of the type [covered by the six categories]." *Id.*[3] It may well be that somewhere in the blacked-out sections of all those pages, the six categories are implicated. But that is not the

[3] To the extent that other open-source information, whether on pages 26 through 29 or elsewhere in the memo, is withheld under Exemptions 1 and 3, it too should be released.

issue before the Court. The issue before the Court is whether the names themselves fall within any of the six categories set out by the Government. They do not. To the extent that the Government is trying to shoehorn the list into Category No. 5—"descriptions of specific intelligence methods and tradecraft that are still in operational use"—the operative term is "descriptions." Not even Blaine suggests the names are descriptions.

Finally, even if the Government were right and the mandate rule applied (DOJ Mem. at 11–14), it would still be proper for the Court to rule on whether Exemptions 1 and 3 have been properly invoked for the name list. There are three generally accepted exceptions to the mandate rule: an intervening change in the law, the need to correct a clear error of law, and "the availability of substantially different evidence on remand." *Carlisle Ventures, Inc. v. Banco Espanol de Credito, S.A.*, 2001 U.S. Dist. LEXIS 1852, at *6 (S.D.N.Y. Feb. 23, 2001). At the time of the mandate, no part of the Preliminary Review Memo had been disclosed. Its disclosure following the Second Circuit's decision constitutes the sort of new evidence that counsels in favor of an exception to the mandate rule. Only with the revelation of the memo was The Times made aware that the Government was redacting open-source material. As set forth above, that evidence casts substantial doubt on the withholding of the page 7 list of names, and the Court should exercise its discretion to set aside the mandate rule and consider the release of the list.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully ask this Court: (i) to deny the Government's motion for summary judgment on remand and to grant Plaintiffs' cross-motion for summary judgment; (ii) to direct the Government to make public within 20 days the sections of the Preliminary Review Memo that remain at issue; (iii) to award Plaintiffs the costs of this

proceeding, including reasonable attorney's fees, as expressly permitted by FOIA; and (iv) to grant such other and further relief as the Court deems just and proper.

Dated: New York, NY
October 30, 2020

Respectfully submitted,

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