

1 UNITED STATES COURT OF APPEALS
2
3 FOR THE SECOND CIRCUIT
4

5
6
7 August Term, 2011
8

9 (Argued: March 9, 2012

Decided: May 21, 2012)

10 Docket Nos. 10-4290-cv(L), 10-4289-cv(CON), 10-4647-cv(XAP),
11 10-4668-cv(XAP)
12
13

14
15 AMERICAN CIVIL LIBERTIES UNION, CENTAL (L)

1 Before:

2 WESLEY, CARNEY, *Circuit Judges*, and CEDARBAUM, *District Judge*.*

3
4 Appeal and cross-appeal from a judgment of the United
5 States District Court for the Southern District of New York
6 (Hellerstein, J.), granting the parties' motions for partial
7 summary judgment with respect to Plaintiffs' Freedom of
8 Information Act request for the disclosure of records
9 concerning the treatment of detainees in United States
10 custody abroad since September 11, 2001. The Government
11 challenges the portion of the judgment requiring it to
12 disclose information in two memoranda pertaining to what the
13 Government considers a highly classified, active
14 intelligence method. Plaintiffs challenge the judgment
15 insofar as it sustained the Government's withholding of
16 certain records relating to the use of waterboarding and a
17 photograph of a high-value detainee in custody. We agree
18 with the district court that the materials at issue in
19 Plaintiffs' cross-appeal are exempt from disclosure. The
20 district court erred, however, in requiring the Government
21 to disclose the classified information redacted from the two
22 memoranda.

23
24 **AFFIRMED** in part and **REVERSED** in part.

25
26
27
28 TARA M. LA MORTE, Assistant United States Attorney
29 (Amy A. Barcelo, Sarah S. Normand, Assistant
30 United States Attorneys, *on the brief*), for
31 Preet Bharara, United States Attorney for the
32 Southern District of New York, New York, NY;
33 (Tony West, Assistant Attorney General, Ian
34 Heath Gershengorn, Deputy Assistant Attorney
35 General, Douglas N. Letter, Matthew M.
36 Collette, Attorneys, Civil Division, Appellate
37 Staff, Department of Justice, Washington,

1 Constitutional Rights, Incorporated, Physicians for Human
2 Rights, Veterans for Common Sense, and Veterans for Peace
3 (collectively "Plaintiffs") appeal from the same judgment
4 insofar as it upheld the Government's withholding of records
5 relating to the CIA's use of the Enhanced Interrogation

1 disclosure of records concerning (1) the treatment of
2 detainees; (2) the deaths of detainees while in United
3 States custody; and (3) the rendition, since September 11,

1 memoranda in a series of *ex parte*, *in camera* sessions. It
2 also reviewed several declarations from high-level executive
3 branch officials supporting the Government's withholding of
4 the redacted information. At the first session, the
5 district court issued a prelim It

1 to the classified information with alternative language
2 meant to preserve the meaning of the text. The district
3 court acknowledged the national security concerns
4 potentially raised by the disclosure of some of the
5 classified information, but nevertheless ordered that the
6 Government either disclose the information or comply with
7 the court's proposed compromise. The district court also
8 ordered that references to the classified information in the
9 transcript of the first *ex parte*, *in camera* proceeding be
10 disclosed or otherwise released in accordance with the
11 compromise. The district court memorialized its oral ruling
12 in a December 29, 2009 order. The Government now appeals
13 from that order.

14 **II. Facts and Procedural History Relevant to Plaintiffs'**
15 **Cross-Appeal**
16

17 Many of the documents released by the Government in
18 response to Plaintiffs' FOIA requests relate to the use of
19 EITs. During the course of this litigation, the President
20 prohibited the future use of certain EITs, including
21 waterboarding, formerly authorized for use on high-value
22 detainees.² On May 7, 2009, the district court ordered the

² On January 22, 2009, the President issued an executive order terminating the CIA's detention and interrogation program

1 Government to compile a list of documents related to the
2 contents of 92 destroyed videotapes of detainee
3 interrogations that occurred between April and December 2002
4 and which would otherwise have been responsive to
5 Plaintiffs' FOIA requests. Pursuant to that order, the CIA
6 identified 580 documents and selected a sample of 65
7 documents for the district court to review for potential
8 release. Specifically, the sample records comprise:

- 9 • 53 cables (operational communications) between CIA
10 headquarters and an interrogation facility;
- 11 • 3 emails postdating the videotapes' destruction;
- 12 • 2 logbooks detailing observations of interrogation
13 sessions;
- 14 • 1 set of handwritten notes from a meeting between a
15 CIA employee and a CIA attorney;
- 16 • 2 memoranda containing descriptions of the contents
17 of the videotapes;
- 18 • 1 set of handwritten notes taken during a review of
19 the videotapes;
- 20 • 2 records summarizing details of waterboard exposures
21 from the destroyed videotapes; and
- 22 • 1 photograph of Abu Zubaydah dated October 11, 2002.

and mandating that individuals in United States custody "not be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in Army Field Manual 2-22.3." Exec. Order No. 13,491, 74 Fed. Reg. 4,893, 4,894 (Jan. 22, 2009). Regpw4 (Jan. 22, 2009)

1
2 The Government withheld these records pursuant to FOIA
3 Exemptions 1 and 3, and the parties filed cross-motions for
4 summary judgment with regard to whether the records were
5 exempt from disclosure.³

6 The Government defended its withholding of the records
7 with three declarations of then-CIA Director Leon Panetta.
8 The declarations explained that the records consist
9 primarily of communications to CIA headquarters from a
10 covert CIA facility where interrogations were being
11 conducted, and include "sensitive intelligence and
12 operational information concerning interrogations of Abu
13 Zubaydah." Panetta Decl. ¶ 5, June 8, 2009. With respect
14 to Exemption 3, the declarations explained that, if
15 disclosed, the records would "reveal intelligence sources
16 and methods" employed by the CIA, as well as "the
17 organization and functions of the CIA, including the conduct
18 of clandestine intelligence activities to collect
19 intelligence from human sources using interrogation
20 methods." *Id.* ¶¶ 32, 35. With respect to Exemption 1, the

³ The Government also withheld portions of the records pursuant to other FOIA Exemptions. Plaintiffs do not challenge those withholdings on appeal.

1 declarations asserted that the records were properly
2 classified pursuant to Executive Order No. 12,958 and that
3 their disclosure could reasonably be expected to result in
4 harm to national security.

5 In response, Plaintiffs argued that the EITs were not
6 “intelligence methods” within the meaning of the CIA’s
7 withholding authorities because they had been repudiated,
8 and, in the case of waterboarding, declared unlawful by the
9 President. Plaintiffs also argued that the CIA had failed
10 to provide any explanation for withholding the photograph of
11 Abu Z

1 rejected Plaintiffs' argument that the President's
2 declaration was a sufficient basis for rejecting the
3 Government's position. The district court explained that it
4 would "decline to rule on the question of legality or
5 illegality in the context of a FOIA request." J.A. 1105-06.
6 Rebuffing Plaintiffs' argument that the photo should be
7 produced because the Government offered no justification for
8 its withholding, the district court sustained the
9 withholding and explained that "the image of a person in a
10 photograph is another aspect of information that is
11 important in intelligence gathering." J.A. 1115.

12 The district court memorialized its rulings in an
13 October 13, 2009 order. In sustaining the withholding of
14 the records under FOIA Exemption 3, the district court
15 concluded that the CIA had satisfied its burden of showing
16 that the release of the records could reasonably be expected
17 to lead to unauthorized disclosure of intelligence sources
18 and methods. The district court also rejected Plaintiffs'
19 argument that records relating to illegal activities are
20 beyond the scope of the unauthorized disclosure of information under FOIA Exemption 3.

1 order. In doing so, the district court reaffirmed its view
2 that neither statutory language nor case law supports
3 Plaintiffs' contention that the legality of the underlying
4 intelligence source or method bears upon the validity of an
5 Exemption 3 withholding.

6 On October 1, 2010, the district court entered partial
7 final judgment pursuant to Federal Rule of Civil Procedure
8 54(b), granting Plaintiffs summary judgment with regard to
9 the Government's withholding of the classified information
10 in the two OLC memoranda, and granting the Government
11 summary judgment with regard to the nondisclosure of records
12 related to the contents of the destroyed videotapes and the
13 photograph. Plaintiffs limit their cross-appeal to those
14 records reflecting the CIA's use of waterboarding and to the
15 photograph of Abu Zubaydah.

16 **DISCUSSION**

17 The Freedom of Information Act "calls for broad
18 disclosure of Government records." *CIA v. Sims*, 471 U.S.
19 159, 166 (1985). But public disclosure of certain
20 government records may not always be in the public interest.
21 Thus, Congress provided that some records may be withheld
22 from disclosure under any of nine exemptions defined in 5

1 U.S.C. § 552(b). *Id.* at 167.

2 An agency withholding documents responsive to a FOIA
3 request bears the burden of proving the applicability of
4 claimed exemptions. *Wilner v. NSA*, 592 F.3d 60, 68 (2d Cir.
5 2009). "Affidavits or declarations . . . giving reasonably
6 detailed explanations why any withheld documents fall within
7 an exemption are sufficient to sustain the agency's burden."
8 *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir.
9 1994). We review the adequacy of the agency's
10 justifications *de novo*. *Wilner*, 592 F.3d at 73. In the
11 national security context, however, we "must accord
12 *substantial weight* to an agency's affidavit concerning the
13 details of the classified status of the disputed record."
14 *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007) (internal
15 quotation marks omitted); see also *Sims*, 471 U.S. at 179.
16 Summary judgment is appropriate where the agency affidavits
17 "describe the justifications for nondisclosure with
18 reasonably specific detail, demonstrate that ²²the information
19 withheld logically falls within the claimed exemption, and
20 are not controverted by either contrary evidence in the
21 record nor by evidence of agency bad faith." *Wilner*, 592
22 F.3d at 73. Ultimately, an agency may ²²om374 IA

1 exemption if its justification “appears logical or
2 plausible.” *Id.* (internal quotation marks omitted).

3 **I. The Government’s Appeal—The OLC Memoranda**

4 The Government contends that the information redacted
5 from the OLC memoranda may be withheld from disclosure under
6 either FOIA Exemption 1 or 3. In our view, Exemption 1
7 resolves the matter easily.⁴ Exemption 1 permits the
8 Government to withhold information “specifically authorized
9 under criteria established by an Executive order to be kept
10 secret in the interest of national defense or foreign
11 policy” if that information has been “properly classified
12 pursuant to such Executive order.” 5 U.S.C. § 552(b)(1).
13 The Government contends that the redacted information was
14 properly classified under Executive Order No. 12,958, as
15 amended, which authorized the classification of information
16 concerning “intelligence activities (including special
17 activities), intelligence sources or methods, or
18 cryptology.” Exec. Order No. 12,958 § 1.5(c), 60 Fed. Reg.
19 19,825 (Apr. 17, 1995), *as amended by* Exec. Order No.

⁴ Because the FOIA Exemptions are independent of each other, we need only discuss why we conclude that the Government may invoke FOIA Exemption 1 to justify withholding the redacted information in the OLC memoranda. See *Wilner*, 592 F.3d at 72 (citing *Larson v. Dep’t of State*, 565 F.3d 857, 862-63 (D.C. Cir. 2009)).

1 13,292, 68 Fed. Reg. 15,315 (Mar. 25, 2003) (hereinafter
 2 "Exec. Order No. 12,958").⁵ Executive Order No. 12,958 also
 3 required as a condition to classification that an original
 4 classification authority "determine[] that the unauthorized
 5 disclosure of the information reasonably could be expected
 6 to result in damage to the national security" and "is able
 7 to identify or describe the damage." *Id.* § 1.1(a)(4), 68
 8 Fed. Reg. at 15,315.⁶

9 The district court held that the exemption was
 10 inapplicable because, in its view, the information pertains
 11 to a "source of authority" rather than a "method of
 12 interrogation." J.A. 1174-75.⁷ On appeal, as it did in the
 13 district court, the Government contends that the information
 14 pertains to an intelligence method and an intelligence

⁵ Executive Order No. 12,958 and all amendments thereto have since been superseded by Executive Order No. 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009). For purposes of Exemption 1, the propriety of a classification decision is considered under the criteria of the executive order that applied when the decision was made. See *Halpern v. FBI*, 181 F.3d 279, 289 (2d Cir. 1999).

⁶ The parties do not dispute whether the remaining criteria for proper classification have been satisfied. See Exec. Order No. 12,958 § 1.1(a), 68 Fed. Reg. at 15,315.

⁷ Addressing only the applicability of Exemption 3, the district court concluded that the information pertains to an intelligence method and an intelligence source. J.A. 1174-75. The government contends that the information pertains to an intelligence method and an intelligence source. J.A. 1174-75. The government contends that the information pertains to an intelligence method and an intelligence source. J.A. 1174-75.

1 activity, and that each category provides a basis for
2 classification under Executive Order No. 12,958. In support
3 of this contention, the Government has submitted
4 declarations from General James L. Jones, then-Assistant to
5 the President for National Security and National Security
6 Advisor; General Michael V. Hayden, then-Director of the
7 CIA; Leon Panetta, then-Director of the CIA; and Wendy M.
8 Hilton, Information Review Officer for Detainee-Related
9 Matters for the CIA.

10 Based on our *ex parte* and *in camera* review of the
11 unredacted OLC memoranda and the Government's classified
12 declarations, we agree with the Government that the redacted
13 information was properly classified because it pertains to
14 an intelligence activity. Plaintiffs concede that, even if
15 we were to characterize the information as a "source of
16 authority," "withholding [a] source of authority itself is
17 . . . proper if disclosing it would reveal . . .
18 intelligence sources, methods, or activities." Pls.' Br.
19 40-41. We give substantial weight to the Government's
20 declarations, which establish that disclosing the redacted
21 portions of the OLC memoranda would reveal the existence and
22 scope of a highly classified, active intelligence activity.

1 *See Doherty v. U.S. Dep't of Justice*, 775 F.2d 49, 52 (2d
2 Cir. 1985).

3 We reject any notion that to sustain the Government's
4 assertion that the withheld information concerns a protected
5 "intelligence activity" under Executive Order No. 12,958 is
6 effectively to exempt the CIA from FOIA's mandate. In
7 response to Plaintiffs' FOIA requests and related court
8 orders, the Government has already produced substantial

1 *Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 927 (D.C.
2 Cir. 2003). "Recognizing the relative competencies of the
3 executive and judici

1 weight and deference to the CIA's declarations, see *Doherty*,
2 775 F.2d at 52, we conclude that it is both logical and
3 plausible that the disclosure of the information pertaining
4 to a CIA intelligence activity would harm national security.

5 Furthermore, we reject the district court's suggestion
6 that certain portions of the redacted information are so
7 general in relation to previously disclosed activities of
8 the CIA that their disclosure would not compromise national
9 security. It is true that the Government has disclosed
10 significant aspects of the CIA's discontinued detention and
11 interrogation program, but its declarations explain in great
12 detail how the withheld information pertains to intelligence
13 activities unrelated to the discontinued program. Hilton
14 Decl. ¶ 6. And even if the redacted information seems
15 innocuous in the context of what is already known by the
16 public, "[m]inor details of intelligence information may
17 reveal more information than their apparent insignificance
18 suggests because, much like a piece of jigsaw puzzle, each
19 detail may aid in piecing together other bits of information
20 even when the individual piece is not of obvious importance
21 in itself." *Wilner*, 592 F.3d at 73 (alterations and
22 internal quotation marks omitted); see also *Sims*, 471 U.S.

1 at 178; *ACLU v. U.S. Dep't of Defense*, 628 F.3d 612, 625
2 (D.C. Cir. 2011). Again, it is both logical and plausible
3 that disclosure of the redacted information would jeopardize
4 the CIA's ability to conduct its intelligence operations and
5 work with foreign intelligence liaison partners.

6 Both parties contend that the district court's
7 compromise, whereby the Government could avoid public
8 disclosure of the redacted information by substituting a
9 purportedly neutral phrase composed by the court, exceeded
10 the court's authority under FOIA. We agree. FOIA does not
11 permit courts to compel an agency to produce anything other
12 than responsive, non-exempt records. See 5 U.S.C.
13 § 552(a)(4)(B). If the Government altered or modified the
14 OLC memoranda in accordance with the compromise, the
15 Government would effectively be "creating"
16 documents—something FOIA does not obligate agencies to do.
17 See, e.g., *Kissinger v. Reporters Comm. for Freedom of the*
18 *Press*, 445 U.S. 136, 152 (1980); *Pierce & Stevens Chem.*
19 *Corp. v. U.S. Consumer Prod. Safety Comm'n*, 585 F.2d 1382,
20 1388 (2d Cir. 1978). Moreover, given the "relative
21 competencies of the executive and judiciary," the district
22 court erred in "second-guess[ing]" the executive's judgment

1 The Government sufficiently explained that the withheld
2 information pertains to an “intelligence activity” and that
3 disclosure of the information would likely result in harm to
4 national security. The Government’s declarations are not
5 contradicted by the record, and there is no evidence of bad
6 faith by the Government in this regard. Accordingly, the
7 Government has sustained its burden of proving that the
8 information redacted from the OLC memoranda is exempt from
9 disclosure under FOIA Exemption 1. *See Wilner*, 592 F.3d at
10 73. We therefore reverse the district court’s judgment
11 insofar as it required disclosure of the information—either
12 in full or in accordance with the district court’s
13 compromise—in the OLC memoranda and the transcript of the
14 district court’s *ex parte*, *in camera* proceeding.

15 **II. Materials at Issue in Plaintiffs’ Cross-Appeal**

16 The district court agreed with the Government that the
17 records related to the contents of destroyed videotapes of
18 detainee interrogations and a photograph of high-value

Government retains ultimate control and may prevent a criminal defendant from disclosing classified information, with the consequence of the court either dismissing the indictment or taking another action adverse to the prosecution. *See* 18 U.S.C. app. 3, § 6(e). By contrast, the Government cannot walk away from a FOIA case in order to avoid disclosure of classified information.

1 detainee Abu Zubaydah in CIA custody may be withheld from
2 disclosure under FOIA Exemption 3. Plaintiffs challenge the
3 withholding of only those records relating to the CIA's use
4 of waterboarding and the photograph.

5 Exemption 3 permits the Government to withhold
6 information from public disclosure provided that: (1) the
7 information is "specifically exempted from disclosure by
8 statute"; and (2) the exemption statute "requires that the
9 matters be withheld from the public in such a manner as to
10 leave no discretion on the issue" or "establishes particular
11 criteria for withholding or refers to particular types of
12 matters to be withheld." 5 U.S.C. § 552(b)(3); see *Sims*,
13 471 N.C. 616, 617 (2006).

1 limiting definition that goes beyond the requirement that
2 the information fall within the Agency's mandate to conduct
3 foreign intelligence." *Id.* at 169.¹³

4 Here, Plaintiffs argue that the provision of the NSA
5 requiring the Director of National Intelligence to "ensure
6 compliance with the Constitution and laws of the United
7 States," see 50 U.S.C. § 403-1(f)(4), delimits the
8 Director's obligation under section 102A(i)(1) to "protect
9 intelligence sources and methods from unauthorized
10 disclosure," see 50 U.S.C. § 403-1(i)(1), and the
11 concomitant rights under FOIA to decline to disclose. The
12 statutory language does not, however, draw any such
13 limitation, and to do so by judicial device would flout
14 *Sims*'s clear directive against constricting the CIA's broad
15 authority in this domain. Again, *Sims* ÷ V ÷ E B l i m y A t t o r n e y 50 U.S.C. § 4

1 that text.

2 Moreover, we are wary of the practical difficulties
3 that would likely arise were the category of protectable
4 intelligence methods circumscribed as Plaintiffs propose.
5 In FOIA actions in which the government seeks to withhold
6 information related to an intelligence method, an
7 information officer and then the court would potentially be
8 forced to engage in a complex inquiry to determine whether
9 the government has sufficiently demonstrated the legality of
10 the method to justify withholding. In this respect, we
11 question how the court and the agency would handle varying
12 assessments of legality. What becomes of information
13 concerning a method that the President, on advice of
14 counsel, considers legal, but which is later declared
15 unlawful by a federal court or by a subsequent
16 administration? Relatedly, is the legality of a method to
17 be determined as of the time of the method's use or may a
18 forward-looking proscription also apply retroactively to
19 prevent reliance on an exemption? The matter currently
20 before us helps illustrate the point. Even if we assumed
21 that a President can render an intelligence method "illegal"
22 through the mere issuance of public statements, or, more

1 formally, through adoption of an executive order, and if we
2 further assumed that President Obama's Executive Order
3 coupled with his statements describing waterboarding as
4 "torture" were sufficient in this regard, we would be left
5 with the difficult task of determining what retroactive
6 effect, if any, to assign that designation. In our view,
7 such an "illegality" inquiry is clearly beyond the scope and
8 purpose of FOIA. See *Wilner*, 592 F.3d at 77.

9 Finally, we also note that prior courts faced with
10 similar questions have declined to address the legality of
11 an intelligence method as part of a FOIA analysis. In *ACLU*
12 *v. U.S. Department of Defense*, the District of Columbia
13 Circuit rejected the very argument raised by Plaintiffs
14 here: that an interrogation technique formerly authorized
15 for use on high-value detainees is no longer a protectable
16 "intelligence method" for FOIA purposes if the President
17 bans its future use. See 628 F.3d at 622. After noting
18 that *Sims* "says nothing suggesting that the change in thdXÓ similar c

1 charter. But in our view, *Wilner's* principle is equally
2 applicable here—a judicial determination of the legality of
3 waterboarding is beyond the sc

1 disclosure under FOIA Exemption 3. See *Wilner*, 592 F.3d at
2 73, 76-77.

3 **B. The Photograph of Abu Zubaydah**

4 Plaintiffs contend that the CIA failed to provide any
5 justification for withholding a photograph of Abu Zubaydah
6 taken while he was in CIA custody abroad and that the post
7 hoc explanations offered by the Government's counsel do not
8 suffice to justify the withholding. We disagree. In a June
9 8, 2009 unclassified declaration, Director Panetta explained
10 that all of the records he reviewed in connection with his
11 invocation of FOIA Exemptions 1 and 3, including the
12 photograph, are "related to the contents of 92 destroyed
13 videotapes of detainee interrogations that occurred between
14 April and December 2002." Panetta Decl. ¶ 3, June 8, 2009.
15 Director Panetta further declared that "miscellaneous
16 documents" in the sample records, including the photograph,
17 "contain[] TOP SECRET operational information concerning the
18 interrogations" of Abu Zubaydah. *Id.* ¶ 5. On appeal, the
19 Government has expanded upon Director Panetta's
20 justification for withholding by explaining that the
21 photograph necessarily "relates to" an "intelligence source
22 or method" because it records Abu Zubaydah's condition in

1 the period during which he was interrogated.

2 We have reviewed the photograph *in camera*. Our
3 examination has been informed by our contemporaneous review
4 of other sample records. Like the district court, we
5 observe that a photograph depicting a person in CIA custody
6 discloses far more information than the person's identity.
7 We agree with the district court that the image at issue
8 here conveys an "aspect of information that is important to9ty.

1 **CONCLUSION**

2 For the foregoing reasons, the judgment of the district
3 court is hereby **AFFIRMED** in part and **REVERSED** in part. We
4 affirm the judgment of the district court insofar as it
5 sustained the Government's withholding of records relating
6 to the CIA's use of waterboarding and the photograph of Abu
7 Zubaydah. We reverse that part of the judgment that
8 requires the Government either to disclose the classified
9 information in the OLC memoranda and the transcript of the
10 district court's *ex parte, in camera* proceeding, or to
11 substitute language proposed by the district court.