

in Afghanistan. This action is related to a pending action brought by plaintiff against the Department of Defense (“DOD”) and several of its components seeking information about the incidents in question. Information produced by DOD in response to the filing of that action indicates that the defendant agencies named in the present action also may have information potentially responsive to plaintiff’s FOIA requests and, coupled with those agencies’ lack of response to those FOIA requests, establish the need, and a good-faith basis, for the filing of this action.

Jurisdiction and Venue

2. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B). This court also has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B).

Parties

3. Plaintiff Physicians for Human Rights (“PHR”) is a not-for-profit organization with its principal place of business in Cambridge, Massachusetts. Its mission is to promote health by protecting human rights. It uses scientific methods and clinical medical skills to investigate allegations of human rights violations. PHR has conducted investigations of health and human rights in Iraq and Afghanistan and has worked around the world to expose war crimes. The goals of PHR’s investigations include revealing the truth about human rights abuses, holding perpetrators accountable, demonstrating the scope of rights violations, and advocating an end to abuses. PHR publishes newsletters, reports, and informational materials for the public, many of which are available on its website, www.physiciansforhumanrights.org.

4. Defendant CIA is a Department of the Executive Branch of the United States Government. CIA is an “agency” within the meaning of 5 U.S.C. § 552(f)(1).

5. Defendant FBI is a division of the U.S. Department of Justice, which is a Department of the Executive Branch of the United States Government. FBI is an “agency” within the meaning of 5 U.S.C. § 552(f)(1).

6. Defendant Department of State is a Department of the Executive Branch of the United States Government. Department of State is an “agency” within the meaning of 5 U.S.C. § 552(f)(1).

FACTS

Discovery and Investigation of a Mass Grave in Afghanistan

7. According to media reports, in late November 2001, several thousand Taliban soldiers surrendered to the Northern Alliance in Konduz, a town in northern Afghanistan. After their surrender, the Northern Alliance, under the command of General Abdul Rashid Dostum, packed the prisoners into flatbed truck shipping containers and transported them over 200 miles to a prison in Sheberghan. As many as 2,000 surrendered prisoners died from asphyxiation during the journey and, in December 2001, were buried in one or more mass graves in nearby Dasht-e-Leili. *See, e.g.*, John Barry, Babak Dehghanpisheli and Roy Gutman, *The Death Convoy of Afghanistan*, Newsweek, Aug. 26, 2002 (attached as Ex. A), Marianne Bray, *U.S. probe mass Taliban 'suffocations,'* CNN.com, Aug. 21, 2002; *U.S. general backs probe of reported Afghan mass graves*, CNN.com, Aug. 25, 2002; John F. Burns, *Political Realities Impeding Full Inquiry Into Afghan Atrocity*, The New York Times, Aug. 29, 2002.

8. According to reports, U.S. forces were providing security at the Sheberghan prison when some of the container trucks arrived there.

9. As part of its continuing investigations of rights abuses in Afghanistan, the plaintiff sent several investigation teams to Northern Afghanistan in January and February 2002. These teams collected information about the mass graves, took pictures and detailed descriptions of the sites, and published their findings on the plaintiff's website. See Physicians for Human Rights, Preliminary Assessment of Alleged Mass Gravesites in the Area of Mazar-I-Sharif, Afghanistan: January 16-21 and February 7-14 (2002) (amended 2008), <http://physiciansforhumanrights.org/library/documents/reports/prelimass-afghanistan.pdf>. Among other evidence, the PHR investigators documented skeletal remains (some with human tissue still attached, indicating recent burial), shoes, prayer beads, and prayer caps in the graves.

10. The mass graves were first reported in the American media in the *New York Times* in May 2002. A cover story in *Newsweek* magazine in August 2002 described the deaths, the gravesite, and surrounding events.

11. In its article, *Newsweek* reported that the Afghan militia leader in charge of the forces responsible for the reported deaths, General Abdul Rashid Dostum, received paramilitary support from the CIA at the time of the incident in question.

PHR's Initial FOIA Request to the DOD and Recent Reports on the Mass Grave

12. In furtherance of its investigation, the plaintiff, in June 2006, submitted a FOIA request to DOD and several of its components for all documents relating to the existence of a mass grave in or around Dasht-e-Leili in Afghanistan and records relating to any investigation of or our correspondence about this grave or to U.S. military presence at or near the grave. After

the FOIA deadline passed without receiving any documents, the plaintiff submitted appeals.

These appeals received no response.

13. In February 2008, after the DOD and its components produced only six inconsequential documents and thus failed to adequately respond to the plaintiff's FOIA request for almost two years, the plaintiff filed a complaint for relief in the District Court for the District of Columbia. Subsequently the DOD and its components searched for and uncovered additional responsive documents from seven agencies, sixty of which it produced to the plaintiff. PHR continues to seek further information from DOD and its action is still pending before this Court. See *Physicians for Human Rights v. United States DOD*, No. RDB-08-273, 2009 U.S. Dist. LEXIS 121331 (D.D.C. Dec. 30, 2009).

14. Among the documents that have been produced by DOD was a Department of State intelligence assessment from November 2002 advising government officials that the remains of between 1,500 and 2,000 individuals were deposited at the site, and that approximately four Afghans who witnessed the death of the prisoners and/or the disposal of their remains had been detained, tortured, killed, and/or disappeared.

15. In addition, recent media reports indicate that government knowledge and investigation into the mass grave incident was widespread. A July 2009 *New York Times* article reporting on the released Department of State intelligence report also reported that in 2002, then Secretary of State Colin Powell appointed Pierre Prosper to investigate the reported deaths and mass grave. James Risen, *U.S. Inaction Seen After Taliban P.O.W.'s Died*, N.Y. Times, Jul. 11, 2009, at A1. A July 2009 *Salon* article reported that Dell Spry, the lead FBI agent at Guantánamo Bay at the time, received reports about the mass killing from several Guantánamo Bay detainees and directed an investigation into the matter. Mark Benjamin, *Did U.S. forces*

watch Afghan massacre?, Salon, Jul. 22, 2009,

http://www.salon.com/news/feature/2009/07/22/mass_graves/index.html.

16. On December 11, 2008, *McClatchy Newspapers'* Tom Lasseter reported evidence that the mass gravesite in Dasht-e-Leili had been exhumed, leaving two gaping pits, one of them around 100 feet long and more than 9 feet deep in places. Tom Lasseter, *As possible Afghan war-crimes evidence removed, U.S. silent*, McClatchy Newspapers, December 11, 2008, <http://www.mcclatchydc.com/227/story/57649.html>.

17. PHR, working with the Science and Human Rights Program of the American Association for the Advancement of Science ("AAAS"), undertook a review of satellite imagery acquired of the Sheberghan area in the Jowzjan Province of northern Afghanistan. The resulting analysis confirms the existence of the gaping pits described in Lasseter's report, and the presence of possible excavation equipment in one image indicates that the pits were created sometime in 2006. See AfghanMassGrave.org, *Satellite Images*, <http://afghanistan.phrblog.org/get-the-facts/satellite-images/> (last visited Feb. 3, 2010).

18. With the mass graves likely gone and evidence at the site likely destroyed, the U.S. government is one of the few remaining entities with knowledge and information about the incident.

Plaintiff's FOIA Requests

19. By letters dated August 26, 2009 to the CIA, FBI, and Department of State, the plaintiff submitted Freedom of Information Act ("FOIA") requests for all records relating to the existence of a grave in or around Dasht-e-Leili in Afghanistan and records relating to any

investigation of or correspondence about this grave or to U.S. military presence at or near the grave.

20. Specifically, the plaintiff requested “the disclosure of the records related to” the following incidents:

- 1) All records pertaining to the existence or reported existence of a grave in or around Dasht-e-Leili (using this or other spelling) in Afghanistan in November or December 2001, including records of physical evidence of a mass grave or investigations conducted contemporaneously or subsequently to determine whether such a grave exists as well as observations, reports, investigations, witness statements, correspondence, memoranda, third-party reports or other records of the alleged creation, construction or existence of such a grave and/or activity surrounding the creation or construction of a grave at this site.
- 2) All records accounting for Taliban or other prisoners who surrendered or were captured at Konduz in or about November or December 2001, including records indicating (1) the numbers of captives unaccounted for and the stated reasons for their absence at the receiving prison; (2) the transport of such prisoners individually or in groups; (3) the destination of such prisoners; (4) records of subsequent interrogations performed by U.S. forces insofar as they relate to the alleged deaths of other prisoners while in transport.
- 3) All records relating to the deaths or alleged deaths of Taliban or other prisoners in or subsequent to transit from Konduz to Sheberghan prison or elsewhere in the vicinity in late 2001, including (1) records of witness accounts of the use of closed containers to transport prisoners and/or the disposal and/or burial of bodies, including 302 witness/source reports; (2) reports, observations, investigations, or other records relating to and/or made by members of the U.S. armed forces or intelligence agencies; (3) reports of third parties of such deaths.
- 4) All records of meetings between General Tommy Franks, the former head of U.S. Central Command, or any other U.S. official and Afghan President Hamid Karzai, in or about August 2002, regarding the alleged deaths of surrendered Taliban in container trucks and their alleged subsequent burial.
- 5) All records relating to any investigation called for or conducted regarding alleged deaths of Taliban prisoners in the vicinity of Sheberghan in November or December 2001. This includes records used to prepare Gen. Franks’ August 11, 2002 statement of support for a further investigation into deaths of prisoners in containers as reported in the media. We further request all records showing responses or follow-up to this statement, including whether or not such an investigation was considered or initiated.

- 6) All records generated in response to reports by human rights organizations, including Physicians for Human Rights, and the media regarding (1) the reported discovery of a mass grave site at Dasht-e-Leili and (2) allegations of the deaths of Taliban prisoners in containers.
- 7) All records of correspondence by U.S. military forces, intelligence, and the State Department with the United Nations (U.N.), other states, and international organizations regarding the alleged death of Taliban or other prisoners in containers or burial in the Dasht-e-Leili site in November or December, 2001, or investigations of such deaths.
- 8) All records regarding the involvement of U.S. forces, including the 595 A-Team, with respect to the arrival of containers with prisoners in them at Sheberghan in November and December 2001, and the disposition of such prisoners. Please include all records about (1) the location of U.S. military personnel and foreign officials in the area around Sheberghan (including the presence of U.S. soldiers upon the arrival of the containers to Sheberghan prison); and (2) whether and how the surrender of Taliban prisoners was negotiated in the presence of American soldiers.
- 9) All records setting forth or discussing policies regarding the reporting by U.S. military and intelligence personnel of deaths or mistreatment of prisoners in the custody of a third party such as the Northern Alliance, as applicable in November and December, 2001.
- 10) All records referencing or relating to "Trodpints" or any other CIA proxy program investigating or collecting information related to the deaths or alleged deaths of Taliban or other prisoners in or subsequent to transit from Konduz to Sheberghan prison or elsewhere in the vicinity in late 2001 or the investigation thereof.
- 11) All records referencing or relating to "namuz", "lal", or other honor or reprisal killings or disappearances related to the deaths or alleged deaths of Taliban or other prisoners in or subsequent to transit from Konduz to Sheberghan prison or elsewhere in the vicinity in late 2001 or the investigation thereof.
- 12) All records referencing or relating to "HMSNG" or any special group established by the U.S. to investigate war crimes associated with the deaths or alleged deaths of Taliban or other prisoners in or subsequent to transit from Konduz to Sheberghan prison or elsewhere in the vicinity in late 2001 .
- 13) All records referencing or relating to "STATE 63415", "KABUL 506", or any other report or record related to the deaths or alleged deaths of Taliban or other prisoners in or subsequent to transit from Konduz to Sheberghan prison or elsewhere in the vicinity in late 2001 or the investigation thereof.
- 14) All records referencing or relating to "OSD U02306/03", or any report or record related to a U.S. government response to any inquiry by PHR regarding the deaths or alleged deaths of Taliban or other prisoners in or subsequent to transit from Konduz to Sheberghan prison or elsewhere in the vicinity in late 2001 or the investigation thereof.

- 15) All records referencing or relating to "FOB 192 SITREP #165" or any other situation report related to the deaths or alleged deaths of Taliban or other prisoners in or subsequent to transit from Konduz to Sheberghan prison or elsewhere in the vicinity in late 2001 or the investigation thereof.
- 16) All records referencing or relating to "FOB 192 INTSUM #166", "CJSOTF Afghanistan INTSUM #151", "CJSOTF Afghanistan INTSUM #205", or any other intelligence summary related to the deaths or alleged deaths of Taliban or other prisoners in or subsequent to transit from Konduz to Sheberghan prison or elsewhere in the vicinity in late 2001 or the investigation thereof.

Defendant CIA's Failure to Respond to Plaintiff's Request

21. By letter dated October 14, 2009, the plaintiff sent a second letter to the CIA, alerting the agency that more than thirty working days had passed since the plaintiff's initial request. The plaintiff specified that this letter constituted an appeal of the CIA's decision to withhold documents.

22. By letter dated October 23, 2009, CIA provided a "final response" regarding the plaintiff's FOIA request. This letter confirmed that the CIA received the plaintiff's FOIA request on September 9, 2009. Additionally, this letter rejected FOIA request item 4 as within the purview of the Department of Defense. The letter also rejected items 6, 7, and 11 as not searchable and claimed that these items were not "reasonably described." The letter rejected items 1, 2, 3, 5, 8, 9, 10, 12, 13, 14, 15, and 16 purportedly in accordance with section 3.6 of Executive Order 12958 and the CIA Act of 1949. With respect to these items, the letter neither confirmed nor denied the existence or nonexistence of responsive records. The letter claimed that the requested records are currently classified and therefore denied from disclosure under FOIA exemptions (b)(1) and (b)(3).

23. By letter dated December 2, 2009, the plaintiff sent a second appeal responding to the CIA's letter dated October 23, 2009, appealing all determinations made by the CIA set forth

in paragraph 18. In addition, in response to the CIA's claim that items 6, 7, and 11 are not searchable, this letter highlighted specific searchable keywords within the items as follows:

Item 6: "All records generated in response to **reports by human rights organizations**, including **Physicians for Human Rights**, and the **media** regarding (1) the reported discovery of a **mass grave site at Dasht-e-Leili** and (2) allegations of the **deaths of Taliban prisoners in containers**."

Item 7: "All records of **correspondence** by U.S. **military forces**, **intelligence**, and the **State Department** with the **United Nations (U.N.)**, other states, and international organizations regarding the alleged **death of Taliban** or other **prisoners in containers** or **burial** in the **Dasht-e-Leili** site in November or December, 2001, or **investigations** of such deaths."

Item 11: "All records referencing or relating to "**namuz**", "**lal**", or other **honor** or **reprisal killings** or **disappearances** related to the **deaths** or alleged deaths of **Taliban** or other **prisoners** in or subsequent to transit from **Konduz** to **Sheberghan prison** or elsewhere in the vicinity in late 2001 or the investigation thereof."

24. By letter dated December 17, 2009 the CIA provided a second "final response" accepting the plaintiff's appeal with regard to items 1, 2, 3, 4, 5, 8, 9, 10, 12, 13, 14, 15, and 16. The letter advised the plaintiff that arrangements for consideration of these requests will be made by the appropriate members of the Agency Release Panel. This letter also stated that the plaintiff's appeal of the CIA's decision regarding items 6, 7, and 11 was not accepted.

25. To date, the CIA has not provided the records requested by the plaintiff in its FOIA request, notwithstanding the FOIA's requirement of an agency response within twenty (20) working days of the appeal sent on December 2, 2009. 5 U.S.C. § 552(a)(6)(A)(ii).

26. PHR has exhausted the applicable administrative remedies with respect to its FOIA request to the CIA. 5 U.S.C. § 552(a)(6)(C)(i).

27. Defendant CIA has wrongfully determined that items 6, 7, and 11 are not searchable as not "reasonably described." PHR's initial descriptions of these records are sufficient to enable the CIA to identify precisely what records are being requested.

28. Defendant CIA has wrongfully withheld the requested records from PHR.

Defendant FBI's Failure to Respond to Plaintiff's Request

29. By letter dated September 2, 2009, the FBI responded to the plaintiff's FOIA request, claiming that no responsive main file records were found.

30. By letter dated September 18, 2009, the plaintiff appealed the FBI's determination and the sufficiency of the FBI's search for records responsive to the plaintiff's August 26, 2009 FOIA request.

31. By letter dated October 1, 2009, the FBI, acknowledged the receipt of the plaintiff's appeal.

32. To date, the FBI has not provided the records requested by the plaintiff in its FOIA request nor has the FBI informed the plaintiff of the outcome of the appeal, notwithstanding the FOIA's requirement of an agency response within twenty (20) working days of the appeal sent on September 18, 2009. 5 U.S.C. § 552(a)(6)(A)(ii).

33. PHR has exhausted the applicable administrative remedies with respect to its FOIA request to the FBI. 5 U.S.C. § 552(a)(6)(C)(i).

34. Defendant FBI has wrongfully withheld the requested records from PHR.

Defendant Department of State's Failure to Respond to Plaintiff's Request

35. As a result of PHR's FOIA complaint against the DOD and several of its components, in 2008 the Defense Intelligence Agency had referred three responsive documents to the Department of State, which in turn reviewed and released parts of these documents to the plaintiff. Based on this interaction, the plaintiff believed that the Department of State would respond affirmatively and promptly to the plaintiff's FOIA request. The Department of State failed to respond to the plaintiff within the allotted statutory timeframe.

36. By letter dated October 14, 2009, the plaintiff alerted the Department of State that more than thirty working days had passed since the plaintiff's initial FOIA request, and the plaintiff specified that this letter constituted an appeal of the Department of State's decision to withhold documents.

37. By letter dated October 27, 2009, the Department of State acknowledged the plaintiff's FOIA request, denied the plaintiff's request for a fee waiver, designated the plaintiff as a representative of the news media, and requested the maximum amount the plaintiff wishes to pay for FOIA processing.

38. By a separate letter dated October 27, 2009, the Department of State alerted the plaintiff that the plaintiff's FOIA request was currently being processed and that because no material had been denied in response to the plaintiff's request, the plaintiff's request was not subject to administrative appeal.

39. By letter dated December 2, 2009, the plaintiff informed the Department of State that it was willing to incur fees up to \$100 with the understanding that, as a representative of the

news media, the plaintiff will not be charged for costs incurred searching for or reviewing responsive records, nor will any charges be assessed for the first 100 pages of duplication.

40. By a separate letter dated December 2, 2009, the plaintiff appealed the Department of State's fee waiver denial.

41. By letter dated December 23, 2009, the Department of State denied plaintiff's appeal of the Department of State's denial of plaintiff's request for a fee waiver.

42. To date, the Department of State has not provided the records requested by plaintiff in its FOIA request, notwithstanding the FOIA's requirement of an agency response within twenty (20) working days of the request sent on August 26, 2009. 5 U.S.C. § 552(a)(6)(A)(i).

43. PHR has exhausted the applicable administrative remedies with respect to its FOIA request to the Department of State. 5 U.S.C. § 552(a)(6)(C)(i).

44. Defendant Department of State has wrongfully withheld the requested records from PHR.

**Count I: Against Defendants CIA, FBI, and Department of State
For Injunctive and Other Relief Under the Freedom of Information Act**

45. PHR hereby incorporates by reference paragraphs 1 – 44 above.

46. 5 U.S.C. § 552(a)(3)(A) requires an agency to make records promptly available to any person upon request for reasonably identified records. 5 U.S.C. § 552(a)(4)(B) precludes the improper withholding of requested agency records.

47. As alleged in paragraphs 1 – 44 above, defendants CIA, FBI, and Department of State have wrongfully withheld records from PHR relating to the mass grave in Dasht-e-Leili by failing to comply with the statutory time limit for processing FOIA requests. 5 U.S.C. § 552(a)(6)(A)(i) and (ii); 32 C.F.R. § 1900.21 (2009); 28 C.F.R. § 16.6 (2009); 22 C.F.R. § 171.12 (2009).

48. PHR has been harmed by defendants' actions as, among other things, it cannot, without the requested records, complete its investigation of, and report to the public concerning, possible human rights violations at Dasht-e-Leili.

49. Although the public interest in the release of the records at issue here is manifest, the defendants have failed to produce any responsive documents. In addition, the defendants have failed to produce any objective indicia that a search is underway.

50. To vindicate the public's right to information about government knowledge of, involvement with, and response to the existence of the mass grave in Dasht-e-Leili, Afghanistan, the plaintiff seeks an injunction requiring defendant agencies to immediately process the plaintiff's request and to release records that are and have been unlawfully withheld.

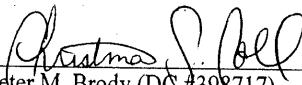
Requested Relief

WHEREFORE, plaintiff prays that this Court:

- 1) Order defendants CIA, FBI, and Department of State to process immediately the requested records in their entireties and make copies available to plaintiff;
- 2) Provide for expeditious proceedings in this action;
- 3) Award plaintiff its costs and reasonable attorneys fees incurred in this action; and
- 4) Grant such other relief as the Court may deem just and proper.

Respectfully submitted,

Dated: February 24, 2010



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