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10
11 **UNITED STATES DISTRICT COURT FOR THE**
12 **NORTHERN DISTRICT OF CALIFORNIA**
13 **SAN FRANCISCO DIVISION**

14
15 MARGUERITE HIKEN and
16 THE MILITARY LAW TASK FORCE,

17 Plaintiffs,

18 v.

19
20 DEPARTMENT OF DEFENSE
and UNITED STATES
21 CENTRAL COMMAND,

22 Defendants.
23

Case No. CV-06-2812 (MHP)

**PLAINTIFFS' OPPOSITION TO
DEFENDANTS' RENEWED
MOTION FOR SUMMARY
JUDGMENT AND MOTION
FOR SUMMARY JUDGMENT**

Hearing Date: April 14, 2008
Hearing Time: 2:00 p.m.

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1 I. INTRODUCTION

2 Plaintiffs initiated their Freedom of Information Act (“FOIA”) request nearly three years
3 ago to obtain documents they believe will shed light on key events in the war in Iraq: the atrocities
4 committed by defendants in Fallujah, Iraq – most notably the slaughter of civilians and almost
5 complete destruction of a city the size of Oakland – and defendants’ subsequent attack on Giuliana
6 Sgrena, the only unembedded journalist covering the U.S.-led assault on Fallujah.

7 Although the Court has not found that defendants’ previous foot-dragging and refusal to
8 release documents related to the Rules of Engagement (“ROE”) amounted to bad faith, both
9 defendants’ most recent declaration and documents they produced upon Court order bring to light
10 new evidence of bad faith on the part of the government.

11 These acts of bad faith include defendants (1) previously hiding and misrepresenting facts
12 essential for the Court to make a final ruling on waiver of exemption, (2) continuing to withhold
13 pertinent facts about identified documents that would allow the Court and plaintiffs to determine
14 whether the documents are responsive, and (3) making repeated misrepresentations to the Court
15 and plaintiffs regarding information in the withheld documents – claiming falsely, for example, that
16 ROE samples provided by plaintiffs are “entirely different” from withheld documents when the
17 information is exactly the same. Defendants’ Reply in Support of Their Motion for Summary
18 Judgment at 15 n.7 (Dkt. No. 35) (“Ds’ Reply”); *see infra* part IV. E. 2.

19 Had defendants earlier provided such information accurately and completely, the Court may
20 have been able to make final rulings on related issues, rendering the present phase of litigation
21 unnecessary. This unnecessary litigation has placed a costly burden on both plaintiffs and the
22 Court.

23 Since defendants continue to withhold releaseable materials, judicial intervention remains
24 necessary. Plaintiffs therefore request that the Court deny defendants’ Renewed Motion for
25 Summary Judgment, grant plaintiffs’ Cross-Motion for Summary Judgment, and order further
26 disclosure of responsive materials.

27 //

28 //

1 **II. PROCEDURAL HISTORY**

2 On October 2, 2007, the Court issued a Memorandum and Order, (Dkt. No. 53), published
3 at *Hiken v. Dep't. of Defense*, 521 F.Supp.2d 1027 (N.D. Cal. 2007) ("*Hiken*"), denying both
4 plaintiffs' and defendants' motions for summary judgment. The order also instructed the
5 government to:

- 6 • Produce to plaintiffs all segregable portions of the ROE-related documents, *Hiken*,
7 521 F.Supp.2d at 1060;
- 8 • Submit all of the documents in dispute to the court for *in camera* review, *Id.* at
9 1055-56, 1059, 1064, 1065;
- 10 • Revise the *Vaughn* Index to "tie the disclosure of information to specific harms," *Id.*
11 at 1055;
- 12 • Supplement the declarations of Maj. Gen. Ghormley to "provide further details
13 regarding":
- 14 ○ "the release of the [AR 15-6 report] document";
- 15 ○ "why it was removed from the [defendants'] website";
- 16 ○ "a comparison of the types of information disclosed in that version of the
17 report with the redacted version provided to plaintiffs," *Id.*, and,
- 18 ○ "provide a more detailed description of the administrative information
19 withheld" from the AR 15-6 report and Annexes, *Id.* at 1061.

20 In response to this Court's order, the government sent plaintiffs a letter dated October 31,
21 2007 with two compact disks¹ that include 117 document pages related to the ROE. These are the
22 first ROE-related documents released by the government in this case. Although six of these
23 documents contain no redactions, the majority of these documents are heavily redacted.² The disks
24

25 _____
26 ¹ Plaintiffs have not filed materials stored on these disks as exhibits because defendants' October 31, 2007 letter represents that defendants also provided the materials to the Court.

27 ² However, one of the documents identified in defendants' first *Vaughn* Index, Appendix 20
28 to Annex C to MNC-I Standard Operating Procedures, which the government originally claimed it could not release even in redacted format, has now been released in its entirety, without a single

(Continued...)

1 also include an AR 15-6 report and accompanying annexes with different redactions from the one
2 defendants previously produced in November 2006.

3 Defendants' original *Vaughn* Index identified only four ROE-related documents. *Vaughn*
4 Index, Exhibit A to Defendants' Motion for Summary Judgment (Dkt. No. 18) ("Ds' *Vaughn*
5 Index"). The Court criticized the government's search that resulted in only these four documents,
6 citing the "lack of specific search terms," the "general nature of the description contained in the
7 affidavit," and "evidence that the results of the search failed to produce responsive documents."
8 *Hiken*, 521 F.Supp.2d at 1054-55. Defendants claimed they were unable to provide more
9 information about the original search, so instead of providing a declaration further explaining the
10 original search, defendants executed a new search with plaintiffs' consent and the Court's
11 permission. Defendants' Renewed Motion for Summary Judgment (Dkt. No. 66) at 1:21-23 ("Ds'
12 Renewed MSJ"). Defendants located twelve additional documents as a result of their new search.
13 Defendants' Revised *Vaughn* Index, Exhibit A to Defendants' Renewed Motion for Summary
14 Judgment (Dkt. No. 66-2) ("Ds' Revised *Vaughn* Index"). The additional documents consist of
15 training materials, flowcharts, appendices, a general order, a policy letter, and ROE cards. Ds'
16 Revised *Vaughn* Index.

17 After completing a new search and preparing a supplemental declaration that complies in
18 part with the Court's order, defendants filed a Renewed Motion for Summary Judgment on
19 December 14, 2007. (Dkt. No. 66).

21 III. DOCUMENTS AT ISSUE IN THIS DISPUTE.

22 The documents at issue in this dispute include sixteen ROE-related documents, an Army
23 Regulation 15-6 investigative report regarding the Sgrenea incident ("AR 15-6 report" or "report"),
24

25 _____
(...Continued)

26 redaction. Nov. 3, 2006 *Vaughn* Index, Exhibit A to Defendants' Motion for Summary Judgment
27 (Dkt. No. 18) ("Ds' *Vaughn* Index"); Doc. 2, Defendants' Revised *Vaughn* Index, Exhibit A to
28 Defendants' Renewed Motion for Summary Judgment at 1, (Dkt. No. 66-2) ("Ds' Revised *Vaughn*
Index").

1 and Annexes A-M to the AR 15-6 report.

2 Defendants have provided plaintiffs with two different versions of the AR 15-6 report, each
3 containing different redactions. Defendants produced the first version of the report and
4 accompanying annexes on November 1, 2006, in hard copy. The initial document production was
5 missing Annex K to the report. ³ Declaration of Maj. Gen. Ghormley, Ds' MSJ, para. 12 n.1 (Dkt.
6 No. 18) ("Ghormley Decl."). In response to the Court's order, defendants mailed a second version
7 of the report and annexes on October 31, 2007, in electronic format. This version includes all the
8 annexes to the report, including Annex K.

9 While there are sixteen ROE-related documents at issue, defendants original *Vaughn* Index
10 identified only four:

- 11 • Doc. 1:⁴ Annex E (Rules of Engagement) to FRAGO 313 Transition of Authority,
12 Multi-National Corps – IRAQ;
- 13 • Doc. 2: Appendix 20 to Annex C to MNC-I Standard Operating Procedures:
14 Escalation of Force ("EOF");
- 15 • Doc. 3: Annex E (Rules of Engagement) to Phase III of Operation Order 05-07, 4th
16 Infantry Division (MECH); and,
- 17 • Doc. 4: Appendix 7 to Annex C to MNC-I Operations Order 06-01 – Rules of
18 Engagement for U.S. Forces.

19 Although the government characterizes the twelve newly identified documents as merely
20 "appendices" to the four previously identified ROE documents, there appears to be much more:

- 21 • Doc. 2a: Training materials on EOF, including definitions, flow charts and vignettes;
- 22 • Doc. 2b: EOF flowchart and Iraqi Claims Pocket Card for EOF incidents where Iraqi
23 civilians suffer property damage, injury or death caused by U.S. forces;

24

25

26 ³ At the March 26, 2007 hearing on cross-motions for summary judgment the Court
27 instructed defendants to perform another search for Annex K. Transcript of Proceedings at 55:4,
28 21-22, *Hiken v. Dept. of Defense*, Case No. 06-2812, March 26, 2007 ("Trx.").

⁴ Document numbers are based on Ds' Revised *Vaughn* Index.

- 1 • Doc. 2c: Vehicle Marking Standards for Fratricide Prevention including instructions
- 2 to be given to contractors;
- 3 • Doc. 2d: Policy Letter establishing procedures to reduce the occurrence of EOF
- 4 incidents and actions to be taken in case of an incident such as determining if there
- 5 are any civilian casualties or property damage;
- 6 • Doc. 2e: Requirements and responsibilities of convoy commanders such as
- 7 instructions to conduct a briefing before each convoy and the information to be
- 8 included in the briefing;
- 9 • Doc. 3a: ROE card including who may be engaged, who and what should not be
- 10 targeted or struck, and instructions on the use of deadly force;
- 11 • Doc. 3b: Targeting categories including a formula for the determination of targeting
- 12 approval;
- 13 • Doc. 3c: Kinetic Strike Authorization Matrix including various types of targets and
- 14 munitions;
- 15 • Doc. 3d: Additional Approval Authority Matrix;
- 16 • Doc. 3e: A General Order regarding prohibited activities regulating such things as
- 17 alcohol, drugs, pornography, gambling, and the entry into mosques;
- 18 • Doc. 4a: ROE card including who may be engaged, who and what should not be
- 19 targeted or struck, and instructions on the use of deadly force; and,
- 20 • Doc. 4b: ROE card including instruction on soldier conduct and proper response to
- 21 detainee abuse or law of war violations.

22
23 **IV. DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT**
24 **BECAUSE THEY HAVE FAILED TO PROVIDE SUFFICIENT EVIDENCE**
25 **TO JUSTIFY NON-DISCLOSURE AND HAVE DEMONSTRATED BAD**
FAITH.

26 Summary judgment is appropriate where “the pleadings, discovery and affidavits show that
27 there is ‘no genuine issue as to any material fact and that the moving party is entitled to judgment
28 as a matter of law.’” *Hiken*, 521 F.Supp.2d at 1053 (quoting Fed. R. Civ. P. 56(c)). Material facts

1 are those which may affect the outcome of the proceedings. *Id.*

2 As discussed earlier in this litigation, the government is entitled to summary judgment in a
3 FOIA case only if it has proven that the requested materials are exempt under the FOIA, and
4 government affidavits furnishing such proof are entitled to a court's deference only if the
5 justifications for disclosure "are not controverted by contrary evidence in the record or by evidence
6 of [agency] bad faith." 5 U.S.C. § 552(a)(4)(B); *Bay Area Lawyers Alliance for Nuclear Arms*
7 *Control v. Dep't of State*, 818 F.Supp. 1291, 1295 (N.D. Cal. 1992); *Minier v. CIA*, 88 F.3d 796,
8 800 (9th Cir. 1996); Ps' MSJ at 2-5. In sum, the government must provide sufficient evidence to
9 justify non-disclosure. *Hiken*, 521 F.Supp.2d at 1053-54.

10 Defendants here are not entitled to summary judgment because they have failed to supply
11 sufficient evidence to justify nondisclosure. First, they have not, as they claim, "complied with [this
12 Court's] order in all respects." See Ds' Renewed MSJ at 1:16-18. For example, defendants have
13 failed to comply with the Court's order to provide a comparison of the information disclosed in the
14 AR 15-6 report provided to plaintiffs with that disclosed in the version of the report that defendants
15 posted publicly on their Web site. *Hiken*, 521 F.Supp.2d at 1057; see Declaration of Maj. Gen.
16 Moore, Ds' Renewed MSJ, paras. 4 (f)-(h), (Dkt. No. 66-3), ("Moore Decl."); *infra*, part IV. A.

17 Moreover, defendants have yet to produce an adequate *Vaughn* Index, see *infra*, part IV. B.,
18 may not have adequately searched their records, see *infra*, part IV. C., have failed to segregate and
19 release all segregable materials, see *infra*, part IV. D., and, in keeping with their practice
20 throughout the nearly three years that have elapsed since plaintiffs submitted their request for the
21 documents here at issue, continue to act in bad faith. See *infra*, part IV. E. Further, defendants have
22 not overcome plaintiffs' showing that defendants waived exemption of the redacted version of the
23 AR 15-6 report that they posted to their Web site and provided to the news media. See *infra*, part
24 IV. F. Accordingly, summary judgment in favor of defendants is inappropriate. *King v. U.S. Dep't*
25 *of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987); *Jones v. F.B.I.*, 41 F.3d 238, 242-43 (6th Cir.
26 1994); *Defenders of Wildlife v. U.S. Dep't of Interior*, 314 F.Supp.2d 1, 8 (D.D.C. 2004).

27 Further, summary judgment is unwarranted, where, as here, the court may not yet have
28 conducted *in camera* review, and there remains a dispute regarding, for example, whether factual

1 information in the AR 15-6 report is protected by the deliberative process privilege. *Knight v.*
2 *C.I.A.*, 872 F.2d 660, 662 (5th Cir. 1989); *Olivia v. Bureau of Prisons*, 1985 WL 3825 *4 (S.D.N.Y.
3 1985); see *infra*, part IV. G.

4
5 **A. Defendants Have Not Fully Complied With the Court's October 2, 2007**
6 **Order.**

7 Defendants improperly base their Renewed Motion for Summary Judgment on the claim
8 that they have "complied with the September 28, 2007 Order in all respects," Ds' Renewed MSJ at
9 1:16-18, considering that they have not complied with all of the Court's directives.

10
11 **1. Defendants Have Failed to Provide a Comparison of the Types of**
12 **Information Revealed in the Version of the AR 15-6 Report Posted to**
13 **Their Web site and the Version Provided to Plaintiffs.**

14 Regarding the AR 15-6 report, the Court required defendants to provide a comparison of the
15 types of information disclosed to plaintiffs and the types of info disclosed in the report the Multi-
16 National Force ("MNF-I") Combined Press Information Center posted to the MNF-I Web site.
17 *Hiken*, 521 F.Supp.2d at 1057; Moore Decl., para. 4(a).

18 Instead, the government's declarant, Maj. Gen. Moore, provides incorrect and misleading
19 information to the Court. For example, he states that unit names and identifiers were only redacted
20 from the version of the report placed on the MNF-I Web site and that they were not redacted from
21 the version initially provided to plaintiffs. Moore Decl., para. 4(g). This statement is false. Not only
22 did defendants redact unit and division names from the report they initially provided to plaintiffs,
23 the Court ruled this information improperly withheld. *Hiken*, 521 F.Supp.2d at 1060. Although the
24 Court rejected defendants' reasoning, the government's prior declarant, Maj. Gen. Ghormley,
25 defended the withholding, claiming that should the names of military units or divisions be made
26 public, it "could assist hostile forces in subverting sensitive military missions and jeopardize the
27 safety and security of military personnel." Supplemental Declaration of Maj. Gen. Ghormley, para.
28 8, Exhibit 1 to Defendants' Reply in Support of Their Motion for Summary Judgment, (Dkt. No.
35), ("Ghormley Supp. Decl."). In erroneously claiming that names of units were initially provided

1 to plaintiffs, Maj. Gen. Moore states something very different: “that information [unit names and
2 divisions] is not normally redacted by CENTCOM because the public is fully aware the Services
3 have units and it is important for the public to know the level at which decisions are made and
4 reviewed.” Moore Decl., para. 4(g). Such false statements undermine the declarant’s credibility.

5 Declarant Moore further states, in this instance correctly, that personally identifying
6 information was redacted from both documents, Moore Decl., para. 4(f), and compares the version
7 of the report on the MNF-I Web site to the reformatted version with no redactions, listing the
8 categories of information revealed after the reformatting. Moore Decl., para. 4(d). Neither of these
9 statements, however, complies with the Court’s order to provide a comparison of the types of
10 information disclosed to plaintiffs with the types disclosed in the report placed on the MNF-I Web
11 site. *Hiken*, 521 F.Supp.2d at 1057.

12 13 **2. Defendants Have Failed to Provide a Description of the** 14 **Administrative Information Withheld From the AR 15-6 Report.**

15 The Court also ordered defendants to provide a more detailed description of the
16 administrative information withheld from the AR 15-6 report and accompanying annexes. *Hiken*,
17 521 F.Supp.2d at 1061. Defendants, however, have failed to provide this information.

18 19 **B. Defendants’ Revised *Vaughn* Index is Inadequate in Its Failure to Provide** 20 **Dates for ROE Documents and the Locations Where They Were in Effect.**

21 Defendants’ Revised *Vaughn* Index is inadequate in its failure to provide dates for ROE-
22 related documents or the locations where the rules were in effect. To prevail on summary judgment
23 in a FOIA action, the government must describe with reasonable specificity the nature of the
24 responsive documents and its justification for any non-disclosure. *Hiken*, 521 F.Supp.2d at 1053;
25 *see Halpern v. FBI*, 1818 F.3d 279, 291 (2nd Cir. 1999). Plaintiffs’ FOIA request seeks ROE
26 documents for the sieges of Fallujah (March – December 2004) and the Sgrenna incident (March 4,
27 2005). Ps’ MSJ at 12:11-15.

28 Without knowing the dates on which defendants created the identified documents,

1 plaintiffs, the public, and the Court will be unable to decipher whether these documents are
2 responsive to plaintiffs' request. To be able to reach conclusions about government activity in Iraq,
3 specifically during the sieges of Fallujah and the Sgrena incident, plaintiffs and the public need to
4 know the dates these documents were created and the location or locations where they were
5 relevant. Because of the lack of specificity in the *Vaughn* Index, the Court noted that it "has no
6 basis for evaluating whether any documents relating to the siege of Fallujah were identified in the
7 Vaughn Index." *Hiken*, 521 F.Supp.2d at 1054. Without providing such information, the
8 government has not met its burden to describe the withheld documents with "reasonable
9 specificity." *Id.* at 1053; *see Halpern v. FBI*, 1818 F.3d 279, 291 (2nd Cir. 1999).

10 Defendants' Revised *Vaughn* Index provides dates for only five of the sixteen documents
11 identified. The remaining eleven documents are marked "Date of Document: Unknown." Ds'
12 Revised *Vaughn* Index. Eight of those eleven were derived from either an April 7, 2006 or a March
13 31, 2007 MNF-I Security Classification Guide. *Id.* Of the five documents for which dates are
14 known, only one, Doc. 3e, General Order Number 1, dated February 12, 2005, appears to pre-date
15 at least one of the incidents at issue in this FOIA case, the Sgrena incident. *Id.* at 7.

16 The government has been of little help in resolving this mystery. At the March 26, 2007
17 hearing, the Department of Justice attorney stated, "*I think* they were just later versions,
18 *potentially*, of the documents, or of the rules of engagement that were in effect at the time of the
19 incidents, but without any, necessarily substantive or significant changes." Trx. at 27:10-13
20 (emphasis added). At the same hearing, the Court rejected this "trust us" doctrine suggested by the
21 government. Trx. at 31:16-17. Moreover, it is difficult to believe that the Department of Defense
22 does not have the technology or adequate filing systems in place to determine the dates necessary
23 to show that the documents listed in their *Vaughn* indices are the responsive documents.

24 The Court appeared skeptical about defendants' purported inability to find clearly
25 responsive documents and provide adequate descriptive information for them. For example, the
26 Court asked the government's attorney the following questions: "Why wouldn't you go back...
27 [and] get the rules of engagement that were in effect at the time of Fallujah, at the time of the
28 Sgrena incident" Trx. at 27:14-19; "Are you still looking for those other documents?... It seems to

1 me almost preposterous that you would not have rules of engagement for all these various and
2 sundry periods of time” *Id.* at 28:20-22; “Are you suggesting that maybe there were no rules of
3 engagement until April 7, ’06?” *Id.* at 28:23-24; “It doesn’t make sense that you would have rules
4 of engagement for periods of time, and you wouldn’t have them... in your files.... It’s not that
5 that’s ancient history. This is the recent past.” *Id.* at 30:3-7. Therefore, only when defendants
6 provide plaintiffs and the Court with date and location information will their *Vaughn* Index be
7 complete.

8 9 **C. Defendants’ Search May Be Inadequate.**

10 To cure deficiencies in their Revised *Vaughn* Index, defendants must provide dates for all
11 ROE documents and the locations where they were in effect. However, if that information were to
12 show that the documents are not relevant to the incidents for which plaintiffs request information,
13 defendants’ search would also be inadequate.

14 Although the government’s declarant, Maj. Gen. Moore, describes the files searched and the
15 search terms used, Moore Decl., paras. 3(a)-(b), the search was nevertheless insufficient if, of the
16 sixteen ROE-related documents identified in defendants’ Revised *Vaughn* Index, only one is
17 responsive. Review of the adequacy of a search generally focuses on the reasonableness of the
18 search itself and not the results. *Hiken*, 521 F.Supp.2d at 1054; *See also Hornbostel v. U.S. Dept. of*
19 *Interior*, 305 F.Supp.2d 21, 27 (D.D.C. 2003). However, the results “are not entirely irrelevant.” *Id.*
20 “Where the scope of the request is broad and the government fails to produce any responsive
21 documents, it may raise a question as to the reasonableness of the search.” *Hiken*, 521 F.Supp.2d at
22 1054; *see also Hornbostel*, 305 F.Supp.2d at 27.

23 Furthermore, defendants’ claims that they have conducted adequate searches in this
24 litigation cannot be taken at face value. Defendants have repeatedly made claims that their searches
25 were thorough and complete, only to go back and locate additional documents. For example,
26 regarding the missing annex to the AR 15-6 report, Annex K, defendants said they conducted
27 “diligent and reasonable searches” for it yet could not locate it. Ghormley Decl., para. 12 n.1.
28 However, when ordered by the Court to search again for the annex, defendants found it. Moore

1 Decl., para. 3(c). Furthermore, in response to plaintiffs' March 2005 FOIA request, defendants'
2 first search resulted in only two documents. Ghormley Decl., para. 3. However, after plaintiffs'
3 appealed defendants' denial of their request, defendants conducted another search, locating two
4 additional documents. *Id.*, para. 6. Defendants then located and sent to plaintiffs a heavily-redacted
5 copy of the AR 15-6 report and accompanying annexes. *Id.*, para. 11. Finally, after *another* search
6 conducted to cure the deficiencies noted by the Court in defendants' previous searches, defendants
7 located *twelve* additional documents. Ds' Revised *Vaughn* Index. Such a pattern undermines
8 defendants' claims to have met the legal standard for an adequate search.

9 Therefore, if the Court determines that some portion of the documents in defendants'
10 *Vaughn* Index are not responsive to plaintiffs' request, it should order defendants to conduct a
11 subsequent search for responsive documents.

12
13 **D. Defendants Have Failed to Segregate and Produce All Releasable**
14 **Information.**

15 FOIA mandates that "any reasonably segregable portion of a record" be released. 5 U.S.C. §
16 552(b). Nevertheless, defendants continue to withhold reasonably segregable materials from the
17 AR 15-6 report. Although defendants have unredacted substantial amounts of material from the
18 previous version of the AR 15-6 report provided to plaintiffs, they continue to improperly withhold
19 information such as the ROE for the soldiers. Oct. 31, 2007 AR 15-6 report at BS 29.⁵ This
20 information is being improperly withheld considering that it is the *exact same* information
21 defendants released in two different ROE-related documents and which plaintiffs provided in a
22 ROE card, an unclassified document, submitted as an attachment to their initial Motion for
23 Summary Judgment. Doc. 1 at 4, 14; Doc 3 at 11; Exhibit F to Ps' MSJ (Dkt. No. 23);
24 International and Operational Law Department, the Judge Advocate General's Legal Center and
25 School, *Operational Law Handbook* 96 (2006).

26
27 ⁵ This is the version of the AR 15-6 report defendants sent to plaintiffs and the Court on
28 October 31, 2007.

1 An unofficial, completely unredacted version of the AR 15-6 report states that the ROE
2 given to the soldiers involved in the Sgrena incident directed them to, “SHOUT, SHOW, SHOVE,
3 and SHOOT.” Exhibit H to Ps’ MSJ at 23 (Dkt. No. 31-2). However, defendants redacted these
4 instructions from the AR 15-6 report produced to plaintiffs. Oct. 31, 2007 AR 15-6 report, at 39.
5 Nonetheless defendants have redacted almost all information in ROE Documents 1 and 3 *except* for
6 these instructions. The instructions, therefore, constitute the *only* information the government has
7 concluded is non-sensitive in those documents.

8 The FOIA requires that agencies disclose all non-exempt information responsive to a
9 request; this requirement applies to all documents and all exemptions. *Ctr. For Auto Safety v. EPA*,
10 731 F.2d 16, 21 (D.C. Cir. 1992). The government must also address “why the remaining
11 information is not segregable.” *Bay Area Lawyers Alliance for Nuclear Arms Control v. Dep’t of*
12 *State*, 818 F.Supp. 1291, 1296 (N.D. Cal. 1992). Defendants provide no explanation for their
13 arbitrary disclosure and redaction of the same information. Where defendants released information
14 in some documents, the Court should order them to unredact the same information from other
15 documents where it is being improperly withheld.

16
17 **E. Defendants Have Engaged in Bad Faith in This Litigation By Withholding**
18 **Pertinent Information, Making False and Misleading Statements About**
19 **Withheld Materials, and Failing to Segregate and Release Responsive**
20 **Documents.**

21 The presumption that a government agency submits affidavits and takes actions in good
22 faith “may be overcome where there is evidence of bad faith in the agency’s handling of a FOIA
23 request.” *Jones v. F.B.I.*, 41 F.3d 238, 242 (6th Cir. 1994). A plaintiff may overcome the
24 presumption not only by showing evidence of bad faith with regard to the FOIA action, but also
25 where there is “evidence of bad faith or illegality with regard to the underlying activities which
26 generated the documents” the plaintiff seeks. *Id.* To grant summary judgment under such
27 circumstances “would be an abdication of a court’s responsibility” and is inappropriate. *Id.* at 242-
28 43.

//

1 **1. Defendants Misled Plaintiffs and the Court Regarding the Nature of**
2 **the Release of the AR 15-6 Report.**

3 In its Order, the Court noted that it lacked sufficient evidence to determine whether
4 defendants' release of the AR 15-6 report was official. *Hiken*, 521 F.Supp.2d at 1057.
5 Consequently, the Court was unable to come to a decision on whether defendants had waived
6 exemption because defendants withheld essential facts such as which agency official posted the
7 report, which agency official redacted the report for posting, or when it was posted. *Hiken*, 521
8 F.Supp.2d at 1057. Instead of providing this information, defendants merely asserted that a
9 redacted version of the report (1) was posted to defendants' Web site "without authorization" or
10 "inadvertently," (2) had been "leak[ed]," (3) was not posted voluntarily, and (4) was "not officially
11 disclosed or declassified by the government." Ds' Reply at 1:12-14, 2:19-3:23, 4:5-8; Ghormley
12 Supp. Decl., para. 3.

13 However, defendants' more recent assertions show the earlier ones to be disingenuous
14 misrepresentations. Defendants now admit that their Public Affairs Office gave their Combined
15 Press Information Center "an unclassified, releaseable document" for online posting. Moore Decl.,
16 para. 4(c). Thus, defendants now concede that the report was not "leaked" – as the Department of
17 Justice attorney earlier insisted – or "inadvertently" or involuntarily posted to the Internet,⁶ and that
18 it *had* been declassified.

19 Had defendants been so forthcoming in the initial phase of the litigation, the current phase
20 of litigation on this point would be unnecessary. By causing such needless, costly litigation in this
21 manner, defendants have acted in bad faith, and summary judgment in their favor is inappropriate.
22 *Jones v. F.B.I.*, 41 F.3d 238, 242-43 (6th Cir. 1994).

23 //

24
25 _____
26 ⁶ Defendants – and even their legal counsel – demonstrate in making such misrepresentations that
27 their word cannot be trusted. Consequently, the Court should reject defendants' oft-repeated but
28 misplaced admonition that "courts should not second-guess" agency determinations of
classification. *E.g.*, Ds' Reply at 9:6-9.

1 **2. Defendants Misled Plaintiffs and the Court by Claiming ROE**
 2 **Samples Provided by Plaintiffs Are “Entirely Different” From**
 3 **Withheld ROE Documents.**

4 In two separate instances defendants provided false and misleading information about
 5 withheld ROE materials to the Court and to plaintiffs. In the first incident, plaintiffs argued that
 6 release of ROE documents would not lead to circumvention of the law, therefore not jeopardizing
 7 the lives of US soldiers, because ROE from the war in Iraq are readily available on the internet. Ps’
 8 MSJ at 25:23-28. The ROE plaintiffs cite is a CFLCC ROE⁷ card published in a US Army report
 9 titled, “Attack on the 507th Maintenance Company, 23 March 2003, An Nasiriyah, Iraq.”⁸ Ps’ MSJ
 10 at 26 n.39. In response, the government claimed, “The Rules of Engagement plaintiffs allude to are
 11 *entirely different* than the rules at issue in this case.” Ds’ Reply at 15 n.7 (emphasis added).
 12 However, this CFLCC ROE card contains *exactly the same* information as the ROE materials
 13 defendants have recently produced to plaintiffs, including instructions on the requirement of
 14 positive identification, instructions not to target or strike hospitals, mosques, churches, shrines, etc.,
 15 instructions not to target infrastructure or lines of communication, instructions on the use of force,
 16 including deadly force, and ROE instructions “shout, shove, show, shoot.”⁹ Doc. 1; Doc. 3¹⁰; Doc.
 17 3a; Doc. 4a. Defendants’ claim is therefore entirely disingenuous and constitutes an act of bad faith
 18 on the part of the government.

19 In the second incident, defendants again made false statements about documents withheld
 20 by the government. Plaintiffs attached two ROE cards to their initial Motion for Summary
 21 Judgment as examples of the type of information they are seeking. Exhibit F¹¹ to Ps’ MSJ. In
 22 response, the government falsely claimed these ROE cards “likely are *entirely different* from the

23 ⁷ This CFLCC ROE card is exactly the same as the CFLCC ROE card attached to plaintiffs’
 24 Motion for Summary Judgment as Exhibit F.

25 ⁸ <http://www.army.mil/features/507thMaintCmpy/AttackOnThe507MaintCmpy.doc>.

26 ⁹ The ROE instructions, “shout, show, shove, shoot,” continue to be improperly redacted
 27 from the AR 15-6 report. October 31, 2007 AR 15-6 report at BS 29; Exhibit H to Ps’ MSJ at 23.

28 ¹⁰ Both Doc. 1 and Doc. 3 were included in defendants’ first *Vaughn* Index, Exhibit A to
 Defendants’ MSJ.

¹¹ Exhibit F to Plaintiffs’ MSJ contains two ROE cards purchased from a soldier selling his
 military documents on the eBay internet auction site.

1 documents defendants are withholding.” Ds’ Reply at 11:23-24 (emphasis added). However, the
2 information in the ROE cards submitted as plaintiff’s Exhibit F is *the exact same information* found
3 in more than one ROE-related document finally released by the government. Doc. 1 at 4, 14; Doc.
4 3a; Doc. 4a. For example:

5 **Ps’ EXHIBIT F:** “SHOUT verbal warnings to halt.”

6 **Ds’ DOC. 1 at 4:** “Shout verbal warnings to halt.”

7 **Ps’ EXHIBIT F:** “SHOW your weapon and demonstrate intent to use it.”

8 **Ds’ DOC. 1 at 4:** “Show your weapon and demonstrate intent to use it.”

9 **Ps’ EXHIBIT F:** “SHOVE, physically restrain, block access or detain.”

10 **Ds’ DOC. 1 at 4:** “Physically restrain, block access or detain.”

11 **Ps’ EXHIBIT F:** “SHOOT to remove the threat of death/serious bodily injury or to protect
12 designated property.”

13 **Ds’ DOC. 1 at 4:** “Shoot to eliminate target.”

14 In light of the documents recently produced, the government’s initial response to plaintiffs’
15 exhibit was improper and disingenuous. Furthermore, by asserting that the documents are “likely”
16 entirely different, the government’s attorney appears to not have familiarized himself with the
17 content of the documents at issue, or even to have looked at them.

18 Finally, even though plaintiffs made defendants aware from the beginning of litigation in
19 April 2006 that they sought the release of ROE cards, which are unclassified documents,
20 defendants continued to withhold such documents until October 31, 2007, after receiving the
21 Court’s order. Plaintiffs’ MSJ at 21-22; Plaintiffs’ Reply in Support of Their Motion for Summary
22 Judgment at 4, (Dkt. No. 39) (“Ps’ Reply”).

23 **3. Defendants Failed to Segregate and Produce Releasable ROE 24 Materials as Obligated by Law.**

25 Defendants previously failed to segregate and produce non-exempt ROE materials, claiming
26 there were no reasonably segregable portions of the ROE-related documents. Defendants’ declarant
27 falsely stated that “[t]he only non-exempt information that could be segregated would consist of
28 lists of references or heading titles such as ‘General Guidance’ or ‘Definitions’ that, if released,
would be of no informational value.” Ds’ Reply at 8; Ghormley Decl., para. 7. The Court rejected

1 this argument and ordered the government to “produce the segregable information of the first four
2 [ROE-related] documents even where it may only reveal heading titles.” *Hiken*, 521 F.Supp.2d at
3 1060. The government then disclosed 117 pages of ROE-related materials, revealing much more
4 than just heading titles.

5 In fact, one of the documents identified by defendants in their first *Vaughn* Index, which
6 their declarant stated contained *no* segregable material, defendants have now released in full,
7 without a single redaction. Appendix 20 to Annex C to MNC-I Standard Operating Procedures, Ds’
8 *Vaughn* Index at 13; Doc. 2, Defendants’ Revised *Vaughn* Index at 1; Ghormley Decl., para. 7. Had
9 the government previously searched for, redacted, and released this information as legally
10 obligated, this second round of litigation would be unnecessary.

11 12 **4. Defendants Have Unnecessarily Delayed and Increased the Cost of** 13 **This Litigation.**

14 A party engages in bad faith where it pursues its case in such a way as “to cause
15 unnecessary delay or needless increase in the cost of litigation.” *Chambers v. NASCO, Inc.*, 501
16 U.S. 32, 46 (1991) (citing Fed. R. Civ. P. 11(b)). As discussed throughout part IV. E. of this
17 pleading, defendants’ acts in the present litigation have engendered both unnecessary delays and
18 increased costs to both plaintiffs and the judiciary, and they constitute bad faith.

19 Moreover, while each of the government’s acts outlined in parts IV. A.-E., by themselves,
20 could be seen as examples of routine government agency delays or oversights that have led to
21 unnecessary litigation, taken together they depict an intentional practice on the part of the
22 government to delay plaintiffs’ access to public documents in its attempt to withhold important
23 documents from the citizenry, who may use information found therein to criticize the war in Iraq.

24 Under the circumstances outlined here, plaintiffs have overcome the normal presumption
25 that an agency’s affidavits supporting its claims of exemption under the FOIA are made in good
26 faith, and a grant of summary judgment in defendants’ favor “would be an abdication of the court’s
27 responsibility.” *Jones v. F.B.I.*, 41 F.3d 238, 242-43 (6th Cir. 1994).

28 //

1 **5. Defendants Acted in Bad Faith in the Underlying Activities That**
 2 **Generated the Documents at Issue.**

3 As the Court noted, “there may be evidence of bad faith or illegality with regard to the
 4 underlying activities which generated the documents at issue” in this FOIA action. *Hiken*, 521
 5 F.Supp.2d at 1056 (quoting *Jones v. F.B.I.*, 41 F.3d 238, 242 (6th Cir. 1994)) (internal quotation
 6 marks omitted). The following allegations demonstrate the illegality of defendants’ conduct in the
 7 current war in Iraq – conduct that underlies documents such as those responsive to plaintiffs’ FOIA
 8 request:

- 9
- 10 • The widespread death of civilians as a result of the siege on Fallujah violates the
 11 Fourth Geneva Convention’s obligation on an Occupying Power to ensure the safety
 12 of civilians;¹²
 - 13 • Collective punishment of the population of Fallujah for the deaths of four
 14 Blackwater mercenaries violates the Fourth Geneva Convention;¹³
 - 15 • The attack on the car carrying journalist Giuliana Sgrena, who was independently
 16 covering the siege on Fallujah, violated the Universal Declaration of Human
 17 Rights;¹⁴
 - 18 • The initiation of the war in Iraq was a crime against peace in violation of the UN
 19 Charter;¹⁵
 - 20 • The occupation of Iraq, in which U.S.-led forces have killed hundreds of thousands
 21 of Iraqi civilians and created millions of refugees, is a crime against humanity;¹⁶

22 ¹² Convention Relative to the Protection of Civilian Persons in Time of War, art. 27, Aug.
 23 12, 1949, 6 U.S.T. 3516, 75 UNTS 287. Ratified by the United States August 2, 1955. “The Party
 24 to the conflict in whose hands protected persons may be, is responsible for the treatment accorded
 25 to them by its agents, irrespective of any individual responsibility which may be incurred”; *Id.*, art.
 26 29.

26 ¹³ *Id.*, art. 33; Ps’ MSJ at 10-12.

27 ¹⁴ Freedom of the Press. Universal Declaration of Human Rights, art. 18, Adopted Dec. 10,
 28 1948.

¹⁵ *The United Nations, International Law, and the War in Iraq*, World Press Review Online,
<http://www.worldpress.org/specials/iraq/#>.

- 1 • Iraqi prisoners have been tortured in violation of the Geneva Convention, the US
2 Anti-Torture Statute of 1994, the U.S. War Crimes Act of 1996, and the President's
3 oath of office;¹⁷ and,
- 4 • Thousands of detainees continue to be held in U.S. custody in Iraq, Afghanistan, and
5 the U.S. Naval Base at Guantanamo Bay, Cuba, without charges or the ability to
6 confront their captors at a fair trial.¹⁸

7 In light of such evidence that the U.S. military has violated the U.S. Constitution, the laws
8 of the United States and ratified treaties throughout the war in Iraq, summary judgment in
9 defendants' favor is unwarranted and should be denied. *Jones*, 41 F.3d at 242-43.

10
11 **F. Defendants Have Waived Exemption of the AR 15-6 Report Which Their
12 Own Public Affairs Officer Placed on the Agency's Web site and Provided
13 to Reporters.**

14 Defendants have failed to overcome plaintiffs' showing that defendants waived exemption
15 of the redacted version of the AR 15-6 report that they released on their own Web site and
16 provided to news outlets. Moore Decl. para. 4(a). The Court ordered that defendants provide further
17 evidence to support their claim that the release of the redacted report was not official and thus
18 exempt. *Hiken*, 521 F.Supp.2d at 1057. Instead, in their Renewed MSJ, defendants urge the Court
19 not to order disclosure of the full, *unredacted* report. *E.g.*, Ds' Renewed MSJ at 3:19-4:5; 4:10-19.
20 However, plaintiffs already have conceded that defendants have waived exemption as to only the
21 redacted version, Ps' Reply at 15:17-20 ("plaintiffs no longer argue that defendants have waived

22 _____
23 (...Continued)

24 ¹⁶ *U.N. Refugee Agency: Exodus in Iraq Forces Priority Shift*, CNN.com International, Oct.
25 13, 2006, <http://edition.cnn.com/2006/WORLD/meast/10/13/iraq.main/index.html>; *655,000 Iraqis
26 Killed Since Invasion*, Guardian Unlimited, Oct. 11, 2006,
27 <http://www.guardian.co.uk/Iraq/Story/0,,1892888,00.html>.

28 ¹⁷ *Amnesty International Report 2007: The State of the World's Human Rights*,
<http://thereport.amnesty.org/eng/Regions/Americas/United-States-of-America>; *Summary of
International and U.S. Law Prohibiting Torture and Other Ill-treatment of Persons in Custody*,
Human Rights Watch, May 24, 2004, <http://hrw.org/english/docs/2004/05/24/usint8614.htm>.

¹⁸ *Amnesty International Report 2007: The State of the World's Human Rights*,
<http://thereport.amnesty.org/eng/Regions/Americas/United-States-of-America>.

1 exemption under the FOIA of the unredacted report available on the Internet”), rendering many of
2 defendants’ contentions on this point moot. *E.g.*, Ds’ Renewed MSJ at 4:10-19.

3 Though in earlier pleadings defendants averred that the disclosure of the report on the
4 Internet was improper because it was done “without authorization,” Ds’ Reply at 8:1, they appear
5 to have changed their focus. They now assert – citing no authority – that they have not waived
6 exemption because there was no “formal FOIA review” of the document prior to its posting online.
7 Ds’ Renewed MSJ at 4:8-9; *e.g.*, Moore Decl., para. 4(a). The test cited by this Court to determine
8 whether a document is officially acknowledged and subject to public disclosure, however, is
9 whether the information sought (1) is “as specific” as that previously released, (2) “matches” the
10 information earlier released, and (3) disclosure of which is “official and documented.” *Hiken*, 521
11 F.Supp.2d at 1057 (quoting *Edmonds v. U.S. Dept. of Justice*, 405 F.Supp.2d 23, 30 (D.D.C. 2005))
12 (internal quotation marks omitted).

13 Here, the Department of Defense released the report, in redacted form, on its own Web site
14 – and it only pulled the report off the site because the PAO noticed that television newscasters were
15 discussing portions of the report defendants had redacted. See Ps’ MSJ at 17-18, 18 n.13; Moore
16 Decl., paras. 4(a)-(b). Defendants acknowledge that the PAO sent the Combined Press Information
17 Center “an unclassified, redacted version” of the report for posting on the Internet. Moore Decl.,
18 para. 4(a). That unclassified, redacted version of the report that defendants posted to their Web site
19 is what plaintiffs seek. Therefore, the version of the report that defendants posted online “matches”
20 the report sought by plaintiffs, and its disclosure was official and documented. *Edmonds*, 405
21 F.Supp.2d at 30; Ps’ MSJ at 17-18; Moore Decl., para. 4(a) (“unclassified, redacted version” of
22 report posted to the Internet). Because defendants released the unclassified version of the report
23 through their own official channels, Ps’ MSJ 17-18, 18 n.13, and this official release has been
24 documented, Moore Decl., para. 4(a), the document meets the *Edmonds* test, and defendants have
25 waived exemption of this version of the report.

26 As plaintiffs have earlier discussed, “once there is disclosure, *the information belongs to the*
27 *public.*” *National Resources Defense Council v. Dep’t of Defense*, 442 F.Supp.2d 857, 866 (C.D.
28 Cal. 2006). And by “providing evidence that the information being withheld is already within the

1 public domain, a FOIA plaintiff brings into question the government's determination that release of
2 such information might reasonably be expected to damage the national security." *Washington Post*
3 *v. U.S. Dep't of Defense*, 766 F.Supp. 1, 12 (D.D.C. 1991). Given the fact that public disclosure of
4 and discussion on television newscasts of the unredacted report resulted in no reports of damage to
5 the national security, it is manifest that disclosure of the redacted version that plaintiffs seek –
6 nearly three years after the incident it discusses – is extremely unlikely to damage the national
7 security. This Court should order disclosure of any as yet undisclosed information from the report
8 that defendants posted to their Web site and should deny defendants' motion for summary
9 judgment.

11 **G. Summary Judgment Is Inappropriate Where the Court Has Not Yet** 12 **Conducted *In Camera* Review.**

13 Finally, if the Court has not yet conducted *in camera* review, summary judgment is
14 inappropriate. *Knight v. C.I.A.*, 872 F.2d 660, 662 (5th Cir. 1989); *Olivia v. Bureau of Prisons*,
15 1985 WL 3825 *4 (S.D.N.Y. 1985). First, the Court stated *in camera* review is necessary to
16 determine whether factual information in the AR 15-6 report is protected by the deliberative
17 process privilege. *Hiken*, 521 F.Supp.2d at 1064. Second, in criticizing the government's failure to
18 provide dates for the documents at issue, the Court noted that without having the documents before
19 it, "the court has no basis for evaluating whether any documents relating to the siege of Fallujah
20 were identified in the Vaughn Index." *Id.* at 1054. Because the governments' Revised *Vaughn*
21 Index fails to provide adequate dates or locations where the documents were in effect, the Court's
22 rationale for conducting *in camera* review remains valid.

24 **V. CONCLUSION**

25 For the foregoing reasons and based on the foregoing authorities, and in the furtherance of a
26 swift and just conclusion of this action, plaintiffs respectfully request that the Court:

- 27 • Deny defendants' Renewed MSJ and grant plaintiffs' Renewed Motion for
28 Summary Judgment;

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- Conduct *in camera* review if the Court has not yet done so;
- Notify parties whether the Court has conducted *in camera* review or, if the Court has not yet done so, notify the parties of a date by which such review will take place;
- Order defendants to comply with all parts of the Court’s October 2, 2007 Order not yet complied with;
- Order defendants to cure inadequacies in their Revised *Vaughn* Index by providing dates for all ROE documents and the locations where they were in effect;
- Order defendants to conduct a new search for responsive documents if date and location information show the documents listed in the Revised *Vaughn* Index to be unresponsive; and,
- Order defendants to unredact and provide to plaintiffs any information they continue to improperly withhold, including information from the redacted version of the AR 15-6 report defendants put on their MNF-I Web site, any other releasable parts of the AR 15-6 report, as well as any releasable sections of the ROE materials.

DATED: February 11, 2008

Respectfully submitted,

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