

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

RAYMOND BONNER,

Plaintiff,

v.

FEDERAL BUREAU OF INVESTIGATION
and CENTRAL INTELLIGENCE AGENCY,

Defendants.

Civil Action No. 21-02166

COMPLAINT

INTRODUCTION

Plaintiff Raymond Bonner, by his undersigned attorneys, alleges:

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *et seq.*, for declaratory, injunctive, and other appropriate relief brought by Raymond Bonner, a prize-winning investigative journalist and author.

2. Mr. Bonner is currently finishing work on a documentary about our nation’s response to the terrorist attacks of 9/11, including the use and effectiveness of so-called “enhanced interrogation techniques.” Abu Zubaydah was one of the first victims of the U.S. Government’s rendition and enhanced interrogation program and is now the longest held detainee at the U.S. military prison at Guantanamo Bay, Cuba.

3. In connection with the research for his documentary, on May 26, 2017, Mr. Bonner submitted a Freedom of Information Act (FOIA) request to the Federal Bureau of Investigation (FBI) that sought, *inter alia*, all records pertaining to Zubaydah created between April 2, 2002 and July 15, 2002, the time period when public reports established that the FBI was participating in the questioning of Zubaydah at a black site run by the Central Intelligence Agency (CIA). After the FBI failed timely to provide the requested documents, that FOIA

request was litigated in this Court. The case was voluntarily dismissed on July 30, 2020 after Mr. Bonner received representations from the FBI that it had responded fully to the FOIA request. *See* Stipulation and Order of Settlement and Dismissal, *Bonner v. Department of Defense, et al.*, No. 1:17-cv-09378 (VEC) (S.D.N.Y. July 30, 2020), ECF No. 76.

4. Former FBI Agent Ali Soufan was present at the CIA black site in 2002 as the FBI's lead interrogator of Zubaydah. Recently, Mr. Bonner has become aware that Soufan sent daily cables describing the interrogations to FBI headquarters over a secure CIA communications network from approximately March 30, 2002, to July 15, 2002. These cables were called for by Mr. Bonner's May 26, 2017 FOIA request to the FBI, but they were not produced.

5. Upon learning of these cables, Mr. Bonner promptly submitted a new FOIA request to defendant Federal Bureau of Investigation on December 4, 2020 seeking expedited release of the Soufan cables. On January 30, 2021, Plaintiff also submitted a second request to the FBI and a request to defendant Central Intelligence Agency, both with narrower and more specific search terms than the December 4 request, seeking expedited release of the cables (collectively, the "Requests"). The CIA promptly denied the request for expedited processing. The FBI denied the request for expedited processing for the December 4 request but has not responded to the January 30 request.

6. Mr. Bonner has a compelling need for prompt release of these records to inform the American public about the enhanced interrogation program at a time when public attention and debate will uniquely focus on the issues raised by our nation's response to 9/11: the upcoming 20th anniversary of the attacks this September. Mr. Bonner, together with award-winning documentarian Alex Gibney, is producing a documentary that is scheduled to be televised on September 20, 2021. The information sought through this FOIA action is needed to

provide a complete and accurate portrayal of Abu Zubaydah’s treatment under our Government’s rendition and enhanced interrogation program. It is also needed to promote a full and meaningful public debate about the value of that interrogation program and about continued operation of the prison at Guantanamo Bay where Zubaydah has been held for years. The Biden administration’s recent announcement of its aim to close the Guantanamo Bay prison further underscores the need for timely disclosure of the records at issue in this case.¹

PARTIES

7. Plaintiff Raymond Bonner is a prize-winning investigative journalist and author with over 35 years of professional experience. He has reported and written for major publications including *The New York Times*, *The New Yorker*, *The Atlantic*, and the *New York Review of Books*. He is currently a contributing writer for *ProPublica*, an independent, non-profit, online newsroom based in New York. Mr. Bonner has published numerous articles about the U.S. War on Terror, treatment of terrorist suspects in the aftermath of 9/11, and detention practices at Guantanamo Bay, Cuba. He has written extensively on Zubaydah’s capture, interrogation, and detention.²

8. Defendant Federal Bureau of Investigation (“FBI”) is a component of the Department of Justice, a department of the executive branch of the U.S. government, and is an agency within the meaning of 5 U.S.C. § 552(f)(1).

9. Defendant Central Intelligence Agency (“CIA”) an intelligence agency established within the executive branch of the U.S. government and is an agency within the

¹ See, e.g., Carol Rosenberg, *Biden Plans to Close Guantanamo Prison, But Details Remain Hazy*, N.Y. Times, February 23, 2021, at A16.

² See, e.g., Raymond Bonner, *The Strange Case of the Forgotten Gitmo Detainee*, POLITICO (May 12, 2015), <https://www.politico.com/magazine/story/2015/05/abu-zubaydah-tortured-waterboarded-cia-dc-circuit-court-guantanamo-117833/>.

meaning of 5 U.S.C. § 552(f)(1) that has possession and control of the records sought by plaintiff.

JURISDICTION AND VENUE

10. This Court has subject-matter jurisdiction over this action and personal jurisdiction over the defendant pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B).

11. Venue is proper under 5 U.S.C. § 552(a)(4)(B) because plaintiff resides in this district.

FACTS

12. Abu Zubaydah was captured in Pakistan in March 2002 and is currently being detained at the U.S. military base at Guantanamo Bay, Cuba.

13. According to the Senate Select Committee on Intelligence’s “Committee Study on the Central Intelligence Agency’s Detention and Interrogation Program” (“SSCI Torture Report”), released in December 2014, Abu Zubaydah was one of the first post-9/11 terror suspects to be interviewed by the FBI and CIA and was subject to the CIA’s “enhanced interrogation techniques” at a CIA run “black site.” *See* S. REP. NO. 113-288 (2014).

14. Abu Zubaydah filed a habeas petition in 2008 challenging his detention, which remains pending today. *See Husayn v. Mattis*, No. 1:08-cv-1360 (D.D.C. Aug. 6, 2008).

15. The U.S. government has held Abu Zubaydah without charge for more than eighteen years, during which time his capture, treatment and continued confinement have been the subject of numerous investigations and reports, including by international tribunals, human rights groups, and the U.S. Senate. His name appears 1001 times in the publicly released five-hundred-page summary of the SSCI Torture Report. *See* S. REP. NO. 113-288 (2014).

16. The facts and circumstances surrounding Abu Zubaydah's treatment remain matters of great public interest and concern. His capture and interrogation have been written about in several books by former FBI and CIA officials.³

Mr. Bonner's May 2017 FOIA Requests

17. On May 26, 2017, Mr. Bonner submitted to defendant FBI a FOIA request seeking, *inter alia*, "[a]ll records created between March 15, 2002, and April 2, 2002, inclusive, which refer or pertain to the March 28, 2002, raid in Pakistan in which Zubaydah was captured," and "[a]ll records created between April 2, 2002 and July 15, 2002, inclusive, which refer or pertain to Zubaydah." *See* Complaint at 7, *Bonner v. Department of Defense, et al.*, No. 1:17-cv-9378 (VEC) (S.D.N.Y. Nov. 30, 2017), ECF No. 1.

18. On November 30, 2017, Mr. Bonner filed suit against defendants and the Department of Defense (DoD) on the basis of three claims related to the 2017 Request and two other requests for records covering related subject matter. *See id.* On January 30, 2019, defendant agencies reported that they had fully completed their production of non-exempt records in response to the 2017 Request. *See* Status Report, *Bonner*, No. 1:17-cv-9378 (VEC) (S.D.N.Y. Feb. 1, 2019), ECF No. 48. On February 3, 2020, the parties reported the resolution of all substantive issues concerning defendant agencies' claimed exemptions. *See* Status Report, *Bonner*, No. 1:17-cv-9378 (VEC) (S.D.N.Y. Feb. 3, 2020), ECF No. 63. On July 30, 2020, Mr. Bonner and defendants voluntarily dismissed the suit with prejudice. *See* Stipulation and

³ *See, e.g.*, James E. Mitchell, ENHANCED INTERROGATION: INSIDE THE MINDS AND MOTIVES OF THE ISLAMIST TERRORISTS TRYING TO DESTROY AMERICA (2016) (written by the architect of the CIA's enhanced interrogation program and the chief interrogator of Abu Zubaydah at the black site); John Rizzo, *The Birth of the Enhanced Interrogation Program* (2002), in COMPANY MAN: THIRTY YEARS OF CONTROVERSY AND CRISIS IN THE CIA 181-202 (2014); Jose A. Rodriguez, Jr., *Abu Zubaydah*, in HARD MEASURES: HOW AGGRESSIVE CIA ACTIONS AFTER 9/11 SAVE AMERICAN LIVES 41-72 (written by the former head of the CIA's Counterterrorism Center); Ali H. Soufan, *The First High-Value Detainee*, in THE BLACK BANNERS: THE INSIDE STORY OF 9/11 AND THE WAR AGAINST AL-QAEDA (2011) (written by the senior FBI agent who interrogated Abu Zubaydah at the black site).

Order of Settlement and Dismissal, *Bonner*, No. 1:17-cv-9378 (VEC) (S.D.N.Y. July 30, 2020), ECF No. 76.

19. In connection with ongoing research for his documentary, Mr. Bonner became aware of daily cables documenting the Zubaydah interrogation sent between March and July 2002 by former FBI Agent Ali Soufan. These cables were not disclosed in response to the 2017 Request, though they were encompassed within the request and should have been produced.

20. The SSCI Torture Report discloses the full text of one such cable sent by Soufan to FBI headquarters that describes Zubaydah's health status, his imminent transfer from a hospital, actions the CIA planned to take as soon as he was moved, and the FBI agent's concerns about the CIA's plans. *See* S. REP. NO. 113-288, at 27 (2014).

21. Defendant FBI should have produced this cable in response to the 2017 Request. The cable was clearly unclassified at the time of the request, but it was not provided to Mr. Bonner by the FBI in whole or in part.

December 4, 2020 FOIA Request to the Federal Bureau of Investigation

22. On December 4, 2020, Mr. Bonner submitted to defendant FBI a FOIA request (the "December 4 FBI Request") seeking copies of documents falling within a narrow and clearly-defined category:

- a. All notes prepared by FBI Agent Ali Soufan, in whatever form and wherever located, that concern the interrogation or treatment of Zubaydah at any point after March 28, 2002.

A true and correct copy of Mr. Bonner's December 4 FBI Request is annexed hereto as Exhibit A.

23. Mr. Bonner requested expedited processing so that the information is available in time to be included in the documentary to be released on the upcoming 20th anniversary of the

9/11 attacks, when public attention and debate will be uniquely focused on the continuing issues raised by our nation's response to them.

24. Mr. Bonner also requested a fee waiver under 5 U.S.C. § 552(a)(4)(A)(ii)(II), because he is “a representative of the news media” within the meaning of the statute.

25. By letter dated December 29, 2020, Michael G. Seidel, Section Chief of the Record/Information Dissemination Section, denied Mr. Bonner's request for expedited processing on the grounds that the request did not “provide[] enough information concerning the statutory requirements for expedition.” A true and correct copy of the FBI response is attached hereto as Exhibit B.

26. Mr. Bonner administratively appealed the denial of expedited processing for the December 4 FBI request by letter dated February 9, 2021. A true and correct copy of his appeal is annexed hereto as Exhibit C.

27. By email dated February 16, 2021, Matthew Hurd, Acting Chief of the Administrative Appeals Staff, denied the appeal on the grounds that there was no “urgency to inform the public,” determining that Mr. Bonner had not established facts “demonstrating that the requested records are a matter of current exigency to the American public,” and had not “articulated a significantly-recognized interest that would be compromised” by a denial of expedited processing. A true and correct copy of the FBI response is annexed hereto as Exhibit D.

28. More than twenty (20) business days have passed since Mr. Bonner submitted his request to FBI. None of the requested documents have been made available to plaintiff, in full or in part.

29. Even assuming that “unusual circumstances” apply in this case, the FOIA allows extension of no more than ten (10) business days, per 5 U.S.C. § 552(a)(6)(B)(i). This time period has also expired.

30. FBI has “fail[ed] to comply with the applicable time limit provisions” of FOIA, and plaintiff has exhausted his administrative remedies. 5 U.S.C. § 552(a)(6)(C)(i).

January 30, 2021 FOIA Request to the Federal Bureau of Investigation.

31. On January 30, 2021, Mr. Bonner submitted to defendant FBI an additional FOIA request (the “January 30 FBI Request”) seeking copies of documents falling into two narrow and clearly-defined categories:

- a. All records created between March 30, 2002 and July 15, 2002, inclusive, authored by FBI Agent Ali Soufan.
- b. All records created between March 30, 2002 and July 15, 2002, inclusive, which refer or pertain to Abu Zubaydah (also known as Zayn Al Abidin Muhammad Husayn).

A true and correct copy of the January 30 FBI Request is annexed hereto as Exhibit E.

32. Mr. Bonner requested expedited processing so that the information is available in time to be included in the documentary to be released on the upcoming 20th anniversary of the 9/11 attacks, when public attention and debate will be uniquely focused on the continuing issues raised by our nation’s response to them. The FBI has not responded to Mr. Bonner’s request for expedited processing.

33. Mr. Bonner also requested a fee waiver under 5 U.S.C. § 552(a)(4)(A)(ii)(II), because he is a “representative of the news media” within the meaning of the statute.

34. More than twenty (20) business days have passed since Mr. Bonner submitted his request to FBI. None of the requested documents have been made available to plaintiff, in full or in part.

35. Even assuming that “unusual circumstances” apply in this case, the FOIA allows extension of no more than ten (10) business days, per 5 U.S.C. § 552(a)(6)(B)(i). This time period has also expired.

36. FBI has “fail[ed] to comply with the applicable time limit provisions” of FOIA, and plaintiff has exhausted his administrative remedies. 5 U.S.C. § 552(a)(6)(C)(i).

FOIA Request to the Central Intelligence Agency

37. On January 30, 2021, Mr. Bonner submitted to defendant CIA a FOIA request (the “CIA Request”) seeking copies of documents falling into two narrow and clearly-defined categories:

- a. All records created between March 30, 2002 and July 15, 2002, inclusive, authored by FBI Agent Ali Soufan.
- b. All records created between March 30, 2002 and July 15, 2002, inclusive, which refer or pertain to Abu Zubaydah (also known as Zayn Al Abidin Muhammad Husayn).

A true and correct copy of Mr. Bonner’s CIA Request is annexed hereto as Exhibit F.

38. Mr. Bonner requested expedited processing so that the information will be available in time to finalize the documentary to be released on the upcoming 20th anniversary of the 9/11 attacks.

39. Mr. Bonner also requested a fee waiver under 5 U.S.C. § 552(a)(4)(A)(ii)(II) because he is “a representative of the news media” within the meaning of the statute.

40. By letter dated February 2, 2021, Mark Lily, Information and Privacy Coordinator at CIA, denied Mr. Bonner’s request for expedited processing, asserting that he had not

demonstrated a “compelling need” for the requested information. Mr. Lily also determined that the information sought by the request is “not relevant to a topic of public urgency regarding an actual or alleged federal activity.” A true and correct copy of the CIA response is annexed hereto as Exhibit G.

41. Mr. Bonner administratively appealed the denial of expedited processing for the CIA Request by letter dated February 2, 2021. A true and correct copy of his appeal is annexed hereto as Exhibit H.

42. By email dated February 24, 2021, Mr. Lily informed Mr. Bonner that the Agency Release Panel had denied the appeal because Mr. Bonner had not demonstrated a “compelling need” for the requested information. A true and correct copy this email is annexed hereto as Exhibit I.

43. More than twenty (20) business days have passed since Mr. Bonner submitted his request to CIA. None of the requested documents have been made available to Plaintiff, in full or in part.

44. Even assuming that “unusual circumstances” apply in this case, the FOIA allows extension of no more than ten (10) business days, per 5 U.S.C. § 552(a)(6)(B)(i). This time period has also expired.

45. CIA has “fail[ed] to comply with the applicable time limit provisions” of FOIA, and plaintiff has exhausted his administrative remedies. 5 U.S.C. § 552(a)(6)(C)(i).

CLAIMS

FIRST CLAIM FOR RELIEF (Violation of FOIA for failure to expedite)

46. Plaintiff repeats, re-alleges, and reincorporates the allegations in the foregoing paragraphs as though fully set forth herein.

47. FBI's failure to expedite the processing of plaintiff's December 4 and January 30 Requests violates FOIA, 5 U.S.C. § 552(a)(6)(E), and the Department of Justice's regulations promulgated thereunder, 28 C.F.R. § 16.5(e)(1).

48. CIA's failure to expedite the processing of plaintiff's Request violates FOIA, 5 U.S.C. § 552(a)(6)(E), and CIA's regulations promulgated thereunder, 32 C.F.R. § 1900.34(c).

SECOND CLAIM FOR RELIEF
(Violation of FOIA for failure to make records promptly available)

49. Plaintiff repeats, re-alleges, and reincorporates the allegations in the foregoing paragraphs as though fully set forth herein.

50. FBI's failure to comply with the statutory time limit for rendering a determination on plaintiff's December 4 and January 30 Requests violates FOIA, 5 U.S.C. § 552(a)(6)(A)(i).

51. CIA's failure to comply with the statutory time limit for rendering a determination on plaintiff's Request violates FOIA, 5 U.S.C. § 552(a)(6)(A)(i).

52. FBI's failure to make promptly available records that are responsive to plaintiff's December 4 and January 30 Requests violates FOIA, 5 U.S.C. § 552(a)(3)(A).

53. CIA's failure to make promptly available records that are responsive to plaintiff's Request violates FOIA, 5 U.S.C. § 552(a)(3)(A).

REQUESTED RELIEF

WHEREFORE, plaintiff respectfully requests this Court to:

- a) Expedite consideration of this complaint pursuant to 28 U.S.C. § 1657;
- b) Declare that the records sought are subject to FOIA and must be disclosed by defendants in the manner prescribed by FOIA;
- c) Declare that plaintiff's FOIA requests are entitled to expedited processing by defendants;

- d) Declare that plaintiff is entitled to fee waivers;
- e) Order defendants immediately to conduct a thorough search for the records requested by plaintiff;
- f) Order defendants to immediately and expeditiously process the responsive records and produce them to plaintiff forthwith;
- g) Enjoin defendants from charging plaintiff fees for processing his requests;
- h) Award plaintiff the cost of this proceeding, including any reasonable attorneys' fees, as expressly permitted by FOIA; and
- i) Grant such other and further relief as the Court deems just and proper.

March 12, 2020

Respectfully submitted

MEDIA FREEDOM AND INFORMATION
ACCESS CLINIC

By: /s/

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