

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ABI WA'EL (JIHAD) DHIAB,

Petitioner/Plaintiff,

v.

BARACK H. OBAMA, et al.,

Respondents/Defendants.

Civ. No. 05-1457 (GK)

**EMERGENCY MOTION FOR ORDER COMPELLING PRESERVATION OF
EVIDENCE AND LIMITED DISCOVERY, BY MAY 18, 2014, OF MEDICAL
RECORDS AND VIDEOTAPES OF FORCE-FEEDINGS AND FORCIBLE CELL
EXTRACTIONS**

On May 21, 2014, this Court will hold a hearing on Petitioner's application for a preliminary injunction against abusive force-feeding practices at Guantánamo Bay. *See* Doc. #203. This emergency motion seeks an order compelling limited discovery in advance of the hearing. Respondents' counsel have advised Petitioner's counsel that "the government opposes the motion."

On May 6, 2014, Petitioner's counsel met and conferred with Respondents' counsel via email and requested limited discovery (on a protected or classified basis), pursuant to Section I.E.2 of the Case Management Order, of "any and all videotapes that have been made of Mr. Dhiab's forcible cell extractions and enteral feedings." On May 8, 2014, Petitioner's counsel reiterated this request more specifically, asking via email for "[a]ny and all videotapes made of Mr. Dhiab's Forcible Cell Extractions and/or enteral feedings during the period April 9, 2013 to February 19, 2014." Also in the email of May 8, 2014, Petitioner's counsel requested limited discovery of "[a]ll medical records for Mr. Dhiab for the period April 9, 2013 to May 7, 2014."

On May 12, 2014, Respondents' counsel advised Petitioner's counsel via email that the Department of Defense refuses Petitioner's request for production of videotapes. This email also stated that "DoD informs us that, as a matter of policy, the[y] do not record enteral feedings." Later that day, Petitioner's counsel responded by email as follows: "You say that 'as a matter of policy' DoD 'do' not record enteral feedings. I understand that to mean that DoD's *current* policy is not to record enteral feedings. As a matter of *past* policy or practice, have any of Mr. Dhiab's enteral feedings been recorded?"

Respondents' counsel replied by email on May 13, 2014 and *admitted for the first time* that there actually *are* videotapes of force-feedings at Guantánamo Bay, stating: "DoD has advised us that during the recording of some FCE videos for enteral feeding purposes, some of the videos recorded both the FCE process and the enteral feeding process." Respondents' counsel have refused, however, to produce any such videotapes, including videotapes that show Mr. Dhiab's force-feedings.

Respondents' email of May 12, 2014 also stated that the Department of Defense will provide Petitioner's medical records only for the period January 1, 2014 to May 7, 2014 and refuses to provide Petitioner's medical records for the period April 9, 2013 to December 31, 2013. As of this writing, Petitioner's counsel have not yet received Petitioner's 2014 medical records.¹

This Court has previously granted a Guantánamo Bay detainee's motion to compel production of videotapes of his Forcible Cell Extractions (FCEs), pursuant to the detainee's

¹ Respondents' May 12, 2014 email also reiterated their previous refusals to disclose still-secret protocols governing force-feeding and the use of restraint chairs at Guantánamo Bay. Those protocols are the subject of a separate request for an order compelling disclosure, set forth in Petitioner's application for preliminary injunction and reiterated in his reply memorandum filed May 12, 2014. *See* Doc. #203-9 (proposed order for disclosure).

assertions that FCEs “have in the past been abusive, violent, and inhumane.” *Al-Adahi v. Obama*, 2009 WL 1743756, at *1 (D.D.C. June 18, 2009). The Court found to be “unpersuasive” the Government’s assertion of concern that the order “might ‘open the door’ to other detainees to request such evidence,” observing that “[e]ach merits judge will make his or her own determination on the basis of the specific facts presented if such a motion is made.” *Id.* at *1 n. 1.

In this respect, the present case is indistinguishable from *Al-Adahi*. Petitioner has presented evidence that he and other detainees have been subjected to abusive and violent practices during FCEs and force-feedings. *See* Doc. #203-1 at 13-14. This evidence satisfies the requirement of Section I.E.2 of the Case Management Order that limited discovery “is likely to produce evidence that demonstrates that Petitioner’s detention is unlawful.” Videotapes of Petitioner’s FCEs and/or force-feedings are likely to demonstrate that Petitioner’s detention is unlawful to the extent they amount to unlawful conditions of confinement. *See Aamer v. Obama*, 742 F.3d 1023, 1035 (D.C. Cir. 2014) (court may “order the prisoner released unless the unlawful conditions are rectified”).

Further, this Court previously determined in *Al-Adahi* that the force-fed petitioners in that case were entitled to discovery of their medical records. *See Al-Adahi v. Obama*, 596 F. Supp. 2d 111, 115 (D.D.C. 2009). Again, the present case is indistinguishable. Petitioner’s full medical records are likely to support his allegations of abuse (*e.g.*, by demonstrating the twice-daily reinsertion of his feeding tubes or the extent to which his FCEs and/or force-feedings are causing him pain). There is no reasonable justification for the Department of Defense to disclose Petitioner’s medical records for the first four months of 2014 but refuse to disclose his medical records for the previous nine-month period in 2013.

Respondents' counsel's email of May 12, 2014 includes conclusory assertions that Petitioner's medical records prior to January 1, 2014 "are not material to your current challenge and would otherwise be unduly burdensome," and that the request for videotapes "is immaterial, overbroad, and unduly burdensome." Respondent's counsel's email of May 13, 2014 similarly asserts that it "would be unduly burdensome" for the Department of Defense to review the videotapes of Mr. Dhiab's FCEs in order to determine which ones include recordings of force-feedings.

Petitioner's requests, however, are hardly "immaterial," but are directly relevant to his assertions of abuse in recent force-feeding practices at Guantánamo Bay. Petitioner's requests are "narrowly tailored, not open-ended," as required by section I.E.2 of the Case Management Order, in that they are restricted to specified material for a specified period of time. It can hardly be burdensome for the Department of Defense to produce another nine months' worth of medical records when it has already agreed to produce four months' worth. And whatever minor inconvenience the Department of Defense might have to shoulder in order to produce the videotapes of Petitioner's force-feedings—the possession of which Respondents have not even admitted until now—is far outweighed by their probative value.

Respondents cannot complain that this discovery could jeopardize national security, because Petitioner does not (at least for the time being) seek public release of this material. *Cf. Int'l Counsel Bureau v. U.S. Dep't of Def.*, 906 F. Supp. 2d 1 (D.D.C. 2012) (denying FOIA public release of FCE videotapes upon Government's assertion of national security concerns); *Center for Constitutional Rights v. Dep't of Def.*, 968 F. Supp. 2d 623, 626, 629-30, 635-36 (S.D.N.Y. 2013) (same). There is only one logical explanation for Respondents' refusal of this

limited discovery: Something in the videotapes and/or Petitioner's full medical records must be worth discovering.

Given the looming May 21, 2014 hearing on Petitioner's application for preliminary injunction, Petitioner respectfully requests that the Court order Respondents to produce the requested medical records and videotapes by May 18, 2014.

Finally, during the course of the May 13, 2014 email exchanges between Petitioner's counsel and Respondents' counsel concerning the videotapes of Petitioner's force-feeding, Petitioner's counsel stated: "I'd like your immediate assurance that you are taking steps to preserve this videotape evidence and to ensure against its destruction." Respondents' counsel responded: "DoD is aware of its preservation obligations and has no reason to believe that the videotapes you seek in your motion have been destroyed." Petitioner's counsel replied: "[Y]our answer does not provide assurance that you are taking steps to preserve this videotape evidence going forward and ensure against its present or future destruction. If you cannot provide me with such assurance immediately, I will also ask the Court for a preservation order. Will you oppose such a request?" As of this writing, Respondents' counsel has not responded.

Consequently, by this motion Petitioner also requests this Court to order Respondents to preserve and maintain all videotapes of Petitioner's forcible cell extractions and/or force-feedings during the period April 9, 2013 to February 19, 2014.

Respectfully submitted,

/s/ Jon B. Eisenberg

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