

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ACCURACY IN MEDIA, INC., et al.,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 14-1589 (EGS)
)	
DEPARTMENT OF DEFENSE, et al.,)	
)	
Defendants.)	
_____)	

**PLAINTIFFS' MOTION FOR PARTIAL STAY OF CASE
AGAINST DEFENDANT CENTRAL INTELLIGENCE AGENCY,
PENDING ISSUANCE OF REPORT OF HOUSE SELECT COMMITTEE PROBE**

COME NOW plaintiffs Accuracy in Media, Inc. ("AIM"), Roger L. Aronoff, Captain Larry W. Bailey, USN (Ret.), Lieutenant Colonel Kenneth Benway, USA (Ret.), Colonel Richard F. Brauer, Jr., USA (Ret.), Clare M. Lopez, Admiral James A. Lyons, Jr., USN, (Ret.), and Kevin Michael Shipp, by counsel, and respectfully move this Court for a partial stay of proceedings against defendant CIA. Defendant CIA takes no position on this motion.

As grounds therefore, plaintiffs submit that the House Select Committee will disclose information corresponding to plaintiffs' FOIA requests to CIA, rendering otherwise exempt records subject to disclosure, whereupon the matter will be fully ripe for adjudication.

In support of the relief proposed, plaintiffs respectfully submit the attached memorandum.

DATE: March 5, 2015.

Respectfully submitted,

 /s/

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**MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL STAY OF
CASE AGAINST DEFENDANT CENTRAL INTELLIGENCE AGENCY,
PENDING ISSUANCE OF REPORT OF HOUSE SELECT COMMITTEE PROBE**

Plaintiffs respectfully submit this memorandum in support of their Motion for a Partial Stay of Proceedings against Defendant CIA.

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A. FOIA Request to CIA Explores Motive for Stand Down Order

Most of plaintiffs' FOIA requests to CIA explore the question raised by the decision not to order an immediate military response, why? Plaintiffs' Administrative Appeal explores the question. Plaintiff Clare Lopez' article, "*Benghazi: The Set-Up and the Cover-Up*," published on October 30, 2012, just two months after the attacks, summarizes CIA

arms-related activities in Benghazi, and the President's and Christopher Stevens' connections to them.¹

In addition to press reports, the Appeal includes the February 2014 UN Security Council "Final report of the Panel of Experts... concerning Libya," reporting that, "[over] the past three years, Libya has become a primary source of illicit weapons... [to] the Syrian Arab Republic via Lebanon and Turkey..." Administrative Appeal at 11.

B. Right to Disclosure of Otherwise Exempted Information upon "Official Disclosure"

"[W]hen information has been 'officially acknowledged,' its disclosure may be compelled even over an agency's otherwise valid exemption claim." *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990). In *Wolf v. CIA*, 473 F.3d 370 (2007), this Circuit addressed the official acknowledgment doctrine in the *Glomar* context, holding that the CIA had waived its right to issue a *Glomar* response because a former CIA director had publicly

¹ Administrative Appeal at 14: "*Benghazi: The Set-Up and the Cover-Up*," C. Lopez, *Pundicity.com*:

According to media reporting, Benghazi was staffed by CIA operatives whose job may have been not just to secure and destroy dangerous weapons (like RPGs and SAMs) looted from former Libyan dictator Muammar Qaddafi's stockpiles during and after the 2011 revolution, but also perhaps to facilitate their onward shipment to the Al-Qaeda and Muslim Brotherhood-dominated Syrian opposition. * * * President Barack Obama signed an intelligence finding sometime in early 2012 that authorized U.S. support for the Syrian rebels and by mid-June 2012, CIA operatives reportedly were on the Turkish-Syrian border helping to steer weapons deliveries to selected Syrian rebel groups. According to an Oct. 14, 2012 *New York Times* article, most of those arms were going to 'hard-line Islamic jihadists."

One of those *jihadis* may well be Abdelhakim Belhadj, former leader of the Al-Qaeda-linked Libyan Islamic Fighting Group (LIFG) and head of the Tripoli Military Council after Qaddafi's ouster. During the 2011 revolt in Libya, Belhadj was almost certainly a key contact of the U.S. liaison to the Libyan opposition, Christopher Stevens.

acknowledged the existence of certain CIA records in congressional testimony. The court remanded the case to the district court to “determine whether the contents—as distinguished from the existence—of the officially acknowledged records” were exempt from disclosure. *Id.* at 380.

Here, the CIA has “officially acknowledged,” to Congress and the public, a great deal of otherwise exempt information. For example, pages one through five of the Senate Select Intelligence Committee's January 5, 2014 Report, “Review of the Terrorist Attacks on U.S. Facilities in Benghazi...,” attached hereto as Exhibit 1, reveals the CIA's official acknowledgment that it ran a facility in Benghazi, that its Chief of Base (“COB”) was on site during the attacks, that the CIA Quick Reaction Force (“QRF”) was frustrated by its inability to immediately respond, and that the QRF departed without the CIA COB's permission. The CIA also acknowledged that the COB denied delaying the QRF's departure, and that the deputy COB similarly related that the CIA had “launched [the] QRF as soon as possible.”

Corresponding officially disclosed sources include the COB's September 19, 2012 CIA “Memorandum for the Record,” a September 23, 2012 internal CIA email, a November 13, 2012 National Counterterrorist Center/FBI Report, a June 27, 2013 teleconference between CIA Benghazi survivors and the Committee, and a December 20, 2012 Committee interview with the COB. “[A] plaintiff asserting a claim of prior disclosure must bear the initial burden of pointing to specific information in the public domain that appears to duplicate that being withheld.” *Afshar v. Dep't of State*, 702 F.2d 1125, 1130 (D.C. Cir. 1983).

A chart of the “officially acknowledged” information in the first five pages of the Senate Select Intelligence Committee's January 2014 Report:

Source	Quote	Officially acknowledged Information	Page
Jan 15, 2014 Report, US Senate Select Intelligence Committee, "Review of the Terrorist Attacks on U.S. Facilities in Benghazi..."	Committee reviewed... [f]our on-the record Member and staff meetings with... former CIA Chief of Base in Benghazi who was at the Annex on the night of the attacks	The CIA ran a facility in Benghazi, and its COB was on site during the attacks.	2
Jan 15, 2014 Report, US Senate Select Intelligence Committee, "Review of the Terrorist Attacks on U.S. Facilities in Benghazi..."	Diplomatic Security... alerted the CIA personnel stationed at the nearby CIA Annex <u>Footnote 7</u> : NCTC and FBI, <i>The 11-12 September Attacks on US Facilities in Benghazi</i> , November 13, 2012, p. 3.	Mission's Diplomatic Security alerted the CIA personnel stationed at nearby CIA Annex. On November 13, the FBI and National Counterterrorism Center produced a Report on the Attacks.	3-4
Jan 15, 2014 Report, US Senate Select Intelligence Committee, "Review of the Terrorist Attacks on U.S. Facilities in Benghazi..."	Although some members of the security team expressed frustration that they were unable to respond more quickly to the Mission compound... <u>Footnote 12</u> : SSCI Memorandum for the Record, "Staff Briefing and Secure Video Teleconference (SVTC) with CIA Benghazi Survivors," June 27, 2013.	A June 23, 2013 Video Teleconference with CIA survivors revealed team frustration by inability to immediately respond.	5
Jan 15, 2014 Report, US Senate Select Intelligence Committee, "Review of the Terrorist Attacks on U.S. Facilities in Benghazi..."	Committee found no evidence of intentional delay or obstruction by the Chief of Base or any other party. <u>Footnote 13</u> : According to informal notes obtained from the CIA, the security team left for the Annex [sic] without the formal approval of the Chief of Base, see attachments to e-mail from CIA staff [redacted] to CIA staff [redacted] September 23, 2012. However, a Memorandum for the Record prepared by the Deputy Chief of Base specifically states that the Chief "authorized the move" and the Chief told the Committee: "We launched QRF [Quick Reaction Force] as soon as possible down to the State [Department] compound." Memorandum for the Record, "Events of 11-12 SEP 2012 at Benghazi Base, Libya," September 19, 2012, p. 1; and SSCI Transcript, <i>Member and Staff Interview of former Chief of Base</i> , December 20, 2012, p. 3.	The CIA told the Committee that rescuers departed without the CIA COB's permission, and an internal CIA email contains the same information. The COB denied this account in his September 19, 2012 "Memorandum for the Record," as did the Deputy COB to the Committee on December 20, 2012—that the COB "launched QRF as soon as possible."	5

C. CIA will Officially Disclose Exempt Information in Probe by House Select Committee to Investigate Benghazi

Televised committee hearings, backed by small staffs with many other responsibilities, with questioning in five-minute bursts, is not suited to the sustained and focused effort necessary to test a witness's story and to pursue leads, even for members who wish to conduct a serious inquiry. The rules of Congress permit the appointment of a select committee to investigate a particular topic when circumstances warrant—a committee staffed for the job and with no other duties.

Beginning in September of 2013, at the CCB's first press conference, which included Rep. Frank Wolf speaking strongly for the formation of the Select Committee, plaintiffs were among those urging Speaker of the House Boehner to call for a vote on the Select Committee. Ultimately, widespread recognition that Congress has not yet ferreted out the truth, even after 13 hearings and six Committee Reports on various aspects of the matter, resulted, in May of 2014, in the establishment of the U.S. House of Representatives Select Committee probe, "Investigation and Report on the Terrorist Attack in Benghazi." It has a broad mandate.

Under House Resolution 567, the Select Committee is "directed to conduct a full and complete investigation and study and issue a final report of its findings to the House regarding all... activities that contributed to the attacks... including any other relevant

issues relating to the attacks...." The Committee will issue a final report "addressing the matters," which "may contain a classified annex."²

Select Committee Chairman Representative Trey Gowdy (R-South Carolina) told Fox News' Greta Van Susteren on May 6 that he "want[s] to see every single solitary relevant material document," and on November 9 stated on Van Susteren's show, "[t]here's no way we can get to the bottom of Benghazi without [then-CIA Director] David Petraeus." He has

² H. Res. 36—113th Congress (2013-2014) INVESTIGATION AND REPORT ON THE EVENTS SURROUNDING THE 2012 TERRORIST ATTACK IN BENGHAZI:

- (a) The Select Committee is authorized and directed to conduct a full and complete investigation and study and issue a final report of its findings to the House regarding—
 - (1) all policies, decisions, and activities that contributed to the attacks...

* * *
 - (3) internal and public executive branch communications about the attacks on United States facilities in Benghazi, Libya, on September 11, 2012;

* * *
 - (9) any other relevant issues relating to the attacks, the response to the attacks, or the investigation by the House of Representatives into the attacks.
- (b) In addition to any final report addressing the matters in subsection (a), the Select Committee may issue such interim reports as it deems necessary.
- (c) Any report issued by the Select Committee may contain a classified annex.

similarly declared his commitment to reporting the unvarnished truth in press releases³ and Congressional Hearings.⁴

D. Adjudication of Disclosure of CIA Information Not Ripe until House Select Committee Issues Report

The CIA Information Act, 50 U.S.C. 431, exempts from the search, review, and disclosure provisions of the FOIA all "operational records" of the CIA. Section (b)(1) of the Act defines operational records as, *inter alia*, those that "document the conduct of foreign intelligence or counterintelligence operations or intelligence." Plaintiffs seek from the CIA disclosure of operational records.

Plaintiffs seek "all-inclusive" production of "records of whatsoever nature regarding... the Mission and the CIA Annex... includ[ing] those that disclose... all weapons brought into the Annex... Manpads... [the] intended destinations and recipients of all such

³ September 5, 2014 Press Release:

We welcome the opportunity, and expect, to talk to personnel who were on the ground in Benghazi, their superiors, and anyone with relevant information related to the Benghazi terrorist attack. There are still facts to learn about Benghazi and information that needs to be explained in greater detail to the American people. And this Committee will do just that.

⁴ Opening remarks at Benghazi Select Committee Hearing 2:

We will have a hearings in January, February, March and until there is a full understanding of what happened in Benghazi. That means access all documents and all witnesses. We are going to answer the questions surrounding the attacks in Benghazi.

See also, e.g., "State Dept. ready to meet with special committee on Benghazi," Assoc. Press, Jan 27, 2015:

The chairman of a special House committee investigating the deadly 2012 attacks in Benghazi, Libya, promised Tuesday to "ratchet up" an inquiry he said is being hobbled by resistance from the Obama administration.

weaponry, including... [t]ransportation of arms out of Libya..." Compl. ¶ 136(1). Other exempt records sought are those provided to congress's "Gang of Eight," required by law to authorize clandestine support⁵ to rebels in Libya and Syria ("intelligence community records, shared with members of Congress, regarding collection, storage, transportation of arms and equipment in Libya" (*id.* ¶ 136(12)), as well "for CIA transport of arms to Syrian rebel forces"⁶).

Regarding records generated during the attacks, plaintiffs seek from the CIA video and radio communications of the attack itself,⁷ contemporaneous communications by the two top CIA officials,⁸ the September 16 "video teleconference... between the FBI and other

⁵ See "Sensitive Covert Action Notifications: Oversight Options for Congress," M. Erwin, Congressional Research Serv., April 10, 2013:

If... the President determines that it is essential to limit access to a covert action finding in order to "meet extraordinary circumstances affecting vital interests of the United States," ... the President may limit such notification to the "Gang of Eight"... comprised of the chairmen and ranking Members of the two congressional intelligence committees and the House and Senate majority and minority leadership. In addition... the President must... provide a statement setting out the reasons for limiting notification... to the Gang of Eight... [and provide] the two intelligence committee chairmen, both Gang of Eight Members... signed copies of the covert action finding in question.

⁶ Compl. ¶ 136(12): "For the period of February 15th, 2011, through December 31st, 2012, all DOD and CIA or other intelligence community records, shared with members of Congress, regarding collection, storage, transportation of arms and equipment in Libya." Compl. ¶ 136 (13): "For the period of February 15th, 2011, through December 31st, 2012, all DOD and CIA or other intelligence community records of Congressional approval for CIA transport of arms to Syrian rebel forces."

⁷ *Id.* ¶ 136(2): "Any and all videos depicting the... Mission... and the CIA Annex" during the attacks. Compl. ¶ 136(4): "[R]adio communications emanating from the Compound's Tactical Operations Center" during the attacks.

⁸ *Id.* ¶ 136(6): "[R]ecords of Deputy CIA Director Michael Morell actions [and CIA Director David Petraeus' (*id.* ¶ 136 (5)) actions and communications for the 24-hour period beginning when first notified... [such as] emails... telephone..."

IC officials... regarding FBI interviews [of survivors]" (*id.* ¶ 136(15)), and other records of survivors' accounts of the attack. *Id.* ¶ 136(3). Plaintiffs' items for records generated prior to the attack are for meetings going back to March OF 2011 between State Department officials and one or more nine named individuals,⁹ and Ambassador Stevens' meetings on September 11. *Id.* ¶ 136(9). Lastly, this February 24, 2014 FOIA request seeks release of "Non-Disclosure Agreements signed by survivors..." *Id.* ¶ 136(16).

Here, most information responsive to the twelve items at issue regard information that may be exempt under FOIA Exemptions (b)(1)¹⁰ or (b)(3).¹¹

When House Select Committee issues its Report, the record of "official acknowledgement" in response to congressional inquiries will be complete, whereupon plaintiffs will conclude their cumulative review of reports and transcripts in that public

⁹ *Id.* ¶ 136(11): "[N]otes, memoranda, and correspondence generated between January of 2007 and September 11, 2012, regarding meetings between Christopher Stevens or any other Tripoli Embassy official, and one or more of the following [nine] individuals..."

¹⁰ Exemption (b)(1) permits an agency to withhold matters from FOIA disclosure if such matters are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). Pursuant to Executive Order 12,958, an agency may withhold information if its disclosure could reasonably be expected to reveal classified intelligence sources or methods or otherwise damage the foreign relations of the United States. *See* 70 Fed. Reg. 21,609 (Apr. 21, 2005).

¹¹ Exemption (b)(3) shields matters "specifically exempted from disclosure by statute... provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3) (effective Nov. 27, 2002 to Dec. 30, 2007). The National Security Act of 1947, as amended, mandates that the Director of National Intelligence protect intelligence sources and methods from unauthorized disclosure. *See* 50 U.S.C. § 403g; *id.* § 403-1(i)(1).

record. See attached Exhibit 2, List of Congressional Reports and transcripts. The matter will then be ripe for plaintiffs to meet their burden to prove CIA official acknowledgments.

E. Two Items of FOIA Request Not the Subject of the Stay Motion

Plaintiffs sought the records of the items identified above on February 24, 2014.

Comp. ¶ 136. They submitted a second request, on October 1, 2014 (*id.* ¶ 136), seeking:

1. Any and all reports, memoranda, correspondence, maps, diagrams, charts, printouts, whether or not recorded electronically, regarding **allegations that Executive Branch personnel deleted, destroyed, erased, obliterated, or obscured, records of CIA activities in Libya in the aftermath of the September 11 and 12, 2012 attacks** in Benghazi, Libya, including but not limited to records in possession of the CIA Office of Inspector General.
2. Records of all **communications generated in March of 2011** regarding Colonel Muammar **Gaddafi's expressed interest in a truce and possible abdication** and exile out of Libya, by or to:
 - (a) Head of Qaddafi's personal security General Abdulqader Yusef Dibri;
 - (b) Rear Admiral (ret.) Chuck Kubic;
 - (c) AFRICOM personnel, including but not limited to:
 - (i) General Carter Ham; and
 - (ii) Lieutenant Commander Brian Linvill; and
 - (d) The CIA.

The instant relief is for a partial stay, excluding these two items; plaintiffs' second CIA FOIA request.

The request for "allegations [made to the CIA's IG] that Executive Branch personnel deleted... records of CIA activities in Libya in the aftermath of the... attacks" is "subject to search and review" under the CIA Act, as plaintiffs observed in their September 29, 2014 CIA Administrative Appeal:

Lastly, you wrote that "[w]ith regard to those portions of your request pertaining to the CIA annex and the remaining items of your request, the CIA Information Act, 50 U.S.C. § 431, as amended, exempts CIA operational files from the search, review, publication, and disclosure requirements of the FOIA." While this statement is accurate, that statute, "Operational files of the

Central Intelligence Agency," also contains exceptions. *See, e.g.*, 50 U.S.C. § 431(c)(3):

[E]xempted operational files shall continue to be subject to search and review for information concerning *** the specific subject matter of an investigation by the congressional intelligence committees, the Intelligence Oversight Board, the Department of Justice, the Office of General Counsel of the Central Intelligence Agency, the Office of Inspector General of the Central Intelligence Agency, or the Office of the Director of National Intelligence for any impropriety, or violation of law, Executive order, or Presidential directive, in the conduct of an intelligence activity.

We believe that much of the information requested falls within one or more exceptions under 50 U.S.C. § 431.

See also "Benghazi Heroes Debunk House Intel Report as 'Full of Inaccuracies' with Firsthand Account," Breitbart.com, December 2, 2014: "[Kris] Paronto knows specifically of a CIA employee that was poorly treated while in Tripoli due to disagreeing with the story that was being fabricated by the CIA. The CIA employee also filed a complaint with the CIA Inspector General..."

The other item is for records of communications regarding Gaddafi's offer of abdication on the eve of the NATO bombing, between (1) Qaddafi officials, (2) Rear Admiral (ret.) Chuck Kubic, (3) AFRICOM personnel, and (4) the CIA. Retired Navy Rear Admiral Charles Kubic recounted that "General Ham was ordered to stand down two days after the negotiation began. *"Joint Chiefs, key lawmaker held own talks with Moammar Gadhafi regime," Wash Times, Jan. 28, 2014, J. Shapiro and K. Riddell. See also Exhibit 3, Admiral Charles Kubic, USN, (Ret.), April, 2014 AIM/CCB Press Roundtable, transcript.*

Until the Select Committee issues its Report, litigation of CIA nondisclosures would result in unnecessary expenditure of the parties' and the Court's resources.

CONCLUSION

Plaintiffs' motion to stay the matter as to the CIA is premised on the Select Committee's disclosure of otherwise exempt CIA information. On May 11, 2014, Mr. Gowdy gave a press conference about the newly-formed Committee, and chided the press for not doing its job. Among his questions for reporters were, "Do you know why we were the last flag flying in Benghazi?" Plaintiffs believe it is not possible to reveal the reason for CIA presence in Benghazi without divulging otherwise exempt CIA information, any more than it is possible to expose the truth of the "stand down" order without disclosing the accounts of the CIA contractors who say they were repeatedly told stand down, and who opine that this order resulted in the deaths of Christopher Stevens and Sean Smith.

WHEREFORE, plaintiffs respectfully pray that this Court partially stay the matter against defendant CIA, pending issuance of Report of House Select Committee on Benghazi.

DATE: March 5, 2015.

Respectfully submitted,

_____/ s/
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ORDER

Upon consideration of Plaintiffs' Motion Partial Stay of the case against defendant Central Intelligence Agency ("CIA"), it is hereby

ORDERED, that this matter against the CIA is partially stayed, pending further Order of this Court, except that the CIA shall respond to plaintiffs' FOIA request for made to CIA on October 1, 2014, seeking:

1. Any and all reports, memoranda, correspondence, maps, diagrams, charts, printouts, whether or not recorded electronically, regarding allegations that Executive Branch personnel deleted, destroyed, erased, obliterated, or obscured, records of CIA activities in Libya in the aftermath of the September 11 and 12, 2012 attacks in Benghazi, Libya, including but not limited to records in possession of the CIA Office of Inspector General.
2. Records of all communications generated in March of 2011 regarding Colonel Muammar Gaddafi's expressed interest in a truce and possible abdication and exile out of Libya, by or to:
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 - (i) General Carter Ham; and
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 - (d) The CIA.

Date: March _____, 2015.

EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE