

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

ACCURACY IN MEDIA, INC., <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No.: 14-cv-1589 (EGS)
	)	
DEPARTMENT OF DEFENSE, <i>et al.</i> ,	)	
	)	
Defendants.	)	
	)	

**DECLARATION OF DAVID M. HARDY - DEPARTMENT OF  
STATE CONSULTATION**

I, David M. Hardy, declare as follows:

(1) I am the Section Chief of the Record/Information Dissemination Section (“RIDS”), Records Management Division (“RMD”), in Winchester, Virginia. I have held this position since August 1, 2002. Prior to my joining the Federal Bureau of Investigation (“FBI”), from May 1, 2001 to July 31, 2002, I was the Assistant Judge Advocate General of the Navy for Civil Law. In that capacity, I had direct oversight of Freedom of Information Act (“FOIA”) policy, procedures, appeals, and litigation for the Navy. From October 1, 1980 to April 30, 2001, I served as a Navy Judge Advocate at various commands and routinely worked with FOIA matters. I am also an attorney who has been licensed to practice law in the State of Texas since 1980.

(2) In my official capacity as Section Chief of RIDS, I supervise approximately 243 employees who staff a total of twelve (12) Federal Bureau of Investigation Headquarters (“FBIHQ”) units and two (2) field operational service center units whose collective mission is to effectively plan, develop, direct, and manage responses to requests for access to FBI records and

information pursuant to the FOIA as amended by the OPEN Government Act of 2007, the OPEN FOIA Act of 2009, the FOIA Improvement Act of 2016; the Privacy Act of 1974; Executive Order 13526; Presidential, Attorney General, and FBI policies and procedures; judicial decisions; and Presidential and Congressional directives. The statements contained in this declaration are based upon my personal knowledge, upon information provided to me in my official capacity, and upon conclusions and determinations reached and made in accordance therewith.

(3) Due to the nature of my official duties, I am familiar with the procedures followed by the FBI in responding to requests for information pursuant to the provisions of the FOIA, 5 U.S.C. § 552 and the Privacy Act (“PA”) of 1974, 5 U.S.C. § 552a, including the procedures followed by the FBI for consultations with other agencies regarding FOIA requests.

Specifically, I am aware that in response to a FOIA request from Plaintiffs in connection with the September 11, 2012 attacks on U.S. government personnel and facilities in Benghazi, Libya, the U.S. Department of State (“DOS”) consulted with the FBI in making release determinations because of potential FBI equities in the information due to an ongoing FBI investigations related to those events.

(4) The FBI submits this declaration in support of Defendants’ Motion for Summary Judgment. This declaration provides justification for DOS’s withholding of information on behalf of the FBI pursuant to FOIA Exemptions 7(A), 7(E) and 7(F), 5 U.S.C. §§ 552, (b)(7)(A), (b)(7)(E) and (b)(7)(F).

**PROCEDURAL HISTORY OF CONSULTATION FROM DOS**

(5) Plaintiff submitted a FOIA request dated February 21, 2014, to DOS seeking a variety of records pertaining to the September 11, 2012 attacks on U.S. government personnel

and facilities in Benghazi, Libya. As a result of its search, DOS located responsive records. Aware of the FBI's investigations of the September 11, 2012 attacks on U.S. government personnel and facilities in Benghazi, Libya that resulted in the deaths of four Americans, DOS, in accordance with its FOIA regulations, consulted with the FBI regarding whether disclosure of information could jeopardize the FBI's investigations.<sup>1</sup>

(6) Following review of the records, the FBI determined that the premature release of certain responsive information could potentially harm the pending investigations. The FBI requested that DOS assert FOIA Exemptions 7(A) and 7(E) to withhold certain information because release would interfere with the ongoing law enforcement investigations of the attacks on U.S. government personnel and facilities in Benghazi, Libya and would disclose techniques, guidelines and procedures for law enforcement investigations or prosecutions, the disclosure of which could reasonably be expected to risk circumvention of the law. The FBI also requested DOS assert FOIA Exemption 7(F) to withhold information to protect the physical safety of third-party individuals identified in the records.

### **JUSTIFICATION FOR NON-DISCLOSURE UNDER THE FOIA**

#### **EXEMPTION 7 THRESHOLD**

(7) FOIA Exemption 7 exempts from mandatory disclosure records or information compiled for law enforcement purposes when disclosure could reasonably be expected to cause one of the harms enumerated in the subparts of the exemption. *See* 5 U.S.C. § 552(b)(7). In this

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<sup>1</sup> DOS consulted with the FBI on the responsive records in 2013 in response to a separate FOIA litigation. In the instant action, the FBI determined the same records at issue still warrant being withheld in full due to the ongoing pending investigations. The records reviewed were DOS videos numbered: C05467904, C05467908, C05467910, C05467912, C05467913, C05467914, C05467915, C05467916, C05467917, C05467919, C05467920, and C05467921.

case, the harm that could reasonably be expected to result from disclosure concerns interfering with pending law enforcement proceedings, nullifying the effectiveness of sensitive law enforcement techniques or procedures, or risk the physical safety of third-party individuals.

(8) In order to assert Exemption 7, an agency first must demonstrate that the records or information it seeks to withhold were compiled for law enforcement purposes. Law enforcement agencies such as the FBI must demonstrate that the records at issue are related to the enforcement of federal laws and that the enforcement activity is within its law enforcement duties. In this case, certain responsive DOS records are an important part of the FBI's investigations of the attacks on U.S. government personnel and facilities in Benghazi, Libya, which resulted in the deaths of four American citizens, and the serious injuries of several others. The investigations are ongoing and within the law enforcement duties of the FBI to detect and undertake investigations into possible violations of Federal criminal and national security laws. For example, 28 U.S.C. § 540A[b]; 28 U.S.C. § 533; 28 C.F.R. § 0.85.

(9) The FBI's authority to investigate threats to the national security derives from the executive order concerning U.S. intelligence activities, from delegations of functions by the Attorney General, and from various statutory sources. E.O. 12333; 50 U.S.C. § 401 et seq. Activities within the definition of "threat to the national security" that are subject to investigation under the Attorney General's Guidelines for Domestic FBI Operations commonly involve violations or potential violations of federal criminal laws. Hence, investigations of such threats may constitute an exercise both of the FBI's criminal investigative authority and of the FBI's authority to investigate threats to the national security. As with criminal investigations generally, detecting and solving the crimes, and eventually arresting and prosecuting the perpetrators, are likely to be among the objectives of investigations relation to threats to the

national security. However, these investigations also often serve important purposes outside the ambit of normal criminal investigation and prosecution, by providing the basis for, and informing decisions concerning, other measures needed to protect the national security. The DOS videos implicate sensitive and evidentiary information concerning the terrorist group and network associated with the perpetrators of the September 11, 2012 attacks targeting U.S. interests abroad. Thus, the records DOS referred to the FBI for consultation as they pertain to open FBI investigations into the attacks on U.S. government personnel and facilities in Benghazi, Libya, were compiled for law enforcement purposes and readily meet the threshold for applying FOIA Exemption 7.

**EXEMPTION 7(A) – PENDING ENFORCEMENT PROCEEDINGS**

- (10) FOIA Exemption 7(A) exempts from disclosure:

records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... could reasonably be expected to interfere with enforcement proceedings. 5 U.S.C. § 552(b)(7)(A).

(11) Application of this exemption requires: the existence of law enforcement records; a pending or prospective law enforcement proceeding; and a reasonable expectation that release of the information would interfere with the enforcement proceeding. The FBI requested that DOS withhold twelve videos pursuant to Exemption 7(A), because the premature release of this information could reasonably be expected to interfere with the FBI's ongoing investigations.

(12) Any release of information the FBI has identified in the DOS' material would be premature due to the harm which could ensue. The material includes images and footage of parties of investigative interest and cooperating witnesses in the investigations. Once material is released in the public domain, the information concerning the investigation could reach the

individuals who are under investigation, and thus risk the untimely revealing of the suspects' identities and potentially alert them to the fact that they are subject to law enforcement scrutiny. This would allow individuals to critically analyze the information in the records pertinent to the investigation of themselves. Such individuals possess the unique advantage of knowing the details surrounding the investigation, the identities of potential cooperating witnesses, direct and circumstantial evidence, *etc.*, and could use the released information to their advantage. In this regard, the following potential harms from the release of these records exist:

- a. The identification of individuals, sources, and potential witnesses who possess information relative to the investigation and possible harm to, or intimidation of these individuals;
- b. Prematurely alerting suspects under investigation to the fact that they are subject to law enforcement scrutiny;
- c. The use of information released to counteract evidence developed by investigators;
- d. The identification of third parties who are also under investigation;
- e. The identification of the subject matter concerning classified information;  
and
- f. The locations in the United States, as well as foreign countries where the FBI is focusing the investigation and collection of investigative and source material.

(13) Furthermore, the release of this information to third parties not directly involved in these matters could allow these third parties to interfere with the pending proceedings by harassment, intimidation, and creation of false evidence dispensing facts discussed during the

FBI's investigation. Once a release is made to a set of plaintiffs under the FOIA, the use and dissemination of the information to third parties is unrestricted. For these reasons, the FBI has requested DOS to assert FOIA Exemption 7(A) to withhold in full the videos at issue.

**EXEMPTION 7(E) – INVESTIGATIVE TECHNIQUES AND PROCEDURES**

(14) Exemption 7(E) protects records or information compiled for law enforcement purposes when release “would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.” 5 U.S.C. § 552(b)(7)(E).

(15) DOS has asserted Exemption 7(E) on behalf of the FBI to protect non-public investigative techniques and procedures utilized by the FBI to pursue its law enforcement and intelligence gathering missions, and also to non-public details about techniques and procedures that are otherwise known to the public.

(16) The FBI requested that DOS assert Exemption 7(E) to protect sensitive intelligence gathering and investigative techniques. These techniques, particularly with respect to surveillance footage of the U.S. diplomatic mission abroad, implicate operational security force protection concerns and the U.S. government's ability to conduct relationships with and obtain information from foreign governments and foreign government services. Revealing these techniques would effectively reveal the blueprint for the security of a U.S. compound and the sophisticated surveillance capacity of the U.S. to protect the U.S. diplomatic mission in Libya from threats, thus risking the defeat of such security measures in the future. Release of the non-public details of these techniques and how they are utilized by the FBI would nullify their effectiveness, risk future criminal and terrorist activity, and make the FBI more vulnerable,

especially in context of continued and increased unrest in Libya. As a result, because release of information would enable terrorists to circumvent the law, this information has been protected pursuant to Exemption 7(E).

(17) The FBI also requested that DOS assert Exemption 7(E) to protect the FBI's strategy for using a particular type of evidence gathered during its investigations. The FBI's investigations are built around identifying individuals in photos and in images from security video footage of the U.S. diplomatic compound in Benghazi through an image by image review. Discerning the actions and determining the relationships between these individuals is critical to building the FBI's investigations and identifying who potentially led the attacks on the compound. The release of these images would lay out the strategy for the FBI's investigations concerning the attacks, would potentially reveal individuals charged in the investigations, and would enable others to access the same techniques used in these investigations. Revealing the utility of this type of information to the FBI would essentially instruct criminals on how best to maintain operational security when conducting their criminal activities. Disclosing how the FBI utilizes its effective investigative strategy would, in future investigations, allow criminals to become savvier at avoiding detection and disruption by the FBI, and enable criminals to circumvent the law. For these reasons, DOS has withheld this information in these videos on behalf of the FBI pursuant to Exemption 7(E).

**EXEMPTION 7(F) – ENDANGERMENT OF THE LIFE OR PHYSICAL SAFETY OF ANY INDIVIDUAL**

(18) 5 U.S.C. § 552(b)(7)(F) exempts from disclosure “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information...could reasonably be expected to endanger the life or physical safety of any individual.”



(19) A primary concern for the FBI when it was reviewing the material responsive to this request was the possibility of harassment and physical violent retaliation against not only the third-party individuals mentioned in the material but against their families as well. The FBI was also concerned with the potential for violence against third parties who are merely mentioned among the material. Accordingly, the FBI has requested DOS to also assert Exemption 7(F) to protect the names and identifying information concerning these third-party individuals. The violence associated with terrorists is known to the world through their numerous acts of aggression. The disclosure of the identities of the individuals who are mentioned in the responsive records, and which are part of the FBI's investigation into the 2012 Benghazi attacks, could lead to violent reprisal once it is learned that they may have cooperated with the FBI. Many of these individuals have assisted in the investigations by providing information that is singular in nature. Considering the nature of the violent terrorist acts associated with the FBI's investigation and the potential for violence, the FBI has determined that the disclosure of the names and identifying information of these individuals would endanger their lives and physical safety. Accordingly, DOS has withheld this information on behalf of the FBI pursuant to Exemption 7(F).

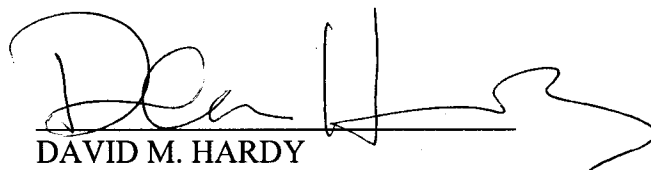
### **CONCLUSION**

(20) As a result of the consultation with DOS regarding the records responsive to Plaintiff's request for information relating to the September 11, 2012 attacks on U.S. government personnel and facilities in Benghazi, Libya, the FBI has determined that the records are exempt from disclosure pursuant to FOIA Exemptions 7(A), 7(E) and 7(F), 5 U.S.C. §§ 552 (b)(7)(A), (b)(7)(E), and (b)(7)(F). The disclosure of any information from the specified records could reasonably be expected to interfere with ongoing investigations, as well as pending and

prospective prosecutions, reveal the details of non-public investigative techniques and procedures and/or non-public details about publicly-known techniques, or risk the physical safety of third party individuals.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 26<sup>th</sup> day of April, 2018.



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