

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DECLARATION OF REAR ADMIRAL JAMES J. MALLOY

Pursuant to 28 U.S.C. § 1746, I, James J. Malloy, Rear Admiral (upper half), United States Navy, hereby declare under penalty of perjury that the following is true and correct:

1. I am the Vice Director of Operations for the Joint Staff at the Pentagon and have served in this capacity since July 2017. In my capacity as the Vice Director of Operations, I assist in the execution of all Department of Defense (“DoD”) operational matters outside of the continental United States. As such, I coordinate and communicate frequently with the staffs of the Unified Combatant Commands, to include U.S. Africa Command, U.S. Central Command, U.S. European Command, U.S. Pacific Command, U.S. Southern Command, U.S. Strategic Command, U.S. Transportation Command and U.S. Special Operations Command, as well as with the Intelligence Community, to ensure on behalf of the Chairman of the Joint Chiefs of Staff that the President of the United States’ and Secretary of Defense’s direction and guidance are conveyed and executed, and that combatant command concerns are addressed by the Joint Staff. I evaluate and synthesize such concerns and advise and make recommendations to the Chairman of the Joint Chiefs of Staff regarding our worldwide military operations.

2. I make the following statements based upon my years of service and experience in the United States military, personal knowledge, and information made available to me in my official capacity. I have served in the United States Armed Forces for over thirty years at various levels of command and staff. In recent years, I have served as deputy director of operations, U.S. Central Command (J3), and commander, Carrier Strike Group 10. As the Vice Director of Operations, I receive and review daily operational plans and briefings, reports, and intelligence analyses from the Combatant Commands, the Joint Staff, and the Intelligence Community. I assist with the supervision of the National Military Command Center, which is responsible for monitoring worldwide events affecting national security and U.S. interests twenty-four hours a day, seven days a week. I have traveled in an official capacity to a number of countries where U.S. forces are conducting ongoing operations against al Qa'ida and associated terrorist groups, engaging with senior military and government officials. As a result of my experiences, I have extensive knowledge of our military forces and their capabilities, current operations, and the conventional and unconventional forces and capabilities of the enemies arrayed against us.

3. I am familiar with the FOIA request, dated March 31, 2014, submitted by Plaintiffs seeking categories of documents relating to the attack on US facilities in Benghazi, Libya, on September 11 and 12, 2012. The portion of the request relevant to this declaration sought “[m]aps depicting all assets that could have been dispatched to the Benghazi mission or the CIA annex facility on September 11th and 12th, 2012, regardless of [sic] such maps were created before or after September 11, 2012.” A true and correct copy of the March 31, 2014, letter is attached as Exhibit A.

Responsive Records

4. The Joint Staff located 12 pages responsive to section 1 of Plaintiffs' request and provided a response on September 19, 2014, which stated that those records were withheld in full pursuant to Exemption 1, as they are currently and properly classified. A copy of that response is attached as Exhibit B. The purpose of this declaration is to detail the basis of that withholding. I understand through counsel that this withholding is the only redaction in DoD's production being challenged by Plaintiffs.

FOIA Exemption (b)(1)

5. FOIA exemption (b)(1) provides that FOIA does not require the production of records that 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).

6. In Section 1.3(a)(2) of Executive Order ("E.O.") 13526, the President authorized agency heads to designate officials that may classify information originally as TOP SECRET. In turn, and pursuant to Section 1.3(c) of E.O. 13526, the Deputy Secretary of Defense, acting pursuant to a delegation from the Secretary of Defense, has authorized me to exercise TOP SECRET and SECRET original classification authority.

7. Section 1.1(a) of E.O. 13526 provides that information may be originally classified under the terms of this order only if all of the following conditions are met: (1) an original classification authority is classifying the information; (2) the information is owned by, produced by or for, or is under the control of the U.S. Government, which these documents are; (3) the information falls within one or more of the categories of information listed in section 1.4 of Executive Order 13526; and (4) the original classification authority determines that the

unauthorized disclosure of the information reasonably could be expected to result in some level of damage to the national security, and the original classification authority is able to identify or describe the damage.

8. As relevant here, section 1.4(a) permits classification of information pertaining to military plans, weapons systems, or operations; 1.4(d) permits classification of information pertaining to, “foreign relations or foreign activities of the United States;” and 1.4(g) permits classification of vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security.

9. The 12 pages withheld by Joint Staff contain the force posture of the Department of Defense for the European Command, Central Command, and Africa Command areas of responsibility as well as the force posture of Special Operation forces worldwide during the relevant timeframe in September 2012. These documents contain the numbers and locations of ships, submarines, response forces, and aircraft surrounding Benghazi, Libya. They further contain the numbers of military personnel located in particular countries during that time. Finally, they contain the transit time required for each available asset to reach Benghazi.

10. This information fits squarely within sections 1.4(a), 1.4(d), and 1.4(g) of E.O. 13526, as it details military operations conducted overseas, describes foreign activities of the United States, and provides transit times and a list of assets that demonstrate the capabilities of DoD’s plans and infrastructure.

11. This information is sensitive and classified at the Secret level, because the release of this information reasonably could be expected to cause serious damage to the national security. Even with the passage of time, how DoD’s forces are positioned at a particular time could provide potentially damaging and/or threatening insight to adversaries regarding DoD’s interests, intent,

and potential operations in these volatile regions of the world. Tensions with hostile foreign governments could rise depending on the disclosure of such positioning. Terrorist organizations, violent extremist organizations, or hostile foreign governments could use transit time capability information to plan attacks within windows of perceived vulnerability. It is for this reason that this information is currently and properly classified and must not be released.

Review for Reasonably Segregable Information

12. Joint Staff has conducted a page-by-page and line-by-line review of the 12 pages at issue in this declaration. I can confirm that there is no reasonably segregable information contained in any of the records.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 11th day of May 2018, in Arlington, VA.



Rear Admiral James J. Malloy, USN
Vice Director of Operations, J-3, Joint Staff

Exhibit A

14-F-0683

Law Office
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Washington, DC 20006
(202) 332-3030
JohnHClarke@earthlink.net

Also Admitted in Virginia
and Maryland

FAX: (202) 332-3030
CELL: (202) 344-0776

March 31, 2014

By Certified Mail — Return Receipt Requested
Article Number 7013 2630 0000 5201 4415

FOIA REQUEST

OSD/JS (Office of the Secretary of Defense and the Joint Staff)
FOIA Requester Service Center
Office of Freedom of Information
1155 Defense Pentagon
Washington, DC 20301-1155

Re: **FOIA Requests**

Dear Ladies and Gentlemen:

This is a request for production of records under the Freedom of Information Act, 5 USC § 552, the "FOIA." I write on behalf of Accuracy in Media, Inc., a District of Columbia 501(c)(3) non-profit corporation, as well as the following eight individuals, all of whom serve as members of the "Citizens' Commission on Benghazi," an unincorporated, informal association of individuals, all working with Accuracy in Media. They are (1) Roger Aronoff, (2) Larry Bailey, (3) Kenneth Benway, (4) Dick Brauer, (5) Clare Lopez, (6) James A. Lyons, Jr., (7) Kevin Shipp, and (8) Wayne Simmons.

Requests. FOIA request Nos. 1, 2 and 3 are for disclosure of records regarding the attack on US facilities in Benghazi, Libya, on September 11th and 12th, 2012. Specifically, we seek production of:

1. **Maps.** Maps depicting all assets that could have been dispatched to the Benghazi mission or the CIA annex facility on September 11th and 12th, 2012, regardless of such maps were created before or after September 11, 2012.

2. **Appeals for help.** Records of requests for help for the Special Mission Compound and the CIA Annex, to:
 - (a) The Turkish Consulate in Benghazi;
 - (b) The Italian Consulate in Benghazi; and
 - (c) The U.K. Security Team.

3. Records concerning **joint military contingency plans:**
 - (a) Plan Identification (PID) Number and title of the operation plan or plans prepared using Deliberate Planning procedures, found in Joint Publication 5-0, Joint Operation Plan, August 2011, **for use** by the supported combatant commander (1) to support military, diplomatic and interagency activities in Libya, through 2012, and (2) to support the military crisis response to the attacks on the Benghazi facilities on September 11 and 12, 2012.
 - (b) Operation plan or plans for use by the supported combatant commander to support military crisis response to the attacks on the Benghazi facilities on September 11 and 12, 2012.
 - (c) List of commands, organizations and agencies comprising the joint planning and execution community (JPEC), found in Joint Publication 5-0, Joint Operation Plan, August 2011, which developed, coordinated, and approved the operation plans referred to under (a) above.
 - (d) Supported combatant commander's Joint Intelligence Preparation of the Operational Environment (JIPOE), developed to support the plans referenced under (a) above.
 - (e) List of commands, organizations, agencies and offices comprising the supported combatant commander's joint interagency coordinating group (JIACG), established to support the plans referenced under (a) above.
 - (f) Copies of any combatant command commercial contracts established to support military, diplomatic and interagency activities at Tripoli and at Benghazi prior to the attacks on the Benghazi facilities on September 11 and 12, 2012.

4. **Military assets pre-positioned in October 2011.** In addition to records regarding the attack on US facilities in Benghazi, Libya, on September 11th and 12th, we also seek records identifying DoD assets pre-positioned off the coast of Tripoli on October 18, 2011, when Secretary Clinton visited Libya.

Kindly note that Request No. 1, seeking maps of assets, is also being simultaneously made to (a) HQ USEUCOM (U.S. European Command), (b) United States Central Command CCJ6-RDF (FOIA), and (c) HQ U.S. AFRICOM (U.S. Africa Command). Request No. 2, for records of requests for assistance from the Turkish or Italian Consulates or the U.K. Security Team, as well as Request No. 4, regarding records of military assets pre-positioned in October 2011 off Tripoli on October 18, 2011, is also being submitted to (a) the Secretary of the Navy Chief of Naval Operations (SECNAV/CNO), and (b) HQ U.S. AFRICOM (U.S. Africa Command).

Expedited Processing. These FOIA requests are subject to expedited processing under DoD Regulation 5400.7-R, "Department of Defense Freedom of Information Act Program," 32 CFR Part 286. Specifically § C1.5.4.3 mandates expedited processing "to a requester after the requester requests such and demonstrates a compelling need for the information." Under § C1.5.4.3.2:

A compelling need also means that the information is urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged Federal Government activity.... Representatives of the news media (see paragraph C6.1.5.7., below) would normally qualify as individuals primarily engaged in disseminating information.

Accuracy in Media, Inc. ("AIM") is a "representatives of the news media," entitling it to a statutory fee waivers, as set forth below. Kindly accept this letter as a certification that the information contained herein is true and correct to the best of the requesters' knowledge, under § C1.5.4.3.3:

A demonstration of compelling need by a requester shall be made by a statement certified by the requester to be true and correct to the best of their knowledge. This statement must accompany the request in order to be considered and responded to within the 10 calendar days required for decisions on expedited access.

Request for Waiver of Search and Review Fees. As a representatives of the news media, AIM submits that it is entitled to a waiver of any fees associated with the search and review of records responsive to these FOIA Requests, under 5 U.S.C. § 552 (a)(4)(A)(ii)(II). *See generally* DoD Regulation 5400.7-R, "Department of Defense Freedom of Information Act Program," 32 CFR Part 286.

AIM is organized and operated to publish or broadcast news to the public, and has been doing so for more than 45 years. It clearly meets the standard of "representative of the news media" status. A "representative of the news media" is "a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." *Nat'l Sec. Archive v. Dep't of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989).

Upon disclosure of the records sought, AIM has concrete plans to make the information public. Its ability and intent to disseminate the information requested is beyond question. Accuracy in Media articles on the subject include, "The MSM and Benghazi: Will Their Coverage Harm Obama Administration?," "Shameful Media Coverage of Benghazi Scandal and Cover-up," "Media Embrace Obama's Controversial Picks for National Security Team," "New York Times Attempts to Blur Benghazi Scandal," "McClatchy Reporter Changes Tune on Benghazi," "CBS in Damage Control Over Error-Filled Benghazi Report," "'60 Minutes' Reveals Little New in Benghazi Exposé," "The Left's Continued Assault on the Truth About Benghazi," "Media Coverage of Benghazi Leans Toward Political Theater," "Conservative Leaders Call on Speaker Boehner: Form a Select Committee on Benghazi," "Further Proof That Obama Knew the Truth About Benghazi," "Blaming the Victim in Benghazigate," "Obama and His Media Loyalists Still Spinning Benghazi," and "Does Navy Map Alter the Benghazi Narrative?"

Additionally, several of the individual requesters have published a number of articles about the matter. *See, for examples*, "Navy SEAL: 'There's guilt in this administration,'" by Captain Larry Bailey, published in WND.com in April of 2013; two articles by Clare Lopez appearing in Pundicity.com in October of 2012, "Benghazi: The Set-Up and the Cover-Up," and "Did Turkey Play a Role in Benghazi Attack?;" and Admiral James Lyons' pieces appearing in the Washington Times, "Obama's Chain of Command Unravels Over Benghazi (October 2012), "Obama needs to come clean on what happened in Benghazi" (October 2012), "The Key Benghazi Questions Still Unanswered" (January 2013), "A hard slog to get Benghazi answers" (January 2013), and "A call to Courage over Benghazi" (May 2013).

Public Interest Fee Waiver. 5 U.S.C. § 552(a)(4)(A)(iii) provides that "[d]ocuments shall be furnished without any charge or at a charge reduced... if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester."

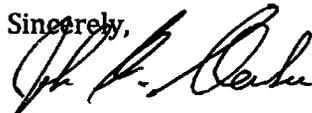
Here, the FOIA requesters do not have a commercial interest in the disclosure. Their purpose is to inform the public. The subject of the requested records concerns the operations or activities of the United States Government. The information sought is directed at finding out what information the government has about its failure to timely respond when its facilities came under attack. These FOIA Requests also concern what information the government did not provide to the public, as well as congressional investigators.

Upon disclosure of the records sought, AIM, as well as other several of the individual requesters, has concrete plans to make the information public, as demonstrated above. The information sought would be likely to contribute to an understanding of United States Government operations or activities, and disclosure will enhance public understanding of the Benghazi incident as compared with awareness prior to the disclosure. The interest of enhancing the public's understanding of the operations or activities of the U.S. Government is clear, and the records' connection to these government activities is direct.

Electronic Format. Kindly produce these records in electronic format. See e-FOIA amendment 5 U.S.C. § 552 (a)(3)(B), as amended, requiring Agency to "provide the record in any form or format requested . . . if the record is readily reproducible by the agency in that form or format." See FOIA Update Vol. XVII, No. 4, 1996.

Reply to Accuracy in Media. If you have any questions about handling this request, please ask via email, to JohnHClarke@earthlink.net. Otherwise, kindly respond, and produce records, to Accuracy in Media, 4350 East West Highway, Suite 555, Bethesda, MD 20814-4582.

Sincerely,



John H. Clarke

cc: Accuracy in Media, Inc.
Roger Aronoff
Larry Bailey
Kenneth Benway
Dick Brauer
Clare Lopez
James A. Lyons, Jr.
Kevin Shipp
Wayne Simmons

Exhibit B



**DEPARTMENT OF DEFENSE
OFFICE OF FREEDOM OF INFORMATION
1155 DEFENSE PENTAGON
WASHINGTON, DC 20301-1155**

19 SEP 2014

Ref: 14-F-0683

Mr. John Clarke
John H. Clarke Law Office
1629 K Street, NW, Suite 300
Washington, DC 20006

Dear Mr. Clarke:

This is the final response to your Freedom of Information Act (FOIA) request dated March 31, 2014, which was received in this office on April 7, 2014. Twelve pages of records were located as responsive to section 1 of your request.

Mr. Mark S. Patrick, Chief, Information Management Division, Joint Staff (JS) has determined that the records responsive to your request, totaling 12 pages, are being denied in their entirety. The records denied in their entirety do not contain meaningful portions that are reasonably segregable. The information is currently and properly classified in accordance with Executive Order 13526, Section 1.4 (a) concerning military plans, weapons, or operations; Section 1.4 (d), concerning foreign relations or foreign activities of the United States, including confidential sources; and Section 1.4 (g) concerning vulnerabilities or capability of systems, installations, infrastructures, projects, plans or protection services relating to the national security. Accordingly, this information is denied pursuant to 5 USC § 552 (b)(1). The pages denied in their entirety do not contain meaningful portions that are reasonably segregable.

Mr. Mark S. Patrick, Chief, Information Management Division, Joint Staff (JS) a FOIA Initial Denial Authority (IDA), advised that based on the information provided in sections 2, 3, and 4 of your request and thorough searches of the paper and electronic records and files of the JS, no documents of the kind you described could be located. We believe that these search methods were appropriate and could reasonably be expected to produce the requested records if they existed. Mr. Patrick further certified that after making a good faith effort and conducting a thorough search of records using methods, detailed above, that could reasonably be expected to produce the information requested, there are no records, and that to the best of their knowledge, no such documents exist within the records of the JS.

There are no assessable fees associated with this response. If you are not satisfied with this action, you may appeal to the appellate authority, the Director of Administration and Management, Office of the Secretary of Defense, by writing directly to the Defense Freedom of Information Policy Office, Attn: Mr. James Hogan, 1155 Defense Pentagon, Washington, D.C. 20301-1155. Your appeal should be postmarked within 60 calendar days of the date of this letter,

should cite to case number 14-F-0683, and should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

for *Charles P. Marge*

Paul J. Jacobsmeyer
Chief