IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ACCURACY IN MEDIA, *et al.*	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 14-1589 (EGS)
	)	
UNITED STATES DEPARTMENT OF DEFENSE, *et al.*	)	
	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

INTRODUCTION

In their opening brief, Defendants United States Department of Defense ("DOD"), United States Department of State ("State"), the Federal Bureau of Investigation ("FBI"), and the Central Intelligence Agency ("CIA") (collectively, "Defendants"), demonstrated that they reasonably and adequately discharged their obligations under FOIA in response to Plaintiffs' requests for records related to the September 11, 2012 attack on the United States diplomatic facility in Benghazi, Libya.

In fact, in response to Defendants' arguments, Plaintiffs have stated that they no longer wish to challenge: (1) State's search for records of Secretary Clinton's actions and communications during the 24-hour period beginning when she was first notified about the September 11, 2012 attack; (2) the CIA's search for emails, memoranda, and notes generated by Director Petraeus and Deputy Director Morell during the 24-hour period when first notified about the September 11, 2012 attack; (3) State's decision to withhold a call log bates labeled C05935290 and three interview summaries bates labeled C06052236, C06052239, and C06052240; (4) DIA's decision to withhold in full three intelligence reports and one situation report bates labeled V-11, V-45, V-48, and V-19; (5) CIA's decision to withhold the identity of confidential sources as referenced in the report of the Inspector General ("IG") under Exemption 7(D); and (6) CIA's decision to withhold the names of CIA officers and contractors who were interviewed in connection with the IG's independent investigation of the September 2012 Benghazi attack under Exemption 6. *See* Pls.' Opp. to Defs.' Mot. for Summ. J., Crsoss-Mot. for Summ. J. and Mot. for Leave to

Propound Interrogatory to DOD ("Pls.' Opp'n Br.") at 3 n.10, ECF No. 71 (June 25, 2018) (delineating "several issues that the plaintiffs do not contest").[1]

And although Plaintiffs' opposition brief asserts that State improperly withheld 12 surveillance videos of the September 2012 attack,[2] *see* Pls.' Opp. at 40-42, prior to the filing of this reply brief, Plaintiffs' counsel informed counsel for Defendants that Plaintiffs agreed to withdraw their challenge to the withholding of the surveillance videos as a result of an agreement reached by the parties in an effort to further narrow the issues that remain to be litigated in this case. Thus, the only issues that remain for this Court to resolve are (1) whether the two challenged searches by DOD comply with the requirements of FOIA; (2) whether the FBI's Exemption 7(A) *Glomar* assertion is proper; and (3) whether CIA and DOD adequately justified their respective decisions to withhold certain information responsive to Plaintiffs' request.

And with respect to these particular claims, Defendants respectfully submit that they are entitled to summary judgment because Plaintiffs have failed to demonstrate that Defendants violated FOIA. To that point, the searches that DOD conducted in response to the challenged requests (*i.e.*, Plaintiffs' requests for initial orders and communications in response to the September 2012 Benghazi attack and Muammar Gaddafi's March 2011 interest in a truce and abdication) were both reasonable and adequate, which is all that is required of an agency under FOIA. This is particularly so given that DOD released records

[1] The parties recently resolved outside of litigation Plaintiffs' challenge to State's decision to withhold 12 surveillance videos. Because Plaintiffs have agreed to dismiss this claim and do not challenge any other aspect of State's response to Plaintiffs' FOIA request, Defendants respectfully request that the Court grant dismiss Defendant State from this case.

[2] The surveillance videos are bates labeled C05467904, C05467908, C05467912, C05467920, C05467921, C05467910, C05467913, C05467914, C05467915, C05467916, C05467917, and C05467919.

responsive to the challenged requests. Plaintiffs' speculation that other responsive records may exist does not undermine that conclusion.

Equally meritless is Plaintiffs' assertion that the FBI cannot assert an Exemption 7(A) *Glomar* response with respect to alleged FBI 302 witness reports because "witness accounts" are publicly available, which purportedly mitigates any harm that could result from releasing the alleged reports to Plaintiffs. Plaintiffs' argument, however, ignores the existence of the FBI's ongoing criminal investigation into the September 2012 attack, the fact that the agency has never officially acknowledged the existence (or non-existence) of the alleged 302 reports, and the deference afforded to the FBI's assessment of the harm that could result if such information (should it exist) is disclosed.

Finally, Plaintiffs have not shown that Defendants CIA and DOD improperly withheld certain information responsive to Plaintiffs' FOIA requests. Plaintiffs' claims that the CIA improperly withheld IG records as "operational records" of the agency and that the agency failed to disclose the subject matter of the IG report are contradicted by the record in this case. The CIA has never claimed that the challenged IG records are "operational records," and Plaintiffs' assertion that the CIA improperly withheld the subject matter of the IG investigation is belied by the unredacted portions of the records themselves.

Plaintiffs' challenge to DOD's decision to withhold records reflecting the agency's military force posture at the time of the Benghazi attack is likewise unavailing. DOD has adequately explained and supported its decision on national security grounds to invoke Exemption 1 to protect from disclosure 12-pages of records reflecting maps and other DOD assets that were available to respond to the September 2012 attack on the United States

diplomatic facility in Benghazi, Libya. Plaintiffs' reliance on the declaration of a retired admiral in an effort to rebut DOD's prediction of harm is both misguided and improper.

Accordingly, for these reasons and those set forth in Defendants' opening brief and accompanying declarations, the Court should grant summary judgment in Defendants favor.

ARGUMENT

I. THE TWO CHALLENGED SEARCHES CONDUCTED BY DEFENDANT DOD SATISFY THE REQUIREMENTS OF FOIA.

In Defendants' opening brief, the accompanying declaration of Mark H. Herrington, and their opposition to Plaintiffs' motion for leave to conduct discovery,[3] Defendant DOD demonstrated that the two challenged searches, *i.e.*, DOD's search for initial communications, orders, and OPREP-PINNACLE reports issued in response to the September 2012 Benghazi attack and its search for records reflecting Muammar Gaddafi's purported interest in a truce and abdication in March 2011, were both reasonable and adequate, resulting in DOD's release of certain non-exempt records in response to the challenged FOIA requests. *See* Defs.' Br. at 3-6, 9-11; *see also* Herrington Decl. ¶¶ 4-27, ECF No. 68-4; Defs.' Opp. to Pls.' Discovery Mot.., ECF No. 74.

To that point, DOD identified offices and directorates likely to have responsive records and directed those entities to conduct searches of their paper and electronic files. *See* Herrington Decl. ¶¶ 8-15 (setting forth the search conducted DOD offices and directorates in response to Plaintiffs' request for initial communications and orders); *see*

[3] Defendants incorporate by reference all of the arguments made in support of Defendant DOD's Opposition to Pls.' Motion for Leave to Propound Interrogatory ("Defs.' Opp. to Pls.' Discovery Mot."). *See* ECF No. 74.

also id. ¶¶ 25-26 (same with respect to Plaintiffs' request for records of Gaddafi's purported interest in a truce and abdication in March 2011). And as is clear from the Herrington Declaration, with respect to the electronic searches conducted in response to both of the challenged searches, DOD identified and used search terms that were reasonably likely to locate electronic records responsive to each request. *See id.* ¶¶ 9, 11 (example of search terms used in connection with DOD's search for records of initial orders and communications); *see also id.* ¶ 26 (search terms used to identify electronic records responsive to Plaintiffs' request for records of Gaddafi's truce and abdication); *see also* Supplemental Herrington Declaration ("Supp. Herrington Decl.") ¶ 13.

Plaintiffs largely ignore these details, arguing instead that DOD's searches were inadequate because other records must exist that DOD has failed to disclose. *See* Pls.' Opp. at 1-36; *see also* Pls.' Reply in Support of Pls.' Discovery Mot. at 3-5. In an effort to bolster their claim, Plaintiffs nitpick the specifics of DOD's searches.[4] For example, Plaintiffs complain that the Herrington Declaration does not specify whether General Carter Ham searched his files (paper and electronic). *See* Pls.' Opp. at 32-33. And in an effort to undermine the adequacy of DOD's search in this regard, Plaintiffs proffer the affidavit of Rear Admiral Charles R. Kubic, CEC, a retired Rear Admiral of the United States Navy ("Kubic Affidavit"), who purports to know some of the individuals who were allegedly involved in the decision to consider Gaddafi's supposed request for a truce and abdication, *see* ECF No. 71-3. According to Plaintiffs, because Rear Admiral Kubic knows

[4] Defendants' opposition to Plaintiffs' discovery motion, which is incorporated by referenced in this brief, *see supra* n. 1, addresses Plaintiffs' remaining arguments with respect to the adequacy of DOD's search for records responsive to Plaintiffs' request for records of Gaddafi's purported truce and abdication. *See* ECF No. 74 n.1.

that General Ham was allegedly involved in this particular decision, it follows that General Ham must have records, paper or otherwise, responsive to Plaintiffs' request. As explained in detail below, Plaintiffs are wrong.

As an initial matter, Plaintiffs' reliance on the Kubic Affidavit is misplaced both because the statements contained therein are irrelevant to the issue before this Court (that is, whether DOD conducted a reasonable and adequate search for responsive records) and because the affidavit does not comport with the requirements of the Federal Rules of Civil Procedure. Specifically, Federal Rule of Civil Procedure 56(c)(4) states in relevant part that "[an] affidavit . . . used to support or oppose a motion [] be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant . . . is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4). Rear Admiral Kubic does not have personal knowledge of the search conducted by DOD, nor could he given that he was retired when the challenged search was conducted. *See* Kubic Affidavit ¶ 3. In addition, several of the statements contained in Rear Admiral Kubic's affidavit are inadmissible hearsay. *See id., e.g.*, ¶ 6 (claiming that Colonel Linvill stated that "Yes, there was interest[] in setting up a direct line between military commanders [and Gaddafi]"); ¶ 9 (alleging that individuals "above General Ham" told some unspecified individual that "we now are told to stand down"). Because the Kubic Affidavit does not comply with Rule 56(c)(4)'s requirements, the Court should strike this affidavit, or alternatively disregard any statements that do not comply with the same. *See Hall v.* CIA, 538 F. Supp. 2d 64, 72 (D.D.C. 2008).[5]

[5] For these same reasons, the Court should also strike the Affidavit of Admiral James A. Lyons, Jr., a retired four-star admiral of the United States Navy, *see* ECF No. 71-2.

Even if the Kubic Affidavit was properly before this Court, it does nothing to undermine the reasonableness of DOD's search. As DOD explained in the Herrington Declaration and clarified in the attached Supplemental Declaration of Mark H. Herrington ("Suppl. Herrington Decl."), among other offices, AFRICOM personnel identified the Office of the Commander as an office reasonably likely to have records responsive to Plaintiffs' request. *See* Herrington Decl. ¶¶ 25-26; *see also* Suppl. Herrington Decl. ¶¶ 11-13. During the timeframe referenced in Plaintiffs' FOIA request, the head of the Office of the Commander was then-Commander, General Carter Ham. *See* Suppl. Herrington Decl. ¶ 11. In order to locate records responsive to Plaintiffs' request, AFRICOM personnel conducted a search of General Ham's paper and electronic files and the paper and electronic files of other personnel in that office during the time period mentioned in Plaintiffs' request. *See id.* As the Supplemental Herrington Declaration clarifies, the scope of the search that AFRICOM personnel conducted in the Office of the Commander is the same as the (reasonable and adequate) searches conducted in other offices that AFRICOM identified as reasonably likely to have responsive records. *See* Herrington Decl. ¶¶ 25-26; *see also* Suppl. Herrington Decl. ¶¶ 11-13.

Plaintiffs' challenge to the scope of Colonel Linvill's search fares no better. In 2014, Colonel Linvill received the same search instructions that were provided to AFRICOM personnel, who were tasked with searching for records responsive to Plaintiffs' request. *See* Herrington Decl. ¶¶ 25-26; *see also* Suppl. Herrington Decl. ¶ 8. Specifically, Colonel Linvill was asked to search both his paper and electronic files and provided a list of search terms that AFRICOM personnel determined were reasonably likely to locate responsive records. *See id.* In order to effectuate his search for responsive electronic

records, Colonel Linvill contacted AFRICOM information technology personnel to determine whether AFRICOM still maintained his three-year-old electronic records and was informed that AFRICOM did not maintain those electronic records as a result of its record retention policy. *See* Suppl. Herrington Decl. ¶ 9. And with respect to the request that Colonel Linvill search his paper files, he explained that he did not have paper records responsive to Plaintiffs' request because it was "not his practice" to maintain paper files during the short tenure of his post in AFRICOM's headquarters in Germany in March 2011. *See id.* ¶ 10.

At bottom, the underlying premise of Plaintiffs' complaints concerning the two challenged searches is their view that other records must exist that DOD has not released. But as explained previously, Plaintiffs' speculation that other records may exist cannot undermine the conclusion that DOD discharged its obligations under FOIA both reasonably and adequately with respect to the two challenged searches. *See Judicial Watch, Inc. v. U.S. Dep't of State*, 177 F. Supp. 3d 450, 457 (D.D.C. 2016) (internal citation omitted), *aff'd sub nom Judicial Watch, Inc. v. U.S. Dep't of State*, 681 F. App'x (D.C. Cir. 2017) ("An agency's search 'need not be perfect, only adequate, and adequacy is measured by the reasonableness of the effort in light of the specific request.'"). Indeed, as a result of the searches that DOD conducted, the agency released records responsive to the two FOIA requests. *See* Herrington Decl. ¶¶ 16-24 (explaining that DOD located and released records reflecting initial communications and orders in response to Plaintiffs' request for the same); *see also* Suppl. Herrington Decl. ¶¶ 5, 12 (explaining that AFRICOM located and produced to Plaintiffs reports and other records referencing the events of March 2011). Plaintiffs'

complaint that DOD failed to "turn up one specific document in its search does not render [its] search[es] inadequate. . . ."[6] *Id.*

II. DEFENDANT FBI PROPERLY DECLINED TO CONFIRM OR DENY THE EXISTENCE OR NON-EXISTENCE OF RECORDS RESPONSIVE TO PLAINTIFFS' FOIA REQUEST

In its opening brief and accompanying declaration, Defendant FBI explained that it could neither confirm nor deny whether the FBI does or does not possess specific statements responsive to Plaintiffs' request for [FBI 302 reports]" because it is reasonably expected that to do so could "interfere with the FBI's ongoing investigation into the attacks on U.S. Government personnel and facilities in Benghazi, Libya." Third Hardy Decl. ¶ 13; *see also id.* ¶¶ 14-15; *see also* Defs.' Br. at 17-19. To be sure, "while it is publicly known the FBI is actively investigating the Benghazi attacks, specific details such as the direction, scope, pace, particular witness statements, and focus of the investigations are not known." *Id.* ¶ 15. More fundamentally, the harm derived from disclosing the existence or non-existence of the alleged FBI reports is real and substantial—namely, that disclosure of this information could "chill the FBI's investigative efforts as prospective witnesses would

[6] This is equally applicable to Plaintiffs' claim that DOD's search for records reflecting initial communications and orders and OPREP PINNACLE reports was inadequate because one of the documents released to Plaintiffs refers to an earlier (responsive) record. *See* Pls.' Opp. at 30-31 (arguing that one of the documents that DOD released in response to Plaintiffs' request for OPREP PINNACLE reports was not the "initial" OPREP PINNACLE report but a subsequent one). This may well be true, but the fact that DOD released a subsequent OPREP report in response to Plaintiffs' request does not render DOD's search for those records inadequate. *See Judicial Watch, Inc.*, 177 F. Supp. 3d at 457. Indeed, it bears mentioning (again) that Plaintiffs submitted this particular request to DIA, which is *not* the unit responsible for generating such a report. *See* Herrington Decl. ¶ 8. Notwithstanding Plaintiffs' misdirected request (the search for which yielded *no* responsive records), DOD re-directed the request to the appropriate unit, AFRICOM, and AFRICOM conducted a search that was reasonably tailored to locate responsive records.

reasonably be reluctant to cooperate if they know the FBI will inform third party requesters about their involvement, if any, in any investigation," *see id.* ¶ 16; *see also Tipograph v. Dep't of Justice*, 83 F. Supp. 3d 234, 239 (D.D.C. 2015). This is particularly so given the FBI's ongoing criminal investigation of the individuals involved in the September 2012 attack. *See, e.g., Citizens for Resp. Ethics in Wash. v. U.S. Dep't of Justice* ("*CREW v. DOJ*"), 746 F.3d 1082, 1096 (D.C. Cir. 2014) (upholding Exemption 7 *Glomar* assertion where the agency demonstrated that there is a pending law enforcement proceeding and declared that release of the purported information could reasonably be expected to cause some articulable harm).

Plaintiffs do not dispute the ongoing nature of the FBI's criminal investigation into the Benghazi attack. *See id.* Instead, they argue that the FBI's *Glomar* assertion is improper because the "information sought is already in [the] target's possession" as a result of (1) publicly-available congressional interview transcripts of United States personnel who were present during the September 2012 attack, and (2) a book and movie about the Benghazi attack, the information in which was purportedly obtained from American security force contractors who were in Benghazi and present during the attack. Pls.' Opp. at 43. According to Plaintiffs, the FBI's assertion of harm is undermined by the fact that the witnesses' "accounts are known" and any criminal targets may "simply review the . . . [congressional transcripts] or read the book."[7] *Id.* at 45.

[7] Plaintiffs' argument appears to rely on the "official acknowledgement" doctrine. "For information to qualify as 'officially acknowledged,' it must satisfy three criteria: (1) the information requested must be as specific as the information previously released; (2) the information requested must match the information previously released; and (3) the information requested must already have been made public through an official and documented disclosure." *Am. Civil Liberties Union v. U.S. Dep't of Def.*, 628 F.3d 612, 620-21 (D.C. Cir. 2011). As explained herein, Plaintiffs cannot satisfy their burden of

The flaw in Plaintiffs' argument is that it wholly ignores the fact that the FBI has "never acknowledged the existence of the alleged FBI 302s, which are the subject of Plaintiffs' request. Nor has the FBI ever made the alleged FBI 302s or the information purportedly contained therein available to the public." Third Hardy Decl. ¶ 7. To that point, Plaintiffs have not pointed to any congressional testimony that specifically references the existence or non-existence of the alleged FBI 302 reports and handwritten notes that Plaintiffs seek in this litigation. *See James Madison Proj. v. U.S. Dep't of Justice*, 302 F. Supp. 3d 12, 20 (D.D.C. 2018) (observing that plaintiff "bears the initial burden of pointing to specific public statements that officially acknowledge the records subject to a *Glomar* response"). This alone is fatal to their claim.

Plaintiffs urge this Court to find otherwise, arguing that it is "dubious" that these transcripts "contain different, or more, information than" the content of the purported 302 reports that they seek. Pls.' Opp. at 44. But their "doubt" is insufficient to demonstrate that the witness accounts set forth in the congressional transcripts "'both match[] the plaintiffs' request [for the alleged FBI 302 reports and handwritten notes] and [that the alleged reports and handwritten notes] ha[ve] [been] publicly and officially acknowledged by the agency.'" *James Madison Proj.*, 302 F. Supp. 3d at 20 (quoting *Moore v. CIA*, 666 F.3d 1330, 1333 (D.C. Cir. 2011)). Put another way, "the records sought must match the records whose existence the plaintiff claims are publicly acknowledged through official statements." *Id.* (citing *Am. Civil Liberties Union v. CIA*, 710 F.3d 422, 427-28 (D.C. Cir. 2013)); *see also Wolf*, 473 F.3d at 378-79 ("In the *Glomar* context . . . if the prior disclosure

---

demonstrating an "official acknowledgement" of the existence (or nonexistence) of the alleged FBI 302 reports and handwritten notes that they seek in this FOIA litigation.

establishes the *existence* (or not) of records responsive to the FOIA request, the prior disclosure necessarily matches both the information at issue—the existence of records—and the specific request for that information."). Plaintiffs cannot satisfy this burden because the transcripts on which they rely do not specifically mention any alleged FBI 302 reports or handwritten notes, nor have Plaintiffs shown that the content of the publicly-available transcripts "match" the content of the alleged 302 reports. *See, e.g. Moore*, 666 F.3d at 1333 (explaining that the "official acknowledgement" doctrine must be applied "strictly" and cannot be based on "speculation [or inference], no matter how widespread"). It is for this reason that Plaintiffs' reliance on purported witness accounts set forth in the book, *13 Hours*, and movie of the same title is equally misplaced. Plaintiffs have not shown that any of the purported statements of security contractors or other personnel who witnessed the September 2012 attack in either the book or the movie specifically references the existence of the FBI 302 reports and handwritten notes. *See id.*

"[T]he fact that information exists in some form in the public domain"—for example, whether the information is derived from congressional transcripts or alleged first-hand accounts as set forth in books or movies, "does not necessarily mean that official disclosure [of the existence or non-existence of the FBI 302 reports] will not cause harm cognizable under a FOIA exemption." *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007). To that point, "much remains uncertain about their [purported] contents, including 'the level of detail in the [alleged 302 reports], [and] the extent to which they corroborate'" information in congressional testimony or *13 Hours*, the book and movie. *Cable News Network, Inc. v. FBI*, 293 F. Supp. 3d 59, 72 (D.D.C. 2008). "Those 'lingering doubts' about the accuracy or thoroughness of [the public accounts of the Benghazi attack] suffice

to satisfy Exemption 7(A)." *Id.* (quoting *Military Audit Proj. v. Casey*, 656 F.2d 724, 745 (D.C. Cir. 1981)); *see also Wilson v. CIA*, 586 F.3d 171, 195 (D.C. Cir. 2009) ("Anything short of [an official] disclosure necessarily preserves some increment of doubt regarding the reliability of the publicly available information.").

Perhaps more fundamentally, the Third Hardy Declaration specifically articulates the harm that is reasonably expected to result if the FBI is forced to acknowledge the existence or non-existence of the alleged FBI 302 reports and handwritten notes. *See* Third Hardy Decl. ¶¶ 14-15 (detailing, among other things, the harm to the integrity of the FBI's ongoing, pending investigations into the Benghazi attack, the potential harassment and retaliation that individuals may be subject to if the agency acknowledges that any individual "has or has not provided the FBI with a statement"). Because the FBI's "predictive judgment of the harm that will result from disclosure of [the requested information]" is entitled to deference, *see Cable News Network, Inc.*, 293 F. Supp. 3d at 72, and because Plaintiffs have failed to demonstrate that the FBI has officially acknowledged the existence or non-existence of the FBI 302 reports and handwritten notes that they seek through FOIA, the Court should grant summary judgment in Defendants' favor.

III. DEFENDANTS CIA AND DOD PROPERLY WITHHELD INFORMATION UNDER EXEMPTIONS 1, 3, AND 7.

A. Defendant CIA Properly Withheld Information In Records Reflecting Its Military Force Posture Under Exemptions 1, 3, 6, and 7.

In their opposition and cross-motion for summary judgment brief, Plaintiffs make clear that their only complaints with respect to the CIA's decision to withhold certain information from the Inspector General ("IG") report are (1) the agency's decision to

withhold "the nature of the underlying grievance," *i.e.*, "the 'subject matter'" of the IG report, and (2) the agency's alleged claim that the IG complaint is "an 'operational file of the Central Intelligence Agency,' 5 U.S.C. § 431(c)(3)."[8] Pls.' Opp. at 36-40; *see also* Pls.' Opp. at 3 n.10 (abandoning, *inter alia*, their challenge to CIA's invocation of Exemption 6, 7(C), 7(D), the agency's *Glomar* assertion with respect to Plaintiffs' request for records of "Gaddafi's expressed interest in a truce and possible abdication and exile out of Libya," and the CIA's search for records the actions and communications of CIA Director Petraeus and Deputy Director Morell during the "24-hour period beginning when first notified" about the September 2012 attack).

These two challenges are easily dispensed with. Plaintiffs' claim that the CIA failed to disclose the "subject matter" of the IG complaint is belied by the unredacted portions of the records that the CIA released in response to Plaintiffs' request. As explained in the Supplemental Declaration of Antoinette B. Shiner, the CIA conducted a "page-by-page and line-by-line review, and released all reasonably segregable, non-exempt information," including, as relevant here, "the subject matter of the IG's investigation." Shiner Supp. Decl. ¶ 6. As Ms. Shiner points out, Exhibit 8 to Plaintiffs' cross-motion for summary judgment expressly references "the subject matter and genesis of the IG complaint" on bates stamped page 000082. *Id.* ¶ 7 (observing, among other things, that the "subject of the emailed complaint is 'Comments on the Benghazi Attacks' and that the complaint "is introduced as addressing the concern that the Director of the CIA

[8] Plaintiffs' cite to 50 U.S.C. § 431 refers to the statute transferred in 2013 and re-codified at 50 U.S.C. § 3141. *See* Supplemental Declaration of Antoinette B. Shiner, Information Review Officer for the Litigation Information Review Office, Central Intelligence Agency ("Supp. Shiner Decl.") ¶ 4 n.1.

("DCIA") had 'not been provided fulsome details regarding the events that took place during the 11/12 September attacks on the U.S. Mission (Consulate) in Benghazi and Benghazi Base'"). The Supplemental Shiner Declaration also provides other examples of the agency's disclosure of the subject matter of the IG complaint based on the unredacted portions of Exhibit 8. *Id.* In other words, Plaintiffs are simply wrong that the CIA failed to disclose the subject matter of the IG complaint.

Similarly unavailing is Plaintiffs' argument that the CIA has improperly claimed that the IG records are exempt as "operational files" of the agency under 50 U.S.C. § 3141(c). Pls.' Opp. at 36. This argument is puzzling given that the CIA has never stated that the IG records responsive to Plaintiffs' request are "operational files" of the agency and therefore exempt from disclosure. *See generally* Shiner Decl., ECF No. 68-5. To make this point clear, the Supplemental Shiner Declaration unequivocally states that "the CIA did not rely on the operational file exemption [as set forth in 50 U.S.C. § 3141] in its search, review, and release determinations regarding the IG [records]." Suppl. Shiner Decl. ¶ 5; *see also id* (reiterating that "there is no mention in the Shiner Declaration of the operational file exemption").

Without these two claims and having abandoned their earlier challenges to the CIA's actions in this case, Plaintiffs' cross-motion for summary judgment with respect to their claims against the CIA fails as a matter of law. Accordingly, the Court should deny Plaintiffs' cross-motion for summary judgment and grant summary judgment in the CIA's favor.

B. Defendant DOD Properly Withheld Information Under Exemption 1.

Defendant DOD adequately explained its decision to withhold a 12-page classified document that contains the force posture of military assets and personnel, including information detailing "military operations conducted overseas." Declaration of Rear Admiral James J. Malloy ("Malloy Decl.") ¶¶ 4-12, ECF No. 69-1; *see also* Defs.' Br. at 20-23, 25-26. Indeed, the 12-page document contains information concerning military operations overseas, including the vulnerabilities or capabilities of the United States' military posture and its overseas mission at the time of the Benghazi attack. *See id.* Among other things, "[t]he 12-pages withheld by the 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 Operations forces worldwide during the relevant timeframe in September 2012. Malloy Decl. ¶ 9. The withheld pages also "contain the numbers and locations of ships, submarines, response forces, and aircraft surrounding Benghazi, Libya" as well the "numbers of military personnel located in particular countries during that time" and "the transit time required for each available asset to reach Benghazi." *Id.* DOD has determined that disclosure of the challenged records "reasonably could be expected to cause serious damage to the national security," and thus the information contained therein "is sensitive and classified at the Secret level," *id.* ¶ 11, an assessment of harm to the national security to which courts "have consistently deferred." *Larson v. U.S. Dep't of State*, 565 F.3d 857, 865 (D.C. Cir. 2009).

In their opposition brief, Plaintiffs contend that DOD's assessment of harm "has no basis in fact" because DOD's force posture in September 2012 "could be of no value to an

adversary. *See* Pls.' Opp. at 29. Plaintiffs' argument is based entirely on the improper and inadmissible "opinion" of Admiral James A. Lyons, Jr., a retired four-star admiral whose affidavit Plaintiffs have filed in support of their cross-motion for summary judgment. *see also* Lyons Aff. ¶ 4. Setting aside whether Ret. Admiral Lyons' statements could help or assist the Court in determining whether DOD's prediction of harm justifies the withholding of the 12-page document (they cannot), the two paragraphs in the Lyons Affidavit on which Plaintiffs primarily rely contain statements that are entirely conclusory and lack the foundation necessary to be admissible under either the Federal Rules of Civil Procedure or the Federal Rules of Evidence. *See, e.g.*, *Hall*, 538 F. Supp. 2d at 72 (granting FOIA defendant's motion to strike certain paragraphs because, among other reasons, the statements were conclusory and contained no foundation, nor would the statements assist the Court in ruling on the parties' summary judgment motions).

In addition, Ret. Admiral Lyons has no personal knowledge regarding DOD's current force posture and whether any aspect of the current force posture is the same or similar to that which existed during the Benghazi attack. He also has no firsthand knowledge regarding the status of current national security concerns or DOD's military force posture. His speculation regarding the risk of harm that might result if DOD is required to disclose the challenged records is entitled to no weight and should be disregarded. *See, e.g.*, *Berman v. CIA*, 378 F. Supp. 2d 1209, 1218 (E.D. Cal. 2005).

Because Plaintiffs are unable to show that DOD improperly withheld the challenged record, the Court should deny Plaintiffs' cross-motion for summary judgment and find that Defendant DOD properly withheld the 12-page document under Exemption 1.

CONCLUSION

For the forgoing reasons and those set forth in Defendants' opening summary judgment brief (and accompanying declarations) and Defendants' opposition to Plaintiffs,

Dated: July 27, 2018

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

ELIZABETH J. SHAPIRO
Deputy Branch Director

/s/ Tamra T. Moore
TAMRA T. MOORE
District of Columbia Bar No. 488392
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, Room 5375
Washington, DC 20001
Tel: (202) 305-8628
Fax: (202) 305-8517
E-mail: tamra.moore@usdoj.gov
Attorneys for Defendants