

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

ACCURACY IN MEDIA, INC., et al., )  
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 Plaintiffs, )  
 )  
 v. )  
 )  
 DEPARTMENT OF DEFENSE, et al., )  
 )  
 Defendants. )  
 \_\_\_\_\_ )

Case No. 14-1589 (EGS)

PLAINTIFFS' MEMORANDUM IN REPLY TO DEFENDANTS'  
OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

COMES NOW Plaintiffs, by counsel, and respectfully submit this Memorandum in Reply to Defendants' Opposition to Plaintiffs' Motion for Summary Judgment.

***DOD—Initial Orders and Communications.*** According to the DOD, there is no record of any order, or communication, to any asset, worldwide, for the first *twelve* hours after the onset of hostilities, and for *eight* hours after it claims to have given its order. This, of course, is not accurate. A review of the record in the matter unquestionably reveals the existence of a number of records that the DOD claims do not exist, as plaintiffs observed in their dispositive motion. *See* ECF No. 71 at 40-41, listing records.

In light of this evidence, the DOD changed its position—the "reasonable and thorough search may have missed them." ECF No. 74 at 8. Additionally, defendant baldly asserts that "the cherry-picked congressional testimony is entirely consistent with the agency's response to congressional inquiries into the Benghazi attack." *Id.* at 7-8. *Cf.* plaintiffs' dispositive motion, ECF No. 71 at 20, "In fact, Mr. Panetta stated over a dozen times that the order was to go," quoting testimony.

**DOD—Records of Available Assets.** The DOD's failure to produce records of its initial communications is accompanied by its refusal to disclose the records revealing to whom the order to deploy could have been given. It posits that disclosure of the information of the placement of its assets, six years ago, the vast majority of which is already in the public domain, could provide adversaries with information that could now be expected to cause serious damage to national security. The DOD asserts two arguments. First, according to the DOD, Admiral Lyons is not an expert.<sup>1</sup> Second, he "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." ECF No. 77 at 21.

Yes, of course, the Admiral has no knowledge of the current force posture. Nor do adversaries. The DOD's argument makes no sense.

The DOD cites *Hall*, 538 F. Supp. 2d at 72, for the proposition that Admiral Lyons' Affidavit should be stricken. But the Court in *Hall* ruled that the affidavit in that case should be

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<sup>1</sup> Defendants' dispositive motion, ECF 74 at 20:

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).

stricken to the extent that it contained opinion, because the Affiant was not an expert. Cleary, Admiral Lyons is an expert.

***DOD—OPREP-PINNACLE Report.*** Here, the DOD argues that it "released a subsequent OPREP report," and that plaintiffs' complaint is that it "was not the 'initial' OPREP PINNACLE report but a subsequent one." *Id.* at 9. No, this is incorrect. The record to which defendant refers, attached as Exhibit 10 to the Herrington Dec., ECF 68-4, simply refers to an OPREP report that was issued on September 12, 2012. Moreover, that record, Exhibit 10, is dated January 12.

***CIA.*** At issue here are the redactions to records of a CIA Inspector General ("IG") complaint. The released record discloses that, in September or October of 2012, Director Petraeus had communicated to CIA employees some information regarding the attacks. Based on Petraeus' communication, on November 1, 2012, one of those CIA employees emailed the IG, asking that the information, which is redacted, be provided to Mr. Petraeus, anonymously.

Contrary to the CIA's understanding, plaintiffs do not object to defendant's "decision to withhold the identity of confidential sources" (ECF No. 74 at 1), or the withholding of "names of CIA officers and contractors," nor did plaintiffs "abandon[.]... their challenge to CIA's invocation of Exemption 6, 7(C), 7(D)." Rather, as plaintiff observed in their Motion for Summary Judgment, "[w]hile many of the CIA's redactions are undoubtedly proper, its nondisclosure of the substance of the underlying allegation—the 'specific subject matter' under 50 U.S.C. § 431(c)(3)—is improper." ECF No. 71 at 37.

According to the CIA, "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." ECF No. 74 at 1. The government elaborates 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 ("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.'" *Id.*

But the CIA does not disclose what the catalyst for the email to the IG was. What "fulsome details" had Director Petraeus not been told?

Public interest in disclosure of the IG records could be significant, if, for example, Mr. Petraeus had remarked that there had been no stand down order, and the CIA Officer had written the email to inform the Director of his misunderstanding. Mr. Petraeus had denied any order to stand down to two Congressional Committees

**FBI.** Here, the issue is the FBI 302 witness reports, to which the government responded with a *Glomar* response. According to the government, "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." *Id.* at 9. The government is mistaken. As the plaintiffs set forth in their initial Complaint, ECF No. 1 ¶ 114(9):

For your reference, the following is an excerpt from the December 30, 2012, Senate Committee On Homeland Security And Governmental Affairs, "Flashing Red: A Special Report On The Terrorist Attack At Benghazi:"

On September 15th and 16th, officials from the FBI conducted face-to-face interviews in Germany of the U.S. personnel who had been on the compound in Benghazi during the attack. The U.S. personnel who were interviewed saw no indications that there had been a protest prior to the attack. Information from those interviews was shared on a secure video teleconference on the afternoon of the 16th with FBI and other IC officials in Washington; it is unclear whether the question of whether a protest took place was discussed during this video conference.

**State Department.** The government observes that "Plaintiffs' counsel informed counsel for Defendants that Plaintiffs agreed to withdraw their challenge to the withholding of the [State Department] surveillance videos." ECF No. 74 at 6. However, plaintiffs "agreed to dismiss this

claim" (*id.*) only because the State Department changed their legal position, again,<sup>2</sup> and produced those records.

WHEREFORE, plaintiffs respectfully pray for entry summary judgment in their favor, together with an order requiring:

- I. Defendant Department of Defense to:
  - A. Release:
    - (1) The 12 pages of maps at issue;
    - (2) Records of assets at Souda Bay, Greece;
    - (3) The OPREP-3 Report.
  - B. Produce records of communications of the first 12 hours from the onset of the attacks, including but not limited to orders made at:
    - (1) 7:19 p.m.;
    - (2) 8:39 p.m.;
    - (3) 8:53 p.m.; and
    - (4) 11:00 p.m.
  - C. Answer Plaintiffs' Interrogatory.
- II. Central Intelligence Agency to release the information withheld that discloses the specific subject of the matter, or genesis, of the Inspector General Complaint.
- III. Department of Justice to release all nonexempt, segregable, portions of the 302s of personnel who had been in the Benghazi mission, and the Benghazi CIA annex, during the September 11th and 12th attacks on those facilities.

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<sup>2</sup> See, e.g., *Plaintiffs' Motion for Partial Summary Judgment Against Defendant Department of State on the Issue of Production of Records in Electronic Format*, ECF No. 23, withdrawn by *Stipulation*, ECF No. 24, only after defendant agreed to comply with 5 U.S.C. § 552(a)(3)(B), and to produce records in electronic format.

