

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ACCURACY IN MEDIA, INC., *et al.*,)
)
Plaintiffs,)
)
v.)
)
DEPARTMENT OF DEFENSE, *et al.*,)
)
Defendants.)
_____)

Case No. 14-1589 (EGS)

PLAINTIFFS' MEMORANDUM IN REPLY TO DEFENDANT FBI'S
OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

COME NOW Plaintiffs 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, Kevin Michael Shipp, and Accuracy in Media, Inc., by counsel, under Rule 56 of the Federal Rules of Civil Procedure, and respectfully submits this Reply to Defendant FBI's Opposition to Plaintiffs' dispositive motion.

Plaintiffs seek disclosure of the FBI FD-302 reports and corresponding handwritten notes for interviews conducted on September 15 and 16, 2012, in Germany, containing the narratives of United States personnel who survived the September 11 and 12, 2012 Benghazi attacks on the State Department Mission, and thereafter on the CIA Annex (hereinafter "302s.")

The issues now before the Court are (1) whether the FBI's categorical invocation of Exemption 7(A) to withhold in full all of the requested records is proper; and, if the Court determines that it is improper, (2) whether defendant's withholdings in full are justified under Exemptions 5, 6, and 7(C).

1. Plaintiffs' Arguments for Disclosure is not a "Rewriting" of their FOIA Request

The FBI's argument that Plaintiffs seek to amend, or rewrite, their FOIA request, is new, and frivolous. According to defendant, because the FOIA request "did not specifically seek information about an alleged 'stand down order,'" they are now "rewriting" their FOIA request. *Defendant FBI's Memorandum in Opposition to Plaintiff's Cross-Motion for Summary Judgment and Reply in Support of Defendant FBI's Renewed Motion for Summary Judgment*, ECF No. 100 at 16 ("*Def. Opp.*").

The FBI avers that plaintiffs' alleged failure to specify what information in the 302s that they were seeking is somehow a rewriting of their request. Defendant even avers that the FOIA Request for the 302s do not "reasonably describe the records sought." *Def. Opp.* at 3. Had plaintiffs' FOIA request specifically sought information about an order to stand down, the government would argue, successfully, that an agency is not required to conduct research in responding to a FOIA request.

Moreover, the entire action, against all defendants, seeks the truth regarding the delay in affecting a rescue, which, of course, includes evidence that assets had been ordered to stand down.¹

¹ See generally *Plaintiffs' Opposition to Defendant FBI's Renewed Motion for Summary Judgment* ECF No. 99 at 4-7, related that, four years of Congressional hearings culminated in Rep. Trey Gowdy's seventh Benghazi probe, the *Final Report of the Select Committee on The Events Surrounding the 2012 Terrorist Attack in Benghazi*, which relied solely on Secretary of Defense Leon Panetta's January 2016 closed-door testimony that the order had been given "by 7:00 p.m. Washington time" and communicated to forces "by 9:00 p.m." Mr. Gowdy wrote that the record of the DOD's "orders or commands... is pending production," unaware that plaintiffs had obtained this record six months before Mr. Gowdy released his Report, and unaware that the order had been relayed on September 12 at 3:00 a.m.—13 hours after the attacks began, nine hours after forces were supposedly ordered to go, and six hours later than Mr. Gowdy had concluded.

2. Privacy Exemptions

Plaintiffs waived their objections to a large number of redactions, as defendant observes.² Plaintiffs argue that privacy concerns are simply inapplicable to the accounts of Mark Geist, Kris Paronto, and John Tiegen; the three security team members whose accounts appear in the 2014 book, *"13 Hours: The Inside Account of What Really Happened in Benghazi,"* by "Mitchell Zuckoff with the Annex Security Team," in the 2016 Paramount Pictures movie, *13 Hours: The Secret Soldiers of Benghazi*, and in the 2014 Fox News interviews with them.

These individuals' very public accounts relate that the CIA Chief-of-Base ("COB") repeatedly ordered them to stand down, until they disobeyed, and that, but for the delay, they likely could have also saved Sean Smith and Christopher Stevens. This is a question of some consequence.

Even after *seven* Congressional probes, the issue of the delay in ordering assets to respond, both inside and outside Libya, remains unresolved. Defendant does not broach the

See also id. at 7-8, setting forth plaintiffs' argument that the CIA's redactions to its production of records of whistleblower complaint to CIA Director David Petraeus, redacting the "specific subject matter," which plaintiffs aver was the stand down order, notwithstanding Director Petraeus's Congressional testimony that he was unaware of any such order having been given.

² *Def. Opp.* note 6 at 12: Plaintiffs state that they have no objection to the FBI's invocation of Exemptions 6 and 7(C) to protect from disclosure the names and other personally identifying information of the six categories of individuals the FBI identified in its opening memorandum. *See* Pls.' Mem. at 12 (citing Def.'s Mem. at 26-34). These categories include: (1) FBI Special Agents and Professional Staff; (2) Personnel from Non-FBI Federal Agencies; (3) Third Parties Merely Mentioned in the Responsive Records; (4) Persons of Investigative Interest; (5) Local Law Enforcement Personnel, and (6) Individuals who Provided Assistance to the CIA.

subject of the unresolved issue of the government's initial response, much less any analysis of the public interest in disclosure balanced against the probable invasion of personal privacy.

Regarding Mr. Tiegan's waiver of any privacy interest that he may have in the 302s, the FBI recognizes that "personal privacy exemptions may be overcome by a waiver signed by the third person whose privacy interest would be affected by the disclosure" (*Def. Opp.* at 14), but claims that its withholding in full is justified under Exemption 7(A). "Mr. Tiegan's waiver does not, therefore, require the FBI to review the requested records and, if his name does appear in one or more of the FD-302 interview reports and attached handwritten interview notes, release versions of those records with Mr. Tiegan's name unredacted." *Id.* at 21.

Plaintiffs seek disclosure of all 302s for interviews conducted on September 15 and 16, 2012, in Germany, appropriately redacted.

3. Withholding in Full under Exemption 7(A)

In response to plaintiffs' observation that the FBI failed to explain how information related to the stand down order could *possibly* interfere with any ongoing Benghazi investigation, defendant states that this circumstance is "based on conjecture and is immaterial." Defendant posits:

The argument assumes that the requested FD-302 interview reports and attachments, including handwritten interview notes, contain information about the alleged stand down order. But the FBI has not "revealed specific investigative information related to the focus and content of the interview reports." Seidel Decl. ¶ 14. Nor is it required to do so.

Def. Opp. at 10.

Thus, in the government view, since the FBI has not admitted that the 302s recount the COB's order to stand down, it need not disclose whether its 302s reflect that order. This view is circular, and nonsensical.

Defendant recites that the FOIA does allow for categorical withholdings where the government can explain, generically, how disclosure of documents could reasonably be expected to interfere with enforcement proceedings. Plaintiffs believe that such a categorization is inapplicable to the 302s, contrary to the FBI's representation that "Plaintiffs do not challenge the FBI's categorization of the records. *See* Pls.' Mem. at 16-17." *Id.* note 2 at 3.

Here, according to the defendant, disclosure could reveal the scope and focus of a pending investigation, which could "allow investigative targets to formulate strategies to contradict evidence to be presented in Court proceedings." *Id.* at 11.

Defendant perfunctorily declares that it has adequately explained how disclosure of the 302s, after appropriate redactions, "could reasonably be expected to interfere with the ongoing Benghazi investigation and prospective enforcement proceedings." *Id.* at 6. The FBI recites the circumstances under which Exemption 7(A) could justify its withholding in full, but does not proffer how those concerns are implicated here.³

Even if, as the FBI asserts, the government is not required to precisely describe how disclosure *would* interfere with enforcement proceedings, it is required to disclose how disclosure of accounts of the stand down order *possibly could* interfere. The FBI cannot do so.

Information that the targets of an investigation already possess is generally not exempt, as the FBI recognizes:

³ *Id.* at 17: Specifically, and as discussed in the FBI's opening memorandum, the Seidel Declaration explains that disclosure of the requested evidentiary/investigative material could reasonably be expected to interfere with the ongoing investigation and prospective enforcement proceedings in at least three ways: (1) by permitting the identification of sources of information, witnesses, and potential witnesses who could then be targeted for potential intimidation and/or physical harm; (2) by allowing individuals to improperly utilize the information contained in the records to, among other things, alter or destroy potential evidence or create false evidence, and (3) by permitting individuals to circumvent investigators by evading detection.

Plaintiffs' argument is based on *Campbell v. United States Department of Health & Human Services*, which held that a "district court must conduct a more focused and particularized review of the documentation on which the government bases its claim that the information [the plaintiff] seeks would interfere with [an] investigation" when an agency withholds records requested by a third party to which the targets of the investigation have access. 682 F.2d 256, 265 (D.C. Cir. 1982); *see also Chesapeake Bay Found., Inc. v. U.S. Army Corps of Eng'rs*, 677 F. Supp. 2d 101, 108 (D.D.C. 2009) (concluding agency's invocation of Exemption 7(A) was improper where it failed to "explain how its investigation will be impaired by the release of information that the targets of the investigation already possess").

Id. at 15.

The government posits that "[t]his argument misses the mark, however, because the targets of the FBI's investigation do not have access to, or possession of, the information withheld under Exemption 7(A)." It then observes that the disclosure of the State Department's surveillance footage does not reflect the contents of the 302s. *Id.*⁴

Plaintiffs agree. The surveillance footage is irrelevant. But the 302s do reflect the accounts of Mark Geist, Kris Paronto, and John Tiegen, whose accounts appear in the 2014 book, *13 Hours: The Inside Account of What Really Happened in Benghazi*, in the movie, *13 Hours: The Secret Soldiers of Benghazi*, and in Fox News interviews. Any target of any investigation is among the millions who possess the detailed accounts of these three men. Because withholding in full under Exemption 7(A) is ill-founded, so too is the FBI's assertion that it has satisfied its segregability obligations. *Id.* at 17.

⁴ Plaintiffs do not argue that that the "official acknowledgment" doctrine is applicable here. *See id.* at 12-14.

4. Handwritten Interview Notes, Redacted, are not Privileged

The FBI asserts that the handwritten interview notes are “draft documents,” subject to withholding under the deliberative process privilege, as they “may not reflect the entire scope of information covered during the interview,” and the “differences between the handwritten interview notes and the official FD 302 interview reports reflect an exercise of judgment as to what facts are most relevant.” *Id.* at 11-12.

Plaintiffs’ pleadings observe that the order to stand down “does not involve deliberation. It is a fact.” Apparently unable argue to the contrary, defendant posits, again, that plaintiffs are re-writing their FOIA Request to “solicit specific information from the FBI that Plaintiffs did not explicitly seek in their FOIA request.” *Id.* at 16.

5. Defendant’s Failure to Admit or Deny Plaintiffs’ Undisputed Material Facts

Paragraph 13(c) of the Court’s Standing Order, ECF No. 62, states:

In response, the opposing party shall file a separate document entitled Counter-Statement of Disputed Facts. The opposing party shall indicate in the right column whether each corresponding fact in the left column is admitted or denied, and for those denied, provide appropriate citations to the record.

Defendant FBI’s Response to Plaintiffs’ Statement of Material Facts Not in Dispute, ECF No. 100-1, responds to 14 of plaintiffs’ 18 statements of material facts as follows:

Disputed to the extent that this paragraph does not set forth uncontroverted facts that are material to the outcome of this suit. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (“Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.”).

The FBI is not free to object to the relevancy of the material facts proffered by plaintiffs, and all 14 of these facts should be deemed admitted.

CONCLUSION

For the foregoing reasons, the Court should deny Defendant FBI's renewed motion for summary judgment and grant Plaintiffs' cross-motion for summary judgment.

Date: October 13, 2023.

Respectfully submitted,

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