

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ACCURACY IN MEDIA, INC., et al.,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 14-1589 (EGS)
)	
DEPARTMENT OF DEFENSE, et al.,)	
)	
Defendants.)	
_____)	

**PLAINTIFFS' MOTIONS FOR EXPEDITED PROCESSING,
AND
FOR PARTIAL STAY OF CASE AGAINST DEFENDANT CIA,
PENDING ISSUANCE OF REPORT OF HOUSE SELECT COMMITTEE PROBE**

COME NOW plaintiffs Accuracy in Media, Inc. ("AIM"), 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, Admiral James A. Lyons, Jr., USN, (Ret.), and Kevin Michael Shipp, by counsel, and respectfully move this Court for judicial review of Department of Defense, State Department, Department of Justice ("FBI"), Central Intelligence Agency ("CIA") failures to respond to, or denial of, their applications for expedited processing of their FOIA Requests, regarding the September 11, 2012 attacks in Benghazi, Libya. The grounds for this motion are that Benghazi is a matter of current exigency to the American people, the information sought regards breaking news, and the value of the information will diminish absent expedition, as plaintiff's posited in their administrative appeals. Defendants oppose this relief sought.

Plaintiffs also move for a partial stay of proceedings against defendant CIA, because the House Select Committee will disclose information corresponding to plaintiffs' FOIA

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**MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT OF PLAINTIFFS' MOTIONS FOR EXPEDITED PROCESSING,
AND
FOR PARTIAL STAY OF CASE AGAINST DEFENDANT CIA,
PENDING ISSUANCE OF REPORT OF HOUSE SELECT COMMITTEE PROBE**

Plaintiffs respectfully submit this memorandum in support of their Motions for Expedited Processing, seeking judicial review of defendants Department of Defense, State Department, FBI, and CIA, failures to respond to, or denial of, their applications for expedited processing of their FOIA Requests. Plaintiffs also respectfully move for a partial stay of proceedings against defendant CIA, because the House Select Committee will disclose information corresponding to plaintiffs' FOIA requests to CIA, rendering otherwise exempt records subject to disclosure.

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I. **FACTS**

A. **Attacks**

Plaintiffs' Amended Complaint, Preliminary Statement, recounts, in part:

On Tuesday, September 11, 2012... at 9:32 p.m., or earlier, dozens of attackers, armed with assault rifles and anti-tank rocket-propelled-grenades, swarmed the gate at the State Department's Benghazi Special Mission Compound, which, at the time, housed seven Americans. Moving with military tactics, the invaders lobbed a grenade into the Mission's command post, and then fired AK-47's into its main doorway. Eventually, their numbers swelled to more than 60. Within minutes... Hicks called the CIA Chief in Tripoli, the operations Center at the State Department in Washington, and the CIA's Benghazi facility, the "CIA Annex," the Agency's secret headquarters...*** Henderson stayed in contact, as did Hicks, while the Tripoli Defense Attaché kept African Command and the Joint Chiefs of Staff informed. Word quickly reached Defense Secretary Leon Panetta and chairman of the Joint Chiefs of Staff General Martin Dempsey.

Global conference calls included European Command, Central Command, Special Operations Command, Transportation Command, and the Army, Navy, Air Force, and Marines.... State's Operations Center issued an alert to the White House Situation Room... among other key government and intelligence offices. An "OPREP-3 Pinnacle Report" alerted the Pentagon's National Military Command Center. By the time that African Command's reconnaissance drone arrived overhead... the attackers had set multiple fires. *** U.S. officials were informed when Tyrone Woods and six others... left the CIA's facility,

and when they arrived at the Mission. Soon after these rescuers discovered that Sean Smith had died from smoke inhalation, but that Ambassador Stevens could not be found.... Updates included that the group of 14 Americans at the Mission had made a break for the CIA Annex... when the CIA Annex was hit with rocket-propelled grenades, bombs, and intense firefights.... The third and fourth rounds hit the roof of the CIA headquarters building, killing Tyrone Woods and Glen Doherty instantly, and seriously wounding two others. The Americans had averted a tragedy on a larger scale during the eight-hour siege only by performing extraordinary acts of courage and heroism.

When the Mission was overrun, CIA-retained security officers were told to stand down, but the team sprang into action regardless. Fighting to save lives while the Mission was set ablaze and choking smoke reduced visibility to zero, they succeeded in retaking the Mission and then escaping to the nearby CIA Annex. But more deadly attacks followed, involving grenades, mortars, and wave after wave of return machine-gun fire. Stationed on the rooftop of the Annex, the team fought through the night to repel mounting enemy forces and firepower. Shortly after 6:00 a.m., a convoy of Libyans arrived to escort the 35 or so Americans to the relative safety of Benghazi's airport, where, 13 hours after the attack began, they boarded Libyan aircraft, bound for Tripoli.

At the time, a 130-man Marine Force Reconnaissance force, along with an AC-130 Spectre gunship, was stationed in Sigonella, Sicily—about an hour's flight from the Mission. US aircraft at Aviano Air Base, in northeastern Italy, were about two hours away. US F-16 Aircraft were located at Souda Bay, Greece. Two Marine Corps Fleet Antiterrorism Security Teams were stationed three-and-a-half to four hours away, in Rota, Spain. Also about three-and-a-half hours away, in Croatia, a forty-man Special Operations Commander's-in-Extremis Force was conducting a counterterrorism exercise. In the United States, Special Operations Forces were eight hours flying time...
Id.

Plaintiffs' action, and the grounds for the instant motion, center on disclosure of records revealing the government's response.

B. Procedural history

(1) Department of Defense

FOIA Request. Records requested will either refute or confirm the governments' official response timeline. The requests seek to disclose the times and contents of all relevant communications—with the Mission itself;¹ communications up the chain-of-command,² and records of orders to US assets worldwide, specifically those in Sicily,³ northern Italy, Spain,⁴ Croatia,⁵ Djibouti, and the United States.⁶ Similarly, the requests

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- ¹ Radio communications from compound requested 3/31/14 from Africa Command: "Audio. All records of radio communications... from the Compound's Tactical Operations Center... September 11 and 12, 2012..." Compl. ("Compl."). ¶¶ 18, 80.
- ² Communications to and from AFRICOM Joint Operations Center, made 3/31/14 to Africa Command: "*AFRICOM communications*. All records of AFRICOM Joint Operations Center (JOC) Chief's communications subsequent to that Officer's receipt of messages emanating from the Compound..." Compl. ¶¶ 20, 80.
- Contemporaneous notifications to DOD, sought from Defense Intelligence Agency on 5/28/14: "*Op Rep 3's*. The OPEREP-3 PINNACLE reports used to provide... notification of, or information about..." Compl. ¶¶ 19, 110.
- ³ Orders to 130-man Marine Force team at Naval Air Station Sigonella, Sicily made 3/31/14 to (1) Navy, (2) Air Force, (3) Marines, and (4) European Command: "Records disclosing the readiness status of the 130-man Marine Force Reconnaissance Team at NAS Sigonella, including: (a) All communications with, and orders to, NAS Sigonella... [re deployment and] to abort or turn back." Compl. ¶¶ 22, 42, 59, 67.
- ⁴ Orders to two Marine Corps Fleet Antiterrorism Security Teams in Rota, Spain made 3/31/14 to (1) Navy, (2) Marines, (3) European Command, and (4) Special Operations Command: "*Rota*. Records revealing the status of two Marine Corps... ("FAST"), at the Spanish naval base Naval Station Rota ("NAVSTA Rota"), including: (a) All communications... [and] if applicable, orders to abort or turn back..." Compl. ¶¶ 42, 50, 59, 67, 90.
- ⁵ Orders to Special Operations Commanders-In-Extremis Force in Croatia made 3/31/14 to (1) Army, (2) European Command, and (3) Special Operations Command: "Records regarding the readiness status of, and orders given to, airborne special operations unit, 'Commanders-In-extremis Force'... in Croatia, including... orders... to deploy to NAS Sigonella; and [a]ll communications... that aircraft was airborne... and, if applicable, orders to abort or turn back." Compl. ¶¶ 27, 37, 67, 90.
- ⁶ Orders to Special Operations in the United States made 3/31/14 to Special Operations Command: "Records disclosing the readiness status of, and orders given to, Special Operations Forces... in the United States..." Compl. ¶¶ 29, 90.

test the government's claims of having sought assistance from allies.⁷

Plaintiffs also seek disclosure of records incident to the relevant communications, such as maps of available assets,⁸ an accounting of aircraft,⁹ combat personnel readiness status,¹⁰ and contingency action plans.¹¹

⁷ Help from allies in country made 3/31/14 to (1) Africa Command, and (2) Office of the Secretary of Defense: "*Appeals for help*. Records of requests for help for personnel at 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." Compl. ¶¶ 21, 80, 95.

Help by use of Italian aircraft in Sigonella Sicily made 4/7/14 to (1) Marines, and (2) European Command: "Any records of the Department of Defense seeking help by use of Italian aircraft at NAS Sigonella." Compl. ¶¶ 24, 50, 67.

⁸ Maps depicting assets made 3/31/14 to (1) European Command, (2) Africa Command, (3) Central Command, (4) Office of the Secretary of Defense, and (5) DIA (4/7/14): "*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..." Compl. ¶¶ 30, 75, 80, 95, 105.

⁹ US aircraft in Djibouti made 10/1/14 to Africa Command: "Records identifying, and concerning, all US aircraft in Djibouti on September 11, 2012... include[ing] those that disclose the readiness status of all AC-130 gunships." Compl. ¶¶ 28, 87.

US aircraft at Aviano, Italy, made 4/7/14 to Air Force: "[D]isclosure of records identifying all US aircraft at Aviano Air Base in northeastern Italy on September 11th and 12th, 2012..." Compl. ¶¶ 25, 56.

US aircraft in Sigonella, Sicily made 3/31/14 to (1) Navy, (2) Air Force, and (3) European Command: "*Sigonella*. Records identifying, and concerning, all US aircraft at NATO Base... Naval Air Station Sigonella in Sicily, Italy..." Compl. ¶¶ 23, 42, 50, 67.

¹⁰ Readiness status of all armed forces requested 5/28/14 from Defense Intelligence Agency: "*Orders regarding readiness status*. For the period of July 1, 2012, through September 30, 2012, records of all directives, orders... regarding the readiness status of United States armed forces on the anniversary of the September 11th..." Compl. ¶¶ 31, 110.

¹¹ Contingency action plans made 3/31/14 to Office of Secretary of Defense and Joint Staff: "joint military contingency plans*** [and] commercial contracts... support[ing] military... [in] Tripoli and at Benghazi..." Compl. ¶¶ 32, 95.

The other three requests to the DOD are for records of Gaddafi's March 2011 offer of abdication,¹² assets prepositioned off the coast in October of 2011,¹³ and a reported aircraft radio transmission, "feet dry over Libya."¹⁴

Response. All DOD components either denied plaintiffs' applications for expedited processing of their FOIA Requests, or failed to respond. European Command's December 4, 2014 response to plaintiffs' administrative appeal is verbatim from Africa Command's August 25, 2014 appeal response. Both granted News Media status, and denied expedition:

Department of Defense (DoD) Regulation 5400.7-R CI.5.4.3.2 states that compelling need [under 5 U.S.C. § 552 (a)(6)(E)(i)(I)] 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 government activity."**

Additionally, federal courts have declared a three-pronged test to determine "compelling need" based on whether or not the information is "urgently needed" (*Al-Fayed v. CIA*, 245 F.3d 300 (D.C. Cir. 2001)). The three prongs of the test are as follows: 1. Whether the request **concerns a matter of current exigency to the American public**. 2. Whether the consequences of **delaying a response would compromise a significant recognized**

¹² Gaddafi's March 2011 interest in truce and abdication made 10/1/14 to Africa Command: "Records of... March of 2011... Gaddafi's expressed interest in a truce and possible abdication and exile out of Libya, by or to: (a) ...General Abdulqader Yusef Dibri; (b) Rear Admiral (ret.) Chuck Kubic; (c) AFRICOM personnel, including... (i) General Carter Ham; and (ii) Lieutenant Commander Brian Linvill; and (d) The CIA." Compl. ¶¶ 35, 87.

¹³ Assets pre-positioned off the coast of Tripoli Oct 2011 made 3/31/14 to (1) Navy, (2) Africa Command, (3) Office of the Secretary of Defense and the Joint Staff, and (4) Defense Intelligence Agency: "*Military assets pre-positioned in October 2011...* [R]ecords identifying DoD assets pre-positioned off the coast of Tripoli on October 18, 2011..." Compl. ¶¶ 36, 42, 80, 95, 105.

¹⁴ "Feet dry over Libya" radio transmission made 3/31/14 to (1) Air force, (2) Africa Command, and (3) Special Operations Command: "Any record of transmission from any aircraft during the crisis that stated, 'Feet dry over Libya,' ..." Compl. ¶¶ 34, 50, 80, 90.

interest. 3. Whether the request concerns actual or alleged federal government activity.

I have determined that Accuracy in Media's initial **request meets the third prong of the "urgently needed" test.** However, it does not meet the first and second prongs of the test. The FOIA request to USEUCOM [USAFRICOM] does not meet the standard of the first prong because information related to **the attacks on U.S. facilities in Benghazi, Libya has been debated in numerous stories [by] members of the media.** Thus, it is **no longer a "breaking news story,"** nor is it a **matter of current exigency to the American people.**

Additionally, Accuracy in Media does not meet the standard of the second prong because Accuracy in Media has **not proven that the consequences of delaying a response to the request could compromise a significant recognized interest.** In particular, Accuracy in Media admits that **this topic is of ongoing interest, therefore showing that the requested information will not lose its value.**

(Emphasis supplied)

From the Navy's August 20, 2014 response to plaintiffs' Appeal, denying expedition:

[Y]ou state that expedited processing is necessary based on your perception "that the government will not produce many of the records sought absent a court order to do so." You also state that if your request is processed in the regular course, the records would not be disclosed until after the 2016 Presidential election, at which point the value of the information would be lost.

According to SECNAVINST 5720.42F, **"urgently needed" means that the information has a "particular value that will be lost if not disseminated quickly." The election cited in your appeal is over two years away.** Even assuming your conjecture about the value of the information is true, the requested information will still retain its value under your theory for at least two more years... **Most of this information is over two years old and is not related to breaking news** and is not of the type that will lose value if not disseminated quickly.

(Emphasis supplied)

(2) State Department

FOIA Request. Six items are at issue here.¹⁵ Plaintiffs' request to the State Department seeks records generated during the attack itself, such as video and radio communications,¹⁶ as well as of Secretary Clinton's communications in the immediate aftermath of her being notified.¹⁷ Plaintiffs also seek records of "survivors' accounts of the attack..." Compl. ¶ 116(3).

Plaintiffs' items for records generated prior to the attack are Secretary Clinton's recommendations to support the ousters of Libya's Gaddafi and Syria's al-Assad,¹⁸ and meetings going back to March 2011 between State Department officials and one or more

¹⁵ By February 28, 2015 correspondence to defense counsel, plaintiffs narrowed their FOIA request by omitting eleven items; one to the DOD, six to the State Department, and four to the FBI. Plaintiffs anticipate seeking leave to amend their Complaint, after the Court rules on plaintiffs' motion for a partial stay of the case against the CIA.

¹⁶ "Videos depicting... the Special Mission Compound..." and "radio communications emanating from the Compound's Tactical Operations Center..." Compl. ¶¶ 116(2), 116(4).

¹⁷ "All records of Secretary Clinton's actions and communications for the 24-hour period beginning when first notified that the Benghazi Consulate was under attack. Responsive records include: (1) All records generated by Secretary Clinton, including all emails, memoranda, or notes; (2) Telephone logs or bills or other statements of all of her telephone calls placed or received; and (3) All records generated by anyone about the Secretary's actions and communications." Compl. ¶ 116(6).

¹⁸ "[R]ecords... "regarding Secretary of State Clinton's recommendations regarding U.S. support to those seeking to oust forces loyal to Colonel Muammar Gaddafi and his government." Compl. ¶ 122(1).

Records "regarding Secretary of State Clinton's recommendations to support those seeking to oust forces loyal to the government of Bashar al-Assad." Compl. ¶ 122(2).

nine named individuals.¹⁹

Response. By letters of May 8 and August 25, 2014, the State Department responded to plaintiffs' appeal, denied expedited processing, and similarly advanced the view that the information would not decline in value if not disseminated quickly.²⁰

(3) CIA

FOIA Request. One item is at issue here. Plaintiffs seek disclosure of records of "allegations that Executive Branch personnel deleted... records of CIA activities in Libya in the aftermath of the September 11 and 12, 2012 attacks in Benghazi, Libya, including, but not limited to, records in possession of the CIA Office of Inspector General."²¹

¹⁹ "All notes, memoranda, and correspondence generated between January of 2007 and September 11, 2012, regarding meetings between Christopher Stevens or any other Tripoli Embassy official, and one or more of the following [nine] individuals..." Compl. ¶ 116(11).

²⁰ State Department May 8 and August 25, 2014 denial of Appeal, seeking expedition, in part:

We have considered your appeal of the denial of expeditious processing. Our published regulations regarding expedition, 22 C.F.R. 171.12(b), require a specific showing of a compelling need. Expeditious processing is granted only in the following situations: * * *

- (2) Urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged Federal Government activity and the information is urgently needed in that a particular value of the information would be lost if not disseminated quickly; * * *

Your request and appeal do not meet the established criteria.

²¹ Compl. ¶ 144(1):

Any and all reports, memoranda, correspondence, maps, diagrams, charts, printouts, whether or not recorded electronically, regarding allegations that Executive Branch personnel deleted, destroyed, erased, obliterated, or obscured, records of CIA activities in Libya in the aftermath of the September 11 and 12, 2012 attacks in Benghazi, Libya, including but not limited to records in possession of the CIA Office of Inspector General.

Response. On November 3, 2014, the CIA acknowledged receipt of plaintiffs' request, but has not otherwise responded.

(4) FBI

FOIA Request. Plaintiffs seek from the FBI disclosure of survivors' accounts of the attacks²² including "FBI 302 Interview Reports September 15th or 16th FBI... interviews [of survivors] conducted in Germany,"²³ as well as the video teleconference on the afternoon of the September 16th "between the FBI and other IC officials in Washington" regarding those FBI interviews.²⁴

Response. In response to plaintiffs' administrative appeal positing that "withholdings under FOIA Exemptions (b)(6) and (b)(7)(C) cannot justify the FBI's blanket denial" (*id.* ¶ 129), defendant FBI reversed its initial determination, "remand[ed]... [the] request for a search for responsive records" (*id.* ¶ 132), but has not otherwise responded. *Id.* ¶ 134.

²² "All records generated between September 11, 2012 and the present, by survivors of the September 11th and 12th attacks on the Benghazi mission and the Benghazi CIA Annex, or by any person regarding the survivors' accounts of the attack." Compl. ¶ 126(5).

²³ "September 15th or 16th FBI 302 Interview Reports, and corresponding handwritten notes, of interviews conducted in Germany of United States personnel who had been in the Benghazi mission and the Benghazi CIA annex during the September 11th and 12th attacks on those facilities." Compl. ¶ 126(8).

²⁴ "Records of the video teleconference on the afternoon of the September 16th, 2012, between the FBI and other IC officials in Washington, regarding FBI interviews with U.S. personnel who had been on the compounds in Benghazi during the attack. 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... interviews..." Compl. ¶ 126(9).

II. ARGUMENT FOR EXPEDITION

Plaintiffs' cause is ripe for adjudication, as all applicable administrative remedies have been exhausted, either actually²⁵ or constructively.²⁶

A. Legal Framework

Statute. Section § 552(a)(6)(A) of the FOIA provides in pertinent part that "[e]ach agency, upon any request for records... shall (i) determine within 20 days... after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination...; and (ii) make a determination with respect to any appeal within twenty [working] days... after the receipt of such appeal." A court may allow an agency additional time "[i]f the Government can

²⁵	<u>Administrative Appeals:</u>	<u>Compl.</u>
	March 31, 2014—FBI	¶ 129
	April 18, 2014—State Department	¶ 120
	June 6, 2014—DOD OSD/JS	¶ 99
	June 12, 2014—DOD AFRICOM	¶ 84
	June 16, 2014—DOD Navy	¶ 47
	June 30, 2014—DOD Eur. Com.	¶ 71
	July 1, 2014—State Department	¶ 124
	July 7, 2014—DOD DIA	¶ 113
	July 7, 10, 2014—FBI	¶ 133
	July 25, 2014—CIA	¶ 142
	Sept 29, 2014—DOD OSD/JS	¶ 103

²⁶	<u>Constructive Exhaustion of Administrative Remedies:</u>	
	DOD—Army	Compl. ¶¶ 37-41
	DOD—Air Force	Compl. ¶¶ 50-58 (Exhaustion disputed, Request resubmitted)
	DOD—Marines	Compl. ¶¶ 59-66 (Exhaustion disputed, Request resubmitted)
	DOD—AFRICOM	Compl. ¶¶ 87-89
	DOD—Central Cmd.	Compl. ¶¶ 75-79
	DOD—Sp Ops Cmd.	Compl. ¶¶ 90-94
	DOD—DIA	Compl. ¶¶ 108-109
	CIA	Compl. ¶¶ 144-147

show exceptional circumstances exist and the agency is exercising due diligence in responding to the request..." 5 U.S.C. § 552(a)(6)(C).

5 U.S.C. § 552(a)(4)(B) provides this Court jurisdiction to grant the relief sought: "On complaint, the district court... has jurisdiction to enjoin the agency from withholding agency records.... In such a case the court shall determine the matter *de novo*...."

The Court's review of the denial of expedition is based on the administrative record as it appeared at the time of the agency determination, under 5 U.S.C. § 552(a)(6)(E)(iii). "Agency action to deny... a request for expedited processing... shall be subject to judicial review under paragraph (4), except that the judicial review shall be based on the record before the agency at the time of the determination." *Id.*

Agency Regulations. Agency regulations require expedited treatment if the requester can demonstrate that it meets certain criteria. Under the DOD's regulations, 32 C.F.R. § 286.4(d)(3), *Expedited processing*, the requester must demonstrate a "compelling need," defined as "urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged Federal Government activity." The term "urgently needed" is further defined as "a particular value that will be lost if not disseminated quickly."

The State Department FOIA regulations, 22 C.F.R. § 171.12(b), *Processing requests*, similarly require the requester to demonstrate a "compelling need," also defined as "urgently needed" by a member of the news media, and "concerning actual or alleged Federal Government activity." Here, too, the requester must demonstrate that the "particular value that will be lost if not disseminated quickly." Actual or alleged Federal Government activity is defined as "information concerns some actions taken, contemplated,

or alleged by or about the government of the United States, or one of its components or agencies, including the Congress." 22 C.F.R. § 171.12(b) (2)(ii).

CIA regulations, 32 C.F.R. § 1900.34(c), *Requests for expedited processing*, provides, in part:

Requests for expedited processing will be approved only when a compelling need is established to the satisfaction of the Agency. A requester may make such a request with a certification of "compelling need... set[ting] forth with specificity the relevant facts upon which the requester relies and it appears to the Agency that substantive records relevant to the stated needs may exist and be deemed releasable." A "compelling need" is deemed to exist... [w]hen the request is made by a person primarily engaged in disseminating information and the information is relevant to a subject of public urgency concerning an actual or alleged Federal government activity.

Case law. "The basic purpose of the FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *Moblev v. Central Intelligence Agency et al.*, 2013 WL 452932 at *4 (D.C.D.C), quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242, 98 S. Ct. 2311, 57 L.Ed.2d 159(1978). Courts have repeatedly concluded that timely processing of requests is a critical factor in ensuring such accountability. *See, e.g., American Civil Liberties Union v. Department of Defense et al.*, 339 F. Supp. 2d 501, 504 (S.D.N.Y. 2004), holding, that "the glacial pace at which defendant agencies have been responding to plaintiffs' requests show an indifference to the commands of FOIA, and fails to afford accountability of government that the act requires."

A court may use its equitable powers to require the agency to process documents according to a court-imposed timeline. *See Elec. Privacy Info. v. DOJ*, 416 F. Supp. 2d 30, 38 (D.D.C. 2006), noting "relevant case law establishes that courts have the authority to impose concrete deadlines on agencies that delay the processing of requests meriting

expedition," citing *Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260-61 (D.D.C. 2005). See also, e.g., *Elec. Privacy Info. Ctr. v. FBI*, 933 F. Supp. 2d 42, 50 (D.D.C. 2013), setting deadlines for processing documents following denial of *Open America* stay; *Buc v. Food and Drug Admin.*, 762 F. Supp. 2d 62, 73 (D.D.C. 2011) (same).

The Court denied expedition in *Al-Fayed*, 254 F.3d at 310, for records related to the 1997 deaths of Princess Diana and Dodi Al Fayed in a car accident, because "none of the events at issue is the subject of a currently unfolding story." The requester had failed to show "that there is substantial interest, either on the part of the American public or the media, in this particular aspect of plaintiff's allegations." *Id.* at 311.

B. Benghazi is a Matter of Current Exigency to the American People

Benghazi has been the subject of six congressional investigations (summarized Exhibit 9). The ongoing Select Committee probe is the seventh such probe. Public debate is pervasive, ongoing, and extraordinary. A LexisNexis search for "Benghazi" from September 11, 2012, to February 8, 2015, yields 52,404 newspaper articles, 32,185 news releases, and 14,698 news transcripts. See Declaration of Richard Tappan, attached as Exhibit 8. In 2013, 19,744 newspaper articles were published, 11,594 newswires and press releases, and 5,170 news transcripts. *Id.* In 2014, the saturation decreased slightly, newspaper articles by 3,700, to 15,957, and newswires and press releases by 1,600, to 10,018. *Id.* In the first five weeks of this year, there have been 688 newspaper articles, and 547 newswires. *Id.*

The debate is continuous, and would appear to be intensifying.

C. Argument for Expedition Advanced in Administrative Appeals

Complaint ¶ 4:

[T]he Citizens' Commission on Benghazi, or "CCB," [is] a group of fifteen distinguished former military and Central Intelligence Agency personnel, all of whom are ardent students of the Benghazi tragedy, and all of whom are extremely troubled by it. The CCB is investigating the matter. It functions like a grand jury, including issuing reports. Collectively, CCB members have published over 40 articles on Benghazi. *See, e.g.*, <http://www.aim.org/benghazi/>. Seven of the CCB's 15 members are plaintiffs in this action.

Plaintiffs submit herewith their Exhibits 1, 2, and 3, the collective materials in their July 7, 2014 Administrative Appeal to the DOD's Defense Intelligence Agency; a representative sample of their appeals.²⁷ Arguments proffered therein are summarized in plaintiffs' Complaint, at ¶ 47:

²⁷ Plaintiffs attach only those portions of the administrative record that are cited or otherwise relied upon in this memorandum, avoiding excess material. *See* LCvR 7 (n) *Motions Involving Judicial Review of Administrative Agency Actions*. All information sought in FOIA requests appear in the Complaint, verbatim, and numbered. Plaintiffs filed eleven Administrative Appeals. They attach as Exhibits 1, 2 and 3, their July 7, 2014 Appeal to the DOD's Defense Intelligence Agency, as illustrative. Because the Court's review on certain issues is limited to the administrative record at the time of the agency decision, plaintiffs apprise the Court of variations in that record.

The record on administrative appeal began on March 31, 2014, when plaintiffs appealed the FBI's blanket denial, on privacy grounds. The FBI reversed and remanded the matter, and, so, that appeal is irrelevant. Plaintiffs' next administrative appeal was to the State Department, on April 18. That appeal letter, attached as Exhibit 4, is 17 pages. In the appeals that followed (June 6, 12, 16, 30, July 1, 7, 10, 25), plaintiffs expanded their appeal letter by three pages, to 20 (Exhibit 1), attached their "Interim Report" (Exhibit 2), and attached exhibits corresponding to their appeal letter (Exhibit 3). Beginning with their June 16 appeal, plaintiffs added six exhibits, Nos. 32-38 (five media accounts and a State Department cable). Lastly, on September 29, plaintiffs appealed the CIA's denial (Exhibit 5), as well as the DOD's Office of Secretary of Defense and Joint Staff's withholding of 12 pages in their entirety.

Plaintiffs administratively appealed all DOD denials of expedited processing and statutory fee waiver determinations in the 40-page appeal, plus 38 attached exhibits. Plaintiffs' appeal proves:

- (a) For the first ten days following the attacks, the Administration repeatedly represented that the attack was spontaneous. This was false, and known to be false. Since then, the Administration has advanced several different versions of the facts.
- (b) The Administration baldly claims that it reacted with all due dispatch, even while the publicly-available record would appear to contradict that claim, in several respects. Disclosure of just the DOD records sought will settle the matter.
- (c) Moreover, even if any one of the Administration's narratives were true, it would not solve the mystery of why the government failed to try to rescue its personnel. Congressional probes and reports demonstrate the Administration's negligence, but are silent on the issue of motive for the absence of an immediate response by the DOD.
- (d) The Administration facilitated delivery of weapons to militias known to be affiliates of jihadists, first to bring down Qaddafi, and subsequently to try and oust Assad. Did decision-makers fear that a rescue operation might expose this operation, exposing them to accusations of violating The Arms Export Control Act, or even materially supporting terrorists?
- (e) The circumstances mandate expedited processing. If processed in the regular course, full disclosure will occur only after the November 2016 elections, and the American people would lose the opportunity to meaningfully participate in this debate. The particular value of the information would be lost. This is particularly evident given the high probability that litigation at the appellate level will be necessary.
- (f) On the issue of when and how the State Department responded, disclosure will also reveal whether Secretary Clinton was truthful when she claimed to have sought help from American allies.
- (g) "Here, the public interest in disclosure is enormous... The public has a right to disclosure of records that would answer the many questions posed by the facts of the Benghazi attacks—*before* the next presidential election."

Plaintiffs' 22-page Appeal ("Exhibit 1" or "Appeal") begins, "This letter is an appeal of the Defense Intelligence Agency's June 30, 2014 denial of expedited processing for the captioned May 28 FOIA request." The letter has eleven headings. It begins with the facts of the "Benghazi siege" (Exhibit 1 at 1-5), recounts the "Initial Administration narrative" (*id.* at 6), the government's "Subsequent narratives" (*id.* at 7-8), and observes that "Disclosure will settle issues" (*id.* at 8-9). The Appeal also explores the possibility that CIA "Arms trafficking" played a role in the government's misconduct." *Id.* at 10-12.

The requesters observed in their "Public interest" section (*id.* at 12-14), "Here, the public interest in disclosure is enormous. The Commission expects these FOIA-requested records to reveal answers to questions raised by the Administration's cover-up of the true catalyst for the attack, as well as the issue of [whether and] why no rescue assets were deployed. Americans know almost nothing of the facts of the Benghazi tragedy." *Id.* at 12.

The Appeal's "Search and review fees" section (*id.* at 16-20) argues for entitlement to fee waivers available to "members of the news media" under the FOIA. Plaintiffs cited, *inter alia*, 20 Benghazi articles published by the corporate plaintiff Accuracy in Media, Inc., seven articles written by former Commander-in-Chief of the U.S. Pacific Fleet and regular Washington Times Op Ed contributor plaintiff Admiral James A. Lyons, Jr., 12 articles authored by AIM editor and plaintiff Roger Aronoff, and three written by plaintiff Clare Lopez. *Id.* at 13-14, 17-18, 35. The requesters argued that they are gathering information of potential interest to the general public, that they are using their editorial skills to turn

the raw materials into a distinct work, and that they have concrete plans to distribute that work to its audience. *Id.* at 16. Ultimately, most defendants agreed.²⁸

Under "Congressional oversight" (*id.* at 15), plaintiffs observe that "the six reports by five different Committees... are silent on the issue of motive for the absence of an immediate DOD response." Under "Commission investigation" (*id.* at 15-16), the Appeal excerpts from its attached interim Report on the matter (Exhibit 2), which it had provided on May 20, 2014 to the newly formed, seventh, congressional probe, "[i]n an effort to assist the Select Committee." *Id.* at 15.

Under "Grounds for expedition" (*id.* at 7), the requesters argued, "If the CCB's FOIA requests are processed in the regular course, the records would be disclosed only after the 2016 Presidential election. The particular value of the information will be lost..."

The Appeal substantiates its allegations, quoting verbatim from its attachments (Exhibit 3). For example, the footnote to the allegation that the spontaneous attack

²⁸ See Compl., Count III, News Media Status, ¶¶ 155-56:

Plaintiffs were not afforded News Media Status by defendants FBI, and four DOD components:

- (1) Army
- (2) Marine Corps
- (3) Central Command
- (4) DIA

Plaintiffs were afforded News Media status by defendants CIA, State Department, and six components of the DOD:

- (1) Navy
- (2) Air Force
- (3) Africa Command
- (4) European Command
- (5) Special Operations Command
- (6) Office of the Secretary of Defense and Joint Staff

"narrative was false and misleading, and known to be false," begins, "Evidence of knowledge of the falsity of spontaneous attack account, by Secretary Clinton, the President, Jay Carney, Susan Rice, Victoria Nuland, David Petraeus, Michael Morell." The sentence is followed by verbatim quotes from eight of the Appeal's 38 attached exhibits.²⁹

Following plaintiffs' arguments, at pages 23-36 of their Appeal, are eight endnotes; continuations of footnotes whose length did not permit their appearance on a single page.³⁰ Pages 37-40 of the appeal lists its attached exhibits (Exhibit 3), Bates-numbered.

Plaintiffs also attached to their Appeals their Interim Report on the matter, submitted on May 20, 2014 to Representative Trey Gowdy's U.S. House of Representatives probe, "Investigation and Report on the Terrorist Attack in Benghazi" (discussed *supra*).

²⁹ See Exhibit 1 at 6 quoting attachments (Exhibit 3): Ex 1 Michael Morell testimony, Ex 2 Gregory Hicks testimony, Ext 4 General Ham testimony, Ex 5 White House emails re talking points, Sept 14, 2012, Ex 8 FLASHING RED: A SPECIAL REPORT... Senate Committee on Homeland Security and Governmental Affairs, Ex 9 Sept 12, 14-15, 2012 emails to Susan Rice, Ex 22 "No protest before Benghazi attack, wounded Libyan guard says," McClatchy Newspapers, Sept 13, 2012, Ex 26 State Dept emails Sept 11, 2012, and Ex 27 Emails Victoria Nuland, Patrick Kennedy etc, Sept 11 and 12, 2012.

³⁰ See Exhibit 1 at 23-35:
Endnote 1: Statements advancing spontaneous attack version by Secretary Clinton, the President, Jay Carney, Susan Rice, Victoria Nuland, David Petraeus and Michael Morell
Endnote 2: Evidence of knowledge of the falsity of any spontaneous attack, by Secretary Clinton, the President, Jay Carney, Susan Rice, Victoria Nuland, David Petraeus, Michael Morell
Endnote 8: Summary of records sought from (1) the DoD, (2) CIA, (3) State Department, and (4) FBI
Endnote 25: Intelligence community reports warning of intent to strike US facilities
Endnote 26: Six requests to the State Department for increased protection
Endnote 28: Six Congressional Reports
Endnote 30: CCB FOIA Request to CIA for records re meetings between Chris Stevens or other Tripoli Embassy official and one or more of the nine individuals
Endnote 31: 20 Accuracy in Media articles on Benghazi

That submission, attached as Exhibit 2, consists of a three-page "Executive Summary & Key Findings," three pages of "Questions for the Select Committee on Benghazi," and a 14-page "Benghazi: A Timeline." The Executive Summary, in part:

In the months since our first press conference in September 2013, at which Rep. Frank Wolf (RVA) spoke strongly for the formation of a congressional Select Committee to coordinate and unify the investigation, we have pursued an independent citizens' investigation of what happened regarding Benghazi and Libya in the time before, during, and after the attacks of 11 September 2012.... [A] number of individuals have approached the CCB with information related to events in Libya that has not been made public by any other investigation to date.

* * *

The CCB's findings fall into several general topic categories: 1) official USG involvement in providing material support to known terrorists affiliated with the Libyan al-Qa'eda and Muslim Brotherhood; 2) USG refusal to respond to Libyan dictator Muammar Qaddafi's request for talks about abdication and exile; 3) USG failure to prepare adequately for the likelihood of terror attack against our Benghazi mission by al-Qa'eda-linked militias despite plentiful advance indicators and warning; 4) White House and administration failure to direct an urgent military response to the 11 September 2012 attack on the sovereign territory of our diplomatic mission, or even attempt to come to the aid of besieged American defenders at our Benghazi mission; and 5) a White House-directed campaign of deliberate deception to blame protests about a YouTube video for the Benghazi attacks.

Among the CCB's "Findings:"

- Muammar Qaddafi sought a 72-hr. white flag of truce in March 2011 to discuss abdication and exile. His officials were in direct telephonic communication with AFRICOM headquarters in Stuttgart, Germany, but Gen. Carter Ham was forced to cut off these discussions on orders from the highest levels of the Obama administration.

* * *

- Even though the White House, Intelligence Community, Pentagon and all major combatant commands knew within minutes that the 11 September 2012 attack on our Benghazi mission was a military-style terrorist assault, there was no military response or even an attempted response. U.S. military assets were available both in-country and in multiple locations around the Western Mediterranean and undoubtedly had sprung to the highest level of readiness immediately upon receipt of the attack reports. Yet, over the 7+-hr. duration of the attack, no order was given for a U.S. military response

* * *

- Senior levels of the Obama administration and U.S. Intelligence Community organized a "Zero Footprint" campaign of material support to known affiliates of Libyan al-Qa'eda militias, including direct facilitation of the delivery of weapons to them.

May 20, 2014 submission to US House of Rep Committee, "Investigation and Report on the Terrorist Attack in Benghazi," Exhibit 2 at 1-2.

Even after tens of thousands of news media reports, and six Congressional hearings (listed in attached Exhibit 9), whether the government timely sought to rescue State Department and CIA personnel remains disputed. Plaintiffs' Complaint alleges, "thirteen hours after the siege began, no U.S. assets were even airborne."

D. Value of the Information will Diminish Absent Expedition

All defendants have flouted the prompt disclosure command of the FOIA. Plaintiff requested 19 items from the DOD (13 items submitted March 31, 2014, two on May 28, three on April 7, and two on October 1). Six items are at issue from the State Department, three items from the FBI, and one to the CIA. To date, defendants have provided no records, and only one substantive response, from the Office of Secretary of Defense, in its September 19 letter, denying 12 pages of records responsive to plaintiffs' requests for maps depicting available assets.

In light of defendants' record, plaintiffs believe they should consider the time for any appeal from this Court's orders when estimating when they will obtain the information sought under the FOIA. Thus, their Appeal avers that "[l]itigation, at both the trial and appellate levels, will be necessary." Exhibit 1 at 7.

(1) Defendants' proposed production schedule

Pursuant to the Court's Order dated January 26, 2014, Dkt. No. 10, requiring counsel to address items subjects listed in LCvR 16.3(c) in their Joint Meet and Confer Statement, the parties have conferred, and defendants have proposed a schedule for the search, review, and production of non-exempt documents responsive to plaintiffs' requests. Defendants DOD and State department have proposed rolling productions, at eight-week intervals, beginning on June 3, 2015. Defendant FBI proposes that it file a motion for entry of an order permitting it to move for summary judgment based on the applicability of 5 U.S.C. § 552(b)(7)(A) to certain records, and, if that motion is denied, to produce responsive records eighteen months from the date that the Court denies the motion. Defendant CIA estimates that it will complete production of documents in June of 2016.

As set forth below, defendants' proposals are not satisfactory.

(2) Department of Defense

European Command reasoned that there is "ongoing interest" in the information, and that it "will not [soon] lose its value." We agree. The value of the information will increase with time, and will likely reach its apex in November of 2016. By contrast, the value of "breaking news" wanes after publication. "Breaking news" is an example of "urgently needed," not its definition.

Plaintiffs believe that disclosure will prove that the government did not order available assets to respond, as claimed. To date, the publicly-available record reveals quite the opposite. The closest assets were ordered *not* to respond, as plaintiffs' Appeal observes. Exhibit 1 at 10:

At the May 8, 2013 Hearing before the House Oversight and Government Reform Committee, Congressman Chaffetz asked Gregory Hicks, "How did the [Tripoli] personnel react to being told to stand down?" Hicks responded, "They were furious. I can only say—well, I will quote Lieutenant Colonel Gibson. He said, "This is the first time in my career that a diplomat has more balls than somebody in the military."
(Footnotes omitted)

In addition to DOD forces in Tripoli, the Benghazi Annex CIA Quick Reaction Force was repeatedly ordered not to respond, as three of those responders recited in their book, "*13 Hours*:"

Standing outside the Mercedes, Tig called out, "Hey, we gotta go now! We're losing the initiative!" "No, stand down, you need to wait," Bob the base chief yelled back. "We need to come up with a plan," the Team Leader repeated.

* * *

In the meantime, Tanto told the bosses, he and the other operators were overdue to move out. The CIA chief looked at Tanto, then at the Team Leader, then back to Tanto. Tanto felt as though the chief was looking right through him. "No," Bob said, "hold up. We're going to have the local militia handle it." Tanto couldn't believe his ears. He turned to the Team Leader: "Hey, we need to go." "No," the T.L. said, "we need to wait. The chief is trying to coordinate with 17 Feb and let them handle it." "What do you mean, 'Let them handle it?'" Tanto demanded.

* * *

"We're being attacked!" one yelled, his voice tight with stress. "There's approximately twenty to thirty armed men, with AKs firing. We're being attacked! We need help! We need help now!" Adrenaline surged through the operators' veins, but again they were told to wait. They were used to following orders, and they knew that insubordination could mean their jobs or worse. But a shared thought took hold in both vehicles: If they weren't given permission to move out soon, they'd take matters into their own hands.

13 Hours: The Inside Account of What Really Happened, at 97-98, 102.³¹

³¹ *13 Hours*, NY, Hachette Book Group, by "Mitchell Zuckoff with Members of the Annex Security Team." The book was released in September of 2014, and, so, is not a part of the administrative record.

Plaintiffs seek disclosure of records revealing what orders were given to what assets, and when. They have the expertise to assess the sufficiency the DOD's response.³²

The public also deserves to learn, in the shorter term, whether Qaddafi offered to abdicate, and whether the administration ignored the offer.

(3) State Department, CIA, FBI

State Department. Here, the Secretary of State supported the violent overthrow of the governments of two countries, the State Department presence in Benghazi facilitated a CIA gun-running operation in support of the toppling of both governments, and, in the aftermath, tens of thousands have died, with no end in sight. On these facts there is no real

³² Plaintiffs include experts in the field. *E.g.*, Captain Larry W. Bailey, USN, (Ret.), 27-year US Navy SEAL, led the first East Coast SEAL platoon into combat Vietnam, served in the Dominican Republic, Philippines, Panama, Bolivia, and Scotland, three-year command of SEAL training Naval Special Warfare Center. Compl. ¶ 5; Lieutenant Colonel Kenneth Benway, USA, (Ret.), 27-year service includes Vietnam, three Special Forces Groups, Special Operations Command in Europe, leadership assignments in both Germany and Italy, exchange program officer in Italy, and JFK Special Warfare Center and School, beginning 1993 served as senior special operations analyst for contract support of Army Special Operations community. *Id.* ¶ 7; Colonel Richard F. Brauer Jr., USAF, (Ret), amassed 5,200 hours of worldwide flying over 26-year service, Master Navigator, tours in Vietnam, Europe, Central and South America, and in country flying instructor for Royal Australian Air Force. Following Pentagon tour, selected to be the 12th Commandant of the United States Air Force Special Operations School, where he served until 1991 retirement, inducted into the Air Commando Hall of Fame. *Id.* ¶ 8; Admiral James A. Lyons, Jr., USN, (Ret), former four-star admiral, Commander-in-Chief of the U.S. Pacific Fleet, father of the Navy Seal Red Cell Program, Senior US Military Representative to the UN, Deputy Chief of Naval Operations principal advisor to the Joint Chiefs of Staff, commands include the US Second Fleet, NATO Striking Fleet, Seventh Fleet Logistic Force, and ship commands. *Id.* ¶ 10.

dispute. Criticism of administration policy regarding Libya is pervasive,³³ a majority of the public is dissatisfied with the government's handling of Benghazi matter,³⁴ and a majority distrust the administration's pronouncements in the aftermath of the attacks.³⁵

Plaintiffs seek records of Secretary Clinton's recommendations to support the ousters of Libya's Gaddafi, and Syria's al-Assad—a goal supported by CIA arms trafficking operations in Benghazi.

"U.S. leadership decided to facilitate the provision of weapons to jihadist militias known to be affiliated with al-Qa'eda and the Muslim Brotherhood in order to bring down a brutal dictator,' as Commission member [and plaintiff] Clare Lopez observed in her April 22, 2014 AIM column, '*Material Support to Terrorism: The Case of Libya*.'" *Id.* at 13. The future ambassador to Libya, Chris Stevens, was sent to Benghazi as a Special Envoy from

³³ See, e.g., Washington Post Editorial Board, "What Obama botched in Libya," May 5, 2014:

The Obama administration and its NATO allies bear responsibility for this mess because, having intervened to help rebels overthrow Gaddafi, they then swiftly exited without making a serious effort to help Libyans establish security and build a new political order. Congress might usefully probe why the administration allowed a country in which it initiated military operations to slide into chaos.

³⁴ See CNN/ORC International public poll, May 29-June 1 2014, <http://i2.cdn.turner.com/cnn/2014/images/06/16/rel6k.pdf>:

As you may know, in 2012, terrorists attacked the U.S. consulate in a town in Libya named Benghazi and killed the U.S. ambassador to that country and three other U.S. citizens. Based on what you have read or heard, are you satisfied or dissatisfied with the way the Obama administration has handled this matter?
Satisfied 37% Dissatisfied 60% No Opinion 4%

³⁵ *Id.*: When it comes to providing information about the Benghazi attack, do you think the Obama administration has generally been honest or dishonest?
Honest 37% Dishonest 61% No Opinion 2%

the Department of State to facilitate delivery of weapons to rebel militias throughout the 2011 rebellion—even though it was well known to U.S. officials that terror groups were among those rebel forces. After Gadhafi was deposed, Stevens was appointed U.S. ambassador to Libya, whereupon the flow of weapons went from Libya to Syria, to arm the rebels fighting Assad.

Plaintiffs also seek disclosure of records "generated between January of 2007 and September 11, 2012, regarding meetings between Christopher Stevens or any other Tripoli Embassy official" and nine named individuals (Compl. ¶ 116), including Ahmed Abu Khattala, who was charged with participation in the attacks in a criminal complaint that was filed under seal on July 15, 2013. It was unsealed on June 17, 2014, four months after plaintiffs made this FOIA request to the State Department. Aside from Khatallah, plaintiffs also seek records of State Department meetings with Abdelhakim Belhadj, "commander of the Libyan Islamic Fighting Group" militia, and "Libyan delegation leader to the Syrian Free Army in late 2011." *Id.* ¶ 116(11). This individual was "almost certainly a key contact of the U.S. liaison to the Libyan opposition, Christopher Stevens." Appeal at 14, quoting "*Benghazi: The Set-Up and the Cover-Up*," Oct 30, 2012, C. Lopez.

The FOIA request names the other seven individuals, and identifies them, *inter alia*, as (1) Chairman of the Libyan National Transitional Council until August of 2012, (2) the interim Prime Minister of Libya, (3) the head of al-Qa'eda in Libya, (4) commander of the Al-Qa'eda-linked al-Sahati Brigade during the revolution and Benghazi Military Council commander afterwards, (5) one of the founders of the Libyan Muslim Brotherhood, (6) an individual who led the effort to gain release of jihadi detainees from Libyan jails, and (7) a suspected leader of the Benghazi attacks. *Id.*

In January of 2013, Secretary Clinton testified that she "directed our response from the State Department, stayed in close contact with officials from across our government and the Libyan government."³⁶ Plaintiffs seek disclosure of State Department's contemporaneous records that would corroborate this account,³⁷ including State's request that Marines "don civilian clothes" before responding, so as not to "unduly alarm or inflame Libyan observers."³⁸

³⁶ Exhibit 4, April 18, 2014 Administrative Appeal to State Department, at 15, quoting Secretary Clinton January 23, 2013 Senate testimony. *See also* Exhibit 1 (same), attaching Senate testimony Exhibit 3 at 8-13.

³⁷ *See* Compl. ¶ 116 (6):

All records of Secretary Clinton's actions and communications for the 24-hour period beginning when first notified that the Benghazi Consulate was under attack. Responsive records include: (1) All records generated by Secretary Clinton, including all emails, memoranda, or notes; (2) Telephone logs or bills or other statements of all of her telephone calls placed or received; and (3) All records generated by anyone about the Secretary's actions and communications.

³⁸ February 10, 2014, MAJORITY INTERIM REPORT: BENGHAZI INVESTIGATION UPDATE, Republican Majority of House Armed Services Committee, February 10, 2014, at 22:

As far as the Marines are concerned, according to General Dempsey, once one FAST platoon was underway it also stopped at a "forward-basing location" so that the Marines could don civilian clothes. This was apparently done upon the request of the Libyan government, conveyed by the Department of State. Presumably, warfighters changed out of uniform because of concerns that the arrival of combat-ready troops might unduly alarm or inflame Libyan observers.

(Footnote omitted)

Cf. February 7, 2013 testimony of Leon Panetta, House Armed Services Committee:

Senator Lindsey Graham: My question is, did anybody leave any base anywhere to go to the aid of the people under attack in Benghazi, Libya, before the attack ended?

Secretary Leon Panetta: No, because the attack ended before they could get off the ground.

Here, the parties dispute whether political decision-makers prevented the DOD from immediately responding. Relatedly, the parties dispute whether the Secretary of State was less than candid about the facts, and her role in them. Plaintiffs seek expedited processing because "[d]elays in processing FOIA requests are endemic at State." Exhibit 4, State Department Appeal, April 18, 2014, at 14.

CIA. The single item at issue here is for disclosure of records of "allegations that Executive Branch personnel deleted... records of CIA activities in Libya in the aftermath of the September 11 and 12, 2012 attacks... including... records in possession of the CIA Office of Inspector General."³⁹ This item is "subject to search and review" under the CIA Act, as plaintiffs observed in their September 29, 2014 Administrative Appeal (Exhibit 5 at 3):

Lastly, you wrote that "[w]ith regard to those portions of your request pertaining to the CIA annex and the remaining items of your request, the CIA Information Act, 50 U.S.C. § 431, as amended, exempts CIA operational files from the search, review, publication, and disclosure requirements of the FOIA." While this statement is accurate, that statute, "Operational files of the Central Intelligence Agency," also contains exceptions. *See, e.g.*, 50 U.S.C. § 431(c)(3):

[E]xempted operational files shall continue to be subject to search and review for information concerning *** the specific subject matter of an investigation by the congressional intelligence committees, the Intelligence Oversight Board, the Department of Justice, the Office of General Counsel of the Central Intelligence Agency, the Office of Inspector General of the Central Intelligence Agency, or the Office of the Director of National Intelligence for any impropriety, or violation of law, Executive order, or Presidential directive, in the conduct of an intelligence activity.

³⁹ Compl. ¶ 144(1):

Any and all reports, memoranda, correspondence, maps, diagrams, charts, printouts, whether or not recorded electronically, regarding allegations that Executive Branch personnel deleted, destroyed, erased, obliterated, or obscured, records of CIA activities in Libya in the aftermath of the September 11 and 12, 2012 attacks in Benghazi, Libya, including but not limited to records in possession of the CIA Office of Inspector General.

We believe that much of the information requested falls within one or more exceptions under 50 U.S.C. § 431.

See also "Benghazi Heroes Debunk House Intel Report as 'Full of Inaccuracies' with Firsthand Account," Breitbart.com, December 2, 2014: "[Kris] Paronto knows specifically of a CIA employee that was poorly treated while in Tripoli due to disagreeing with the story that was being fabricated by the CIA. The CIA employee also filed a complaint with the CIA Inspector General..."

The public also deserves to learn, in the shorter term, whether the CIA sought to cover up its conduct in Libya, and, if so, what it sought to obscure.

FBI. Plaintiffs seek from the DOJ records of survivors' "FBI 302 Interview Reports," as well as the September 16 video teleconference "between the FBI and other IC officials in Washington," regarding those survivor interviews. Upon the public testimony of members of the CIA-contracted quick-reaction-force in Benghazi, including Kris Paronto, John Tiegen, and Mark Geist, the public's interest in the September 16, FBI 302 interview reports will heighten: Do these interview reports use "the exact words 'stand down' [that] were used by the [CIA] Chief of Base 'Bob' to Tiegen." *See* Breitbart.com, "Benghazi... Firsthand Account." *Id.* (Plaintiffs believe that this information "could [not] reasonably be expected to interfere with enforcement proceedings" under FOIA Exemption 7(A), at least to the extent that FBI interview reports correspond to responders who authored a book about their accounts.)

E. Plaintiffs seek Information on Breaking News

Disclosure of records of Secretary Clinton's recommendations to support the ousters of Libya's Gaddafi, in lieu of accepting his offer to abdicate (a goal that the CIA

facilitated), is "breaking news." In their first of a three-part series, on January 28, 2014, the Washington Times published, "Joint Chiefs, key lawmaker held own talks with Moammar Gadhafi regime," by Jeffrey Shapiro and Kelly Riddell. The piece links to surreptitiously recorded tapes of telephone conversations between then Rep. Dennis J. Kucinich and Col. Moammar Gadhafi's son, heir apparent and top Libyan leader. Gadhafi's son "told American officials in the secret conversations that he was worried Mrs. Clinton was using false pretenses to justify unseating his father and insisted that the regime had no intention of harming a mass of civilians." He "also warned that many of the U.S.-supported armed rebels were 'not freedom fighters' but rather jihadists whom he described as 'gangsters and terrorists.'" The piece also reports:

Retired Navy Rear Adm. Charles Kubic, who was acting as a business consultant in Libya at the time, said he was approached by senior Libyan military leaders to propose the truce. He took the plan to Lt. Col. Brian Linvill, the U.S. AFRICOM point of contact for Libya. Col. Linvill passed the proposal to Gen. Ham, who agreed to participate.

* * *

"The Libyans would stop all combat operations and withdraw all military forces to the outskirts of the cities and assume a defensive posture. Then to insure the credibility with the international community, the Libyans would accept recipients from the African Union to make sure the truce was honored," Mr. Kubic said, describing the offers.

* * *

"[Gadhafi] came back and said he was willing to step down and permit a transition government, but he had two conditions," Mr. Kubic said. "First was to insure there was a military force left over after he left Libya capable to go after al Qaeda. Secondly, he wanted to have the sanctions against him and his family and those loyal to him lifted and free passage. At that point in time, everybody thought that was reasonable."

But not the State Department.

Gen. Ham was ordered to stand down two days after the negotiation began, Mr. Kubic said. The orders were given at the behest of the State Department, according to those familiar with the plan in the Pentagon.

* * *

"Everything I am getting from the State Department is that they do not care about being part of this. Secretary Clinton does not want to negotiate at all," the Pentagon intelligence asset told Seif Gadhafi and his adviser on the recordings.

* * *

Shutting the Gadhafis out of the conversation allowed Mrs. Clinton to pursue a solitary point of view, said a senior Pentagon official directly involved with the intervention.

* * *

"The decision to invade [Libya] had already been made, so everything coming out of the State Department at that time was to reinforce that decision," the official explained, speaking only on the condition of anonymity for fear of retribution.

The piece concludes, "[i]f Mrs. Clinton runs for president next year, her style of leadership as it relates to foreign policy will be viewed through the one war that she personally championed as Secretary of State. Among the key questions every candidate faces is how they will assess U.S. intelligence and solicit the advice of the military leadership." *Id.*

Retired Navy Rear Admiral Charles Kubic recounted that "General Ham was ordered to stand down two days after the negotiation began." *Id.* See also Exhibit 6, Admiral Charles Kubic, USN, (Ret.), April, 2014 CCB Press Roundtable, transcript. Plaintiffs seek disclosure from the African Command the referenced records of Gaddafi's expressed interest in a truce and abdication, and this "stand down" order. Compl. ¶ 87(2):

Records of all communications generated in March of 2011 regarding Colonel Muammar Gaddafi's expressed interest in a truce and possible abdication and exile out of Libya, by or to:

- (a) Head of Qaddafi's personal security General Abdulqader Yusef Dibri;
- (b) Rear Admiral (ret.) Chuck Kubic;
- (c) AFRICOM personnel, including but not limited to:
 - (i) General Carter Ham; and
 - (ii) Lieutenant Commander Brian Linvill; and
- (d) The CIA.

And plaintiffs seek, from the State Department, records of the Secretary of State's recommendations to support those seeking to oust forces loyal to Gaddafi.⁴⁰ On February 3, 2015, the Washington Times followed with "Hillary Clinton Libya tapes set for House Benghazi committee review:"

The chairman of a special House committee created to investigate the 2012 Benghazi tragedy on Monday instructed his staff to review secretly recorded tapes and intelligence reports that detail Hillary Rodham Clinton's role in advocating and executing the war in Libya, opening the door for a possible expansion of his probe. Rep. Trey Gowdy's decision to seek a review of the materials, first highlighted in a series of Washington Times stories last week, carries consequences for the 2016 election in which Mrs. Clinton is expected to seek the presidency.

* * *

In reaction to the Times final installment of the series on Monday, which revealed secret Libyan intelligence reports that linked NATO supported rebels to al-Qaeda, Rep. Louie Gohmert said the news was not a complete surprise. "During the Obama-Clinton hunger to enter a bombing war in Libya, some of us knew the rebels included al-Qaeda but we did not know the full extent of their involvement," he said. "So we pleaded for U.S. restraint. With bombing in their heart and radical Islamists whispering in their ears, the Obama-Clinton team would not even entertain offers of a ceasefire and peaceful transition of power. While acting under U.N. approval to prevent atrocities, it appears the Obama-Clinton bombing barrages caused atrocities that sent a country into chaos which is continuing today."

The Times series about the Libyan intervention was also picked up across the Atlantic. Britain's Daily Mail described the story as "stunning" declaring that, "[Sec.] Clinton will face tough questions about her march to war against Moammar Gadhafi if she runs for president."

Mr. Poe said that he believes the series will prompt new questions, especially with the current state of military and political affairs in Libya. "As far as I'm concerned Benghazi is not going away," Mr. Poe said. "That the U.S. would give in and arm rebels and criminals to overthrow Col. Gadhafi, and then mislead the world on that is shameful. We now have chaos in Libya... it's the

⁴⁰ Compl. ¶ 122(1):

Records generated from August 2009, through October of 2011, regarding Secretary of State Clinton's recommendations regarding U.S. support to those seeking to oust forces loyal to Colonel Muammar Gaddafi and his government.

U.S.' undoing of a country. Gadhafi was no saint, but what we have now are gangsters and jihadists running the country. We have chaos because the US intervened in a deceitful way.

Some articles following up on this story use the term, "breaking" in their titles. *See, e.g.* "Breaking: Washington Times Bombshell Confirm Clinton Instrumental in Libya Decisions," Western Free Press, January 31, 2015.

III. MOTION FOR PARTIAL STAY OF ACTION AGAINST CIA

A. FOIA Request to CIA Explores Motive for Stand Down Order

Most of plaintiffs' FOIA requests to CIA explore the question raised by the decision not to order an immediate military response, why? Plaintiffs' Appeal explores the question. *See Exhibit 1* at 7. Plaintiff Clare Lopez' article, "*Benghazi: The Set-Up and the Cover-Up*," published on October 30, 2012, just two months after the attacks, summarizes CIA arms-related activities in Benghazi, and the President's and Christopher Stevens' connections to them.⁴¹

⁴¹ *Exhibit 1* Appeal at 14: "*Benghazi: The Set-Up and the Cover-Up*," C. Lopez, *Pundicity.com*:

According to media reporting, Benghazi was staffed by CIA operatives whose job may have been not just to secure and destroy dangerous weapons (like RPGs and SAMs) looted from former Libyan dictator Muammar Qaddafi's stockpiles during and after the 2011 revolution, but also perhaps to facilitate their onward shipment to the Al-Qaeda and Muslim Brotherhood-dominated Syrian opposition. * * * President Barack Obama signed an intelligence finding sometime in early 2012 that authorized U.S. support for the Syrian rebels and by mid-June 2012, CIA operatives reportedly were on the Turkish-Syrian border helping to steer weapons deliveries to selected Syrian rebel groups. According to an Oct. 14, 2012 *New York Times* article, most of those arms were going to 'hard-line Islamic jihadists.' One of those *jihadis* may well be Abdelhakim Belhadj, former leader of the Al-Qa'eda-linked Libyan Islamic Fighting Group (LIFG) and head of the Tripoli Military Council after Qaddafi's ouster. During the 2011 revolt in Libya, Belhadj was almost certainly a key contact of the U.S. liaison to the Libyan opposition, Christopher Stevens.

In addition to press reports, the Appeal includes the February 2014 UN Security Council "Final report of the Panel of Experts... concerning Libya," reporting that, "[over] the past three years, Libya has become a primary source of illicit weapons... [to] the Syrian Arab Republic via Lebanon and Turkey..." Exhibit 1 at 11; Exhibit 3 at 88-90.

B. Right to Disclosure of Otherwise Exempted Information upon "Official Disclosure"

"[W]hen information has been 'officially acknowledged,' its disclosure may be compelled even over an agency's otherwise valid exemption claim." *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990). In *Wolf v. CIA*, 473 F.3d 370 (2007), this Circuit addressed the official acknowledgment doctrine in the *Glomar* context, holding that the CIA had waived its right to issue a *Glomar* response because a former CIA director had publicly acknowledged the existence of certain CIA records in congressional testimony. The court remanded the case to the district court to "determine whether the contents—as distinguished from the existence—of the officially acknowledged records" were exempt from disclosure. *Id.* at 380.

Here, the CIA has "officially acknowledged," to Congress and the public, a great deal of otherwise exempt information. For example, pages one through five of the Senate Select Intelligence Committee's January 5, 2014 Report, "Review of the Terrorist Attacks on U.S. Facilities in Benghazi...", attached hereto as Exhibit 7, reveals the CIA's official acknowledgment that it ran a facility in Benghazi, that its Chief of Base was on site during the attacks, that the CIA Quick Reaction Force was frustrated by its inability to immediately respond, and that the QRF departed without the CIA COB's permission. The CIA also acknowledged that the COB denied delaying the QRF's departure, and that the deputy COB similarly related that the CIA had "launched [the] QRF as soon as possible." The officially

disclosed sources of the information include the COB's September 19, 2012 CIA "Memorandum for the Record," a September 23, 2012 internal CIA email, a November 13, 2012 National Counterterrorist Center/FBI Report, a June 27, 2013 teleconference between CIA Benghazi survivors and the Committee, and a December 20, 2012 Committee interview with the COB. (These operational files, the subject "of an investigation by the congressional intelligence committee," are subject to search an review, under the CIA Act, 50 U.S.C. § 431(c)(3).)

"[A] plaintiff asserting a claim of prior disclosure must bear the initial burden of pointing to specific information in the public domain that appears to duplicate that being withheld." *Afshar v. Dep't of State*, 702 F.2d 1125, 1130 (D.C. Cir. 1983). Such information in the first five pages of the Senate Select Intelligence Committee's January 2014 Report:

Source	Quote	Officially acknowledged Information	Page
Jan 15, 2014 Report, US Senate Select Intelligence Committee, "Review of the Terrorist Attacks on U.S. Facilities in Benghazi..."	Committee reviewed... [f]our on-the record Member and staff meetings with... former CIA Chief of Base in Benghazi who was at the Annex on the night of the attacks	The CIA ran a facility in Benghazi, and its COB was on site during the attacks.	2
Jan 15, 2014 Report, US Senate Select Intelligence Committee, "Review of the Terrorist Attacks on U.S. Facilities in Benghazi..."	Diplomatic Security... alerted the CIA personnel stationed at the nearby CIA Annex <u>Footnote 7</u> : NCTC and FBI, <i>The 11-12 September Attacks on US Facilities in Benghazi</i> , November 13, 2012, p. 3.	Mission's Diplomatic Security alerted the CIA personnel stationed at nearby CIA Annex. On November 13, the FBI and National Counterterrorism Center produced a Report on the Attacks.	3-4
Jan 15, 2014 Report, US Senate Select Intelligence Committee, "Review of the Terrorist Attacks on U.S. Facilities in Benghazi..."	Although some members of the security team expressed frustration that they were unable to respond more quickly to the Mission compound... <u>Footnote 12</u> : SSCI Memorandum for the Record, "Staff Briefing and Secure Video Teleconference (SVTC) with CIA Benghazi Survivors," June 27, 2013.	A June 23, 2013 Video Teleconference with CIA survivors revealed team frustration by inability to immediately respond.	5

<p>Jan 15, 2014 Report, US Senate Select Intelligence Committee, "Review of the Terrorist Attacks on U.S. Facilities in Benghazi..."</p>	<p>Committee found no evidence of intentional delay or obstruction by the Chief of Base or any other party. <u>Footnote 13:</u> According to informal notes obtained from the CIA, the security team left for the Annex [sic] without the formal approval of the Chief of Base, see attachments to e-mail from CIA staff [redacted] to CIA staff [redacted] September 23, 2012. However, a Memorandum for the Record prepared by the Deputy Chief of Base specifically states that the Chief "authorized the move" and the Chief told the Committee: "We launched QRF [Quick Reaction Force] as soon as possible down to the State [Department] compound." Memorandum for the Record, "Events of 11-12 SEP 2012 at Benghazi Base, Libya," September 19, 2012, p. 1; and SSCI Transcript, <i>Member and Staff Interview of former Chief of Base</i>, December 20, 2012, p. 3.</p>	<p>The CIA told the Committee that rescuers departed without the CIA COB's permission, and an internal CIA email contains the same information.</p> <p>The COB denied this account in his September 19, 2012 "Memorandum for the Record," as did the Deputy COB to the Committee on December 20, 2012—that the COB "launched QRF as soon as possible."</p>	<p>5</p>
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C. CIA will Officially Disclose Exempt Information in Probe by House Select Committee to Investigate Benghazi

Televised committee hearings, backed by small staffs with many other responsibilities, with questioning in five-minute bursts, is not suited to the sustained and focused effort necessary to test a witness's story and to pursue leads, even for members who wish to conduct a serious inquiry. The rules of Congress permit the appointment of a select committee to investigate a particular topic when circumstances warrant—a committee staffed for the job and with no other duties.

Beginning in September of 2013, at the CCB's first press conference, which included Rep. Frank Wolf speaking strongly for the formation of the Select Committee, plaintiffs were among those urging Speaker of the House Boehner to call for a vote on the Select Committee. Ultimately, widespread recognition that Congress has not yet ferreted out the

truth, even after 13 hearings and six Committee Reports on various aspects of the matter, resulted in the May 2014 establishment of the U.S. House of Representatives Select Committee probe, "Investigation and Report on the Terrorist Attack in Benghazi." It has a broad mandate.

Under House Resolution 567, the Select Committee is "directed to conduct a full and complete investigation and study and issue a final report of its findings to the House regarding all... activities that contributed to the attacks... including any other relevant issues relating to the attacks...." The Committee will issue a final report "addressing the matters," which "may contain a classified annex."⁴²

Select Committee Chairman Representative Trey Gowdy (R-South Carolina) told Fox News' Greta Van Susteren on May 6 that he "want[s] to see every single solitary relevant

⁴² H. Res. 36—113th Congress (2013-2014) INVESTIGATION AND REPORT ON THE EVENTS SURROUNDING THE 2012 TERRORIST ATTACK IN BENGHAZI:

- (a) The Select Committee is authorized and directed to conduct a full and complete investigation and study and issue a final report of its findings to the House regarding—
 - (1) all policies, decisions, and activities that contributed to the attacks...
 - * * *
 - (3) internal and public executive branch communications about the attacks on United States facilities in Benghazi, Libya, on September 11, 2012;
 - * * *
 - (9) any other relevant issues relating to the attacks, the response to the attacks, or the investigation by the House of Representatives into the attacks.
- (b) In addition to any final report addressing the matters in subsection (a), the Select Committee may issue such interim reports as it deems necessary.
- (c) Any report issued by the Select Committee may contain a classified annex.

material document," and on November 9 stated on Van Susteren's show, "[t]here's no way we can get to the bottom of Benghazi without [then-CIA Director] David Petraeus." He has similarly declared his commitment to reporting the unvarnished truth in press releases⁴³ and Congressional Hearings.⁴⁴

D. Adjudication of Disclosure of CIA Information Not Ripe until House Select Committee Issues Report

The CIA Information Act, 50 U.S.C. 431, exempts from the search, review, and disclosure provisions of the FOIA all "operational records" of the CIA. Section (b)(1) of the Act defines operational records as, *inter alia*, those that "document the conduct of foreign intelligence or counterintelligence operations or intelligence." Plaintiffs seek from the CIA disclosure of operational records.

They seek "all-inclusive" production of "records of whatsoever nature regarding... the Mission and the CIA Annex... includ[ing] those that disclose... all weapons brought into

⁴³ September 5, 2014 Press Release:

We welcome the opportunity, and expect, to talk to personnel who were on the ground in Benghazi, their superiors, and anyone with relevant information related to the Benghazi terrorist attack. There are still facts to learn about Benghazi and information that needs to be explained in greater detail to the American people. And this Committee will do just that.

⁴⁴ Opening remarks at Benghazi Select Committee Hearing 2:

We will have a hearings in January, February, March and until there is a full understanding of what happened in Benghazi. That means access all documents and all witnesses. We are going to answer the questions surrounding the attacks in Benghazi.

See also, e.g., "State Dept. ready to meet with special committee on Benghazi," Assoc. Press, Jan 27, 2015: "The chairman of a special House committee investigating the deadly 2012 attacks in Benghazi, Libya, promised Tuesday to 'ratchet up' an inquiry he said is being hobbled by resistance from the Obama administration."

the Annex... Manpads... [the] intended destinations and recipients of all such weaponry, including... [t]ransportation of arms out of Libya..." Compl. ¶ 136(1). Other exempt records sought are those provided to congress's "Gang of Eight," required by law to authorize clandestine support⁴⁵ to rebels in Libya and Syria ("intelligence community records, shared with members of Congress, regarding collection, storage, transportation of arms and equipment in Libya," as well "for CIA transport of arms to Syrian rebel forces"⁴⁶).

Regarding records generated during the attacks, plaintiffs seek from the CIA video and radio communications of the attack itself,⁴⁷ contemporaneous communications by top two CIA officials,⁴⁸ the September 16 "video teleconference... between the FBI and other IC

⁴⁵ See "Sensitive Covert Action Notifications: Oversight Options for Congress," M. Erwin, Congressional Research Serv., April 10, 2013:

If... the President determines that it is essential to limit access to a covert action finding in order to "meet extraordinary circumstances affecting vital interests of the United States," ... the President may limit such notification to the "Gang of Eight"... comprised of the chairmen and ranking Members of the two congressional intelligence committees and the House and Senate majority and minority leadership. In addition... the President must... provide a statement setting out the reasons for limiting notification... to the Gang of Eight... [and provide] the two intelligence committee chairmen, both Gang of Eight Members... signed copies of the covert action finding in question.

⁴⁶ Compl. ¶ 136(12): "For the period of February 15th, 2011, through December 31st, 2012, all DOD and CIA or other intelligence community records, shared with members of Congress, regarding collection, storage, transportation of arms and equipment in Libya." Compl. ¶ 136 (13): "For the period of February 15th, 2011, through December 31st, 2012, all DOD and CIA or other intelligence community records of Congressional approval for CIA transport of arms to Syrian rebel forces."

⁴⁷ Compl. ¶ 136(2): "Any and all videos depicting the... Mission... and the CIA Annex" during the attacks. Compl. ¶ 136(4): "[R]adio communications emanating from the Compound's Tactical Operations Center" during the attacks.

⁴⁸ Compl. ¶ 136(6): "[R]ecords of Deputy CIA Director Michael Morell actions [and CIA Director David Petraeus' (id. ¶ 136 (5))] actions and communications for the 24-hour period beginning when first notified... [such as] emails... telephone..."

officials... regarding FBI interviews [of survivors]" (*id.* ¶ 136(15)), and other records of survivors' accounts of the attack. *Id.* ¶ 136(3). Plaintiffs' items for records generated prior to the attack are for meetings going back to March 2011 between State Department officials and one or more nine named individuals,⁴⁹ and Ambassador Stevens' meetings on September 11. *Id.* ¶ 136(9). Lastly, this February 24, 2014 FOIA request seeks release of "Non-Disclosure Agreements signed by survivors..." *Id.* ¶ 136(16).

Here, most information responsive to the twelve items at issue regard information that may be exempt under FOIA Exemptions (b)(1)⁵⁰ or (b)(3).⁵¹

When House Select Committee issues its Report, the record of "official acknowledgement" in response to congressional inquiries will be complete, whereupon plaintiffs will conclude their cumulative review of reports and transcripts in that public

⁴⁹ Compl. ¶ 136(11): "[N]otes, memoranda, and correspondence generated between January of 2007 and September 11, 2012, regarding meetings between Christopher Stevens or any other Tripoli Embassy official, and one or more of the following [nine] individuals..."

⁵⁰ Exemption (b)(1) permits an agency to withhold matters from FOIA disclosure if such matters 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). Pursuant to Executive Order 12,958, an agency may withhold information if its disclosure could reasonably be expected to reveal classified intelligence sources or methods or otherwise damage the foreign relations of the United States. *See* 70 Fed. Reg. 21,609 (Apr. 21, 2005).

⁵¹ Exemption (b)(3) shields matters "specifically exempted from disclosure by statute... provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3) (effective Nov. 27, 2002 to Dec. 30, 2007). The National Security Act of 1947, as amended, mandates that the Director of National Intelligence protect intelligence sources and methods from unauthorized disclosure. *See* 50 U.S.C. § 403g; *id.* § 403-1(i)(1).

record. See attached Exhibit 9, List of congressional Reports and transcripts. The matter will then be ripe for plaintiffs to meet their burden to prove CIA official acknowledgments.

Until the Select Committee issues its Report, litigation of CIA nondisclosures would result in unnecessary expenditure of the parties' and the Court's resources.

CONCLUSION

The issue of whether the government ordered its assets to stand down has been the subject of congressional probes, extensive mass media coverage, books, and, reportedly, a movie is in the offing. Information sought "is the subject of a currently unfolding story," and "there is substantial interest, either on the part of the American public or the media, in this particular aspect of plaintiff's allegations." *Al-Fayed*, 254 F.3d at 311. As plaintiffs' Appeal observes under the heading, "Disclosure will settle issues:"

The appropriateness of the Administration's efforts to rescue is one of the central issues in the case, and production of records responsive to the CCB's FOIA requests would resolve it. The Commission seeks disclosure of records confirming or refuting Secretary Panetta's claim that he ordered a response, as well as General Dempsey's statement that it would have taken five hours for U.S. forces to get airborne, and 13 hours for the arrival of any rescue force.

Appeal at 8-9, footnotes omitted.

In addition to settling the issue of the Administration's efforts to send rescue assets from outside Libya (only the President has "cross-border authority"), disclosure here will also reveal whether government officials knew by September 16, 2012, that CIA assets in Benghazi were ordered to "stand down." Plaintiffs believe that this stand down order is recounted in the September 15, reports of the FBI interviews of the responders, and that this information was undoubtedly communicated in the next day's video teleconference

"between the FBI and other IC officials in Washington." If so, it would undermine the veracity of the Administration's version of events over the past two-and-a-half years.

The matter is current *and* ongoing. Its value is increasing. The exigency of the matter is not dependent on the identity of the Democratic nominee for President. Disclosure here will shed light on the government's conduct, and will significantly contribute to public understanding of the operations or activities of the government.

The merits of plaintiffs' motion for expedition is dependent on the production dates in the absence of expedition. But there can be no such analysis until defendants provide the dates when they will "complete action" on the requests, as that term is used in 5 U.S.C. § 552 (a)(7)(B)(ii). Defendants' proposed schedule does not include that information.

Plaintiffs' motion to stay the matter as to the CIA is premised on the Select Committee's disclosure of otherwise exempt CIA information. On May 11, 2014, Mr. Gowdy gave a press conference about the newly-formed Committee, and chided the press for not doing its job. Among his questions for reporters were, "Do you know why we were the last flag flying in Benghazi?" and, "Do you know why no assets were deployed during the siege?" Plaintiffs believe it is not possible to reveal the reason for CIA presence in Benghazi without divulging otherwise exempt CIA information, any more than it is possible to expose the truth of the "stand down" order without disclosing the accounts of the CIA contractors who say they were repeatedly told stand down, and who opine that this order resulted in the deaths of Christopher Stevens and Sean Smith.

WHEREFORE, plaintiffs respectfully pray that this Court:

- I. Grant plaintiffs' requests for expedited processing under 5 U.S.C. § 552(a)(4)(A)(ii)(II), to:
 - A. The Department of Defense for records of:
 - (1) Contemporaneous response to the Benghazi attacks, and available assets;
 - (2) Gaddafi's March 2011 offer of abdication; and
 - (3) Military assets pre-positioned off the coast of Tripoli during Secretary Clinton's October 2011 visit.
 - B. The State Department, for records of:
 - (1) Secretary Clinton's contemporaneous response to the attacks;
 - (2) Secretary Clinton's recommendations to support the ousters of Libya's Gaddafi and Syria's al-Assad;
 - (3) Meetings from March of 2011 through September of 2012 between State Department officials and nine named individuals.
 - C. The DOJ, for FBI 302 Interview Reports, and the video teleconference between the FBI and other IC officials in Washington.
 - D. The CIA, for documentation of allegations that it deleted records of its activities in Libya in the aftermath of the attacks.
- II. Partially stay the matter against defendant CIA, pending issuance of Report of House Select Committee on Benghazi.

Attachments:

- Exhibit 1: July 7, 2014 Administrative Appeal to Defense Department, DIA
Exhibit 2: Citizens' Commission on Benghazi May 20, 2014 Executive Summary & Key Findings...; Questions for the Select Committee...; Timeline
Exhibit 3: Exhibits to July 7, 2014 Administrative Appeal to Defense Department, DIA
Exhibit 4: April 18, 2014 Administrative Appeal to State Department
Exhibit 5: September 29, 2014 Administrative Appeal to CIA
Exhibit 6: Admiral Charles Kubic, USN, (Ret.), April 2014 CCB Press Roundtable, transcript
Exhibit 7: Senate Select Intelligence Committee's January 5, 2014 Report, "Review of the Terrorist Attacks on U.S. Facilities in Benghazi..." pages 1-5
Exhibit 8: Declaration of Richard Tappan
Exhibit 9: List of congressional Reports and transcripts

DATE: February 22, 2015.

Respectfully submitted,

_____/s/_____
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ACCURACY IN MEDIA, INC., et al.,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 14-1589 (EGS)
)	
DEPARTMENT OF DEFENSE, et al.,)	
)	
Defendants.)	
_____)	

ORDER

Upon consideration of Plaintiffs' Motions for Expedited Processing under the Freedom of Information Act ("FOIA"), and for Partial Stay of the case against defendant Central Intelligence Agency ("CIA"), it is hereby

ORDERED, that plaintiffs' requests for expedited processing under 5 U.S.C. § 552(a)(4)(A)(ii)(II) of the FOIA is hereby GRANTED, and it is further

ORDERED, that this matter against the CIA is partially stayed, pending issuance of the Report of House Select Committee on Benghazi, except that the CIA shall respond to plaintiffs' FOIA request for documentation of allegations that it deleted records of its activities in Libya in the aftermath of the attacks.

Date: March _____, 2015.

EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE