

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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

THIRD DECLARATION OF DAVID M. HARDY

I, David M. Hardy, declare as follows:

(1) I am the Section Chief of the Record/Information Dissemination Section (“RIDS”), Records Management Division (“RMD”), in Winchester, Virginia. I have held this position since August 1, 2002. Prior to my joining the Federal Bureau of Investigation (“FBI”), from May 1, 2001 to July 31, 2002, I was the Assistant Judge Advocate General of the Navy for Civil Law. In that capacity, I had direct oversight of Freedom of Information Act (“FOIA”) policy, procedures, appeals, and litigation for the Navy. From October 1, 1980 to April 30, 2001, I served as a Navy Judge Advocate at various commands and routinely worked with FOIA matters. I am also an attorney who has been licensed to practice law in the State of Texas since 1980.

(2) In my official capacity as Section Chief of RIDS, I supervise approximately 243 employees who staff a total of twelve (12) Federal Bureau of Investigation Headquarters (“FBIHQ”) units and two (2) field operational service center units whose collective mission is to

effectively plan, develop, direct, and manage responses to requests for access to FBI records and information pursuant to the FOIA as amended by the OPEN Government Act of 2007, the OPEN FOIA Act of 2009, the FOIA Improvement Act of 2016; the Privacy Act of 1974; Executive Order 13526; Presidential, Attorney General, and FBI policies and procedures; judicial decisions; and Presidential and Congressional directives. The statements contained in this declaration are based upon my personal knowledge, upon information provided to me in my official capacity, and upon conclusions and determinations reached and made in accordance therewith.

(3) Due to the nature of my official duties, I am familiar with the procedures followed by the FBI in responding to requests for information from its files pursuant to the provisions of the FOIA, 5 U.S.C. § 552, and the Privacy Act of 1974, 5 U.S.C. § 552a. Specifically, I am aware of the FBI's handling of Plaintiffs' February 21, 2014 FOIA request submitted to FBIHQ for records pertaining to the FBI's investigations into the September 11, 2012 Benghazi attacks.

(4) Plaintiffs have amended the original complaint twice to narrow the scope of the original FOIA request. *See* ECF Nos. 12 and 31. As agreed upon by all parties on or about November 29, 2017, the only outstanding issue is the FBI's *Glomar* response regarding the alleged existence of survivor accounts of the attacks, to include September 15 or 16 FBI 302 Interview Reports. *See* Joint Motion to Amend Briefing Schedule at 2, ECF No. 64 (Nov. 29, 2017).

(5) The FBI submits this declaration in support of Defendants' Motion for Summary Judgment. Specifically, this declaration addresses the FBI's response to Plaintiffs' request for survivors' accounts of the attacks, to include September 15 or 16 FBI 302 Interview Reports, and explains the basis for the FBI's 7(A) *Glomar* response concerning any FBI 302 Interview

Reports, or accounts of any survivors or witnesses. This declaration incorporates by reference the David Hardy Declarations of March 3, 2015, *see* ECF No. 18-1 (Mar. 3, 2015), and June 8, 2015, *see* ECF No. 29-1 (June 8, 2015) (“First Hardy Declaration” and “Second Hardy Declaration,” respectively).

Glomar Response

(6) The FBI relies on a *Glomar* response in instances in which, assuming that responsive records exist, even acknowledging their existence would result in a harm protected against by one or more FOIA exemptions. To be credible and effective, the FBI must use a *Glomar* response in all similar cases regardless of whether responsive records actually exist, including instances in which the FBI does not possess records responsive to a particular request. If the FBI were to invoke a *Glomar* response only when it actually possessed responsive records, the *Glomar* response would be interpreted as an admission that responsive records exist.

(7) Here, Plaintiffs’ FOIA request seeks the survivors’ accounts of the Benghazi attacks, to include September 15 or 16 FBI 302 Interview Reports. Plaintiffs argue that the FBI’s right to assert a *Glomar* response has been waived by the publication of the book *13 Hours*, claiming that this information is in the public domain and must therefore replicate that information the FBI is purportedly withholding. The FBI, however, has never acknowledged the existence of the alleged FBI 302s, which are the subject of Plaintiffs’ FOIA request. Nor has the FBI ever made the alleged FBI 302s or the information purportedly contained therein available to the public. The publication of *13 Hours* is unrelated to and has no bearing on the FBI’s *Glomar* assertion as Plaintiffs are merely speculating what information could be in the purported FBI 302s based on the content of a book. Mere speculation that the alleged FBI 302s consist of the

same information portrayed in the book is not the same as an official acknowledgment by the FBI, and therefore do not undermine the FBI's *Glomar* response in this matter.

FOIA Exemption (b)(7)(A)

Exemption (b)(7) Threshold

(8) Before an agency can invoke any of the harms enumerated in Exemption (b)(7), it first must demonstrate that the records or information at issue were compiled for law enforcement purposes. Law enforcement agencies such as the FBI must demonstrate that the records at issue are related to the enforcement of federal laws and that the enforcement activity is within its law enforcement duties.

(9) Pursuant to 28 U.S.C. §§ 533 and 534, Executive order 12,333 as implemented by the Attorney General's Guidelines for Domestic FBI Operations ("AGG-DOM"), and 28 C.F.R. § 0.85, the FBI is the primary investigative agency of the federal government, with authority and responsibility to investigate all violations of federal law not exclusively assigned to another agency; to conduct investigations and activities to protect the United States and its people from terrorism and threats to national security; and to further the foreign intelligence objections of the United States.

(10) Plaintiffs' FOIA request presumes the FBI has information of witness or survivor interviews. Assuming this were true, such activities by the FBI would necessarily relate to federal laws falling within its law enforcement mission to investigate attacks on U.S. Government personnel and facilities in Benghazi, Libya. Accordingly, the records that Plaintiffs have requested, if they exist, would readily meet the threshold requirement of FOIA Exemption (b)(7).

Exemption (b)(7)(A)

(11) FOIA Exemption 7(A) protects “records or information compiled for law enforcement purposes [when disclosure] could reasonably be expected to interfere with enforcement proceedings.” 5 U.S.C. § 552(b)(7)(A).

(12) In addition to satisfying Exemption (b)(7)’s Threshold, an agency must establish (a) there is a pending or prospective law enforcement proceeding and (b) disclosure of responsive records could reasonably be expected to adversely affect it.

(13) While it is publicly known the FBI is actively investigating the Benghazi attacks, specific details and focus of the investigations are not known. Accordingly, confirming or denying that the FBI does or does not possess specific statements responsive to Plaintiffs’ request would require the FBI to confirm or deny whether it has this purported information and could reasonably be expected to interfere with the FBI’s ongoing investigations into the attacks on U.S. Government personnel and facilities in Benghazi, Libya.

(14) Any existing records responsive to Plaintiffs’ request concern the FBI’s investigations into the attacks on U.S. Government personnel and facilities in Benghazi, Libya. As mentioned above, the FBI has ongoing, pending investigations into these attacks; therefore, any investigative records pertaining to this matter, specifically, survivors’ accounts of the Benghazi attacks, and any alleged September 15th or 16th FBI 302 Interview Reports, are exempt from disclosure pursuant to FOIA Exemption (b)(7)(A), as well as any applicable underlying exemptions.

(15) To protect the integrity of the pending law enforcement proceedings, the FBI can neither confirm nor deny the existence of any specific witness accounts, including the ones requested by Plaintiffs, as the mere acknowledgement of the existence or nonexistence of these

records would interfere with the pending investigations. That is because while it is publically known the FBI is actively investigating the Benghazi attacks, specific details such as the direction, scope, pace, particular witness statements, and focus of the investigations are not known. As such, the mere acknowledgement that specific interview reports were obtained or not obtained itself undermines the integrity of the ongoing investigations.

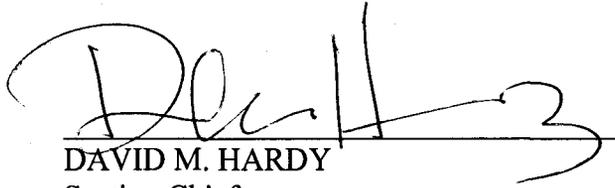
(16) Acknowledgement that any individual has or has not provided the FBI with a statement concerning an investigation may subject the individual to harassment, ridicule, or even retaliation as acknowledgement would confirm or not confirm the identity of a potential cooperating witness. Lastly, acknowledgment that any individual has or has not provided the FBI with a statement would chill the FBI's investigative efforts as prospective witnesses would reasonably be reluctant to cooperate if they know the FBI will inform third party requesters about their involvement, if any, in an investigation. Accordingly, the FBI can neither confirm nor deny the existence of specific records responsive to Plaintiffs' request without causing harms protected against by FOIA Exemption (b)(7)(A).

Conclusion

(17) For the reasons set forth above, the FBI neither confirms nor denies the existence of records responsive to Plaintiffs' FOIA request because merely acknowledging whether or not responsive records exist would itself cause harms protected against by FOIA Exemption (b)(7)(A).

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 26th day of April, 2018.

A handwritten signature in black ink, appearing to read "D. Hardy", written over a horizontal line.

DAVID M. HARDY
Section Chief
Record/Information Dissemination Section
Records Management Division
Federal Bureau of Investigation
Winchester, Virginia