

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

Case No. 14-1589 (EGS)

PLAINTIFFS' REPLY TO DEFENDANT DEPARTMENT OF DEFENSE
OPPOSITION TO MOTION FOR LEAVE TO PROPOUND INTERROGATORY

COME NOW Plaintiffs, by counsel, and respectfully submit this Memorandum in Reply to the DOD's Opposition to Plaintiff's Motion for Leave to Propound Interrogatory to DOD ("Gov. Opp.").

The government's opposition is founded on its view that there is no genuine issue of material fact, under Federal Rule of Civil Procedure 56(d).

Plaintiffs' dispositive motion demonstrates, and the DOD wrote, that the first-in-time responsive record produced is European Command's two-page¹ "Execution Order ('EXORD'),

¹ The government recites, incorrectly, that the follow-up FRAGORDS, are responsive. Gov. Opp. at 2-3:

Plaintiffs' request for initial orders and communications and describes the agency's release of over 70 pages of non-exempt records (or the portions thereof) responsive to the same.... Instead, having reviewed the "70 pages of" initial communications and orders and the OPREP-3 PINNACLE report that DOD released in response to their request, Plaintiffs complain... Plaintiffs claim that the over 70 pages of records that DOD released in response to the challenged FOIA request "beg[] the production of the corroborating records sought[through discovery]," *see id.* at 33-34.

the first written order... in response to the September 11, 2012 attack on the United States mission in Benghazi, Libya." Gov. Opp. at 2. An EXORD is, by definition, the first order.

This record was, as the DOD observes, generated "in *response to* the September 11" attacks. But it was not issued *on* September 11, curiously. Rather, it was issued almost twelve hours after the onset of hostilities, and eight hours after the alleged order to assets in Croatia, Spain,² and the United States,³ which is said to have been given sometime before 7:00 p.m. Yet, the government somehow concludes that "the DOD's response to Plaintiffs' FOIA request is entirely consistent with the agency's response to congressional inquiries into the Benghazi attack." *Id.* at 2.

According to the DOD, there is no record of any order, or communication, to any asset, worldwide, for the first *twelve* hours. This, of course, is not accurate. The DOD would rely on the fact that the first orders were given "verbally." Yes, obviously. And, of course, "somebody

² The Commander of the Marine Fleet Antiterrorism Security Team in Rota, Spain, first learned of the attack while watching television, having seen images of the "building consulate on fire" on Fox News, three hours before the Pentagon issued its 3:00 a.m. EXORD. *See* Exhibit 1 attached hereto, FAST Commander testimony, excerpts.

Cf. Gov. Opp. at 7-8:

If anything, the cherry-picked congressional testimony and records on which Plaintiffs rely suggest that DOD's response to Plaintiffs' FOIA request is entirely consistent with the agency's response to congressional inquiries into the Benghazi attack.

³ Plaintiffs' requests are not limited to the assets that DOD admits to having communicating with. Plaintiffs seek records of communications to all personnel and aircraft, including (1) Sigonella, Sicily, (2) Souda Bay, Crete, (3) the sixth Fleet at Naples, and (4) the Navy helicopter-carrying amphibious assault ship in the Mediterranean that was ordered to stand down, upon information and belief.

then types those orders out, in terms of a formal authorization." Plaintiffs' Motions for Summary Judgement, ECF 71 at 14, quoting Panetta *Select Committee* testimony.

For years the DOD has represented that the records exist. Now its unequivocal position is that they do not. The DOD argues that there is "no factual dispute," and that "the adequacy of the search does not remain in doubt." *Id.* In the alternative, it claims that its search may have missed responsive records.⁴ The government also posits that, by reason of its production of the 3:00 a.m., EXORD, "Plaintiffs have received the records responsive to their request." *Id.* at 2.

Defendant's positions lack merit. The DOD would mock plaintiffs' "complaint that Congress took the DOD's word for it" (*id.* at 7), but does not dispute the claim. Nor can it. The absence of an exact time, at least prior to its production here of a record that was time-stamped at exactly 3:00 a.m., proves that defendant has never reviewed, much less produced, the records of the initial communications at issue. The government's observation that the "interrogatory seeks additional information with which to re-litigate the timeline of events... that has been the subject of numerous congressional hearings" (*id.* at 5) does not help the DOD.

The DOD's other two arguments are also flawed. The first would rely on procedural grounds. Defendant pleads that, because plaintiffs filed their summary judgment motions, they are barred from seeking discovery. *Id.* at 4-5. A plaintiff does not waive his right to seek redress under Rule 56(d) by having opposed defendants' summary judgment motions. The DOD's

⁴ Gov. Opp. at 8:

Indeed, "it is long settled that the failure of an agency to turn up one specific document in its search does not alone render a search inadequate . . . [because] particular documents may have been accidentally lost or destroyed, or a reasonable and thorough search may have missed them."
(Citations omitted.)

approach would require additional briefings, needlessly, whether or not the Court grants the instant relief. Such is particularly the case where there are four defendants, as here.

DOD also argues that plaintiffs do not challenge the adequacy of its search:

As an initial matter, Plaintiffs do not purport to "dispute the particulars of the DOD's search." Pls.' Opp'n Br. at 4.... Plaintiffs largely do not dispute "the particulars of the DOD's search." Pls.' Opp'n Br. at 4 (citing Pls.' Counter-Statement of Material Facts ¶¶ 11-18, 20-23).

Id. at 4, 7.

Here is what plaintiffs wrote (ECF 71 at 4):

While plaintiffs are not in a position to dispute the particulars of the DOD's search (*see* Plaintiffs' Counter-Statement of Material Facts ¶¶ 11-18, 20-23), the record in this matter, generated over the course of seven Congressional probes, is replete with references to orders and communications that the DOD now claims never existed.

The referenced statements of fact identify the databases searched. Contrary to the DOD's interpretation, plaintiffs were observing that they had no expert to opine on what databases were not searched. The DOD's statements of fact do not allege that the DOD searched all databases that were likely to contain responsive records, nor do they address the adequacy of the search terms employed. *See* Plaintiffs' Response to Defendants' Statement of Material Facts, ECF 71-5.

The DOD told Congress that it gave the order to go by 7:00 p.m., and has now produced a record of a first order given eight hours later. The government argues that this state of affairs is not an "exceptional circumstance" which would justify discovery (*id.* at 3). To the contrary, plaintiffs aver, they have demonstrated good cause to obtain discovery which will confirm, or refute, the government's version of its response to the September 11, 2012 attack on U.S. facilities in Benghazi, Libya.

The DOD observes that the interrogatory is "another formulation of the FOIA request to which DOD has already responded." Gov. Op. at 2. Yes, it is. It is necessitated by the absence

