

IN THE 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/DAR)

PLAINTIFFS' OBJECTION TO MAGISTRATE
JUDGE'S REPORT AND RECOMMENDATION

COME NOW Plaintiffs Roger L. Aronoff, Captain Larry W. Bailey, USN (Ret.), Lieutenant Colonel Kenneth Benway, USA (Ret.), Colonel Richard F. Brauer, Jr., USA (Ret.), Clare M. Lopez, Kevin Michael Shipp, and Accuracy in Media, Inc., by counsel, under LCvR 72.2 (b), and respectfully submit this *Objection to Magistrate Judge's Ruling*, seeking the Court's review of the *Report and Recommendation*, ECF 83 ("*Report*"), submitted by United States Magistrate Judge Deborah A. Robinson on August 27, 2020.

Plaintiffs seek a review of the recommendation to deny their dispositive motions, seeking (1) disclosure of records regarding initial orders and communications generated by the Department of Defense ("DOD") in response to the September 11, 2012 attacks in Benghazi, Libya; and (2) leave to propound an Interrogatory to the DOD.

Plaintiffs also seek disclosure of certain redactions in CIA records regarding a complaint to that Agency's Inspector General.

I. BACKGROUND

Plaintiff summarized the genesis of the matter in the Preliminary Statement of their Amended Complaint ("*Compl.*"), ECF 31 at 2:

On Tuesday, September 11, 2012... at 3:32 p.m. eastern time, 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.

A central issue in this case is when Secretary of Defense Leon Panetta ordered U.S. assets to respond, and whether or not these assets were instructed not to respond, or to "stand down." As surprising as it may seem, that question still has not been suitably resolved. Here, the disclosure of the records that plaintiffs seek would have enormous value in opening up the inner workings of government to public scrutiny, particularly in light of the Congressional investigative history of the matter, which plaintiffs summarize below, briefly.

2012 Congressional Report. Almost four months after the attack, on December 30, 2012, Congress released its first of seven reports on the matter,¹ when the Senate Committee Homeland Security and Governmental Affairs concluded that there had been ample warnings of an attack, and that there had been no protest.

¹ See *Clarke Decl.*, ECF No. 15-9 ¶ 3: December 30, 2012, FLASHING RED: A SPECIAL REPORT ON THE TERRORIST ATTACK AT BENGHAZI, issued by both parties U.S. Senate Committee on Homeland Security and Governmental Affairs. Fifty security incidents in Benghazi served as a "flashing red" warning, according to the Republican report. Failing to suspend or abandon the Benghazi facilities was a "grievous mistake." Key findings include State Department initial knowledge that the attack was preplanned and the absence of any protest, at least by September 15th. Report faults IC and open source reports for the account of a protest in Benghazi.

Two 2013 Congressional Reports. Four months later, on April 23, 2013, the Republican Majorities of five House Committees issued its Report, concluding that the State Department had known that there had been no demonstration before Ambassador Rice claimed otherwise on talk shows, and observed that the President and Secretary Clinton had appeared in an advertisement broadcast in Pakistan disavowing the YouTube video.² Congress's other 2013 report, issued on September 13 by the House Committee on Oversight and Government Reform, critiqued various State Department failures and opined that the Accountability Review Board's report was unreliable.³

DOD Timeline. While there was little exploration in Congress of when military assets had been ordered to commence a rescue operation, in November of 2013, the DOD distributed a

² *Id.* April 23, 2013, INTERIM PROGRESS REPORT FOR THE MEMBERS OF THE HOUSE REPUBLICAN CONFERENCE ON THE EVENTS SURROUNDING THE SEPTEMBER 11, 2012 TERRORIST ATTACKS IN BENGHAZI, LIBYA, issued by Republican Majority of five House Committees. On "the same day and prior to" Ambassador Rice's talk show appearances, "a senior official on the ground in Libya informed senior leaders at the State Department that there was no demonstration prior to the attack." The Administration had altered its talking points to "remove references to the likely participation of Islamic extremists." The President and Secretary Clinton for appeared in a \$70,000 advertisement campaign in Pakistan disavowing the YouTube video. Also, "State Department personnel have testified that funding was not a reason for the drawdown of security levels in Benghazi."

³ *Id.* September 16, 2013, BENGHAZI ATTACKS: INVESTIGATIVE UPDATE INTERIM REPORT ON THE ACCOUNTABILITY REVIEW BOARD, issued by Republican Majority of Committee on Oversight and Government Reform. Under Secretary of Management at the Department of State Ambassador Kennedy personally oversaw the staff at any time at the Special Mission Compound, decided to discontinue the Security Support Team, and approved the extension of the facility "as is." All four State Department officials who were placed on administrative leave failed to receive due process from the State Department, three of whom were not permitted to see the charges against them for six months because the information was classified. Hillary Clinton selected four of the five Accountability Review Board members, Undersecretary Kennedy oversaw the selection of ARB staff, and the ARB failed to interview Clinton. Admiral Mullen gave Cheryl Mills a friendly "heads up" that Charlene Lamb would not be a good witness.

timeline. It reports that, between 6:00 p.m. and 8:00 p.m. Washington time, "Secretary Panetta directs (provides verbal authorization)" for two Fleet Antiterrorism Security Teams (FAST) platoons stationed in Rota, Spain, and two Special Operations forces, one in Central Europe and the other in the United States, "to prepare to deploy." Plaintiffs found the timeline curious, for two reasons. First, it provided a two-hour range within which the order is said to have been given, and second, it did not reflect an order to deploy, or to go, but rather, it directed forces to get ready for an order to go, or to "prepare."

The DOD included the timeline in the record in this case in support of its position that it has been forthright in its account of its response to the siege.⁴ Plaintiffs submitted it for the proposition that the timeline, together with the records produced in this action, proves that DOD's account is a fraud, as set forth below. The timeline is attached hereto as Exhibit 1.

Three 2014 Congressional Reports. Congress issued three more reports in 2014. In January, the Senate Select Committee on Intelligence reported that the attacks had been in three distinct phases, terrorists had participated, and that a month before the attacks the CIA had advised of the locations of ten Islamist militias and AQ training camps. It too faulted the State

⁴ Plaintiffs submitted the timeline as Exhibit 2 to the *Clarke Decl.*, ECF No. 15-9, and the DOD submitted it with the *Herrington Decl.*, ECF 68-4, ¶ 18: "in an effort to assuage Plaintiffs' concern that the DoD production failed to include these alleged earlier written orders."

Department for inadequate security.⁵ On February 7, the House Foreign Affairs Committee found that Secretary Clinton had been aware of the security problems in Libya, and critiqued other State Department actions.⁶ On February 10, the House Armed Services Committee declared that there had been no "stand down" order, and that the military acted appropriately given the inadequate posture of its forces.⁷

⁵ *Id.*: January 15, 2014, REVIEW OF THE TERRORIST ATTACKS ON U.S. FACILITIES IN BENGHAZI, LIBYA, SEPTEMBER 11-12, 2012, TOGETHER WITH ADDITIONAL VIEWS," issued by U.S. Senate Select Committee on Intelligence. The bipartisan report holds the State Department responsible for inadequate security at the Mission in the face of an increased violence, and the tragedy "preventable." There were three diplomatic Security agents assigned to the Mission, whereas nine security officers were assigned at the CIA Annex. Itemization of security improvements at the CIA Annex is redacted, while the Mission failed to keep all surveillance cameras running or install its new cameras. The attacks were in three distinct phases, with probing attacks at the CIA Annex between 11:56 p.m. and 1:00 a.m. This Report details the August 15, 2012 Emergency Action Committee Report and its corresponding classified cable: "A CIA officer briefed the EAC on the location of approximately ten Islamist militias and AQ training camps within Benghazi." "Individuals affiliated with terrorist groups, including AQIM, Ansar al- Sharia, AQAP, and the Mohammad Jamal Network, participated in the September 11, 2012, attacks." The FBI and CIA reviewed the closed circuit television video from the Mission on September 18, 2012, and FBI intelligence reports regarding the interviews of the survivors were disseminated on September 20, 2012.

⁶ *Id.*: February 7, 2014, BENGHAZI: WHERE IS THE STATE DEPARTMENT ACCOUNTABILITY? Issued by Republican Majority of the House Foreign Affairs Committee. Secretary Clinton was aware of the security problems in Libya and should have acted accordingly, according to this Republican report. Of the four reinstated employees who had been placed on leave (Charlene Lamb, Scott Bultrowicz, Ray Maxwell, and Eric Boswell), two retired with full benefits, and the other two have been reassigned to positions with commensurate pay and benefits. Elizabeth Dibble, Jake Sullivan, and Victoria Nuland were all promoted. Patrick Kennedy was not held accountable, even after (1) "approv[ing] a one-year extension of the Benghazi SMC in December 2011," (2) telling "the Defense Department in July 2012 that the State Department would no longer need the U.S. military's 16-member SST," and (3) "terminat[ing] Embassy Tripoli's use of a DC-3 aircraft that provided logistical support to the SST" on May 3.

⁷ *Id.*: February 10, 2014, MAJORITY INTERIM REPORT: BENGHAZI INVESTIGATION UPDATE, issued by Republican Majority of House Armed Services Committee. While this Republican report declares that there was no "stand down" order given and that the military acted appropriately given the resources available, the Committee questions the

FOIA Requests. Thus, after six different Congressional probes, involving 13 days of public hearings, the release of the testimony of witnesses who had given closed-door testimony,⁸ and the issuance of six Committee Reports on various aspects of the matter, the only information disclosed regarding the order to respond was that it had been "transmitted" sometime between 6:00 and 8:00 p.m., that no U.S. forces had been airborne when the survivors had finally escaped 13 hours after the siege had begun, and, according to one Committee, there had been no "stand down" order.

Given this void of evidence of when Secretary Panetta had first ordered assets to deploy, plaintiffs sought that order under the Freedom of Information Act. In March, April, and May of 2014, plaintiffs sought the relevant DOD communications to assets worldwide; Africa,⁹ Sicily,¹⁰

posture of military forces. "Why didn't the Administration prioritize a violent Libya among the ongoing threats"? Why was the Commander's in Extremis Force training on September 11th? Why didn't General Ham know that the CIA had a facility in Benghazi? The State Department was ultimately responsible for embassy security. The attack was "carefully planned," with a "scouted...scene beforehand."

⁸ *Id.* at 3-4.

⁹ 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.

¹⁰ 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.

northern Italy, Spain,¹¹ Croatia,¹² Djibouti, and the United States.¹³ Plaintiffs also sought disclosure of records of personnel¹⁴ and aircraft¹⁵ that could have been dispatched.

2016 Select Committee Report. Plaintiffs were not alone in their recognition that Congress had not ferreted out the truth. In May of 2014, as plaintiffs were submitting their FOIA requests, the "House Select Committee on Events Surrounding the 2012 Terrorist Attack in Benghazi" ("*Select Committee*") was established. It had a broad mandate. Under House Resolution 567, the *Select Committee* was "directed to conduct a full and complete investigation

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- ¹¹ 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... " Compl. ¶¶ 42, 50, 59, 67, 90.
- ¹² 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.
- ¹³ 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.
- ¹⁴ 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.
- ¹⁵ US aircraft in Djibouti made 10/1/14 to Africa Command: "Records identifying, and concerning, all US aircraft in Djibouti on September 11, 2012... 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..." Compl. ¶¶ 23, 42, 50, 67

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..."¹⁶

Representative Trey Gowdy (R-South Carolina) was selected as Committee Chairman. He told Fox News' Greta Van Susteren on May 6 that he "want[s] to see every single solitary relevant material document." In his opening remarks at the hearing, he declared that the *Select Committee* would demand "access to all documents:"

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.

On December 7, 2016, the Select Committee issued its 650-page, *Final Report of the Select Committee on The Events Surrounding the 2012 Terrorist Attack in Benghazi*.

¹⁶ 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.

II. DEPARTMENT OF DEFENSE

A. Initial Communications and Orders

On the issue of when the order had been given, and relayed, the *Select Committee* Report states:

By 7:00 p.m. in Washington [1:00 a.m. in Benghazi], nearly three hours after the attacks began, the Secretary issued what he believed, then and now, to be the only order needed to move the FAST platoons, the CIF, and the U.S. SOF.²⁸⁶ Yet nearly two more hours elapsed before the Secretary's orders were relayed to those forces. Several more hours elapsed before any of those forces moved. During those crucial hours between the Secretary's order and the actual movement of forces, no one stood watch to steer the Defense Department's bureaucratic behemoth forward to ensure the Secretary's orders were carried out with the urgency demanded by the lives at stake in Benghazi.

Select Committee Report, selections attached as Exhibit 4 to *Clarke Decl.*, ECF 71-1, at Bates 55-56.

So, after seven Congressional probes, and four years of sustained news media saturation,¹⁷ the final word on the matter, as far as the public knows, is that Secretary Panetta gave the order to respond "by 7:00," but a bureaucratic snafu had delayed those orders by "nearly two more hours," or 9:00 p.m. This is around the same time that the DOD had claimed in its timeline, at 8:39 p.m., that the "National Military Command Center transmits formal authorization... to move to an intermediate staging base in southern Europe." Exhibit 1.

Pages 601 through 616 of the *Select Committee* Report is "Appendix J: Requests and Subpoenas for Documents." Under the heading, "Department of Defense," the Report states that its request for "documents relating to orders or commands given to defend against the attacks or

¹⁷ See *Tappan Decl.*, ECF 15-8, LexisNexis search "Benghazi" September 11, 2012 through February 8, 2015; 52,404 newspapers, 32,185 newswires & press releases.

rescue Americans in Benghazi is pending production." These records had not been produced to the *Select Committee*.

But six months before the issuance of the *Select Committee* Report, in June of 2016, the Department of Defense did disclose the "documents relating to orders or commands given to defend against the attacks or rescue Americans"—to plaintiffs, 20 months after they filed this lawsuit.

And that production proves, unequivocally, that Secretary Panetta's order, said to have been given "by 7:00 p.m.," had not, in fact, been relayed two hours after he allegedly gave it, as the DOD had claimed in its timeline and the *Select Committee* reported. Rather, the DOD's production proves that the order had been relayed eight hours later. In this lawsuit, in stark contrast to the DOD's position over four years of Congressional probes, the DOD is certain that this first order had been relayed at 3:00 a.m. the following day. That first order, the EXORD,¹⁸ is attached hereto as Exhibit 2.

As an eight-hour delay to relay the order to deploy military assets to defend Americans under siege is unbelievable, so too is the claim that the order had been given "by 7:00 p.m."

¹⁸ See, e.g., *Herrington Decl.*, ECF 68-4, ¶ 18:

This EXORD that EUCOM produced to Plaintiffs is the first written order. Despite relaying this information, Plaintiffs insist that there must have been earlier written orders. In an effort to assuage Plaintiffs' concern that the DoD production failed to include these alleged earlier written orders, I provided Plaintiffs with a two-page timeline of DoD actions on September 11-12, 2012, which was prepared and provided to Congress for the multiple inquiries into the Benghazi attack.

An EXORD is by definition the first order. All parties agree that "0700 ZULU" in EXORD is 3:00 a.m. Eastern Daylight Time. See, e.g., Time Conversion Chart, *Clarke Decl.*, ECF 71-1, Exhibit 11 at Bates 112. See also *Report* at 13, 14, 30.

The *Report* appears not to have recognized the significance of the fact that the 3:00 a.m. EXORD disproves the DOD's version of events (at 14):

Secretary Panetta's testimony and the timeline of communications provided by the DoD to Plaintiffs all support the idea that no written records or communications were created prior to the 3:00 a.m. EXORD. *See Herrington Decl.* ¶ 18. ("This EXORD that EUCOM produced to Plaintiffs is the first written order."); *see Clarke Decl.*, Ex. 1 at 3 (explaining that at approximately 6:00 p.m. to 8:00 p.m. "Secretary Panetta directs (provides verbal authorization) for the following actions: [to direct forces and assets to prepare to deploy]" and that the EXORD was issued at approximately 3:00 a.m.).

Plaintiffs agree that Secretary Panetta reportedly "directs (provides verbal authorization) for the following actions" sometime between 6:00 p.m. and 8:00 p.m., and that the first order was issued at 3:00 a.m. But the DOD's long-standing version, adopted by the *Select Committee*, was that the order had been transmitted at 8:39 p.m., not 3:00 a.m. the next day. *See* DOD's entry in its timeline under 8:39 p.m. Eastern, Exhibit 1:

As ordered by Secretary Panetta, the National Military Command Center transmits formal authorization for the two FAST platoons, and associated equipment, to prepare to deploy and for the EUCOM special operations force, and associated equipment, to move to an intermediate staging base in southern Europe.

The conclusion that "[a]ny gap in time between these verbal orders and the creation of the EXORD record that the DoD released may have simply been the result of administrative delay" (*Report* at 13) ignores that the DOD's long-standing version is that the order had been transmitted at 8:39 p.m.—not 3:00 a.m. Such a conclusion would necessarily mean that an "administrative delay" had not spanned two hours, but rather, the order to respond to defend and rescue Americans under siege would have been administratively delayed for eight hours, which is inexplicable.

Mr. Goudy failed to obtain the "documents relating to orders or commands." His chronology is based on one source, and one source only: Leon Panetta. The footnote to the

Select Committee's conclusion that, "By 7:00 p.m. in Washington... the Secretary issued... the order" is Mr. Panetta's January 8, 2016 closed-door testimony, released in 2017, well after Mr. Goudy had released his Report. Plaintiffs submitted that testimony as Exhibit 3 to *Clarke Decl.*, ECF 71-1 at Bates 5-48, and quoted it extensively in their dispositive motion, *Plaintiffs' Opposition to Defendants' Motions for Summary Judgment, Cross-Motions for Summary Judgment, and Motion for leave to Propound Interrogatory*, ECF 71 ("*Motion*").

Mr. Panetta's testimony is remarkable. It conflicts with known facts. His various actions seem contradictory. His professed ignorance of the particulars of the siege or that it was ongoing is not plausible given that, from the onset of hostilities, both the Pentagon and White House followed events in real time, and Mr. Panetta had travelled from the Pentagon and went straight to the White House Situation Room. And his memory lapses regarding that September 11th seem excessive.

On the one hand, within minutes of learning of the attack, Panetta left the Pentagon bound for the White House, while on the other hand, he further testified, he had to drive back to the Pentagon, at the height of rush-hour, before determining the appropriate action to take. *Motion* at 11, 14.

When notified at 4:42 p.m., Panetta had been at the Pentagon, as was the Chairman of the Joint Chiefs, General Martin Dempsey, and the Commander of African Command, General Carter Ham. Panetta testified that he couldn't remember when he was notified, or who told him, or whether he or Dempsey had spoken with General Ham before leaving the Pentagon, and he wasn't sure where he was when notified. *Id.* at 9. Within minutes of being notified, Panetta and Dempsey left for the White House to meet with the President. Panetta testified that the meeting with the President began at 5:00. *Id.* at 12. But that is not accurate, as they travelled by car

during rush-hour, which took longer than 18 minutes, and they had first gone to the White House Situation Room before the meeting, for "additional information... about events in Benghazi." *Id.*

That visit to the Situation Room had been a full hour after that command and control center had been notified. Equipped with advanced communications equipment for the President to maintain command and control of U.S. forces around the world, it had been fully engaged by the time the Secretary of Defense arrived there. He testified that he didn't "think we received any additional intelligence" from the Situation Room. *Id.*

When the attacks first began, Christopher Stevens called the Tripoli Deputy Chief of Mission Greg Hicks. "Greg, we're under attack." That opened the lines of communication, and they stayed open—in Benghazi with the mission until rescued and with the CIA Annex; in Tripoli with the CIA Chief and the Defense Attaché; with the State Department Operations Center; and soon thereafter with African Command, the Joint Chiefs of Staff, European Command, Central Command, Special Operations Command, and the White House Situation Room. *See, e.g., Compl. Preliminary Statement*, ECF 31 at 1. At 5:10 p.m., just as the meeting with the President was getting underway, African Command's reconnaissance drone arrived on station over the compound, and transmitted to the DOD, and no doubt to the Situation Room, the feed showing GRS officers returning fire while Diplomatic Security Agents loaded their vehicle and escaped the compound under fire, at 5:16 p.m. *Select Committee Report*, Exhibit 4 *Clarke Decl.* ECF 71-1 at Bates 56.

Notwithstanding that the information of the ongoing assault was being broadcast by the DOD in real time, world-wide, for over an hour by the time Panetta met the President, he "did not have information about the state of the situation," or the "potential" attack. *Motion* at 12. At this juncture, according to Mr. Panetta, none of the meeting's participants—the Secretary of

Defense, the Chairman of the Joint Chiefs of Staff, National Security Director Tom Donilon, and the President—had been aware that hostilities were ongoing, even while scores of government officials were following events in real time. Secretary Clinton had been apprised of the ongoing nature of the attack shortly after 4:00 p.m., whereupon she immediately called Tom Donilon, around the same time as the Situation Room had been notified. *Id.* at 17. Panetta testified that he could not remember whether Tom Donilon, or the President, even knew that there was an attack. *Id.*

According to Panetta, he "did not go into particulars about what resources would or would not be deployed" to the President (*id.* at 17-18), while the DOD's position in its timeline, Exhibit 1, is that he had "discuss[ed] potential responses to the emerging situation" with the President.

Ninety minutes into the hostilities, and allegedly having scant information, Mr. Panetta and General Dempsey travelled back to the Pentagon. They did so because they "had to get back to the Pentagon in order to determine what steps ought to be taken to try to respond to the situation" (*id.* at 14), in rush-hour traffic, yet, minutes after being notified, they had left the Pentagon, also by car.

For two hours after he allegedly gave the order, according to his testimony, for a "couple of hours the principals were... mak[ing] sure that the steps that I had ordered were taking place,"¹⁹ during which time he "continued to ask, 'Give me updates,' to make sure these people

¹⁹ *Motion* at 17:

Q. So a meeting that occurred back at the Pentagon that resulted in a series of directives from you to prepare to deploy and deploy these various forces, can you recall the timeframe that that meeting took, that you met with Admiral Winfield, General Dempsey, General Kelly, Jeremy Bash? And General Ham. And General Ham. Thank you.

A. I mean, we were meeting kind of on an ongoing basis, as you can imagine. I

are on the move and ready to deploy," and he was told, "things were moving,"²⁰ so he "assumed that they were moving as expeditiously as they could."²¹ But his Generals misinformed him: "[T]wo more hours elapsed before the Secretary's orders were relayed to those forces." *Select Committee Report, infra.*

Three hours to order assets to respond to defend Americans under siege seems excessive. The *Select Committee's* excuse of a bureaucratic snafu causing another two-hour delay to relay the order would be an unusual occurrence. And the eight-hour delay, from 7:00 p.m., to 3:00 a.m., is incredible. What possible reason could DOD have for claiming that the order had been transmitted at 8:39 p.m.—and not 3:00 a.m.—other than to cover up the truth of when the order had actually been given?

mean, I issued the orders with regards to those teams that ought to respond, but we continued to be there. And I think, you know, it was probably at least a couple hours where the principals were still kind of talking and continuing to talk to make sure that the steps that I had ordered were taking place and also, frankly, trying to get intelligence about what the hell was happening in Benghazi. I mean, it was very fragmented information about what was taking place there.

²⁰ *Id.*:

- Q. And then, that night, as with respect to after you gave the order to deploy sometime between 6 and 8, and more probably before 7:19, and it obviously appears surprising to you to learn about the—and now we're re at 11 o'clock and so forth. After you gave the order to deploy, why did you not check to see what was happening and what was moving?
- A. I did. And, I mean, I continued to talk with General Dempsey and with Admiral Winfield and, obviously, General Kelly, my military aide, and continued to ask—"Give me updates," to make sure these people are on the move and ready to deploy. And, you know, they indicated things were moving.

²¹ *Id.* at 18:

- Q. Knowing that the incident was notified to the Office of SecDef at 4:30, it's that time, between 4:30 and 11, that would cause me to wonder, were we moving out as smartly as you, Mr. Secretary, directed personally. Is that a fair question? Is that a fair observation?
- A. You know, I think it's obviously, it's a fair question, but it's not one that I can answer, because, frankly, my view was, "Go," and I assumed that they were moving as expeditiously as they could.

The DOD deceived Congress and the public about when the order to deploy had been relayed, by six hours. The Secretary of Defense's version that he had given the order by 7:00 p.m. lacks credibility for this reason alone. Mr. Panetta's testimony does not help the DOD.

This is the state of the evidence upon which plaintiffs seek to propound a single interrogatory:

State the times of all electronic, verbal, and written, communications, from 3:32 p.m., through 3:00 a.m., by and among all DOD components, the total number of individuals on the communication, their titles and locations, and the substance of that communication. Include in your answer a description of all records, in any form, containing, reflecting, or otherwise corroborating, that communication.

Having failed to address the fact that the 3:00 a.m. EXORD disproves the DOD's version of events, the *Report* does not recognize that this misrepresentation is evidence of bad faith:

As the undersigned has observed, "[f]ew cases in this Circuit address what is sufficient to demonstrate 'bad faith.' Many more cases address what is not bad faith." *Khatchadourian v. Def. Intelligence Agency*, No. 1:16-CV-311-RCL/DAR, -- F. Supp. 3d --, 2020 WL 1309941, at *42 (D.D.C. Mar. 19, 2020) (collecting cases). Plaintiffs' contentions about the DoD's inaccurate timeline of events do not meet this Circuit's standard because Plaintiffs' claims amount to a "mere allegation of agency misrepresentation[.]" *Id.* (quoting *Hayden v. NSA/Cent. Sec. Serv.*, 608 F.2d 1381, 1387 (D.C. Cir. 1979)).... In the absence of specific evidence to the contrary, Plaintiffs' insistence that their assumptions and speculative assertions are true cannot rebut a presumption of good faith. *Accuracy in Media*, 194 F.3d at 125.

Report at 30.

The *Report* accorded no significance to the fact that Panetta's testimony conflicted with known facts, that his actions were contradictory, or his professed initial ignorance of the particulars of the siege or that it was ongoing, or that Mr. Panetta's subordinates had assured him that forces were moving when no such order had been transmitted. The DOD claims that Mr. Panetta gave the order to go, his subordinates assured him that forces were moving into place,

yet the order had not even been transmitted for eight more hours. For Panetta's version of these events to be true, military leaders would have to have been lying to the Secretary of Defense, or be wholly incompetent. The *Report* would appear not to have considered these circumstances:

Plaintiffs' main contention is that this official timeline of events is doubtful; however, the undersigned finds that this contention is of little significance. *See, e.g.,* Pls.' Mem. at 14 (expressing skepticism that Secretary Panetta could have travelled from a meeting in the White House to the Pentagon in 30 minutes).

Report at 14.

The *Report* found that plaintiffs' observations regarding Mr. Panetta's testimony did not overcome the presumption of good faith.

In reviewing the testimony, the undersigned does not find grounds to overcome the presumption of good faith accorded to the DoD. Former Secretary of Defense, Leon Panetta, testified before a House Select Committee that he received word of the attack in Benghazi around 4:32 pm EST on September 11, 2012. *See Clarke Decl.*, ECF No. 71-1, Ex. 3 ("Panetta Test.") at 12. After speaking to President Obama in the Oval Office and returning to the Pentagon for further informational meetings, Secretary Panetta issued orders to "not only prepare to deploy but deploy." *See id.* at 15. He testified that these orders were verbal and later released in the written EXORD, the first written order, at 3:00 a.m. *Id.* 15-16.

Report at 13.

But Mr. Panetta did not testify that the first written order had been generated at 3:00 a.m. The DOD has long posited that the order had been transmitted at 8:39 p.m. The fact that the first order had, in fact, been transmitted at 3:00 a.m. was only revealed in June of 2016, when defendant produced the EXORD, Exhibit 2.

Plaintiffs observed in their *Motion* another issue with the DOD's version of events. Almost the only follow-up in Mr. Panetta's testimony had been on the question of whether his order had been to prepare to deploy, or to deploy—to go. Mr. Panetta stated over a dozen times that the order was not to prepare to go, but, rather, to go. *Motion* note 24 at 15. The *Select*

Committee agreed.²² But that is not what the DOD's timeline, Exhibit 1, reports. The timeline states that, sometime between 6:00 p.m. and 8:00 p.m., the initial order had been for "movement of forces upon receipt of formal authorization," and, at 8:39 p.m., the order had been to "prepare to deploy." *Motion* at 23-24.

B. Available Assets

Plaintiffs' FOIA requests seek identification of available assets, both personnel and aircraft.

The *Select Committee* fared no better in its quest to obtain these records than it did obtaining "documents relating to orders or commands given to defend against the attacks or rescue Americans." The maps that DOD provided to the *Select Committee* "failed to include assets that actually were deployed in response to Benghazi," and, although the "Committee requested it [DOD] to confirm whether there were any additional assets not identified on the maps or any assets withheld due to special access programs restrictions," the DOD "did not respond to the Committee's request."²³ Nor did the DOD produce the information requested

²² *Select Committee* Report, ECF 71-1 Exhibit 4 at Bates 69:

The Secretary said his orders were active tense. "My orders were to deploy those forces, period. . . . [I]t was very clear: They are to deploy." He did not order the preparation to deploy or the planning to deploy or the contemplation of deployment. His unequivocal testimony was that he ordered the identified assets to "deploy." By 7:00 p.m. in Washington [1:00 a.m. in Benghazi], nearly three hours after the attacks began, the Secretary issued what he believed, then and now, to be the only order needed to move the FAST platoons, the CIF, and the U.S. SOF.

²³ *Id.* at Bates 55 (footnotes omitted):

The Defense Department provided copies of maps identifying assets present in European Command, AFRICOM, and Central Command's areas of responsibility on September 11, September 12, and September 13 to the Committee. The assets

regarding aircraft stationed at Souda Bay, Greece.²⁴ The *Select Committee* wrote that "[t]his failure to respond unnecessarily and unadvisedly leaves questions the Defense Department can easily answer, and it is in the public interest that it do so."

The DOD declined to produce twelve pages of maps, which, it states, contain virtually all of the responsive information regarding available assets.²⁵ It is withheld on the grounds that disclosure of the information of the placement of its assets—eight years ago—could provide

identified on the maps were purportedly considered during this meeting, although the Joint Staff at the time did not keep a daily updated list of assets and their locations. During its investigation, the Committee determined the maps failed to include assets that actually were deployed in response to Benghazi.... Given this discrepancy, the Committee requested it confirm whether there were any additional assets not identified on the maps or any assets withheld due to special access programs restrictions. It did not respond to the Committee's request. This failure to respond unnecessarily and unadvisedly leaves questions the Defense Department can easily answer, and it is in the public interest that it do so.

(Plaintiffs' information is that DOD's Global Command and Control System (GCCS), used by all combatant commands, shows on-screen graphics showing US air, land, and sea assets world-wide, together with actions.)

²⁴ See *Select Committee* Report at 64, under heading "Assets at Souda Bay, Crete:"

While conducting oversight in Souda Bay, Members of the Committee received a briefing regarding special operations aircraft that were stationed at Souda Bay on the night of the attacks in Benghazi and could have been utilized in response to the attacks. The Committee sought confirmation of this information through interviews and requests for information from the Defense Department. The Defense Department has not denied the presence of these assets.

²⁵ *Malloy Decl.*, ECF 69-1 ¶¶ 4, 22:

The 12 pages withheld by Joint Staff contain the force posture of the Department of Defense for the European Command, Central Command, and Africa Command areas of responsibility as well as the force posture of Special Operation forces worldwide during the relevant timeframe in September 2012. These documents contain the numbers and locations of ships, submarines, response forces, and aircraft surrounding Benghazi, Libya. They further contain the numbers of military personnel located in particular countries during that time. Finally, they contain the transit time required for each available asset to reach Benghazi.

adversaries with information that could now be expected to cause serious damage to national security.

The DOD relies on the Declaration of Vice Director of Operations for the Joint Staff at the Pentagon, Rear Admiral James J. Malloy, ECF 69-1. In the DOD's view, "This information is sensitive and classified at the Secret level, because the release of this information reasonably could be expected to cause serious damage to the national security. Even with the passage of time, how DoD's forces are positioned at a particular time could provide potentially damaging and/or threatening insight to adversaries regarding DoD's interests, intent, and potential operations in these volatile regions of the world.... [with] transit time capability information to plan attacks within windows of perceived vulnerability." *Id.* ¶ 11.

The *Report*, at 17, discounts plaintiffs' point that the information is already public, as follows:

Plaintiffs' argument that these maps should not be confidential because some information is in the public domain fares little better. Pls.' Mem. at 29-30 (referencing some, limited public information about aircraft in Europe). This Circuit "has repeatedly rejected the argument that the government's decision to disclose some information prevents the government from withholding other information about the same subject." *ACLU I*, 628 F.3d at 625. Plaintiffs do not attempt to demonstrate, as this Circuit requires under these circumstances, that the following criteria is satisfied: "(1) the information requested must be as specific as the information previously released; (2) the information requested must match the information previously disclosed; and (3) the information requested must already have been made public through an official and documented disclosure." *Id.* at 620-21 (citations omitted). In any event, as Plaintiffs point out, the DoD has steadfastly resisted release of this information, so the third prong of this test cannot be satisfied. *See* Pls.' Mem. at 29-30 (noting that the DoD did not cooperate with the Select Committee in its requests for information about available military assets)

Here, plaintiffs submitted with their *Motion* the *Select Committee's* map, labelled "Mediterranean Region," which provides the locations of ten bases with assets, including the distances. *Clarke Decl.*, ECF 71-1, Exhibit 4 at Bates 50. Plaintiffs also submitted their own

such map, which adds the assets at each base (except Souda Bay, Greece), along with travel times to Benghazi. *Id.* Exhibit 12 at Bates 113. Plaintiffs recounted this information on available assets in the Preliminary Statement of their Complaint:

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 from bases in Sicily and Spain...

Compl., ECF 31 at 1.

Plaintiffs did not believe that the Court would need a proffer of evidence showing that the information requested has already been made public through an official source. The Congressional record on this issue is replete with discussions of the assets, travel times, and available personnel and aircraft, and this information has been extensively reported by the media.

Contrary to the *Report's* conclusion (at 17), the DOD has not "steadfastly resisted the release of this information." Rather, the DOD has declined to disclose "any additional assets not identified," including the aircraft stationed at Souda Bay, Greece, as the Select Committee noted.

Plaintiffs' expert, Admiral James Lyons, Jr.,²⁶ addresses the fluidity of assets in his Affidavit. He opined that the "[t]he disposition of our forces in September 2012 is tactical

²⁶ Affidavit of Admiral James A. Jr. ISN (Ret), ECF 71-2:

I am a retired four-star admiral, former Commander-in-Chief of the U.S. Pacific Fleet, father of the Navy Seal Red Cell Program, Senior U.S. Military Representative to the UN, and Deputy Chief of Naval Operations, where I was the principal advisor to the Joint Chiefs of Staff. My commands included the U.S. Second Fleet, the NATO Striking Fleet, the Seventh Fleet Logistic Force, and several ship commands.

information that is perishable in that immediate time frame," and, therefore, "disclosure of this information could not provide adversaries with information that could harm national security." *Lyons Aff.*, ECF 71-2 ¶ 4.

The *Report* accorded Admiral Lyons' Affidavit "little weight," because he was retired, and "so his opinion about the nature of current or future military assets is limited at best."²⁷ While this observation is sound, Admiral Lyons does not opine on current or future military assets, but about the posture of military assets eight years ago.

Plaintiffs received information that Navy and Marine elements had been in the Mediterranean, close enough to respond, but were ordered to stand down. As ship locations are fluid, the release of the information sought would implicate no national security interest.

C. Other Records²⁸

Plaintiffs *Motion*, at 16, quotes Chief Investigative Counsel Dana Chipman's question to Mr. Panetta, referring to Chipman's own copy of the DOD timeline, to which he had added his own notes regarding other events. The referenced notes regard message traffic, and an order

²⁷ *Report* at 16-17:

Admiral Lyons was retired for several years prior to submitting his affidavit, so his opinion about the nature of current or future military assets is limited at best. *See Lyons Aff.*, ECF No. 71-2 ¶ 1. As Admiral Lyons effectively acknowledged, he offered an "opinion" based on his experience, but this opinion is not based on personal knowledge of these records or the present risks to the military, so the undersigned accords these opinions little weight.

²⁸ Plaintiffs do not challenge the DODs search for records of Gaddafi's March 2011 offer to abdicate, as they had in their *Motion* at 31-33. *See Compl.*, ECF 31 ¶ 87: 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.

from General Ham, given at 8:02 p.m.²⁹ Regarding the order that the DOD has long claimed having given at 8:39 p.m., Mr. Panetta said that "somebody types those orders out" before they are "transmitted." *Id.* at 9. Plaintiffs' *Motion* also quotes another of Mr. Chipman's questions regarding an order said to have been given at 11:00 p.m.³⁰

Plaintiffs also sought disclosure of the PINNACLE OPREP-3 Report, which, as the DOD explained, "describes an event of such importance that it needs to be brought to the immediate attention of the National Command Authority, Joint Chiefs of Staff/National Military Command Center, and other national-level leadership." *Herrington Decl.*, ECF 68-4 ¶ 24. Further, "the combatant command with the area of responsibility for the location of the incident would be responsible for the report (*id.* ¶ 8), which is AFRICOM. *Id.* ¶ 24. The DOD's search did not

²⁹ *Motion* at 16:

Q. Exhibit 4 is, in essence, a series of times and dates and activities, added to by majority counsel, in trying to get a compilation of what appears to be supported by other evidence and by other witnesses we have talked to and by *message traffic*. So there are no citations on this document, and we can certainly supplement the record, should we need to, with what we are basing these times on. But it appears that General Ham's guidance was *issued certainly by 8:02 p.m.* and the EUCOM SOF in Croatia learned then that they might have the potential to deploy into Benghazi.
(Emphasis added)

³⁰ *Id.* at 20:

Q. And I think that, from my perspective, Mr. Secretary, I would agree with you that that is an accurate assessment. But it's that idea of "started moving forces" that I think is worthy of some discussion. And so, if you don't start moving forces until *the 11 o'clock order* is issued, then you're going to build in some more time. So there is time from the incident to notification to liftoff. There is time from liftoff to arrival. And what I think I would take issue with, at least in part, from this particular statement, is that we seem to have a significant time from the incident to notification to deploy.
(Emphasis added)

locate it, but did find a record that referred to it,³¹ which it attached to its Declaration. *Id.* Exhibit 10 at 54.

While the DOD named three of its command and control units as the recipients of the OPREP-3, and stated that AFRICOM would be "responsible for the report," the *Report* opines that plaintiffs had not proffered any evidence that the DOD is the custodian, or that the OPREP-3 may have been transmitted to DOD components only verbally,³² or that the OPREP-3 may not be responsive to plaintiffs' FOIA requests³³ (not recognizing that plaintiffs had specifically requested it³⁴). The DOD had not advanced these views.

³¹ *Cf. Report* note 6 at 12 regarding OPREP-3, "a version of which was actually released to Plaintiff..."

³² *Id.* at 14-15:
See Herrington Decl, Ex. 1, at 1. Plaintiffs' allege certain other orders and communications but, even if they existed in some sense, Plaintiffs do not point to evidence of records that would exist in the physical possession of the DoD. *See e.g.*, Pls.' Mem. at 30-32 (alleging stand down orders that were relayed over the phone). To be clear, Plaintiffs do not specifically allege, and the record does not establish, that the Ops Alert was in writing and in DoD's possession.

³³ *Id.* at 14:
Plaintiffs do not show how this record would be responsive to Plaintiffs' request for "communications with, and orders to . . . personnel to get ready to deploy, and if applicable, to deploy" if the record is an inter-agency communication describing the attack rather than a communication with personnel about deployment.

³⁴ *Compl.*, ECF 31 ¶ 110:
On May 28, 2014, by certified mail to defendant Defense Intelligence Agency, plaintiffs requested disclosure of records regarding the attack on US facilities in Benghazi, Libya, on September 11th and 12th, 2012. Specifically, plaintiffs sought disclosure of:
1. Op Rep 3's. The OPREP-3 PINNACLE reports used to provide any Department of Defense division (or office or entity) with notification of, or information about, the September 11th and 12th, 2012 attacks on U.S. facilities in Benghazi, Libya...

See also id. at 2, Preliminary Statement: "An OPREP-3 Pinnacle Report alerted the Pentagon's National Military Command Center."

The *Report* (at 14) recites that it could "only find two allegations of specific, actual records which, according to Plaintiffs, must exist" the OPREP-3, and the record that referred to a telephone call, but is silent on the three records identified above, generated at 8:02 p.m., 8:39 p.m., and 11:00 p.m.

III. CENTRAL INTELLIGENCE AGENCY

At issue here is the CIA's redactions in its production of records of a complaint to the CIA Inspector General ("IG"). *See Compl.* ECF 31 ¶ 144(1). On September 25, 2017, the CIA advised that it had located twenty responsive records. It released eight, totaling 25 pages. Nine of these pages are wholly redacted, with the balance heavily redacted. Additionally, it withheld 12 documents in their entirety. Plaintiffs submitted the 25-page production with their *Motion, Clarke Decl.* ECF 71-1 Exhibit 8 at Bates 77-111. The release discloses the existence of the IG complaint, its administrative history, and the chronology of a Congressional inquiry.

The production discloses that, shortly after the attack, Director Petraeus had spoken to CIA Officers who had been there, regarding the CIA's response to the attack. He said something that at least one Officers wanted to correct. But that statement is redacted. The *only* information regarding the subject matter of the complaint is that it "calls into question some actions and decisions made by the Chief of Base," and that Director Petraeus had not been provided "fulsome details" about CIA actions that night.

The whistleblower had emailed his or her information to the IG, asking that the information be provided to Director Petraeus, anonymously, which the IG did. The IG stated that he had declined to elevate the complaint for four reasons: (1) It "concern[ed] largely matters that would... be addressed by the Accountability Review Board;" (2) it would have "the potential

[for] disruption" of the ongoing FBI probe; (3) an IG case would not have added "sufficient value" to the matter; and (4) the CIA was going to conduct an "internal investigation into Benghazi" with "an interview team [that] Director Petraeus was putting together to interview Agency personnel."

Under the CIA Act, "the specific subject matter of an investigation by... the Office of Inspector General of the Central Intelligence Agency," unlike most other CIA operational records, is subject to the FOIA.³⁵ This provision of the Act is based on the public's interest in knowing about accusations of CIA wrongdoing.³⁶ Here, the CIA's disclosure redacted "the specific subject matter" of the complaint. The fact that the complaint "called into question some actions and decisions made by the Chief of Base" does not reveal what Petraeus had been told.

The *Report* concluded that the "the subject matter of these records is apparent from the face of them." But it is not. This is a whistleblower complaint, and, as such, alleges wrongdoing. That malfeasance remains undisclosed.

Apparently, someone had lied to Petraeus. What was the lie? Is it significant? Plaintiffs believe that they may know. The IG complaint was probably regarding the COB's order to "stand down," and Petraeus had stated otherwise to the whistleblower, who had believed that

³⁵ 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.

³⁶ *Cf. Report* at 18:
The law which Plaintiffs cite as imposing this requirement applies to "operational files," a status that the CIA has never asserted for the records in question. 50 U.S.C. § 3141(c)(3).

Petraeus had been deceived, and sought to so inform him. Whether or not the COB had issued a "stand down" order is the subject of a good deal of publicity, and it, too, remains controversial. The Deputy Chief of Base denied that such an order in his *Memorandum for the Record*,³⁷ as had the COB in testimony to the Senate Select Intelligence Committee, and in testimony before the *Select Committee*. Plaintiffs attached the *Memorandum for the Record* in the *Clarke Decl.* ECF 71-1 Exhibit 9 at Bates 104-108. It states, in part:

[The GRS] advised he had just received a call from the State compound indicating they had been penetrated and were taking fire. He strongly recommended taking the available GRS personnel then on base, himself and five other personnel. I found the COB and we apprised him of the situation. He authorized the move.

Even though the Senate Committee noted that, "[a]ccording to informal notes obtained from the CIA, the security team left for the Annex [sic] without the formal approval of the Chief of Base" (Note 13 at 6), "the Committee found *no evidence* of intentional delay or obstruction by the Chief of Base or any other party" (emphasis supplied). While the Committee Report

³⁷ By February 24 FOIA to the CIA (submitted with the *Shiner Decl.* ECF 68-5 at 61-62), plaintiffs sought the *Memorandum for the Record*, prepared by the Deputy Chief of Base, and titled "Events of 11- 12 SEP 2012 at Benghazi Base, Libya." That document had been cited in the January 15, 2014, U.S. Senate Select Committee on Intelligence in its Report, REVIEW OF THE TERRORIST ATTACKS ON U.S. FACILITIES IN BENGHAZI, LIBYA, SEPTEMBER 11-12, 2012, TOGETHER WITH ADDITIONAL VIEWS, at 5, as follows:

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.

included the contrary account,³⁸ it gave credence to the COB's version that he had "launched QRF [Quick Reaction Force] as soon as possible."

The QRF that did respond claimed otherwise. QRF testified to the *Select Committee* that the teams were packed up and ready to go in under five minutes, and that the COB did, in fact, order QRF to "stand down," resulting in a 20-minute delay. *See Select Committee Report*, ECF 71-1 Exhibit 9 at Bates 104-08. He used those "exact words." *Id.* The COB denied it to the *Select Committee*, "I did not issue a stand-down order," and to the Washington Post. *See "Former CIA chief in Benghazi challenges the story line of the new movie '13 Hours'"* (Jan. 15, 2016).

This is a matter of consequence. QRF opined that, had they not been ordered to stand down, they could have saved Sean Smith and Christopher Stevens, and that, had they not ultimately disobeyed the stand down order, the other five Americans at State's facility would have also been killed.³⁹

³⁸ The Senate Select Committee on Intelligence Report, REVIEW OF THE TERRORIST ATTACKS, included that "some members of the security team expressed frustration that they were unable to respond more quickly to the Mission compound," footnoted:

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, *Member and Staff Interview of former Chief of Base*, December 20, 2012, p. 3.

³⁹ Plaintiffs seek FBI reports of its interviews with personnel who had been in the Benghazi mission, and the Benghazi CIA annex, during attacks. *Compl.*, ECF 31 ¶ 126 (8)). On September 10, 2020, the government filed *Defendants' Notice Regarding Report and Recommendation*, ECF 86, wherein the FBI apprised plaintiffs and the Court "that it no longer intends to maintain its prior *Glomar* assertion... and intends to conduct a search for responsive records that would have been covered by the *Glomar* assertion."

Moreover, if Mr. Petraeus had been informed by the whistleblower's email that the COB had, in fact, issued a stand down order, Mr. Petraeus' sworn testimony to the contrary, to two Congressional Committees, may have been criminal. *See Panetta Select Committee* testimony:

- Q. There has been a similar urban myth surrounding the efforts by those at the Annex to rescue those at the diplomatic facility. That is, that the people at the Annex were ordered to stand down and not come to the assistance of those at the diplomatic facility. The Republican lead and bipartisan House Intelligence Committee debunked that myth, General Petraeus came in again yesterday and debunked that myth. Are you aware of any evidence from your involvement in this that there was any stand down order of those at the temporary—at the Annex CIA facility to come to the rescue of those at the diplomatic facility?
- A. No, not at all.

Motion note 45 at 27.

The *Report* does not agree with plaintiffs. It concluded that "the subject matter of these records is apparent from the face of them,"⁴⁰ that disclosure of the specifics of the wrongdoing

⁴⁰ *Report* at 18:

Further, to the extent that FOIA broadly imposes an obligation to produce nonexempt portions of records like the subject matter of a record, the subject matter of these records is apparent from the face of them. These records reveal a complaint to the CIA IG concerning an individual's belief that the CIA did not have accurate and full information about the Benghazi attack. Plaintiffs, by their own admission, instead seek the "details" of the IG Files which, as the undersigned will now explain, are protected from disclosure...

alleged could lead to the disclosure of the whistleblower's identity,⁴¹ and that nondisclosure is justified as the information "relates to intelligence sources and methods."⁴²

However, the whistleblower had been among CIA officers at the CIA Annex, the identities of all such personnel remain classified, so the information sought could not lead to the whistleblower's identity. And the information does not relate to intelligence sources or methods. Moreover, the subject matter of these records—what Director Petraeus had said—is not apparent from the face of the records.

⁴¹ *Report at 22:*

Here, this exemption applies to both the identity and identifying information of the confidential source in addition to information from the confidential source. *See Roth*, 642 F.3d at 1185. The information here relates to “an investigation pertaining to the September 2012 attacks in Benghazi, Libya.” *Shiner Decl.* ¶ 54. The source was a “confidential source” because the CIA offered explicit or implicit assurances that his or her identity would not be revealed. *See id.*; *Roth*, 642 F.3d at 1184. The underlying subject matter of the initial complaint would tend to provide enough information to reveal the identification of the reporting individual, which is why the CIA has a policy of refusing to disclose both identification of the individual and the substance of their statements. *See id.* Thus, not only is the identification of the source of the complaint to the IG protected, the information provided is also covered by Exemption 7(D) because the information would tend to reveal a confidential source’s identity. The undersigned recommends granting Defendants’ motion as it related to the CIA’s withholdings pursuant to Exemption 7(D).

⁴² *Report at 21:*

Here, the undersigned is satisfied that the CIA’s withholdings comport with the narrow scope of the CIA Act because, pursuant to this law, the CIA has only withheld “information concerning the organization, names, or official titles of personnel employed by the CIA[.]” *Shiner Decl.* ¶ 41. Under the National Security Act, the Director of National Intelligence “shall protect intelligence sources and methods from unauthorized disclosure.” 50 U.S.C. § 3024(i)(1). Courts in this Circuit construe this provision broadly to protect information that “relates to intelligence sources and methods” and information which “can reasonably be expected to lead to unauthorized disclosure of intelligence sources and methods.”

CONCLUSION

Discovery in FOIA cases is usually limited to issues regarding an agency's search, or where the plaintiff has demonstrated bad faith. Here, plaintiffs have pointed to concrete evidence of bad faith or illegality with regard to the underlying activities which generated the documents at issue.

Date: September 24, 2020.

Respectfully submitted,

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