

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ACCURACY IN MEDIA, INC., et al.,

Plaintiffs,

v.

DEPARTMENT OF DEFENSE, et al.,

Defendants.

Civil Action No. 14-cv-1589 (EGS)

Exhibit C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
ACCURACY IN MEDIA, INC., et al.,)	
)	
Plaintiff,)	
)	
v.)	
)	Civil Action No. 14-cv-1589
DEPARTMENT OF DEFENSE, et al.))	
)	
Defendant.)	
_____)	

DECLARATION OF TIMOTHY J. KOOTZ

Pursuant to 28 U.S.C. § 1746, I, Timothy J. Kootz, declare and state as follows:

1. I am the Director of the Office of Information Programs and Services (“IPS”) of the United States Department of State (the “Department” or “State”), a position in which I have served since March 26, 2023. I am the Department official immediately responsible for responding to requests for records under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552; the Privacy Act of 1974, 5 U.S.C. § 552a; and other applicable records access provisions. Prior to serving in this capacity, I served as the Agency Records Officer and the Chief of the Records and Archives Management Division of IPS beginning in October 2016.

2. I am familiar with the efforts of Department personnel to process the FOIA request that is the subject of this litigation, and I am in charge of coordinating the agency’s processing efforts with respect to that request. As the Director of IPS, I have original classification authority and am authorized to classify and declassify national security

information. I make the following statements based upon my personal knowledge, which in turn is based upon information furnished to me in the course of my official duties.

3. The core responsibilities of IPS include: (1) responding to records access requests made by the public (including under the FOIA, the Privacy Act, and the mandatory declassification review requirements of the Executive Order governing classified national security information), by Members of Congress, by other government agencies, and those made pursuant to judicial process such as subpoenas, court orders, and discovery requests; (2) records management; (3) national security classification management and declassification review; (4) corporate records archives management; (5) research; (6) operation and management of the Department's library; and (7) technology applications that support these activities.

4. This declaration explains the withholdings that the Department requested the Federal Bureau of Investigation ("FBI") make on its behalf with respect to certain records that the FBI sent to the Department for consultation and review of its equities therein. A description of the Department's administrative processing of the consultation request and the applicable exemptions applied to the withholdings is provided below.

I. ADMINISTRATIVE PROCESSING OF PLAINTIFF'S FOIA REQUEST

5. By email dated November 9, 2020, the FBI referred the records at issue to the Department for review and response to the FBI. The Department assigned this consultation Case Control Number CL-2021-00018.

6. The Department reviewed the pages referred by the FBI and requested certain withholdings under FOIA Exemptions 1, 6, and 7, as described below. The Department returned the pages to the FBI by email dated March 17, 2021.

7. In its response to the FBI, the Department requested that the FBI withhold the records in full pursuant to FOIA Exemptions 1, 6, and 7, 5 U.S.C. § 552(b)(1), pursuant to Executive Order (“E.O.”) 13526, sections 1.4(b), 1.4(c), and 1.4(d); (b)(6); (b)(7)(A); (b)(7)(C); (b)(7)(E); and (b)(7)(F).

II. FOIA EXEMPTIONS CLAIMED

FOIA Exemption 1 – Classified Information

8. 5 U.S.C. § 552(b)(1) states that the FOIA does not apply to matters that 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

9. The Department withheld portions of all the documents referred by the FBI, as described in further detail below, pursuant to Exemption 1, 5 U.S.C. § 552(b)(1).

10. Based upon my personal review of the documents and information furnished to me in the course of my official duties, I have determined that the information withheld by the Department under Exemption 1, 5 U.S.C. § 552(b)(1), continues to meet the classification criteria of E.O. 13526 and that the Department has not previously authorized or officially acknowledged public release of this information.

11. For information to be properly classified and withheld from disclosure pursuant to Exemption 1, the information must meet all of the following requirements set forth in Section 1.1(a) of E.O. 13526:

- (1) an original classification authority is classifying the information;
- (2) the information is owned by, produced by or for, or is under the control of the United States Government;
- (3) the information falls within one or more of the categories listed in section 1.4 of [E.O. 13526]; and

- (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, which includes defense against transnational terrorism, and the original classification authority is able to identify or describe the damage.

12. This information withheld pursuant to Exemption 1 reflects information under the control of the United States Government that was classified at the SECRET level. Section 1.2 of E.O. 13526 states:

“Secret” shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security that the original classification authority is able to identify or describe.

13. Section 6.1(l) of E.O. 13526 defines “damage to the national security” as follows:

“Damage to the national security” means harm to the national defense or foreign relations of the United States from the unauthorized disclosure of information, taking into consideration such aspects of the information as the sensitivity, value, utility, and provenance of that information.

14. Information withheld in this case under Exemption 1 is properly classified pursuant to Sections 1.4(b), 1.4(c), or 1.4(d) of E.O. 13526. Section 1.4 provides:

Information shall not be considered for classification unless . . . it pertains to one or more of the following: . . . (b) foreign government information; (c) intelligence activities (including covert action), intelligence sources or methods, or cryptology; (d) foreign relations or foreign activities of the United States, including confidential sources . . . ;

Section 1.4(b) – Foreign Government Information

15. Section 6.1(s) of E.O. 13526 defines “foreign government information” as follows:

- (1) information provided to the United States Government by a foreign government or governments, an international organization of governments, or any

element thereof, with the expectation that the information, the source of the information, or both, are to be held in confidence;

(2) information produced by the United States Government pursuant to or as a result of a joint arrangement with a foreign government or governments, or an international organization of governments, or any element thereof, requiring that the information, the arrangement, or both, are to be held in confidence

16. Section 1.1(d) of E.O. 13526 states:

The unauthorized disclosure of foreign government information is presumed to cause damage to the national security.

17. The ability to obtain information from foreign governments is essential to the formulation and successful implementation of U.S. foreign policy. Release of foreign government information provided in confidence, either voluntarily by the Department or by order of a court, would cause foreign officials to believe that U.S. officials are not able or willing to observe the confidentiality expected in such interchanges. Governments could reasonably be expected to be less willing in the future to furnish information important to the conduct of U.S. foreign relations, and in general less disposed to cooperate with the United States in the achievement of foreign policy objectives of common interest. In view of the important relationship between the United States and the foreign governments identified in the responsive documents, protecting foreign government information, and in some cases even the fact that information has been provided, is important to our relationship and conduct of foreign relations.

18. In all the documents referred to the Department by the FBI, the Department withheld certain foreign government information the release of which could reasonably be expected to cause serious damage to the national security. Specifically, the Department withheld information in these documents that was provided to the U.S. Government by a foreign government in confidence that the Department's Diplomatic Security officers relayed to the FBI

during the interviews concerning the September 11, 2012, attacks. Release of the foreign government information in these documents, either voluntarily by the Department or by order of a court, would cause foreign officials to believe that U.S. officials are not able or willing to observe the confidentiality expected in such interchanges. The disclosure of such information would weaken the relationship with the government that provided the information, as well as other countries considering sharing similar information with the United States in the future. Moreover, this information is currently and properly classified pursuant to Section 1.4(b) of E.O. 13526 and, is therefore, exempt from disclosure under FOIA Exemption 1, 5 U.S.C. § 552(b)(1).

Section 1.4(c) – Intelligence Activities and Intelligence Sources and Methods

19. In all the documents referred to the Department by the FBI, the Department withheld certain information that relates directly to intelligence activities, sources, or methods. This classified information includes, among other things, details related to the names of sources who assisted the United States government during the attack as well as the methods used to respond to the attack. Disclosure of this information could enable foreign governments or persons, or entities opposed to U.S. foreign policy objectives, to identify U.S. intelligence activities, sources, or methods, and to undertake countermeasures that could frustrate the ability of the U.S. Government to acquire information necessary to the formulation and implementation of U.S. foreign policy; therefore, disclosure “reasonably could be expected to result in damage to the national security.” The information withheld in these documents is currently and properly classified pursuant to Section 1.4(c) of E. O. 13526 and is, therefore, exempt from disclosure under FOIA Exemption 1, 5 U.S.C. § 552(b)(1).

Section 1.4(d) – Foreign Relations or Foreign Activities of the United States

20. Diplomatic exchanges are premised upon, and depend upon, an expectation of confidentiality. Mutual trust between governments in this realm is vital to U.S. foreign relations. The inability of the United States to maintain confidentiality in its diplomatic exchanges would inevitably chill relations with other governments and could reasonably be expected to damage U.S. national security by diminishing our access to vital sources of information.

21. Some of the withheld information is classified under Section 1.4(d) of E.O. 13526. This information concerns both confidential sources and sensitive aspects of U.S. foreign relations, including, in particular, issues relating to identifying potential threats to U.S. national security. Release of this classified information has the potential to inject friction into, or cause damage to, a number of our bilateral relationships with countries whose cooperation is important to U.S. national security, including some in which public opinion might not currently favor close cooperation with the United States. Release of information revealing confidential sources reasonably could be expected to risk the safety of those confidential sources. Failure to preserve the expected confidentiality could jeopardize future access not only to the sources of the withheld information, but also to others who might provide sensitive information to U.S. officials that is important to U.S. national security interests. For these reasons, the Department withheld certain information in this case that is currently and properly classified pursuant to Section 1.4(d) of E.O. 13526; and is therefore exempt from release under Exemption 1, 5 U.S.C. § 552(b)(1).

FOIA Exemption 7 – Law Enforcement Information

22. FOIA Exemption 7 protects from disclosure all “records or information compiled for law enforcement purposes” that could reasonably be expected to cause one of the six harms outlined in the Exemption’s subparts. 5 U.S.C. § 552(b)(7). The law to be enforced for FOIA

Exemption 7 purposes includes administrative, regulatory, civil, and criminal law. Records pertaining to routine agency activities can qualify for FOIA Exemption 7 protection when those activities involve a law enforcement purpose. Although the records must be created for some law enforcement purpose, there is no requirement that the matter culminate in actual administrative, regulatory, civil, or criminal enforcement proceedings. In this case, the harm that could reasonably be expected to result from disclosure concerns the invasion of personal privacy; revealing sensitive law enforcement investigative techniques, security protocols, and procedures used by the U.S. Department of State and other federal agencies; and danger to the life or physical safety of an individual.

23. Before an agency can invoke any of the harms enumerated in FOIA Exemption 7, it must first demonstrate that the information or records at issue were compiled for law enforcement purposes. The FBI is a law enforcement agency with authority to undertake investigation into possible violations of Federal criminal and national security laws. The Department's Bureau of Diplomatic Security ("DS") officers are the security and law enforcement arm of the U.S. Department of State. DS has a broad scope of global responsibilities, with protection of people, information, and property as its top priority. DS designs and maintains security programs for every diplomatic mission in the world, investigates passport and visa fraud, conducts personnel security investigations, and protects the Secretary of State and high-ranking foreign dignitaries and officials visiting the United States. DS also trains foreign civilian law enforcement officers in disciplines designed to reduce the threat and repercussions of terrorism throughout the world.

24. The FBI has a broad law enforcement mandate that includes preventing and investigating acts of international and domestic terrorism. The FBI compiled the records over

which the Department has asserted FOIA Exemption 7, which consists of forms FD-302 and their attachments.

25. Form FD-302 is used by FBI agents to record information obtained through witness interviews, grand jury subpoenas, proffer agreements and immunity statements, and from other federal agencies. The FD-302s on which the Department of State is asserting Exemption 7 were compiled during the FBI's investigation of the September 11, 2012, attacks on the State Department's Special Mission Compound in Benghazi, Libya. Specifically, these FD-302s are from the FBI's interviews of DS officers.

FOIA Exemptions 7(A) – Law Enforcement Proceedings

26. FOIA Exemption 7(A) protects information from disclosure which “could reasonably be expected to interfere with enforcement proceedings.” 5 U.S.C. § 552(b)(7). Application of Exemption 7(A) requires the existence of law enforcement records or information; a pending or prospective law enforcement proceeding; and a reasonable expectation that the release would interfere with the enforcement proceeding. State withheld these documents in full pursuant to Exemption 7(A) because the premature release of this information could reasonably be expected to interfere with the FBI's ongoing investigation into the Benghazi attacks and related investigations. Specifically, disclosure of this information could reveal logistical details that would allow perpetrators to discover or anticipate the FBI's movement of personnel and destroy or tamper with evidence useful to the FBI's investigation.

FOIA Exemptions 6 and 7(C) – Personal Privacy¹

27. FOIA Exemption 6 protects “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). The courts have interpreted the language of Exemption 6 broadly to encompass all information that applies to an individual without regard to whether it was located in a particular type of file.

28. FOIA Exemption 7(C) protects “records or information compiled for law enforcement purposes [when disclosed] could reasonably be expected to constitute an unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(7)(C). FOIA Exemption 7(C) is the law enforcement counterpart to Exemption 6 and protects the privacy interests of all persons mentioned in law enforcement records. As described below, the Department has withheld certain information about DS officers, other federal government employees, contractors, and third parties, including foreign nationals under Exemptions 6 and 7(C).

29. When withholding information pursuant to Exemptions 6 and 7(C), the Department is required to balance the privacy interests of the individuals mentioned in the records against any public interest in disclosure. In asserting these exemptions, the Department examined each item of information to determine the nature and strength of the privacy interest of every individual whose name or identifying information appears in the records at issue.

¹ The Department has asserted Exemption 6 in conjunction with Exemption 7(C). Although the balancing test for Exemption 6 uses the standard of “would reasonably constitute a clearly unwarranted invasion of personal privacy,” and the test for Exemption 7(C) uses the lower standard of “could reasonably be expected to constitute an unwarranted invasion of personal privacy,” the analysis and balancing required by both exemptions is sufficiently similar to warrant consolidated discussion here. The privacy interests are balanced against the public’s interest in disclosure under the analysis of both exemptions.

30. In *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), the Supreme Court laid down two rules for determining public interest in disclosure of information involving a privacy interest: (1) whether disclosure would serve the “core purpose” for which Congress enacted the FOIA, i.e., to show “what the government is up to,” and (2) that public interest means the interest of the public in general, not particular interests of the person or group seeking the information. Accordingly, the identity of the requester as well as the purpose for which the information is sought is irrelevant in making the disclosure determination. In each instance where the Department determined that there were substantial privacy interests at stake, it analyzed whether there was a public interest and, if so, whether the public interest was sufficient to outweigh the individuals’ privacy interests.

31. The Department requested that the FBI withhold information pursuant to FOIA Exemptions 6 and 7(C) only after determining that the individuals’ privacy interests outweighed any public interest or when the Department determined that there was no public interest at all to balance against the individuals’ privacy interests.

32. The Department requested that the FBI assert Exemptions 6 and 7(C) to withhold the names of Department and other federal government officials, Blackberry cell phone numbers for Department officials, the email address of another federal government official, the direct phone numbers and email address of a foreign government official, and the names of foreign nationals contained in these documents because disclosure of this information could reasonably subject them to harassment, intimidation, unwanted attention, and/or unsolicited communications. Releasing the names of these individuals would expose their association with the U.S. Government, which would put them at an increased risk of harm. Thus, the Department

determined that these individuals had a strong privacy interest in not having their names or identifying information disclosed.

33. After identifying the substantial privacy interests of these individuals, the Department balanced those interests against the public interest in disclosure. The Department could identify no public interest in disclosure of this information because it would not shed light on the operation and activities of the Department or the U.S. Government. As a result, the Department determined that the lack of a public interest in this information is far outweighed by the individuals' substantial privacy rights. Accordingly, the Department concluded that the disclosure of this information would constitute a clearly unwarranted invasion of personal privacy under Exemptions 6 and 7(C) and requested that the information be withheld by the FBI.

FOIA Exemption 7(E) – Law Enforcement Techniques and Procedures

34. FOIA Exemption 7(E) protects records or information compiled for law enforcement purposes when release “would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law” 5 U.S.C. § 552(b)(7)(E). Assertion of Exemption 7(E) requires that the agency demonstrate logically how the release of the requested information might create a risk of circumvention of the law. The agency need not demonstrate an actual or certain risk of circumvention, but rather a reasonably expected risk. The Department withheld portions of documents under Exemption 7(E) because disclosure could reveal investigative techniques related to protection of the U.S. diplomatic mission abroad. These techniques implicate operational security force protection concerns and the U.S. Government's ability to conduct relationships with and obtain information from foreign governments and foreign government

services. Revealing these techniques would effectively reveal the operational details of the security of the U.S. compound that protects the U.S. diplomatic mission from threats, thus risking the defeat of such security measures in the future. These techniques and their utility in the context of these and similar international terrorism investigations are not known to the general public. If made public, individuals could harness this information to identify and exploit security vulnerabilities at U.S. Government compounds, risking the safety of the U.S.

Government employees. Moreover, release of this information could allow individuals to interfere with ongoing and future investigations into attacks on U.S. Government compounds and personnel. Release of the nonpublic details of these techniques would nullify their effectiveness, risk future criminal and terrorist activity, and make the U.S. Government more vulnerable, especially in the context of continued and increased unrest in the Middle East. Individuals who possess such knowledge may be able to utilize this information to search for vulnerabilities, thus compromising the effectiveness of the investigatory techniques. In each instance where the Department withheld information, I determined that release of the requested information would risk circumvention of the law.

FOIA Exemption 7(F) – Danger to Life or Physical Safety

35. FOIA Exemption 7(F) protects “records or information compiled for law enforcement purposes” when disclosed “could reasonably be expected to endanger the life or physical safety of any individual.” 5 U.S.C. § 552(b)(7)(F).

36. The Department has asserted FOIA Exemption 7(F) to protect details of threats received against U.S. Government employees, the release of which could reasonably be expected to endanger the lives and/or physical safety of these employees. The nature of the threats against these employees gives rise to a reasonable expectation that release of certain information would

place the employees at risk. The Department also asserted Exemption 7(F) to protect the details of foreign nationals employed by and/or cooperating with the U.S. Government because identifying their association with the U.S. Government and the Benghazi Special Mission, and/or the investigation of the September 11, 2012, attacks, could expose them to threats to their lives or personal safety. For these reasons, the Department has properly withheld certain information pursuant to Exemption 7(F), 5 U.S.C. § 552(b)(7)(F).

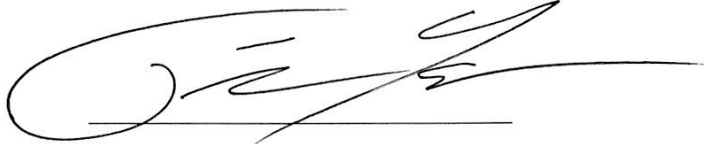
IV. CONCLUSION

37. In summary, the Department reviewed the documents in response to the FBI's consultation request made in connection with this litigation. The Department provided a response to the FBI's request, requesting that certain information in the documents be withheld from disclosure under FOIA Exemptions 1, 6, and 7.

38. The Department carefully reviewed all the documents addressed herein and, in making its withholding determinations, determined that no meaningful information can be segregated without disclosing information warranting protection under the law.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 27 day of June 2023, Washington, D.C.

A handwritten signature in black ink, appearing to read 'Timothy J. Kootz', written over a horizontal line.

Timothy J. Kootz