[ORAL ARGUMENT NOT SCHEDULED]

No. 24-5165

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ACCURACY IN MEDIA, et al.

Plaintiffs-Appellees,

ROGER L. ARONOFF,

Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF DEFENSE, et al.

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR DEFENDANTS-APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Plaintiffs in district court were Accuracy in Media, Inc., Roger L. Aronoff, Captain Larry W. Bailey, Lieutenant Colonel Kenneth Benway, Colonel Richard F. Brauer, Jr., Clare M. Lopez, Admiral James A. Lyons, Jr., and Kevin Michael Shipp. The notice of appeal was filed by plaintiff Roger L. Aronoff.

Defendants-appellees are the U.S. Department of Defense, U.S. Department of State, U.S. Department of Justice, and Central Intelligence Agency.

B. Rulings Under Review

Plaintiff-appellant is appealing from the April 26, 2024, summary judgment order and opinion issued by the Honorable Loren L. AliKhan and all prior orders entered in this case against plaintiffs, including the November 28, 2022, summary judgment order and opinion issued by the Honorable Emmet G. Sullivan, United States District Court for the District of Columbia, in Case No. 14-cv-1589. *See* Dkt. No. 92 (JA536-64); Dkt. No. 93; Dkt. No. 103 (JA909-18); Dkt. No. 104 (JA919); Dkt. No.

105 (JA920). No citation to either summary-judgment ruling is currently available in the Federal Supplement. The district court's April 26, 2024, opinion can be found at 2024 WL 1833851. The district court's November 28, 2022, opinion can be found at 2022 WL 17250196.

C. Related Cases

Counsel for defendants-appellees is not aware of any related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

s/ Urja Mittal
Urja Mittal

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GLOSSARY

AFRICOM	United States Africa Command
CIA	Central Intelligence Agency
EXORD	Execution Order
FBI	Federal Bureau of Investigation
FOIA	Freedom of Information Act
JA	Joint Appendix

STATEMENT OF JURISDICTION

Plaintiffs Accuracy in Media, Inc., Roger L. Aronoff, Captain Larry W. Bailey, Lieutenant Colonel Kenneth Benway, Colonel Richard F. Brauer, Jr., Clare M. Lopez, Admiral James A. Lyons, Jr., and Kevin Michael Shipp invoked the district court's jurisdiction under 28 U.S.C. § 1331. The district court entered final judgment on April 26, 2024, granting summary judgment to the government. *See* JA919. Plaintiff Roger Aronoff timely appealed on June 22, 2024. *See* JA920. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Plaintiffs filed this Freedom of Information Act (FOIA) suit against the U.S. Department of Defense, U.S. Department of State, Federal Bureau of Investigation (FBI), and Central Intelligence Agency (CIA) challenging their responses to requests for information regarding the September 2012 attack on U.S. diplomatic facilities in Benghazi, Libya. On appeal, the issue presented is whether the district court erred in granting summary judgment to the government as to plaintiffs' challenges to certain withholdings and the adequacy of an agency's search for records under FOIA.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Statutory Background

Under FOIA, federal agencies are generally required to release records to the public upon request, subject to certain exemptions. *See* 5 U.S.C. § 552(a)-(b). An agency is required to make only "reasonable efforts to search for the records," *id.* § 552(a)(3)(C), and is not required to disclose material that is subject to FOIA's statutory exemptions, *id.* § 552(b).

Exemption 1 protects from disclosure information that is "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" and is "properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1).

Exemption 3 covers records that are exempt from disclosure by statute if the statute "(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue or

(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3)(A).

Exemption 6 permits the government to withhold "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).

Exemption 7(A) allows the government to withhold records or information "compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records of information could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A).

Exemption 7(D) authorizes the government to withhold records or information compiled for law enforcement purposes if release of the records or information "could reasonably be expected to disclose the identity of a confidential source." 5 U.S.C. § 552(b)(7)(D).

"[T]he vast majority of FOIA cases can be resolved on summary judgment," *Brayton v. Office of the U.S. Trade Representative*, 641 F.3d 521, 527 (D.C. Cir. 2011), without discovery against the government. *See Larson v. Department of State*, 565 F.3d 857, 865 (D.C. Cir. 2009).

B. Prior Proceedings

1. In 2014, plaintiffs Accuracy in Media, Inc., Roger L. Aronoff, Captain Larry W. Bailey, Lieutenant Colonel Kenneth Benway, Colonel Richard F. Brauer, Jr., Clare M. Lopez, Admiral James A. Lyons, Jr., and Kevin Michael Shipp sent more than 40 FOIA requests to the U.S. Department of Defense, U.S. Department of State, FBI, and CIA seeking information related to the September 2012 attack on U.S. diplomatic facilities in Benghazi, Libya. *See* JA24-86. Plaintiffs subsequently filed suit challenging the agencies' handling of the requests. *See* Dkt. No. 1; JA24-86. As relevant to this appeal, several of plaintiffs' FOIA requests sought information about the U.S. government's response to the Benghazi attacks, which was the subject of congressional inquiry and culminated in reports by various congressional committees. *See* JA24-86.

The parties cross-moved for summary judgment, and plaintiffs filed a motion to propound an interrogatory to the Department of Defense. *See* JA87-92; Dkt. Nos. 68, 71, 73. While the motions were pending, the parties narrowed the remaining issues, and plaintiffs dropped their claims against the State Department. *See* JA498-500.

Over the course of the litigation, plaintiffs narrowed the focus of their requests for information in part to focus on orders by U.S. government officials in response to the Benghazi attacks, and whether, on plaintiffs' account of events, any U.S. officials gave a purported "stand down" order to U.S. security personnel during the attacks.

2. The district court largely adopted a magistrate judge's report and recommendation and granted summary judgment to the government on all but one issue. *See* JA501-533; JA536-64. Specifically, the district court upheld all of the Department of Defense and CIA's withholdings under FOIA and denied as moot summary judgment as to the FBI. *See* JA536-64.

The FBI had initially asserted a *Glomar* response to plaintiffs' request for FBI records reflecting survivors' accounts of the attacks, which meant that the agency had neither confirmed nor denied the existence of any such records. *See* JA570, ¶ 5 (Seidel Decl.); JA73, ¶ 126(8). The FBI subsequently withdrew its *Glomar* response and searched for responsive records, leading the district court to deny the government's request for summary judgment as moot as to the FBI. *See* JA534; JA543; JA606-07, ¶¶ 20-22 (Hardy Decl.).

Finally, the district court rejected plaintiffs' motion to propound an interrogatory to the Department of Defense seeking communications within the agency relating to the Benghazi attacks. *See* JA536-64.

3. Following the summary judgment ruling, plaintiffs notified the district court that they would only continue to challenge the FBI's withholding of interview reports and handwritten notes from interviews of U.S. personnel who were present during the attacks. *See* JA566.

After a second round of cross-motions for summary judgment, the district court granted summary judgment to the government as to the FBI's remaining withholdings. *See* JA909, 912. The district court concluded that the withholdings were proper under Exemption 7(A). *See* JA912. As the court explained and plaintiffs did not dispute, the FBI had compiled the records for law enforcement purposes and the government's investigation into the Benghazi attacks remained ongoing. *See* JA913. The district court concluded that the government had adequately established that disclosure could reasonably be expected to interfere with the ongoing law enforcement investigation. *See* JA914.

Plaintiff Roger Aronoff appealed. *See* JA920.

STANDARD OF REVIEW

This Court reviews de novo an agency's reliance on a FOIA exemption to justify withholding documents under FOIA, *see Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007), and reviews discovery rulings for abuse of discretion, *see Public Citizen v. Department of State*, 276 F.3d 634, 640 (D.C. Cir. 2002).

SUMMARY OF ARGUMENT

I. This Court should reject appellant's challenges to the adequacy of the Department of Defense's search for responsive documents and the withholding of records reflecting the Department of Defense's personnel and assets in connection with the Benghazi attacks. The Department of Defense established the adequacy of its search through its affidavits, which are entitled to a presumption of good faith that appellant fails to rebut. The Department of Defense also established the propriety of its withholdings under Exemption 1 as properly classified material, the disclosure of which could reasonably be expected to harm national security. Additionally, the district court did not abuse its discretion in denying plaintiffs' request to propound an interrogatory to the agency seeking communications within the agency relating to the attacks.

II. Appellant's challenges to the FBI's withholdings also fail. The FBI's interview reports, attachments, and corresponding notes are exempt from disclosure under Exemption 7(A), which allows an agency to withhold records or information compiled for law enforcement purposes to the extent that the production of such law enforcement records or information could reasonably be expected to interfere with law enforcement proceedings.

III. Appellant's argument that the CIA should have disclosed the "substance" of a complaint made to the CIA Inspector General following the Benghazi attacks is likewise unpersuasive because the CIA's withholdings were justified under Exemptions 1, 3, and 7(D). Appellant was apprised of the subject matter of the complaint, and his remaining challenges are speculative and unfounded.

Thus, this Court should affirm the district court's grant of summary judgment.

ARGUMENT

I. The Department of Defense's withholdings were proper.

A. The agency conducted an adequate search for responsive documents and properly withheld maps of personnel and assets under Exemption 1.

As the district court explained, the government properly established the adequacy of its search for responsive documents from the Department of Defense and its components. *See* JA548-55. The Department of Defense submitted declarations from Mark Herrington in the Department of Defense's Office of General Counsel, who explained how the agency processed the FOIA requests. *See* JA109-10, ¶ 3 (Herrington Decl.). Mr. Herrington's declaration explains the databases the agency searched and the search terms the agency used to locate responsive records. JA111-17, ¶¶ 6-24 (Herrington Decl.). The agency thus established that it "made a good faith effort," *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990), to conduct "a search reasonably calculated to uncover all relevant documents," *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983).

The agency's withholding under Exemption 1 of documents containing information about U.S. personnel and assets relevant to the Benghazi attacks was also proper. As the district court explained, the

Department of Defense "appropriately withheld in full 12 pages of maps containing 'the numbers and locations of ships, submarines, response forces, and aircraft surrounding Benghazi, Libya'; the 'numbers of military personnel located in particular countries during that time'; and 'the transit time required for each available asset to reach Benghazi.'" JA555-56 (quoting JA515-16 (quoting JA354, ¶ 9 (Malloy Decl.))). The agency's affidavits established that the sought-after information is properly classified and exempt from disclosure under Exemption 1.

Specifically, the agency submitted an affidavit from Real Admiral James J. Malloy, Vice Director of Operations for the Joint Staff at the Pentagon, that explained that the withheld material is properly classified because it "details military operations conducted overseas, describes foreign activities of the United States, and provides transit times and a list of assets that demonstrate the capabilities of [the Department of Defense's] plans and infrastructure." JA354, ¶ 10 (Malloy Decl.). The same affidavit explained that "release of this information reasonably could be expected to cause serious damage to the national security," because "[e]ven with the passage of time, how [the Department of Defense's] forces are positioned at a particular time

could provide potentially damaging and/or threatening insight to adversaries regarding [the Department of Defense's] interests, intent, and potential operations in these volatile regions of the world." JA354-55, ¶ 11 (Malloy Decl.). This, in turn, could result in escalating "[t]ensions with hostile foreign governments" and would allow "[t]errorist organizations, violent extremist organizations, or hostile foreign governments [to] use transit time capability information to plan attacks within windows of perceived vulnerability." *Id.*

In the national security context, this Court "accord[s] substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record," *American Civil Liberties Union v. U.S. Dep't of Def.*, 628 F.3d 612, 619 (D.C. Cir. 2011) (quoting *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007)), and "defer[s] to executive affidavits predicting harm to the national security," *Center for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 927 (D.C. Cir. 2003). In light of the detailed affidavits that the government submitted in district court and the deference accorded to such affidavits regarding national security risks, the government properly established that Exemption 1 applies.

B. Appellant's challenges to the agency's search and withholdings are unsupported by the record.

1. Appellant begins by detailing purported contradictions between the congressional testimony of former Secretary of Defense Leon Panetta regarding the Benghazi attacks and other accounts of the timeline of events during the attacks. *See* Br. 21-33. Appellant does not clearly explain which of the district court's FOIA rulings he seeks to challenge with this recounting, but the district court appeared to construe these arguments as challenging the adequacy of the agency's search. *See* JA548-55. Those arguments were unsuccessful in district court and fail again on appeal.

As the district court found, the agency met its burden of establishing the adequacy of its search by providing a "reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials … were searched." *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 313-14 (D.C. Cir. 2003) (alteration in original) (quoting *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999)); *see* JA109-17, ¶¶ 3-24 (Herrington Decl.). Such affidavits are given a presumption of good faith and establish the adequacy of the

search unless a plaintiff provides evidence establishing bad faith on the part of the agency. *See SafeCard Servs., Inc. v. Securities & Exch. Comm'n*, 926 F.2d 1197, 1200 (D.C. Cir. 1991); JA549.

Appellant points to testimony by former Secretary Panetta to a House Select Committee that the first order from U.S. officials regarding military deployment and preparation was transmitted before 7:19 p.m. on September 11, 2012, and argues that the earliest order the Department of Defense produced in response to the FOIA request was an "Execution Order," or EXORD, at 3:00 a.m. on September 12, 2012 *See* Br. 21-22. As the agency's declaration explains, however, officials issued oral orders earlier in the evening on September 11, and the EXORD at 3:00 a.m. was the "first written order." JA115-17, ¶¶ 16-22 (Herrington Decl.). The timeline of events that the agency submitted with its declaration confirms this sequence of events. *See* Dkt. No. 87-1 at 1-2. Appellant now asserts that the "EXORD" is "the first order," and that the district court "found otherwise," which "was error." Br. 22. But appellant's account does not establish the "[f]alsity" of the agency's account, or any "error" on the part of the district court in finding that there were earlier oral orders that preceded the EXORD. *Id.* And in

any event, appellant does not establish any bad faith on the agency's part that would call into question the adequacy of its search.

Appellant's other assorted allegations regarding the purported "[f]alsity" of the agency's "[a]ccount" are also unavailing. Br. 23-33. Some of appellant's alleged "contradiction[s]" relate to purported differences between the description of events in a timeline that the agency provided in district court and the language that former Secretary Panetta used in his testimony. Br. 25. At other points, appellant offers unsupported assertions that certain aspects of former Secretary Panetta's testimony are "false." Br. 28; *see also* Br. 28-30. But none of the issues that appellant purports to identify has any bearing on the FOIA dispute here. At no point does appellant identify any actual evidence calling into question the Department of Defense's declarations establishing the adequacy of its search. And none of appellant's assertions establish bad faith or rebut the good-faith presumption accorded to the agency's affidavits. *See Morley v. CIA*, 508 F.3d 1108, 1116 (D.C. Cir. 2007).

Appellant cannot circumvent these shortcomings by arguing that the district court's alleged failure to make certain "factual findings"

calls into question the agency's withholdings. *See* Br. 18. The relevant inquiry is not whether the district court failed to make factual findings that accord with appellant's views, but whether appellant established the agency had acted in bad faith or not conducted a reasonable search—a question the district court correctly answered in the negative.

Likewise meritless are appellant's suggestions that the agency's search was inadequate because of allegedly missing records. *See* Br. 33-35. Appellant argues that the "absence of any record" of certain oral orders to deploy is not "credible," Br. 34, but "[m]ere speculation that as yet uncovered documents may exist does not undermine the finding that the agency conducted a reasonable search for them." *SafeCard Servs.*, 926 F.2d at 1201. Appellant also faults the government for failing to provide declarations stating those orders were issued orally, *see* Br. 34, but can identify no authority that states that the absence of affidavits attesting that certain documents do not exist establishes bad faith. The agency established the adequacy of its search through the affidavits in the record, and no more was required.

2. Appellant's challenge to the district court's denial of the request to propound an interrogatory to the Department of Defense, *see*

Br. 35-37, also fails. Discovery is sparingly granted in FOIA actions, and this Court "overturn[s] the district court's exercise of its broad discretion to manage the scope of discovery only in unusual circumstances." *SafeCard Servs.*, 926 F.2d at 1200. The interrogatory requested extensive information and records of communications within the Department of Defense during the Benghazi attacks. *See* Br. 37. But because appellant has not rebutted the good-faith presumption accorded to the government's declaration establishing the adequacy of the search, there is no basis for discovery here. *See id.* And appellant offers no authority in support of his novel contention that he is "entitled to a meritorious finding of fact upon which that ruling is based." Br. 20.

3. Appellant next appears to contend that the Department of Defense did not provide certain reports known as OPREP 3 reports, *see* Br. 37, but this contention is belied by the record. OPREP 3 reports are reports "of a specific incident," and a "PINNACLE OPREP 3 describes an event of such importance that it needs to be brought to the immediate attention" of military leadership. JA117 ¶ 24 (Herrington Decl.). Plaintiffs sought records of "OPREP-3 PINNACLE report(s) used to provide any Department of Defense division (or office or entity)

with notification of, or information about" the Benghazi attacks from the Defense Intelligence Agency. JA112, ¶ 8 (Herrington Decl.) (quotation marks omitted); *see also* JA117, ¶ 23 (Herrington Decl.). As the Department of Defense explained, however, the Defense Intelligence Agency would not be "the unit responsible for such a report, but rather the combatant command with the area of responsibility for the location of the incident would be responsible for the report"—here, the United States Africa Command (AFRICOM). JA112, ¶ 8 (Herrington Decl.).

Appellant asserts that the Defense Intelligence Agency failed to "[f]orward" his request "to [the] [p]roper [c]omponent." Br. 37. The government's declaration explained, however, that the Defense Intelligence Agency searched for responsive records, JA112, ¶ 9 (Herrington Decl.), and AFRICOM "did locate and produce" the redacted OPREP 3 report, JA117 ¶ 24 (Herrington Decl.); JA162-63. Appellant does not address these aspects of the government's declaration. *See* Br. 37-38. To the extent this is a separate challenge to the adequacy of the search, appellant does not establish any bad faith warranting reversal. *See SafeCard Servs.*, 926 F.2d at 1200.

4. Appellant's challenge to the government's withholding of certain maps of U.S. personnel and assets related to the Benghazi attacks and the government's response, *see* Br. 39-41, is also meritless. As the district court explained, the Department of Defense "appropriately withheld in full 12 pages of maps containing 'the numbers and locations of ships, submarines, response forces, and aircraft surrounding Benghazi, Libya'; the 'numbers of military personnel located in particular countries during that time'; and 'the transit time required for each available asset to reach Benghazi.'" JA555-56 (quoting JA515-16 (quoting JA354, ¶ 9 (Malloy Decl.))). This information was properly withheld under Exemption 1 because its "release … reasonably could be expected to cause serious damage to the national security"; "[e]ven with the passage of time, how [the Department of Defense's] forces are positioned at a particular time could provide potentially damaging and/or threatening insight to adversaries regarding [the Department of Defense's] interests, intent, and potential operations in these volatile regions of the world." JA97-98, ¶ 11 (Malloy Decl.).

Appellant does not dispute that the information was previously properly classified, but he asserts that disclosure is now warranted because the government's national security interest in the information has dissipated. *See* Br. 40-41. In support of this assertion, appellant points to a declaration from a retired military official opining that "to continue to maintain that revealing that tactical information six years later has no basis in fact" and disclosure "could not provide adversaries with information that could harm national security." Br. 40 (quoting JA485, ¶ 5). But appellant cites no authority suggesting that an unsubstantiated statement in an affidavit from a former military officer calls into question the government's proper classification and withholding of this material under Exemption 1. The district court properly declined to consider this declaration on the ground that the declarant only offered his "conclusory opinions" about national security risks. JA557 (quoting *Waldie v. Schlesinger*, 509 F.2d 508, 510 (D.C. Cir. 1974)). Moreover, the declarant's opinion "'about the nature of current or future military assets is limited at best' because he is currently retired and does not know [the government's] current national security concerns." JA557 (quoting JA516-17).

II. The FBI's withholdings were proper.

A. The agency properly withheld its investigative interview reports and associated documents under Exemption 7(A).

1. The FBI properly withheld its interview reports, attachments, and corresponding notes from the Benghazi investigation under Exemption 7(A). Exemption 7(A) "reflects the Congress's recognition that 'law enforcement agencies ha[ve] legitimate needs to keep certain records confidential, lest the agencies be hindered in their investigations or placed at a disadvantage when it [comes] time to present their case.'" *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Justice*, 746 F.3d 1082, 1096 (D.C. Cir. 2014) (quoting *National Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978)) (alterations in original). To withhold documents under Exemption 7(A), an agency must show that the documents were "compiled for law enforcement purposes and that their disclosure (1) could reasonably be expected to interfere with (2) enforcement proceedings that are (3) pending or reasonably anticipated." *Mapother v. Department of Justice*, 3 F.3d 1533, 1540 (D.C. Cir. 1993) (emphasis omitted). An ongoing criminal investigation typically triggers

Exemption 7(A). *See Citizens for Responsibility & Ethics in Washington*, 746 F.3d at 1098.

Exemption 7(A)'s requirements are met here. At issue on appeal are the FBI's withholdings of its "Interview Reports with attachments, including handwritten notes, of interviews conducted on September 15-16, 2012, in Germany of United States personnel who had been in the Benghazi mission and the Benghazi CIA annex during the September 11-12, 2012 attacks on those facilities." JA573 ¶ 13 (Seidel Decl.); *see also* JA574-76 ¶¶ 15-17 (Seidel Decl.) (further detailing these withholdings). The FBI's declaration comprehensively explains that the agency compiled these records for an ongoing law enforcement investigation into the Benghazi attacks. *See* JA571-76, ¶¶ 10-17 (Seidel Decl.). The government also provided a declaration from the Department of State, which asserted Exemption 7(A) over these documents for the same reason. *See* JA889 ¶¶, 25-26 (Kootz Decl.). The district court correctly credited the government's declarations on these points, *see* JA913-14, and appellant does not dispute these points from the declarations on appeal.

The FBI also thoroughly explained that disclosure of the records could reasonably be expected to interfere with the ongoing investigation. *See* JA914. The FBI made this determination as to all of the responsive records that it categorized as "Evidentiary/Investigative Materials," which included the interview reports and associated handwritten notes and attachments. JA574-76, ¶¶ 15-17 (Seidel Decl.). The FBI's declarant explained that its categorical approach was appropriate since providing a document-by-document description of the attacks risked undermining the FBI's investigation of "potential crimes and/or possible threats to national security" related to the Benghazi attacks. JA572, 574, ¶¶ 10, 15 (Seidel Decl.). As the declarant explained, disclosure of these documents could reveal "leads the FBI is pursuing and the scope of the investigation, permitting groups or individuals to change their behavior and avoid scrutiny." JA574, ¶ 15 (Seidel Decl.). The FBI's declarant also explained that the disclosure of persons of "investigative interest" could lead to witness tampering and the destruction of evidence. JA574, ¶ 14 (Seidel Decl.).

The FBI's withholdings were thus amply justified. "[T]his is not an edge case," as the district court observed. JA916. "The interference

that the agency warns of—potential witness tampering, destruction of evidence, and revelation of the scope of investigation—is within the heartland of [E]xemption 7(A)." JA916. Because the FBI demonstrated a "rational link" between the disclosure of these withheld documents and the potential for interference with a law enforcement investigation, the withholdings were proper. *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 789 F.2d 64, 67 (D.C. Cir. 1986); *see Citizens for Responsibility & Ethics in Washington*, 746 F.3d at 1088-89; *see also Center for Nat'l Sec. Studies*, 331 F.3d at 927 (noting "the propriety of deference to the executive in the context of FOIA claims which implicate national security").

2. The FBI also properly withheld portions of the interview reports and attachments on its own behalf pursuant to Exemptions 3, 5, 6, 7(C), 7(E), and 7(F), *see* JA577-95, ¶¶ 21-55 (Seidel Decl.), and on behalf of the State Department and the CIA pursuant to Exemptions 1, 3, 5, 6, 7(C), 7(E), and 7(F), *see* JA596, ¶¶ 56-57 (Seidel Decl.); JA883-894 ¶¶ 8-36 (Kootz Decl.); JA900-07, ¶¶ 10-25 (Blaine Decl.); *see also* Dkt. No. 97-1 at 13-41. Although the government raised these other exemptions in district court, the district court found it unnecessary to

address these exemptions in light of its conclusion that the withholdings were proper under Exemption 7(A). *See* JA912. If this Court concludes that the FBI properly invoked Exemption 7(A) to withhold these documents on a categorical basis, then it need not consider the propriety of these other exemptions. *See, e.g.*, *American Civil Liberties Union*, 628 F.3d at 623 n.3. If this Court determines that it is appropriate to consider these exemptions, however, it should remand the matter for the district court to assess the government's arguments in the first instance.

B. Appellant's contrary arguments are unavailing.

1. Appellant asserts that "[p]rivacy exemptions are unavailable" for the FBI's interview reports for three U.S. personnel who have publicly recounted their experiences as survivors of the Benghazi attack—Mark Geist, Kris Paronto, and John Tiegen. Br. 46; *see* Br. 46-48. Appellant argues that he seeks only the names in the "interview reports of these three CIA Annex security team members," and that this information is not exempt from disclosure under Exemptions 6 and 7(C). Br. 46. But these arguments are inapposite: The district court did not uphold the FBI's withholdings on the basis of "privacy exemptions,"

but instead upheld them in full under Exemption 7(A), which exempts disclosures that could reasonably be expected to interfere with law enforcement proceedings. As explained above, the FBI's withholdings were proper under Exemption 7(A), and appellant has failed to explain how disclosure of the information he seeks would be proper given the potential for interference with ongoing law enforcement proceedings that appellant neither addresses nor disputes.

To the extent appellant argues that the "survivors' accounts of the order to stand down" do not "implicate[] the protections of the exemptions [the government] asserts," Br. 48, that argument also fails. The withholdings are proper under Exemption 7(A) because disclosure could reasonably be expected to interfere with ongoing law enforcement proceedings, as the district court held. *See* JA914. And even if this Court were to disagree with the district court on Exemption 7(A), the FBI's withholdings were also properly protected from disclosure under Exemptions 1, 3, 5, 6, 7(C), 7(E), and 7(F)—the additional exemptions that the government asserted and the district court did not address.

In fact, appellant concedes that "[m]any of the exemptions that the FBI asserted are well-founded, for which redactions are proper," but

vaguely asserts that the FBI "does not, and cannot, articulate how survivors' accounts of the order to stand down implicates the protections of the exemptions it asserts." Br. 48. At no point, however, does appellant contest any of the points in the government's detailed declarations in support of the withholdings, let alone any aspect of the district court's analysis explaining why the withholdings are justified under Exemption 7(A). Reversal of the district court's judgment is not warranted on the basis of appellant's assertions alone. *See Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981); *Judicial Watch, Inc. v. U.S. Dep't of Def.*, 715 F.3d 937, 940-41 (D.C. Cir. 2013).

2. Appellant's assorted citations are also unpersuasive. He cites *Campbell v. Department of Health & Human Services*, 682 F.2d 256, 265 (D.C. Cir. 1982), for the point that the Court "must conduct a more focused and particularized review of the documentation on which the government bases its claim that the information [appellant] seeks would interfere with [an] investigation." Br. 49 (second alteration in original) (quoting *Campbell*, 682 F.2d at 365). But appellant does not argue that the district court failed to conduct such a review, nor could he. The FBI's declaration explained why it was proper to withhold the

names as well as the "survivors' accounts of the order to stand down," Br. 48, to the extent such information exists in the records. The declaration explained that the interview reports "document the FBI's investigation of potential crimes and/or possible threats to national security" related to the attacks, and that document-by-document description or disclosure of persons "of investigative interest" could lead to witness tampering and the destruction of evidence. JA572-74, ¶¶ 10-14 (Seidel Decl.); *see* JA915.

Appellant also relies on *Chesapeake Bay Foundation, Inc. v. U.S. Army Corps of Engineers*, 677 F. Supp. 2d 101 (D.D.C. 2009), for the notion that the agency must "explain how its investigation will be impaired by the release of information that the targets of the investigation already possess." Br. 49-50 (quoting *Chesapeake Bay Found.*, 677 F. Supp. 2d at 108). As the FBI's declarant explained, the FBI categorized its interview reports and attachments, including handwritten notes of the witness interviews, as "Evidentiary/Investigative Materials" related to the Benghazi investigation. *See* JA575-76, ¶¶ 16-17 (Seidel Decl.). The FBI's declarant explained that disclosure of this category of records "could

reasonably lead to disclosure of the scope and focus of the pending investigative efforts related to the ongoing Benghazi investigation" and "could be detrimental to success of the pending investigation and prospective enforcement proceedings." JA575-76, ¶ 17 (Seidel Decl.). Disclosure would "permit[] subjects to estimate the scope of the FBI's investigation and judge whether their activities are likely to be detected; allow[] investigative subjects to discern the FBI's investigative strategies and employ countermeasures to avoid detection and disruption by law enforcement; and/or allow investigative targets to formulate strategies to contradict evidence to be presented in Court proceedings." *Id.*

The FBI's declarant also explained that the agency was asserting Exemption 7(A) to "prevent interference with the ongoing proceedings" and to "avoid disruption to prospective prosecutions that may arise as a result of the FBI's investigative efforts," such as witness intimidation, evidence destruction, and efforts to evade investigation. JA576-77, ¶ 19 (Seidel Decl.); *see also* JA889, ¶ 26 (Kootz Decl.) (State Department declaration explaining that "disclosure … 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"); JA903-04, ¶ 16 (Blaine Decl.) (detailing risks of disclosing classified CIA information). No more was required.

Thus, the FBI's withholdings were justified under Exemption 7(A). If the Court disagrees, however, it should remand this case to the district court to address the other exemptions that the government raised to protect this material from disclosure in the first instance.

III. The CIA's withholdings were proper.

A. The agency's challenged withholdings were proper under multiple FOIA exemptions.

As part of their FOIA request, plaintiffs sought records regarding a complaint sent to the CIA Inspector General's office following the Benghazi attack. The CIA released 25 redacted pages of responsive records about the complaint and withheld certain documents in full. *See* JA518; Br. 41. Appellant seeks "those portions of its records that relate that" the CIA Chief of Base at the Benghazi mission "ordered the [Quick Reaction Force] to 'stand down.'" Br. 43. The district court, affirming the magistrate judge's report and recommendation, properly upheld the CIA's withholdings under Exemptions 1, 3, and 7. *See* Dkt. JA560-62; JA518-23.

Exemption 1 protects the withheld information from disclosure, because as the CIA's declarant explained, it contains "code words, locations, names of covert personnel, as well as references to classified Agency programs, functions, assets, and activities unrelated to the September 2012 attacks." JA177, ¶ 35 (Shiner Decl.). "[D]isclosure of this information could reasonably be expected to result in serious damage to national security," JA179, ¶ 39 (Shiner Decl.), since, for example, the release of code words could "permit foreign intelligence service and other groups to fit disparate pieces of information together to discern or deduce the identity of the source or nature of the project or location for which the code word stands," to the detriment of national security interests, JA177-78, ¶ 37 (Shiner Decl.). The CIA's affidavits sufficiently "describe[] the justifications for withholding the information with specific detail[and] demonstrate[] that the information withheld logically falls within the claimed exemption." *American Civil Liberties Union*, 628 F.3d at 619.

Much of the material withheld by the CIA was also properly withheld under Exemption 3. The CIA invoked Section 6 of the Central Intelligence Agency Act of 1949 and Section 102A(i)(1) of the National

Security Act of 1947, which are exempting statutes under Exemption 3. *See Halperin v. CIA*, 629 F.2d 144, 147 (D.C. Cir. 1980). Section 6 of the CIA Act "provides for the exemption of the CIA from any law that requires disclosure of the organization, functions, names, official titles, salaries or numbers of personnel employed by the Agency." *Id.* (citing 50 U.S.C. § 3507, previously codified as 50 U.S.C. § 403g). Pursuant to the CIA Act, the CIA withheld "information concerning the organization, names, or official titles of personnel employed by the CIA." JA179-80 ¶ 41 (Shiner Decl.). Section 102A(i)(1) of the National Security Act of 1947 protects "intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 3024(i)(1); *American Civil Liberties Union*, 628 F.3d at 619. The CIA properly invoked the National Security Act to protect "code words and names of covert personnel." JA181-82, ¶ 44 (Shiner Decl.).[1]

The district court also properly held that the substance of the Inspector General files was properly withheld under Exemption 7(D),

[1] The government also determined that CIA officers' and contractors' names were properly withheld in the redacted portions of the documents under Exemption 6. *See* JA182-84, ¶¶ 45-49 (Shiner Decl.). The magistrate judge and district court did not address the government's Exemption 6 arguments in their rulings.

which authorizes withholding information compiled for law enforcement purposes if release of the information "could reasonably be expected to disclose the identity of a confidential source." 5 U.S.C. § 552(b)(7)(D). Disclosing the "underlying subject matter of the initial complaint would tend to provide enough information to reveal the identification of the reporting individual," as the magistrate judge explained in her ruling, which the district court adopted. JA522; JA560-62; *see Roth v. U.S. Dep't of Justice*, 642 F.3d 1161, 1185 (D.C. Cir. 2011).

B. Appellant's challenges to the withholdings are speculative and unsupported.

1. Appellant seeks the disclosure of portions of a complaint to the CIA Inspector General following the Benghazi attack that, according to appellant, "relate that the [CIA Chief of Base] ordered the [Quick Reaction Force] to 'stand down.'" Br. 43. Appellant suggests that the "CIA Act's language mandating release of 'the specific subject matter' of an [Inspector General] complaint" compels disclosure. *Id.* It does not. The statute that appellant cites, 50 U.S.C. § 3141(c)(3),[2] provides: "Notwithstanding subsection (a) of this section," which provides that the

[2] Appellant cites 50 U.S.C. § 431, which has been recodified as 50 U.S.C. § 3141.

CIA Director may exempt CIA operational files from disclosure, search, or review, under FOIA, "exempted operational files shall continue to be subject to search and review for information concerning … the specific subject matter of an investigation by," *inter alia*, the Inspector General of the CIA "for any impropriety, or violation of law, Executive order, or Presidential directive, in the conduct of an intelligence activity." *Id.* By its terms, the provision applies only to files that the CIA has deemed "operational" under the CIA Act, and the CIA has never deemed these records "operational." JA561; JA494, ¶ 5 (Shiner Supp. Decl.) (explaining that "[r]ecords of the Office of Inspector General – including the [Inspector General] Documents – do not meet th[e] definition of operational files," so the "CIA did not rely on the operational file exemption in its search, review, and release determinations regarding the [Inspector General] Documents").

Furthermore, appellant has already been apprised of the subject matter of the Inspector General complaint. As the CIA's declarant explained, the agency "conducted a page-by-page and line-by-line review, and released all reasonably segregable, non-exempt information, including the subject matter of the [Inspector General's]

investigation." JA494, ¶ 6 (Shiner Supp. Decl.). The disclosed records "reveal a complaint" to the CIA Inspector General "concerning an individual's belief that the CIA did not have accurate and full information about the Benghazi attack." JA518-19. Plaintiffs' own papers include some of the disclosed materials, which "disclose[] multiple references to the subject matter and genesis of the [Inspector General] complaint." JA494, ¶ 7 (Shiner Supp. Decl.). In one document, the "complaint is introduced as addressing the concern that the Director of the CIA … had 'not been provided fulsome details regarding the events that took place during the 11/12 September attacks on the U.S. Mission (Consulate) in Benghazi and Benghazi Base'"; another is an "email to then-Director Petraeus, where the CIA [Inspector General] summarizes the complaint as 'call[ing] into question some actions and decisions made by the Chief of Base, Benghazi'" and noting that the "complainant was alleging that Director Petraeus had 'not been provided with all the details regarding the attack in Benghazi and subsequent response.'" JA495, ¶ 7 (Shiner Supp. Decl.) (third alteration in original).

Any additional information that appellant seeks about the "specific substance – as opposed to the subject – of the [Inspector General] complaint," was properly withheld pursuant to FOIA. JA496, ¶ 8 (Shiner Supp. Decl.). Any such information was withheld under Exemptions 1, 3, 6, and/or 7, *see id.*, and the district court upheld the withholding of that information. *See* JA560-62; JA518-23. Appellant makes no argument that the exemptions do not apply to protect the "substance" of the Inspector General complaint from disclosure, instead offering only speculation about the redacted information's relationship to congressional testimony about the attacks. *See* Br. 44. Such speculation is no basis for compelled disclosure under FOIA.

2. Lacking any authority to support additional disclosures, appellant asserts that the CIA has not provided "any explanation on how or why disclosure of the stand down order could 'reasonably be expected to result in some level of damage to the national security.'" Br. 43. But the CIA's affidavits explained that the withheld material is protected under Exemption 1 because it contains "code words, locations, names of covert personnel, as well as references to classified Agency programs, functions, assets, and activities unrelated to the September

2012 attacks," which, as the CIA's declarant explained, can injure national security interests if disclosed. JA177-79, ¶¶ 35-39 (Shiner Decl.). In explaining the application of Exemption 7(D), which was asserted "to protect not only the individuals providing information to the [Inspector General] but also the specific information provided," JA496 ¶ 9 (Shiner Supp. Decl.), the government explained that "[d]isclosure of the sources and the information provided would severely compromise the [Inspector General's] ability" to carry out its "mission to conduct independent investigations," which is "heavily reliant upon its access to unfiltered information provided by confidential sources," JA186, ¶ 55 (Shiner Decl.). The agency also relied on Exemption 3, *see* JA179-82, ¶¶ 40-44 (Shiner Decl.), which does not require any showing of harm to national security, *see Electronic Privacy Info. Ctr. v. National Sec. Agency*, 678 F.3d 926, 931 (D.C. Cir. 2012); *Morley*, 508 F.3d at 1126; *see also* JA181-82, ¶ 44 (Shiner Decl.) (explaining that "although no harm rationale is required, the release of this information is reasonably likely to significantly impair the CIA's ability to carry out its core missions of gathering and analyzing intelligence").

Appellant has offered no basis to call into question the presumption of good faith accorded to the agency's affidavits. *See SafeCard Servs.*, 926 F.2d at 1200. And in this context, the protection of any additional information about the content of the complaint or these records is inherently intertwined with the need to protect the identities of individuals, intelligence activities, sources, and methods referenced in the withholdings. *See Mead Data Cent., Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 250 (D.C. Cir. 1977).

Appellant also asserts that the government "cannot explain how disclosure will interfere such that the court can 'trace a rational link between the nature of the document and the alleged likely interference.'" Br. 44 (quoting *Crooker*, 789 F.2d at 67). This claim also misses the mark. Appellant's quoted language is from a decision explaining that when the government seeks to withhold entire categories of documents under Exemption 7(A), it should define the categories by their function to allow courts to connect the documents to the potential for interference with law enforcement proceedings. *See Crooker*, 789 F.2d at 67; *see also Citizens for Responsibility & Ethics in Washington*, 746 F.3d at 1098 (similar). Since appellant is not

disputing any categorical withholding of documents under Exemption 7(A), these arguments are inapposite.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,930 words. This brief also complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6), because it was prepared using Word for Microsoft 365 in Century Schoolbook 14-point font, a proportionally spaced typeface.

s/ Urja Mittal
URJA MITTAL

ADDENDUM

TABLE OF CONTENTS

5 U.S.C. § 552 – Public information; agency rules, opinions, orders, records, and proceedings (excerpts)

(a) Each agency shall make available to the public information as follows:

* * *

(3)

* * *

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

* * *

(b) This section does not apply to matters that are—

(1)

(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;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute—

(A)

(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information

(A) could reasonably be expected to interfere with enforcement proceedings,

(B) would deprive a person of a right to a fair trial or an impartial adjudication,

(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy,

(D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source,

(E) 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, or

(F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

* * *

50 U.S.C. § 3024 – Responsibilities and authorities of the Director of National Intelligence (excerpt)

* * *

(i) Protection of intelligence sources and methods

(1) The Director of National Intelligence shall protect, and shall establish and enforce policies to protect, intelligence sources and methods from unauthorized disclosure.

* * *

50 U.S.C. § 3057 – Protection of nature of Agency's functions

In the interests of the security of the foreign intelligence activities of the United States and in order further to implement section 3024(i) of this title that the Director of National Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure, the Agency shall be exempted from the provisions of sections 1 and 2 of the Act of August 28, 1935 (49 Stat. 956, 957; 5 U.S.C. 654), and the provisions of any other law which require the publication or disclosure of the organization or functions of the Agency, or of the names, official titles, salaries, or numbers of personnel employed by the Agency: Provided, That in furtherance of this section, the Director of the Office of Management and Budget shall make no reports to the Congress in connection with the Agency under section 607 of the Act of June 30, 1945, as amended (5 U.S.C. 947(b)).

50 U.S.C. § 3141 – Operational files of the Central Intelligence Agency (excerpt)

(a) Exemption by Director of Central Intelligence Agency

The Director of the Central Intelligence Agency, with the coordination of the Director of National Intelligence, may exempt operational files of the Central Intelligence Agency from the provisions of section 552 of title 5 (Freedom of Information Act) which require publication or disclosure, or search or review in connection therewith.

(b) "Operational files" defined

In this section, the term "operational files" means—

(1) files of the National Clandestine Service which document the conduct of foreign intelligence or counterintelligence operations or intelligence or security liaison arrangements or information exchanges with foreign governments or their intelligence or security services;

(2) files of the Directorate for Science and Technology which document the means by which foreign intelligence or counterintelligence is collected through scientific and technical systems; and

(3) files of the Office of Personnel Security which document investigations conducted to determine the suitability of potential foreign intelligence or counterintelligence sources;

except that files which are the sole repository of disseminated intelligence are not operational files.

(c) Search and review for information

Notwithstanding subsection (a) of this section, exempted operational files shall continue to be subject to search and review for information concerning—

(1) United States citizens or aliens lawfully admitted for permanent residence who have requested information on themselves pursuant to the provisions of section 552 of title 5 (Freedom of Information Act) or section 552a of title 5 (Privacy Act of 1974);

(2) any special activity the existence of which is not exempt from disclosure under the provisions of section 552 of title 5 (Freedom of Information Act); or

(3) 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.

* * *