

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

SUPPLEMENTAL DECLARATION OF MARK H. HERRINGTON

Pursuant to 28 U.S.C. § 1746, I, Mark H. Herrington, hereby declare under penalty of perjury that the following is true and correct:

1. I am an Associate Deputy General Counsel in the Office of General Counsel (“OGC”) of the United States Department of Defense (“DoD”). OGC provides legal advice to the Secretary of Defense and other leaders within the DoD. I am responsible for, among other things, overseeing Freedom of Information Act (“FOIA”) litigation involving DoD. I have held my current position since March 2007. My duties include coordinating searches across DoD to ensure thoroughness, reasonableness, and consistency, and also coordinating productions of responsive documents, including the appropriate redaction of some of those documents.

2. The statements in this declaration are based upon my personal knowledge, my review of information available to me in my official capacity, including information provided to me from individuals who were tasked with searching for records responsive to Plaintiffs’ FOIA request. Specifically, I am the OGC counsel currently assigned to this case.

3. This declaration provides further details of the search conducted by Africa Command (“AFRICOM”) in response to Plaintiffs’ request for:

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 [Colonel] *sic* Brian Linvill; and (d) The CIA.

4. I understand that, among other issues, Plaintiffs claim that AFRICOM’s search was deficient because 1) it “located no responsive records,” 2) it “was limited to electronic records,” 3) it did not specify spelling variants of the term “Gaddafi,” 4) it did not specify whether Colonel Linvill searched his paper files for responsive records, and 5) it did not specify “whether it searched General Carter Ham’s records.” I address each of these issues below.

DOD’s release of records it located in response to Plaintiffs’ FOIA request

5. In my first declaration, I described the manner in which AFRICOM conducted its search for records responsive to Plaintiffs’ request but did not state whether AFRICOM produced records responsive to this request. *See* Herrington Decl. ¶¶ 25-26. As Plaintiffs are likely aware, in response to Plaintiffs’ request, AFRICOM released records that it located as a result of its search. Those records include documents from March 2011 detailing reports, such as “Libya’s Foreign Minister announced that his government has agreed to an immediate ceasefire per UNSCR 1973 in order to safeguard its citizens and property,” and the events of March 2011 generally. A sample of such records is attached as Exhibit 1.

The searches conducted by Colonel Linvill and General Carter Ham

6. As I previously explained, “AFRICOM personnel directed COL Brian Linvill to conduct a search of his electronic and paper files because Plaintiffs specifically mentioned him in the request.” Herrington Decl. ¶ 25. Plaintiffs claim that the declaration does not specify whether

Colonel Linvill actually conducted a search of his paper files. In order to clarify this issue, I recently contacted and spoke to Colonel Linvill to clarify the scope of his search for records responsive to Plaintiffs' request.

7. Colonel Linvill, informed me that in March 2011 (the timeframe referenced in Plaintiffs' request), he was serving as the defense attaché at the U.S. Embassy Tripoli, which was evacuated and shut down in February 2011 during the Arab Spring. As a result of his February 2011 evacuation from the U.S. Embassy in Tripoli, he was temporarily posted at AFRICOM headquarters in Germany from the time of the evacuation in February 2011 until early May 2011, when he returned to the United States.

8. In 2014, three years after his temporary post in AFRICOM headquarters, Colonel Linvill was contacted by AFRICOM personnel, who directed him to search for records responsive to Plaintiffs' FOIA request and to do so in the manner described in the first Herrington Declaration. *See* Herrington Decl. ¶¶ 25-26. Colonel Linvill explained that AFRICOM personnel directed him to search both his electronic and paper files.

9. Because of the length of time that had passed since his temporary post at AFRICOM headquarters in Germany, Colonel Linvill contacted AFRICOM's information technology personnel in order to determine whether any of the electronic records that he had generated during his March 2011 temporary post had been archived such that he (or information personnel) could conduct a search of his electronic records. Colonel Linvill was told that as a result of AFRICOM's record retention policy, AFRICOM did not have any electronic records generated during his March 2011 temporary assignment and thus those records could not be searched.

10. With respect to the search of paper files, Colonel Linvill informed me that during his March 2011 temporary posting, it was not his practice to maintain paper files. Consequently, he

had no need to request that AFRICOM store his paper files (classified or otherwise) after his departure from his temporary posting. Colonel Linvill reiterated that he did not have any paper files responsive to Plaintiffs' request.

11. Plaintiffs also claim that DOD failed to state whether General Carter Ham searched his files, paper and electronic, for records responsive to Plaintiffs' request. As I explained in my first declaration, AFRICOM personnel searched, among other offices, the Office of the Commander. *See* Herrington Decl. ¶ 25. During the March 2011 timeframe referenced in Plaintiffs' FOIA request, the head of this office was then-Commander, General Carter Ham. In order to clarify any confusion regarding the nature of the search that AFRICOM personnel conducted in the Office of the Commander, I recently confirmed that AFRICOM's search of the Office of the Commander included a search of the paper and electronic files of General Ham and other personnel in that office during the relevant time period. With respect to AFRICOM personnel's search of electronic files in the Office of the Commander, AFRICOM personnel conducted its search of electronic records using the search terms set forth in the first Herrington Declaration, *see* Herrington Decl. ¶ 26, and the spelling variants discussed herein. *See infra* ¶ 13.

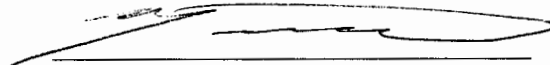
12. As noted above, AFRICOM has produced all of the records that it located in its search for records responsive to Plaintiffs' request. *See supra* ¶ 5.

Spelling Variants of Gaddafi

13. Finally, I have confirmed through AFRICOM personnel that the following spelling variants of the term "Gaddafi" were used in its search of electronic records: "Gaddafi," "Gadhafi," "Kadafi," "Khadafi," and "Qaddafi."

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 27th day of July, 2018, in Arlington, VA.

A handwritten signature in black ink, appearing to read "Mark H. Herrington", written over a horizontal line.

Mark H. Herrington, Esq.