

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

Case No. 14-1589 (EGS)

PLAINTIFFS' OPPOSITION TO DEFENDANT FBI'S
RENEWED MOTION FOR SUMMARY JUDGMENT, AND
PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

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 Rule 56
of the Federal Rules of Civil Procedure, and respectfully move the Court for entry of Summary
Judgment in their favor.

In support of this relief, plaintiffs submit the attached Memorandum in Support,
Plaintiffs' Statement of Material Facts to which there is No Genuine Issue, and Plaintiffs'
Counter-Statement of Material Facts to which there is a Genuine Issue.

Date: August 10, 2023.

Respectfully submitted,

_____/ s/
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PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO
DEFENDANT FBI'S RENEWED MOTION FOR SUMMARY JUDGMENT, AND IN
SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

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Preliminary Statement

Plaintiffs' theory of the case is that the Central Intelligence Agency ("CIA"), as well as the Department of the Defense ("DOD"), ordered forces to stand down, and thereafter postponed the order to respond until September 12.

Now before the Court is the issue of the legality of defendant Department of Justice ("FBI") withholding, in full, of the FBI 302-interview reports of the survivors.

Because the cases against the three defendants—DOD, CIA, and FBI—all seek information regarding the failure to timely order a rescue, plaintiffs include the background and procedural history of those matters as well, for context.

I. BACKGROUND AND PROCEDURAL HISTORY

A. DOD and the Order to Respond

On Tuesday, September 11, 2012, at 3:32 p.m. Washington time, dozens of attackers, armed with AK-47's, anti-tank rocket-propelled grenades, assaulted the State Department's Special Mission Compound in Benghazi, Libya, killing two Americans.¹ Hours later, the group launched a mortar attack against a CIA annex less than a half mile away, killing two more Americans.

¹ Within minutes, Ambassador Stevens called his second in command, in Tripoli, Deputy Chief of Mission Greg Hicks. "Greg, we're under attack." Hicks immediately called the CIA Chief in Tripoli, the operations Center at the State Department in Washington, and the CIA's Benghazi facility, the "CIA Annex," which was about a quarter of a mile away. Thirty-three minutes into the attack, at 4:05 p.m. Washington time, State's Operations Center issued an alert to the White House Situation Room, the FBI, and the Office of the Director of National Intelligence, among other key government and intelligence offices. An "OPREP-3 Pinnacle Report" alerted the Pentagon's National Military Command Center. By the time that Africa Command's reconnaissance drone arrived overhead, ninety minutes into the siege, the attackers had set multiple fires.

The Obama administration initially reported that the genesis of the attack had been a demonstration that had spontaneously gone awry. Public disclosure that this was not true, as well as questions about the delay in affecting a rescue, including whether assets had been ordered to stand down, resulted in news saturation—for the next four years.²

All told, Congress held seven sets of hearings. The first six Congressional Committees³ looking into the matter had no jurisdiction to determine when the order for assets to respond was given, which is a focus of plaintiffs' FOIA request.

The seventh Congressional probe, established in May of 2014, was the *House Select Committee on Events Surrounding the 2012 Terrorist Attack in Benghazi* ("Select Committee"), chaired by Rep. Trey Gowdy. 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*. The *Select Committee* did have jurisdiction to determine when assets were ordered to

² See, e.g., *Tappan Aff.* ECF No 15-8, relating LexisNexis search September 11, 2012 through February 8, 2015 yielded 52,404 articles, 32,185 newswires & press releases, 14,698 news transcripts.

³

- Dec. 30, 2012, *Flashing Red: A Special Report On The Terrorist Attack At Benghazi*, Senate Committee On Homeland Security And Governmental Affairs.
- 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, Republican majorities five House committees.
- Sept. 16, 2013, *Benghazi Attacks: Investigative Update Interim Report on the Accountability Review Board*, Republican Majority Committee on Oversight and Government Reform.
- Jan. 15, 2014, *Review of the Terrorist Attack on U.S. Facilities in Benghazi, Libya, September 11-12, 2012*, U.S. Senate Select Committee on Intelligence.
- February 7, 2014, *Benghazi: Where is the State Department's Accountability?* Republican Majority House Foreign Affairs Committee.
- Feb. 10, 2014, *Majority Interim Report: Benghazi Investigation Update*, Republican Majority House Armed Services Committee.

respond, and when that order had been relayed to forces.⁴ Mr. Gowdy wrote that Secretary of Defense Leon Panetta had issued that order to respond "by 7:00 p.m. Washington time," but there had been an administrative delay, so the order had not been communicated to forces until two hours after the order had been given, by 9:00 p.m.⁵

The *Select Committee* Report relates that it had requested the DOD to provide a record of that order, but the DOD had not done so. It was "pending production."⁶ (Nor did the *Select Committee* learn what assets were available to deploy,⁷ or obtain the record of the initial report of

⁴ H. Res. 36—113th Congress (2013-2014): "(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... internal and public executive branch communications about the attacks... [and] the response to the attacks..."

⁵ *Select Committee* Report excerpt, ECF 71-1, at Bates 55-56:

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. 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.

⁶ *Id.* quoting Appendix J: *Requests and Subpoenas for Documents*: "[D]ocuments relating to orders or commands given to defend against the attacks or rescue Americans in Benghazi is pending production." *Cf.* Mr. Gowdy's opening remarks, vowing "a full understanding of what happened in Benghazi. That means access all documents and all witnesses."

⁷ The *Select Committee*, as well as plaintiffs' FOIA request, sought identification of available assets, both personnel and aircraft. The DOD refused to disclose those records to plaintiffs, and to the *Select Committee*. ECF 71 at 34: "[T]he Committee determined the maps failed to include assets that actually were deployed in response to Benghazi.... the Committee requested it confirm whether there were any additional assets not identified... 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." (Footnotes omitted.)

the attack.⁸) But plaintiffs did receive the DOD's record of the initial order, in this action, on May 16, 2016, six months before Mr. Gowdy released his Report.

Here, plaintiffs have no qualms with the DOD's search, or production, of the initial order to forces to respond. It was given in what's called an "EXORD," meaning an order to execute. It is, by definition, the first order.⁹ The EXORD was relayed on September 12, at 3:00 a.m. Washington time. This is six hours later than Mr. Gowdy had concluded.

Given the apparent falsity of the government's assertion that the order to assets to respond had been relayed by 9:00 p.m. on September 11, rather than at 3:00 a.m. September 12, it appears inconceivable that the Mr. Panetta gave that order by 7:00 p.m., as the *Select Committee* wrote. Such a conclusion would mandate a finding that it had taken a full eight hours for that order to be relayed to forces. There is no record of forces having received any such order on September 11, and no record of such an order having been passed down the chain-of-command, until September 12.

See also id. at 64: Under *Assets at Souda Bay, Crete*, relating that the Committee received information "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... The Defense Department has not denied the presence of these assets."

⁸ The DOD also failed to produce to plaintiffs the requested OPREP-3, which "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).

⁹ *See Herrington Decl.*, ECF 68-4 ¶ 22: "The EXORD mentioned above and attached is the first written order—there are no others."

Additionally, had the order been relayed at 7:00 p.m., forces would have been enroute within a few hours, but were not airborne 13 hours after the onset of the siege, and over nine hours¹⁰ after having allegedly been ordered to go.¹¹

Mr. Gowdy's sole source of when the order was given, and received, is Secretary of Defense Leon Panetta's January 8, 2016, closed-door testimony before the *Select Committee*. The transcript of that testimony was released about a year after Mr. Gowdy released his Report. *Panetta testimony*, ECF 71-1 at 80-106. *See generally Plaintiffs' Cross Motion for Summary Judgment*, ECF 71 at 12-25.

Mr. Panetta testified that, within minutes of being informed of the attack at 4:42 p.m., he and General Martin Dempsey traveled to the White House and went straight to the Situation

¹⁰ *Cf. Panetta testimony* "Q. [D]id anybody leave any base anywhere to go to the aid of the people under attack in Benghazi, Libya, before the attack ended? A. No." ECF 71-1 at 24.

¹¹ *See Plaintiffs' Cross Motion for Summary Judgment*, ECF 71 note 24 at 15, quoting *Panetta testimony* relating nine times that the order was to deploy; "Based on their recommendations, that we have our FAST teams, Marine FAST teams, respond, be prepared to—you know, not only prepare to deploy but deploy;" at 16: "So those were the orders that I gave. And I had the authority to give those orders. And those orders were carried out. But it was very clear: They are to deploy;" at 19: "My directions were very clear; those forces were to be deployed, period;" at 23: "I'm not aware of that point that you've made here. As far as I was concerned, once I issued the orders, they were moving;" at 27: "You know, that is my view, as Secretary, is: I issued the orders. I want those units in place. Do whatever the hell you have to do in order to make it happen;" at 30: "Q. So no one would have been waiting on you to issue a subsequent order. A. That's correct. Q. You were clear the first time. A. Absolutely;" at 34: "Q. So we can eliminate the President being part of that principal, plural, and your testimony is that there was no ambiguity in terms of what you said you wanted done? A. That's right;" at 43: "Q. Your direction was, 'Move out as quickly as you can.' A. That's right;" at 45: "It makes sense to me. But, you know, again, as to the specific timeline, I was not—you know, the Secretary is not really aware of the specific timeline. My view was: Get them going as quickly as you can;" at 48: "You know, the specifics of what they do or do not have, you know, it's not something I'm that familiar with. But, clearly, my viewpoint was: These are elite forces. When you order them to go, they go."

Room. *Id.* at 17. The two then met with the President and National Security Director Tom Donilon, and thereafter travelled back to the Pentagon to convene a meeting "to determine what steps ought to be taken to try to respond to the situation." *Id.* at 19. That meeting was with General Dempsey, General Ham, General Kelly, Admiral Winfield, and Mr. Panetta's Chief of Staff Jeremy Bash. By Mr. Panetta's account, for "at least a couple of hours" after he gave that order to deploy, by 7:00 p.m., "the principals were... making sure that the steps that" he "had ordered were taking place." His underlings "were assuring me that the forces were moving into place." "Give me updates," he requested, "to make sure these people are on the move." Each time, he said, he was told that "things are moving." *Id.* at 22-23.

Mr. Panetta's testimony is not credible. When he and General Dempsey entered the White House Situation Room after 5:00 p.m., that command-and-control facility was fully engaged, having received the alert from the State Department's Operations Center at 4:05 p.m., over an hour before Mr. Panetta's arrival. At 5:10 p.m., the DOD's surveillance drone arrived on-scene and began transmitting a live feed of the attack. "I don't think we received any additional intelligence" from the Situation Room, Mr. Panetta said. *Id.* at 16.

Mr. Panetta could not remember whether the President, or Mr. Donilon, were even aware of the attack. However, at least an hour before that meeting, Mr. Donilon had committed to fully supporting the State Department's efforts. Secretary Clinton was among those notified "shortly after 4:00 p.m." by the State Department's Operations Center, whereupon she immediately called Mr. Donilon. "I briefed him on developments. I sought all possible support from the White House, which they quickly provided." Secretary Clinton testimony before *Senate Committee on Foreign Relations*, ECF 71-1 at 76.

Mr. Panetta testified that he "had to get back" to the Pentagon to determine what steps to take, while minutes after being notified he had left the Pentagon. He is said to have given the order "by 7:00 p.m.," but had earlier testified that he had done so "immediately" upon his return to the Pentagon.¹²

Mr. Panetta claims that his Generals repeatedly assured him that the forces were "moving into place," while the order had not even been transmitted for another two hours. He learned only later that the order had not been relayed until 9:00 p.m.

According to the DOD, there is no record of any order, or communication, to any asset, worldwide, for the first twelve hours after the onset of hostilities, and for eight hours after the Secretary of Defense claims to have given its order to respond. This is not accurate.

The Court did not agree, and declined to find bad faith by the DOD.¹³

B. CIA and the Order to Stand Down

In September or October of 2012, FBI Director David Petraeus gave a talk to CIA employees who had been at the CIA facility during the attack. Based on Mr. Petraeus'

¹² *Senate Intelligence Committee* testimony, Feb, 7, 2013 ECF 71-1 at 114: "We continued to talk [with the President and Mr. Donilon]. I think we teed up some other issues that we were dealing with at the time to inform the President, and then once that concluded we both went back to the Pentagon and immediately I ordered the deployment of these forces into place."

¹³ While the Magistrate Judge's Aug. 27, 2020 *Report and Recommendation* wrote 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" (ECF 83 at 13), the Court took a different view. It cites the DOD's claim that the order had been given orally at 8:39 p.m. Nov. 28, 2022. *Memorandum Opinion* ECF 92 at 16: "[T]he 3:00 A.M. EXORD was 'the first written order' and that 'the initial orders were conveyed verbally' earlier in the night." *Cf. Panetta testimony* relating that, upon giving the order, "somebody then types those orders out, in terms of a formal authorization." ECF 71-1 at 20. (The DOD's long-standing position to Congress was that the order had been given, and relayed to forces, by 8:00 p.m. *See* DOD Timeline, ECF 71-1 at 8).

communication, on November 1, 2012, a CIA Officer emailed CIA Inspector General David Buckley ("IG"), asking that some information be provided to Director Petraeus, anonymously. The IG promptly did so. At issue here was the CIA's redactions to its production of records of this complaint to the IG. *See* CIA Inspector General Records, ECF 71-1 at 77-103.

The *only* information disclosed regarding the "subject matter" of the complaint is that it "calls into question some actions and decisions made by the Chief of Base, Benghazi." Plaintiffs believe that the "specific subject matter"¹⁴ was Director Petraeus's mistaken belief that there had been no stand down order, and that he had been disabused of that notion by the whistleblower's email. If so, Director Petraeus lied to Congress when he testified that he was unaware of any such order having been given.¹⁵

The Court held all redactions were proper.¹⁶

¹⁴ While the CIA did not assert that these records are exempt from the FOIA as operational records, the CIA Act's language of permitting the discovery of "the specific subject matter" is instructive here. *See* 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... Office of Inspector General of the Central Intelligence Agency..." (Emphasis supplied.)

¹⁵ *See, e.g., Panetta testimony* ECF 71-1 at 36. By Adam Schiff: "The Republican lead and bipartisan House Intelligence Committee debunked that [stand down order] myth, General Petraeus came in again yesterday and debunked that myth."

¹⁶ Aug. 27, 2020 *Report and Recommendation* ECF 83 at 8, holding that "the subject matter of these records is apparent from the face of them;" Nov. 28, 2022 *Memorandum Opinion* ECF 92 at 26 (same), and holding that "disclosure of the specifics of the wrongdoing alleged could lead to the disclosure of the whistleblower's identity, and that nondisclosure is justified as the information 'relates to intelligence sources and methods.'"

C. FBI and the Order to Stand Down

Still at issue, under the Court's rulings, is the FBI's response to plaintiffs' February 21, 2014, FOIA request for disclosure of FBI 302 Interview Reports ("302s") of FBI interviews conducted in Germany. *See Compl.*, ECF 31 ¶ 126 (8):

September 15th or 16th FBI 302 Interview Reports, and corresponding handwritten notes, of interviews conducted in Germany of United States personnel who had been in the Benghazi mission and the Benghazi CIA annex during the September 11th and 12th attacks on those facilities.

The following paragraph of the *Compl.*, ¶ 126 (9), quotes a report regarding the FBI interviews at issue:

For your reference, the following is an excerpt from the December 30, 2012, Senate Committee On Homeland Security And Governmental Affairs, *Flashing Red: A Special Report On The Terrorist Attack At Benghazi*:

On September 15th and 16th, officials from the FBI conducted face-to-face interviews in Germany of the U.S. personnel who had been on the compound in Benghazi during the attack. The U.S. personnel who were interviewed saw no indications that there had been a protest prior to the attack. Information from those interviews was shared on a secure video teleconference on the afternoon of the 16th with FBI and other IC officials in Washington.

Within five minutes of the first call from the State Department facility to the CIA Annex asking for help, five members of the Agency's Quick Reaction Force ("QRF") at the Annex had assembled in two armored cars, armed and ready to go. This much is uncontested.

According to at least three QRF team members, the CIA Chief-of-Base, who was in charge, forbade the rescuers' departure, repeatedly told them to "stand down" and "hold up." After being ordered to stay in place at least three times, the rescuers disobeyed orders, and set out on their rescue mission.

The CIA, on the other hand, has an entirely different version. "The Chief-of-Base was adamant," writes the *Select Committee*, "that he never told the Annex team members to 'stand

down." ECF 71-1 at 58. "I did not tell anybody to stand down," he testified.¹⁷ The CIA Deputy Chief-of-Base also denied the charge in his September 19, 2012 *Memorandum for the Record*:

[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.

ECF 71-2 at 108.

"The Chief told the Committee 'We launched QRF [Quick Reaction Force] as soon as possible down to the State [Department] compound.'" Jan. 15, 2014, *Review of the Terrorist Attack on U.S. Facilities in Benghazi, Libya, September 11-12, 2012*, U.S. Senate Select Committee on Intelligence.

As the Senate Intelligence Committee gave credence to the CIA's version in accepting the CIA's position that the COB had "launched QRF as soon as possible,"¹⁸ the matter remains

¹⁷ CIA Deputy Chief-of-Base *Select Committee* testimony, ECF 71-1 at 58:

Q: You said that you let them go. Did you give them an affirmative order for them to go?

A: I think I was working with [the Team Lead] the whole time—in an effort to get them to get them gone, to have them go. So, whether or not I gave an affirmative order, but I wanted them to go. They were cleared to go. And they went.

Q: When you say they were cleared to go, is that you giving the clearance?

A: Yes.

Q: Did you have any discussions—do you recall having any discussions with the Deputy Chief-of-Base about allowing the guys to go?

A: I don't recall any. It was never—I never had any doubt about the GRS people going to the State Department compound. I had great concerns and great worry about it but I did not, I did not tell anybody to stand down.

¹⁸ *See, e.g., Panetta testimony* ECF 71-1 at 36. "Q. There has been a similar urban myth... that the people at the Annex were ordered to stand down... 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 standdown... at the Annex CIA facility to come to the rescue of those at the diplomatic facility? A: No, not at all."

unresolved. *See, e.g., Benghazi Heroes Debunk House Intel Report as 'Full of Inaccuracies' with Firsthand Account*, Breitbart.com Dec. 2, 2014: "[QRF] Paronto knows specifically of a CIA employee that was poorly treated while in Tripoli due to disagreeing with the story that was being fabricated by the CIA. The CIA employee also filed a complaint with the CIA Inspector General." *See also* Jan. 15, 2016, *Former CIA Chief in Benghazi Challenges the Story Line of the New Movie "13 Hours,"* Jan. 15, 2016, Wash. Post.

II. ARGUMENT

If the QRF's departure had, in fact, been delayed by repeated orders to stay put, their FBI interview reports would reflect these facts. This is a matter of some consequence. Rescuers estimated that the stand down orders delayed their arrival at the State Department Compound by over 20 minutes, that Ambassador Christopher Stevens and Sean Smith probably would have lived but for the delay, and that all seven of the victims would have been killed had the QRF not disobeyed the order.

Just as the identification of the specific subject matter of the CIA whistleblower's complaint would shed light on whether an order to stand down had been given (and whether Mr. Petraeus lied to Congress), so too with disclosure of this information in the 302's.

The government admits that it possesses the records sought. The *Defendant FBI's Renewed Memorandum in Support of Defendant FBI's Renewed Motion for Summary Judgment* ECF 97-1 ("*Def. Motion*") asserts that there are no "reasonably segregable" portions of the FBI 302 Reports that are not subject to one FOIA exemption or another, and so it withholds all responsive records, in full, categorically, in accordance with 5 U.S.C. § 552(b)(9), which mandates disclosure non-exempt portions of records.

Many of the exemptions that the FBI asserted are well-founded, for which redactions are proper. However, the accounts of the survivors on the facts of the attacks, particularly the

portions of 302s reflecting an order to stand down, redacted for identifying information, does not implicate a single one of the exemptions claimed. The FBI simply asserts FOIA exemptions, and quotes cases applying them, but does not, and cannot, articulate how survivors' accounts of the attack implicate the exemptions it asserts.

A. Exemption 6 and Exemption 7(C)

Exemptions 6 and Exemption 7(C) protect against invasion of privacy. Exemption 6 protects against "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)), and Exemption 7(C) protects "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information... could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C).

Plaintiffs have no objection to the FBI's redaction of identifying information of the six categories of individuals it listed:

- (1) FBI Special Agents and Professional Staff,
- (2) Personnel from Non-FBI Federal Agencies,
- (3) Third Parties Merely Mentioned in the Responsive Records,
- (4) Persons of Investigative Interest,
- (5) Local Law Enforcement Personnel, and
- (6) Individuals who Provided Assistance to the CIA.

Def. Motion at 26-34.

The government claims that withholding is proper under Exemption 7(C) as release "could reasonably be expected to constitute an unwarranted invasion of personal privacy." But the only names that plaintiffs seek are the in FBI 302 interview reports of three CIA Annex security team members. Here, the government cannot explain any harm resulting from disclosure of the names of three witnesses whose accounts are very public; Mark Geist, Kris

Paronto, and John Tiegen. Mr. Tiegan memorialized his waiver of any privacy interest he may have in the subject Reports. *See Tiegan Aff.* attached hereto as Exhibit 1.

In September of 2014, Hachette Book Group published "*13 Hours, The Inside Account of what Really Happened in Benghazi*," by "Mitchell Zuckoff with the Annex Security Team." *See* excerpts ECF 25-1 at 4-5: "The main sources of this book are the five surviving American security force contractors, known as 'operators'... Dave Benton, Mark Geist, Kris Paronto, Jack Silva, and John Tiegen. Based on exclusive firsthand accounts... their intent is to record for history, as accurately as possible, what they did, what they saw, and what happened to them—and to their friends, colleagues, and compatriots—during the Battle of Benghazi.... [Their] only editorial demand was that the story be told truthfully." The book recounts that, after being ordered to stay in place at least three times, the rescuers disobeyed orders.¹⁹ The movie, *13*

¹⁹ *See, e.g.,* historical book *13 Hours, The Inside Account of what Really Happened in Benghazi*, Sept. 2014 Hachette Books: "The main sources of this book are the five surviving American security force contractors... Based on exclusive firsthand accounts... their intent is to record for history, as accurately as possible." Excerpts *13 Hours* ECF 25-1 at 4-5.

Standing outside the Mercedes, Tig called out, "Hey, we gotta go now! We're losing the initiative!" "No, stand down, you need to wait," Bob the base chief yelled back. "We need to come up with a plan," the Team Leader repeated. In the meantime, Tanto told the bosses, he and the other operators were overdue to move out. CIA chief looked at Tanto, then at the Team Leader, then back to Tanto. Tanto felt as though the chief was looking right through him. "No," Bob said, "hold up." "We're going to have the local militia handle it." Tanto couldn't believe his ears. He turned to the Team Leader: "Hey, we need to go." "No," the T.L. said, "we need to wait. The chief is trying to coordinate with 17 Feb and let them handle it." "What do you mean, 'Let them handle it?'" Tanto demanded. "We're being attacked!" one yelled, his voice tight with stress. "There's approximately twenty to thirty armed men, with AKs firing. We're being attacked! We need help! We need help now!" Adrenaline surged through the operators' veins, but again they were told to wait. They were used to following orders, and they knew that insubordination could mean their jobs or worse. But a shared thought took hold in both vehicles: If they weren't given permission to move out soon, they'd take matters into their own hands. *Id.* at 8-10.

Hours: The Secret Soldiers of Benghazi, released on January 15, 2016 by Paramount Pictures, grossed \$69 million. It depicts the same order to stand down as does the book. Moreover, these three witnesses have made significant, and successful, efforts to publicize and promote their account of the matter. *See, e.g.*, September and October 2014 interviews of Mark Geist, Kris Paronto, and John Tiegen on Fox News with Sean Hannity, Greta Van Susteren.

The FBI acknowledges that "some information pertaining to the Benghazi attacks has been made public," however, "the FBI has not disclosed the identities of the individuals that were interviewed within the scope of the investigation or revealed specific investigative information related to the focus and content of the interviews, as memorialized in the FD-302s and attachments." *Def. Motion* at 37.

The "only relevant 'public interest in disclosure' to be weighed in this balance is the extent to which disclosure would serve 'the core purpose of... FOIA,' which is "contribut[ing] significantly to public understanding of the operations or activities of the government." *SafeCard Servs.*, 926 F.2d at 1206. Here, disclosure would do just that.

B. Exemption 1

Exemption 1 protects from disclosure records that are "(A) specifically authorized under criteria established by an Executive [O]rder 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." 5 U.S.C. § 552(b)(1).

Contrary to defendant's view, disclosure of information that the CIA ordered the QRF to stand down does not implicate any of the three Executive Orders that it cites:

- (1) *Foreign Government Information* under E.O. 13,526 § 1.4(b);
- (2) *Information Pertaining to Intelligence Activities and Intelligence Sources and Methods* under E.O. 13,526 § 1.4(c), or

- (3) *Information Pertaining to Foreign Relations or Foreign Activities of the United States* under E.O. 13,526 § 1.4(d).

Def. Motion at 14-18.

Plaintiffs do not seek disclosure of "confidential sources," or "sensitive aspects of U.S. foreign relations," or information "relating to identifying potential threats to U.S. national security," or information provided "by a foreign government in confidence." *Def. Motion* at 27-28.

C. Exemption 3

Exemption 3 incorporates into the FOIA certain nondisclosure provisions that are contained in other federal statutes. Specifically, Exemption 3 allows the withholding of information prohibited from disclosure by another federal statute provided that one of two disjunctive requirements are met: the statute either "(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3).

Whether the CIA Chief-of-Base ordered the QRF to "hold up" and "stand down" is not "information concerning intelligence sources and methods."

D. Exemption 5

Exemption 5 protects from disclosure "interagency or intra-agency memorandums or letters which would not be available by law to a party... in litigation with the agency." 5 U.S.C. § 552(b)(5). Information on the question of whether an order to stand down does not involve any deliberation. It is a fact.

Either the witnesses recounted that the CIA ordered the stand down, or they did not.

E. Exemption 7(A)

The FBI asserts that this exemption 7(A) alone justifies its withholding-in-full of the subject Reports. *Motion* at 12, 18-23.

Exemption 7(A) protects "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." According to the FBI, its "case agents reported that the 'investigation into the 2012 Benghazi Attack remains ongoing'... and release of the records could reasonably be expected to interfere in the agency's ongoing investigation of the Benghazi attacks, as well as prospective prosecutions of individuals involved in those attacks." *Id.* at 23.

The FBI does not attempt to explain how information on the stand down order could possibly interfere with any investigation or prosecution, or "reveal the scope and focus of the investigation: the number and identities of witnesses and cooperators; the identities of individuals the FBI is investigating, why, and for what specific activities." *Id.* at 52.

Moreover, the FBI did not object when, on August 17, 2018, the State Department released to plaintiffs 54 salient video-clips of the attack on its facility, which plaintiffs promptly combined and published on YouTube. See <https://www.youtube.com/watch?v=pjaDJYeS3sg>.

The court in *Campbell v. Department of Health and Human Services*, 682 F. 2d 256 (DC Cir. 1982) held that information to which the target of the probe already had access cannot be withheld under Exemption 7(A) because the government could not demonstrate how the documents "provided by or available to" the target of the investigation, would "interfere with enforcement proceedings." *Id.* at 259. Where information sought is already in targets' possession, "the government must show, by more than conclusory statements... precisely how

the particular kinds of investigatory records requested would interfere with a pending enforcement proceeding." *Goldschmidt v. Dep't of Agric.*, 557 F. Supp 274, 278 (D.D.C. 1983), citing *Campbell*.

F. Exemption 7(E)

Exemption 7(E) authorizes withholding of information compiled for law enforcement purposes if release of the information "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).

Here too disclosure would not implicate law enforcement techniques and procedures.

Again, the FBI may redact from the information it itemizes:

1. Sensitive Investigative File Numbers
2. Focus of Specific Investigation
3. Surveillance Techniques
4. Investigative Techniques Related to Protection of U.S. Diplomatic Mission

Def. Motion at 47.

G. Exemption 7(F)

Exemption 7(F) protects against disclosure that "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." Defendant argues that disclosure "could reasonably be expected to endanger the life or physical safety of any individual."

Here too the government is free to redact any such information.

CONCLUSION

Mr. Panetta explains that, when an order to respond is given, "someone then types those orders out, in terms of a formal authorization." Had the DOD relayed the order by 9:00 p.m., some record of it would have been generated over the next six hours. The only reasonable inference to be drawn from the absence of any such record before 3:00 a.m. is that it had not been relayed at 9:00 p.m. And the only reasonable inference to be drawn from the absence of a record of transmission until 3:00 a.m. is that it had not been given orally at 7:00 p.m., eight hours earlier. This hypothesis is consistent with there being no forces airborne for at least 10 hours after the order to respond is said to have been given.

The *Select Committee* declined to exercise its subpoena power to obtain the records of the DOD's orders to assets (the records were "pending production"), oblivious that the subject records had been produced in this action. In lieu of subpoenaing the records of what assets were available, it simply observes that the absence of these records "leaves questions the Defense Department can easily answer, and it is in the public interest that it do so." The record of Congressional oversight in this matter is troubling.

The FBI cannot articulate how the accounts of the survivors on the facts of the attacks, appropriately redacted, implicates a single one of the exemptions it asserts. Disclosure will shed light on whether the CIA's account is fact or fiction.

WHEREFORE, plaintiffs respectfully pray that the Court

- (A) Deny Defendant FBI's Renewed Motion for Summary Judgment;
- (B) Grant Plaintiffs' Cross-Motion for Summary Judgment; and
- (C) Order the Department of Justice to release the all nonexempt, segregable, portions of the 302s of personnel who had been in the Benghazi mission, and in the Benghazi CIA annex during the September 11 and 12, 2012 attacks on those facilities, together with the corresponding handwritten notes.

DATE: August 10, 2023.

Respectfully submitted,

/ s/

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