UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GOVERNMENT ACCOUNTABILITY PROJECT, Plaintiff, v. CENTRAL INTELLIGENCE AGENCY, Defendant.	)	Civil Action No. 19-0449 (RDM)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF CIA'S MOTION FOR SUMMARY JUDGMENT

Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, Plaintiff the Government Accountability Project ("Plaintiff" or "GAP") has sought records from the Central Intelligence Agency ("CIA") relating to civil nuclear cooperation and assistance between the United States and Egypt, Jordan, and Saudi Arabia. As set forth in the accompanying declaration from Antoinette B. Shiner, the Information Review Officer for the CIA's Litigation Information Review Office, the CIA refused to either confirm or deny the existence of any responsive records that would tend to reveal a classified relationship with the agency a so-called "*Glomar* response." The CIA's supporting declaration establishes that providing an affirmative or negative response to Plaintiff's request would reveal classified information protected by FOIA Exemption 1 as well as compromise intelligence sources and methods shielded from disclosure by FOIA Exemption 3. Thus, there is no genuine issue as to any material fact, and Defendant is entitled to judgment as a matter of law.

BACKGROUND

A. Plaintiff's FOIA Request

This action arises from FOIA requests Plaintiff submitted to the CIA and other agencies[1]. The expedited request to the CIA sought records related to the following topics: (i) civil nuclear cooperation with Middle Eastern countries; (ii) the "Middle East Marshall Plan;" (iii) Negotiation of a U.S.-Saudi "123" Civil Nuclear Cooperation Agreement; (iv) the "International Peace Power and Prosperity" ("IP3") Corporation and any proposal for nuclear and cyber cooperation with Middle Eastern countries; and (v) Westinghouse, its March 2017 bankruptcy, and the U.S. Government's policy response of the U.S. Government. *See* Compl. ¶¶ 85-86. Plaintiff also listed the names of 18 current and former U.S. Government personnel and 6 individuals purported to be at the IP3 Corporation who Plaintiff states are likely to be referenced in the documents and communications. *Id*. ¶¶ 86-89.

On September 11, 2018, the CIA responded by letter to the Plaintiff explaining that the Plaintiff's request did not meet the criteria for expedited processing because the request neither involved an "imminent threat to the life or physical safety of an individual," nor was it made "by a person primarily engaged in disseminating information" related to "a subject of public urgency concerning an actual or alleged or Federal activity." *See* Declaration of Antoinette B. Shiner ("Shiner Decl.") ¶ 7. The CIA stated that the Plaintiff had the option to appeal this decision within 90 days from the date of the letter. *Id*.

[1] Plaintiff also sent similar FOIA requests to the U.S. Department of State ("State"), U.S. Department of Commerce ("DOC"), U.S. Department of Treasury ("DOT"), U.S. Department of Defense ("DoD"), and U.S. Department of Energy ("DOE"). *See* Complaint, ECF No. 1 at 2-3, 21-27; 30-40. Those agencies are processing Plaintiff's FOIA requests on a rolling basis.

The CIA requested further clarity from the Plaintiff with respect to the first category of information Plaintiff requested in order to allow the CIA to conduct a reasonable search. *See* Shiner Decl. ¶ 8. The request for clarification was sent to Plaintiff on December 4, 2018. *Id*.

On January 8, 2019, Plaintiff responded to the CIA's letter seeking clarification. *Id*. ¶ 8. Plaintiff stated that its first request should be interpreted to mean records regarding cooperation between the United States and Egypt, Jordan, and/or Saudi Arabia. *Id*. ¶ 9. Further, the term "civil nuclear cooperation" should be interpreted to mean "any form of assistance regarding nuclear material, equipment, or technology; changes to U.S. or international law regarding the acquisition of nuclear material, equipment, or technology by foreign countries; funds or financing to acquire nuclear material, equipment, or technology; as well as efforts by US entities and persons to promote the acquisition of civilian nuclear reactors and related services by foreign countries." *Id*.

Before the CIA provided a substantive response to Plaintiff's FOIA request, Plaintiff filed its complaint against the CIA and other U.S. Government agencies in this Court on 22 February 2019. *Id*. While the lawsuit was pending, the CIA completed its review of Plaintiff's FOIA request and determined that, in accordance with section 3.6(a) of Executive Order 13,526, it could neither confirm nor deny the existence or nonexistence of records responsive to Plaintiff's FOIA request. *Id*. This is known as a *Glomar* response.[2]

The CIA invoked a *Glomar* response in this case because confirming or denying the existence or nonexistence of the requested records would reveal classified information that is protected from disclosure by executive order and federal statute. *Id*. ¶ 12. As an intelligence

[2] The origins of the *Glomar* response trace back to the D.C. Circuit's decision in *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976), which affirmed CIA's use of the "neither confirm nor deny" response to a FOIA request for records concerning CIA's reported contacts with the media regarding Howard Hughes' ship, the "Hughes Glomar Explorer."

organization that by its very nature must operate clandestinely to accomplish its foreign intelligence mission, the CIA typically cannot disclose whether or not it has any role or interest in specific U.S. Government meetings with foreign diplomats, policy initiatives or cooperation agreements, or any other topics that may have been discussed. *Id*. Because the requests at issue in this case seek precisely those types of information regarding the CIA's role or interest in sensitive foreign activities, the CIA can neither confirm nor deny that the CIA had any involvement in alleged discussions about various nuclear and/or cyber cooperation agreements with the specified – or any other – Middle Eastern Countries. Confirming or denying whether the CIA has information responsive to the requests at issue would cause harm to national security. *Id*. Accordingly, the CIA must assert a *Glomar* response and refuse to confirm or deny the existence or nonexistence of records that would be responsive to Plaintiff's request. *Id*.

The CIA is charged with carrying out a number of important functions on behalf of the United States, which include, among other activities, collecting and analyzing foreign intelligence and counterintelligence. *Id*. ¶ 13. A defining characteristic of the CIA's intelligence activities is that they are typically carried out through clandestine means, and therefore, must remain secret to be effective. *Id*. In the FOIA context, this means that the CIA must carefully evaluate whether its response to a particular FOIA request could jeopardize the clandestine nature of its intelligence activities or otherwise reveal previously undisclosed sensitive information, including but not limited to, its sources, capabilities, authorities, interests, strengths, weaknesses, and how resources are deployed. *Id*.

In a typical scenario, a FOIA requester submits a request to the CIA for information on a particular subject and the CIA conducts a search of non-exempt records and advises whether responsive records were located. If records are located, the CIA provides non-exempt records or

reasonably segregable non-exempt portions of records and withholds the remaining exempt records and exempt portions of records. *Id*. ¶ 14. In this circumstance, the CIA's response – either to provide or not provide the records sought – actually confirms the existence or nonexistence of CIA records related to the subject of the request. *Id.* Such confirmation may pose no harm to the national security because the response focuses on releasing or withholding specific substantive information contained within the records. *Id* In those circumstances, the fact that the CIA possesses or does not possess records is not itself classified, though the information contained within the records may be classified. *Id*.

In other cases, the mere confirmation or denial of the existence or nonexistence of responsive records would in itself reveal a classified fact: namely, whether the CIA has an intelligence interest in or connection to a particular subject or whether the CIA utilizes particular sources or methods that would enable the CIA to collect the type of information sought in the FOIA request. *Id*. ¶ 15. In these cases, the CIA asserts a Glomar response because the very fact of the existence or nonexistence of CIA records responsive to the request is itself a currently and properly classified fact, the disclosure of which reasonably could be expected to cause damage to the national security. *Id*.

To be credible and effective, the CIA must use the Glomar response consistently in all cases where the existence or nonexistence of records responsive to a FOIA request is a classified fact, including instances in which the CIA does not possess records responsive to a particular request. *Id*. ¶ 16. If the CIA were to invoke a Glomar response only when it actually possessed responsive records, the Glomar response would be interpreted as an admission that responsive records exist. *Id*. This practice would reveal the very information that the CIA must protect in the interest of national security. *Id*.

After careful review, Ms. Shiner determined that if the CIA were to confirm the existence of records in response to Plaintiff's request, such confirmation would indicate that the CIA had a role or interest in various civil and/or nuclear cooperation agreements with Middle Eastern countries, in economic development planning proposals, or in policy discussions regarding the Westinghouse bankruptcy. *Id*. ¶ 17. On the other hand, if the CIA were to respond by admitting that it did not possess any responsive records, it would indicate that the CIA had no involvement or interest in the agreements, proposals, or alleged discussions. Either confirmation would reveal sensitive information about the CIA's intelligence activities, sources, and methods that is protected from disclosure by Executive Order 13,526 and statute. *Id*. Therefore, the CIA must assert a Glomar response to Plaintiff's request. *Id*. The fact of the existence or nonexistence of records responsive to Plaintiff's FOIA request is currently and properly classified and exempt from release under FOIA Exemptions 1 and 3. *Id*.

LEGAL STANDARDS

I. Summary Judgment

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In determining whether a genuine issue of material fact exists, the trier of fact must view all facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. V. Zenith Radio Corp*., 475 U.S. 574, 587 (1986). The nonmoving party must show that the dispute is genuine and material to the case. A "genuine issue" is one whose factual dispute is capable of affecting the substantive outcome of the case and is supported by admissible evidence that a reasonably trier of fact could find for the nonmoving party. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247-48 (1986). The burden on the moving party may be discharged by showing that

there is an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

II. Summary Judgment in FOIA Cases

FOIA cases are typically and appropriately decided on motions for summary judgment. *Gold Anti-Trust Action Comm., Inc. v. Bd. of Governors of Fed. Reserve Sys*., 762 F. Supp. 2d 123, 130 (D.D.C. 2011). In a FOIA action, an agency that moves for summary judgment "bears the burden of showing that there is no genuine issue of material fact, even when the underlying facts are viewed in the light most favorable to the requester." *Weisberg v. U.S. Dep't of Justice*, 705 F. 2d 1344, 1350 (D.C. Cir. 1983). An agency can meet its burden by submitting declarations or affidavits. Fed. R. Civ. P. 56(c)(1)(A). Summary judgment is justified in a FOIA lawsuit once the agency demonstrates that no material facts are in dispute and, if applicable, that each document that falls within the class requested either has been produced, is unidentifiable, or is exempt from disclosure. *Students Against Genocide v. Dep't. of Stat*e, 257 F.3d 828, 833 (D.C. Cir. 2001).

A. The Freedom of Information Act

The "basic purpose" of FOIA reflects a "general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989). "Congress recognized, however, that public disclosure is not always in the public interest." *CIA v. Sims*, 471 U.S. 159, 166-67 (1985). Accordingly, in passing FOIA, "Congress sought 'to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy.'" *John Doe Agency*, 493 U.S. at 152 (quoting H.R. Rep. No. 89-1497, at 6 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2423). As the D.C. Circuit has recognized, "FOIA represents a balance struck by Congress between the public's right to know

and the [G]overnment's legitimate interest in keeping certain information confidential." *Ctr. for Nat'l Sec. Studies v. Dep't of Justice*, 331 F.3d 918, 925 (D.C. Cir. 2003) (citing *John Doe Agency*, 493 U.S. at 152).

FOIA mandates disclosure of government records unless the requested information falls within one of nine enumerated exemptions. *See* 5 U.S.C. § 552(b). "A district court only has jurisdiction to compel an agency to disclose improperly withheld agency records," *i.e.* records that do "not fall within an exemption." *Minier v. CIA*, 88 F.3d 796, 803 (9th Cir. 1996) (emphasis omitted); *see also* 5 U.S.C. § 552(a)(4)(B) (providing the district court with jurisdiction only "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant"); *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980) ("Under 5 U.S.C. § 552(a)(4)(B)[,] federal jurisdiction is dependent upon a showing that an agency has (1) 'improperly' (2) 'withheld' (3) 'agency records.'"). While narrowly construed, FOIA's statutory exemptions "are intended to have meaningful reach and application." *John Doe Agency*, 493 at 152; *accord DiBacco v. U.S. Army*, 795 F.3d 178, 183 (D.C. Cir. 2015).

The courts resolve most FOIA actions on summary judgment. *See Urban Air Initiative, Inc. v. EPA*, --- F. Supp. 3d ---- , 2017 WL 4284542, at *6 (D.D.C. Sept. 25, 2017). The Government bears the burden of proving that the withheld information falls within the exemptions it invokes. *See* 5 U.S.C. § 552(a)(4)(B); *King v. Dep't of Justice*, 830 F.2d 210, 217 (D.C. Cir. 1987). A court may grant summary judgment to the Government based entirely on an agency's declarations, provided they articulate "the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by

evidence of agency bad faith." *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981); *accord Urban Air Initiative*, 2017 WL 4284542, at *6. Such declarations are accorded "a presumption of good faith, which cannot be rebutted by purely speculative claims[.]" *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991).

B. Special Considerations in National Security Cases

The issues presented in this case directly "implicat[e] national security, a uniquely executive purview." *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 926-27. While courts review *de novo* an agency's withholding of information pursuant to a FOIA request, "*de novo* review in FOIA cases is not everywhere alike." *Ass'n of Retired R.R. Workers, Inc. v. U.S. R.R. Ret. Bd.*, 830 F.2d 331, 336 (D.C. Cir. 1987). Indeed, the courts have specifically recognized the "propriety of deference to the executive in the context of FOIA claims which implicate national security." *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 927-28; *see Ray v. Turner*, 587 F.2d 1187, 1194 (D.C. Cir. 1978) ("[T]he executive ha[s] unique insights into what adverse [e]ffects might occur as a result of public disclosure of a particular classified record."). Thus, the agencies' "arguments need only be both 'plausible' and 'logical' to justify the invocation of a FOIA exemption in the national security context." *Benjamin v. U.S. Dep't of State*, 178 F. Supp. 3d 1, 4 (D.D.C. 2016) (quoting *ACLU v. Dep't of Def.*, 628 F.3d 612, 624 (D.C. Cir. 2011)), *aff'd* No. 16-5175, 2017 WL 160801 (D.C. Cir. Jan. 3, 2017).

For these reasons, the courts have "consistently deferred to executive affidavits predicting harm to the national security, and have found it unwise to undertake searching judicial review." *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 927; *see Larson v. Dep't of State*, 565 F.3d 857, 865 (D.C. Cir. 2009) ("Today we reaffirm our deferential posture in FOIA cases regarding the 'uniquely executive purview' of national security."); *accord Benjamin*,

178 F. Supp. 3d at 4. Consequently, a reviewing court must afford "substantial weight" to agency declarations "in the national security context." *King*, 830 F.2d at 217; *see Fitzgibbon v. CIA*, 911 F.2d 755, 766 (D.C. Cir. 1990) (holding that the district court erred in "perform[ing] its own calculus as to whether or not harm to the national security or to intelligence sources and methods would result from disclosure"); *Frugone v. CIA*, 169 F.3d 772, 775 (D.C. Cir. 1999) (because "courts have little expertise in either international diplomacy or counterintelligence operations, we are in no position to dismiss the CIA's facially reasonable concerns" about the harm that disclosure could cause to national security). FOIA "bars the courts from prying loose from the government eventhe smallest bit of information that is properly classified or would disclose intelligence sources or methods." *Afshar v. Dep't of State*, 702 F.2d 1125, 1130 (D.C. Cir. 1983).

II. CIA PROPERLY DECLINED TO CONFIRM OR DENY THE EXISTENCE OR NONEXISTENCE OF RECORDS RESPONSIVE TO PLAINTIFFS' FOIA REQUESTS

A *Glomar* response allows the Government to "refuse to confirm or deny the existence of records where to answer the FOIA inquiry would cause harm cognizable under an FOIA exception." *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007) (quoting *Gardels v. CIA*, 689 F.2d 1100, 1103 (D.C. Cir. 1982)); *accord Sea Shepherd Conservation Soc'y v. IRS*, 208 F. Supp. 3d 58, 89 (D.D.C. 2016) ("The Glomar doctrine applies when confirming or denying the existence of records would itself cause harm cognizable under a FOIA exception."). The Court should afford "substantial weight" to the agencies' determinations to assert Glomar responses. *Sea Shepherd Conservation Society*, 208 F. Supp. 3d at 89. And summary judgment is appropriate when the asserting agencies put forth "public affidavit[s] explaining in as much detail as is possible the basis for its claim that it can be required neither to confirm nor to deny the existence

of the requested records." *Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976). Ultimately, the Government can establish the appropriateness of the Glomar response if it is deemed "logical" or "plausible." *Wolf*, 473 F.3d at 375.

Courts in this Circuit have consistently upheld Glomar responses where, as here, confirming or denying the existence of records would reveal classified information protected by FOIA Exemption 1 or disclose information protected by statute in contravention of FOIA Exemption 3. *See, e.g.*, *Frugone*, 169 F.3d at 774-75 (finding that CIA properly refused to confirm or deny the existence of records concerning the plaintiff's alleged employment relationship with CIA pursuant to Exemptions 1 and 3); *Larson*, 565 F.3d at 861-62 (upholding the National Security Agency's use of the Glomar response to the plaintiffs' FOIA requests regarding past violence in Guatemala pursuant to Exemptions 1 and 3); *Wheeler v. CIA*, 271 F. Supp. 2d 132, 140 (D.D.C. 2003) (ruling that CIA properly invoked a Glomar response to a request for records concerning the plaintiff's activities as a journalist in Cuba during the 1960s pursuant to Exemption 1); *Morley v. CIA*, 699 F. Supp. 2d 244, 257-58 (D.D.C. 2010) (upholding CIA's Glomar response to the plaintiff's request concerning covert CIA operations pursuant to Exemptions 1 and 3).

Here, the CIA can neither confirm nor deny whether they possess records responsive to Plaintiffs' FOIA requests because the CIA has determined that the existence or non- existence of any such records is exempt from disclosure. *See* Shiner Decl. ¶¶ 12, 17.

A. CIA Correctly Invoked Their Glomar Responses under FOIA Exemption 1

FOIA 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 "are in fact properly classified pursuant to such Executive

Order." 5 U.S.C. § 552(b)(1). Under Executive Order 13,526, an agency may withhold information that an official with original classification authority has determined to be classified because its "unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security[.]" Exec. Order 13,526 § 1.4, 75 Fed. Reg. 707, 709 (Dec. 29, 2009). The information must also "pertain[] to" one of the categories of information specified in the Executive Order, including "intelligence activities (including covert action), intelligence sources or methods."[3] Exec. Order 13,526 §§ 1.4(c); *see also Judicial Watch, Inc. v. Dep't of Defense*, 715 F.3d 937, 941 (D.C. Cir. 2013) ("[P]ertains is not a very demanding verb."). As addressed above, when it comes to matters affecting national security, the courts afford "substantial weight" to an agency's declarations addressing classified information, *King*, 830 F.2d at 217, and defer to the expertise of agencies involved in national security and foreign relations. *See Fitzgibbon*, 911 F.2d at 766; *see also Benjamin*, 178 F. Supp. 3d at 4. Given that Plaintiff's FOIA request, on its face, seeks "intelligence information" and the "identif[ication]" of the source of that information, it is not difficult to demonstrate that the existence or nonexistence of records would relate to intelligence activities, sources, or methods and would therefore be classified. CIA more than accomplish this task.

B. The CIA's Glomar Response Protects Classified Information.

The CIA also properly asserted its Glomar response to protect currently and properly classified information. *See* Shiner Decl. ¶¶ 12-17. As an intelligence agency that "by its very

[3] As also required by Executive Order 13,526, Section 1.1(a), the declarant has confirmed that she is an original classification authority. *See* Shiner Decl. ¶ 3.

nature must operate clandestinely," the CIA does not ordinarily reveal whether or not it had any part or interest in nuclear cooperation with Middle Eastern countries. *Id*. ¶ 23. Here, the CIA can neither confirm nor deny whether it contributed intelligence to alleged discussions surrounding nuclear and cooperation agreements with Middle Eastern countries. *Id*. ¶ 24. More specifically, the CIA cannot say one way or another whether it "had may have participated in or had an interest in policy discussions regarding nuclear cooperation with Middle Eastern countries or the Westinghouse bankruptcy." *Id*. Indeed, confirmation that the CIA possesses responsive records would indicate that the CIA had a role or an interest in these topics. *Id*. Conversely, affirming that the CIA did not have responsive materials would suggest that it did not participate in the topics discussed. *Id*.

The Shiner Declaration establishes that confirming whether or not the CIA possesses responsive records reasonably could be expected to cause damage to the national security of the United States by disclosing intelligence activities. *See* Shiner Decl. ¶¶ 23-24. In this specific case, confirming that the CIA possesses records would suggest or reveal, among other things, that the CIA attended the meeting, used the meeting to obtain intelligence from or about the Middle Eastern countries and may have participated in discussions with U.S. government officials, diplomats, or foreign intelligence services regarding these topics, or at least had an intelligence interest in the subject matter. *Id*. Alternatively, a denial that it had responsive records would tend to show that the CIA was not involved or did not have an interest in the topics discussed. *Id*. In sum, disclosure of CIA activities in this regard would undermine the CIA's ability to effectively operate as a clandestine intelligence agency. *Id* ¶¶ 23-24.

Further, the CIA's Glomar response is necessary to protect CIA sources and methods, the disclosure of which would cause damage to this country's national security. *See* Shiner Decl. ¶ 24. The CIA collects information from around the globe to be used by the President and his closest advisors when making national security decisions of great significance. *Id*. Often times, the CIA depends on information provided by foreign officials, nationals, and intelligence services "under an arrangement of absolute secrecy." *Id*. By revealing how or from whom the CIA does or does not collect such information, this country's adversaries will obtain "insight into the methods the CIA uses to accomplish its intelligence mission." *Id*. Acknowledging one way or another whether the CIA had responsive records, therefore, would "indicate whether or not the CIA received and shared intelligence from Israeli sources." Shiner Decl. ¶ 24. In this case, Plaintiff's FOIA request did not indicate whether or not any CIA official played a role in discussions or had an interest in the various agreements and policy proposals. *Id*. ¶ 25.

Forcing the CIA to disclose whether or not it has documents responsive to Plaintiff's FOIA request would reveal whether or not the CIA may have collected pertinent intelligence that could have been provided to U.S. Government officials, whether the CIA participated in meetings with foreign governments or intelligence services related to the requested topics, or whether the CIA collected intelligence surrounding any of the alleged meetings would inevitably reveal the nature of CIA's sources, the subjects of the collection, and potentially methods used to collect any such intelligence. *Id*. Moreover, to the extent Plaintiff's request specifically seeks records related to alleged intelligence briefings or communications with any of the listed individuals, confirming or denying the existence or nonexistence of responsive

records would indicate whether or not the CIA had and/or shared intelligence related to Plaintiff's requested topics. *Id*.

C. CIA Correctly Invoked Their Glomar Responses under FOIA Exemption 3

FOIA Exemption 3 exempts from disclosure records that are "specifically exempted from disclosure by [another] statute" if the relevant statute "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue" or "establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3). The Government's mandate to withhold information under FOIA Exemption 3 is broader than its authority under FOIA Exemption 1, as it need not demonstrate that the disclosure will harm national security. *See Sims*, 471 U.S. at 167; *Gardels*, 689 F.2d at 1106-07. Instead, "the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within the statute's coverage. It is particularly important to protect intelligence sources and methods from public disclosure." *Morley v. CIA*, 508 F.3d 1108, 1126 (D.C. Cir. 2007). In analyzing the propriety of a withholding made pursuant to FOIA Exemption 3, the Court need not examine "the detailed factual contents of specific documents[.]" *Id.* For the reasons discussed below, the CIA properly asserted their respective Glomar responses pursuant to FOIA Exemption 3.

D. The CIA's Glomar response shields statutorily-protected information.

The Shiner Declaration attests that the CIA has properly invoked the Glomar response to protect from disclosure statutorily-protected information pursuant to FOIA Exemption 3 and Section 102A(i)(1) of the National Security Act of 1947, as amended, 50 U.S.C. § 3024. *See* Shiner Decl. ¶¶ 27-28. Again, this statute requires the Government to "protect intelligence

sources and methods from unauthorized disclosure," 50 U.S.C. § 3024(i)(1), and it undoubtedly qualifies as a withholding statute for the purposes of FOIA Exemption 3. *See, e.g., ACLU*, 628 F.3d at 619. For the reasons discussed above with regard to FOIA Exemption 1, confirming or denying whether the CIA possesses responsive records would divulge information about the existence or non-existence of intelligence sources and methods protected from disclosure under FOIA Exemption 3. *See* Shiner Decl. ¶¶ 28-29. Indeed, the Shiner Declaration explains that to acknowledge the possession (or lack of possession) of materials responsive to Plaintiffs' request would reveal information that concerns intelligence sources and methods, which the National Security Act is designed to protect. *Id.* ¶ 28. Accordingly, the CIA has demonstrated the appropriateness of its Glomar response under FOIA Exemption 3.

E. Sufficiency of the CIA's *Vaughn* Declaration.

Summary judgment in FOIA cases may be awarded "based solely on the information provided in [agency] affidavits or declarations when the affidavits or declaration describe 'the justifications for non-disclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.'" *Fischer*, 596 F. Supp. 2d at 42 (quoting *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981)). Typically, the agency's declarations or affidavits are referred to as a *Vaughn* index, after the case of *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). The purpose of a *Vaughn* index is "to permit adequate adversary testing of the agencies claimed right to an exemption." *NTEU v. Customs*, 802 F.2d 525, 527 (D.C. Cir. 1986) (citing *Mead Data Cent. v. U. S. Dep't of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977), and *Vaughn*, 484 F.2d at 828). Thus, the index must contain "an adequate

description of the records" and "a plain statement of the exemptions relied upon to withhold each record." *NTEU*, 802 F.2d at 527 n.9.

In accordance with *Vaughn*, Antoinette B. Shiner executed a declaration to support Defendant's motion for summary judgment. Shiner is well-qualified to explain the CIA's withholdings and the justifications for those withholdings. *See* Shiner Decl. ¶¶ 1-4; (explaining declarant's role and responsibilities). The Shiner declaration demonstrated that the CIA carefully reviewed Plaintiff's FOIA request and properly withheld information subject to FOIA Exemptions. Therefore, the *Vaughn* declaration is sufficient.

CONCLUSION

For the reasons set forth above, Defendant respectfully requests that this Court grant judgment in favor of the CIA.

Respectfully submitted,

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