IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GOVERNMENT ACCOUNTABILITY PROJECT Plaintiff, v. UNITED STATES DEPARTMENT OF STATE, *et. al.*, Defendants.	)	Civil Action No. 19-0449 (RDM)

DECLARATION OF ANTOINETTE B. SHINER,
INFORMATION REVIEW OFFICER,
LITIGATION INFORMATION REVIEW OFFICE,
CENTRAL INTELLIGENCE AGENCY

I, ANTOINETTE B. SHINER, hereby declare and state:

I. INTRODUCTION

1. I currently serve as the Information Review Officer ("IRO") for the Litigation Information Review Office ("LIRO") at the Central Intelligence Agency ("CIA" or "Agency"). I assumed this position effective 19 January 2016.

2. Prior to becoming the IRO for LIRO, I served as the IRO for the CIA's Directorate of Support ("DS") for over sixteen months. In that capacity, I was responsible for making classification and release determinations for information originating within the DS. Prior to serving in the DS, I was the Deputy IRO for the Director's Area of the CIA ("DIR Area")

for over three years. In that role, I was responsible for making classification and release determinations for information originating within the DIR Area, which included, among other offices, the Office of the Director of the CIA, the Office of Congressional Affairs, the Office of Public Affairs, and the Office of General Counsel. I have held other administrative and professional positions within the CIA since 1986, and have worked in the information review and release field since 2000.

3. I am a senior CIA official and hold original classification authority at the TOP SECRET level under written delegation of authority pursuant to section 1.3(c) of Executive Order 13526, 75 Fed. Reg. 707 (Jan. 5, 2010). Among other things, I am responsible for the classification review of CIA documents and information that may be the subject of court proceedings or public requests for information under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the Privacy Act of 1974, 5 U.S.C. § 552a.

4. Through the exercise of my official duties, I have become familiar with this civil action and the underlying FOIA request. I make the following statements based upon my personal knowledge and information made available to me in my official capacity. I am submitting this declaration in support of the Motion for Summary Judgment filed by the United States Department of Justice in this proceeding.

5. The purpose of this declaration is to explain and justify, to the greatest extent possible on the public record, the CIA's actions in responding to Plaintiff's FOIA request. Accordingly, Part II of this declaration describes Plaintiff's FOIA request; Part III discusses the CIA's response to the Plaintiff's FOIA request in which the CIA neither confirms nor denies the existence or nonexistence of responsive records, known as a Glomar response; and Part IV discusses the application of FOIA exemptions to Plaintiff's request.

II. PLAINTIFF'S FOIA REQUEST

6. By letter dated 31 August 2018, Plaintiff submitted an expedited request to the CIA pursuant to the FOIA seeking 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. 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. A true and correct copy of the 31 August 2018 letter is attached to this declaration as Exhibit A.

7. On 11 September 2018, the CIA responded by letter to the Plaintiff explaining that the Plaintiff's request does 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." The CIA stated that the Plaintiff had the option to appeal this decision within 90 days from the date of the letter. A true and correct copy of the 11 September 2018 letter is attached to this declaration as Exhibit B.

8. By letter dated 4 December 2018, 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* Exhibit C.

9. On 8 January 2019, the Plaintiff responded to the CIA's letter seeking clarification. The 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. 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." *See* Exhibit D.

10. 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.

11. 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 13526, it could neither confirm nor deny the existence or nonexistence of records responsive to Plaintiff's FOIA request. This is known as a Glomar response.[1]

III. THE CIA'S GLOMAR DETERMINATION

12. The CIA has 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

[1] 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."

statute. As an intelligence 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. 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. As described in greater detail Part IV below, confirming or denying whether the CIA has information responsive to the requests at issue would cause harm to national security. 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.

13. 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. 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. 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.

14. 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. 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. 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. 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.

15. 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. 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.

16. 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. 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. This practice would reveal the very information that the CIA must protect in the interest of national security.

17. After careful review, I have 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. 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. As will be explained in more detail in Section IV, either confirmation would reveal sensitive information about the CIA's intelligence activities, sources, and methods that is protected from disclosure by Executive Order 13526 and statute. Therefore, the CIA must assert a Glomar response to Plaintiff's request. 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 (b)(1) and (b)(3).

IV. APPLICATION OF FOIA EXEMPTIONS

A. FOIA Exemption (b)(1)

18. FOIA exemption (b)(1) provides that FOIA does not require the production of records that are: "(A) specifically authorized under criteria established by an Executive order to

be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1).

19. Section 1.1(a) of Executive Order 13526 provides that information may be originally classified under the terms of this order only if all of the following conditions are met: (1) an original classification authority is classifying the information; (2) the information is owned by, produced by or for, or is under the control of the U.S. Government; (3) the information falls within one or more of the categories of information listed in section 1.4 of Executive Order 13526; and (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in some level of damage to the national security, and the original classification authority is able to identify or describe the damage.

20. Furthermore, section 3.6(a) of Executive Order 13526 specifically states that "[a]n agency may refuse to confirm or deny the existence or nonexistence of requested records whenever the fact of their existence or nonexistence is itself classified under this order or its predecessors." Executive Order 13526 therefore explicitly authorizes precisely the type of response that the CIA has provided in this case.

21. Consistent with sections 1.1(a) and 3.6(a) of Executive Order 13526, and as described below, I have determined that the existence or nonexistence of the requested records is a properly classified fact that concerns intelligence activities, sources, and methods under section 1.4(c) of the Executive Order. This fact constitutes information that is owned by and under the control of the U.S. Government, and the unauthorized disclosure of the existence or nonexistence of requested records reasonably could be expected to result in damage to national security.[2]

22. Clandestine intelligence activities lie at the heart of the CIA's mission. Disclosure of information regarding specific intelligence activities can reveal the CIA's intelligence interests, capabilities, authorities, and resources. Although it is widely known that the CIA is responsible for performing activities in support of foreign intelligence collection and analysis for the United States, the CIA generally does not confirm or deny the existence or nonexistence of, or disclose the target of, specific intelligence activities. Foreign intelligence services, terrorist organizations, and other hostile groups seek to obtain and use this type of information

[2] My determination that the existence or nonexistence of the requested records is classified and has not been made to conceal violations of law, inefficiency, or administrative error; to prevent embarrassment to a person, organization, or agency; to restrain competition; or to prevent or delay the release of information that does not require protection in the interests of national security.

to defeat, undermine, and avoid CIA activities and to attack the United States and its interests.

1. Necessity of a Glomar Declaration

23. In this case, acknowledging whether or not the CIA has records responsive to Plaintiff's FOIA request reasonably could be expected to cause damage to the national security by disclosing information about the CIA's intelligence activities and interests. Acknowledging the existence or nonexistence of responsive records would reveal whether or not the CIA had a role or intelligence interest in discussions or initiatives related to civil nuclear cooperation or cyber cooperation with Middle Eastern countries, economic policy proposals, or policy responses to the Westinghouse bankruptcy. As a general matter, CIA does not acknowledge when it is, and when it is not, involved or interested in particular U.S. Government policy proposals or meetings with diplomatic officials. It would be alerting and possibly alarming for foreign countries to learn that CIA was somehow involved or interested in specific diplomatic meetings or policy proposals, signaling to both the diplomats and the world that there was something about the diplomatic meeting that warranted CIA involvement. Here, for example, acknowledging the existence of records responsive to Plaintiff's FOIA request would tend to reveal that CIA may have an intelligence interest in or information about the potential

for nuclear and/or cyber cooperation with Middle Eastern countries; that the CIA may have contributed intelligence to alleged discussions surrounding nuclear and/or cyber cooperation agreements with Middle Eastern countries; that the CIA may have participated in discussions with U.S. Government officials, foreign diplomats, or foreign intelligence services regarding these topics; that the CIA may have used any such meetings to obtain intelligence; or that the CIA participated in or had an interest in policy discussions regarding economic policy proposals or policy responses to the Westinghouse bankruptcy. On the other hand, if it were disclosed that CIA was not involved in any such meetings or interested in these topics, then it would signal to foreign governments and intelligence services that these were not of interest to CIA or that intelligence had not been gathered on these topics. This disclosure would give other countries insight into the scope and nature of CIA's intelligence activities and interests, and thus falls squarely within the ambit of Exemption (b)(1).

24. Because of the CIA's unique authorities to operate in a clandestine manner, revealing a CIA interest or involvement in a matter is significantly different than revealing an interest or involvement by the U.S. Government as a whole – or even by the other named parties in this case – in the same matter. For the CIA to operate as an effective clandestine intelligence agency,

it must be able to conceal its own involvement, or non-involvement, in meetings or discussions with, among others, U.S. Government officials or foreign governments related to specific policy proposals. As noted above, 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; in this case, to confirm or deny the existence of CIA records pertaining to one particular diplomatic meeting would diminish the value of a Glomar response to requests for records relating to other such diplomatic meetings.

25. This case also implicates CIA sources and methods. One of the major functions of the CIA is to gather intelligence from around the world that can be used by the President and other high level Government officials - such as those listed in Plaintiff's FOIA request - in making important decisions. To fulfill this responsibility, the Agency must often depend upon information and assistance provided by sources under an arrangement of absolute secrecy. The CIA utilizes foreign officials, nationals, and intelligence services to acquire intelligence information or support CIA intelligence collection activities. Intelligence methods include the basic business practices and methodological "tools" used by the CIA to accomplish its mission. Detailed knowledge of the CIA's

intelligence methods must be protected from disclosure because such knowledge would be of material assistance to those who seek to detect, prevent, or damage U.S. intelligence operations. In this case, none of Plaintiff's FOIA requests indicate whether or not any CIA official played a role in discussions or had an interest in the various agreements or policy proposals. 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. 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.

26. For these reasons, I have determined that the existence or nonexistence of requested records is a properly

classified fact that concerns intelligence activities, sources, and methods under section 1.4(c) of the Executive Order, and thus is exempt from disclosure under FOIA exemption (b)(1).

B. FOIA Exemption (b)(3)

27. FOIA exemption (b)(3) provides that FOIA does not apply to matters that are:

> 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 (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld . . . .

5 U.S.C. § 552(b)(3).

28. Section 102A(i)(1) of the National Security Act, as amended, 50 U.S.C. § 3024 (i)(1) (formerly codified at 50 U.S.C. § 403-1(i)(1)), provides that the Director of National Intelligence ("DNI") "shall protect intelligence sources and methods from unauthorized disclosure." Accordingly, the National Security Act constitutes a federal statute which "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue." 5 U.S.C. § 552(b)(3). Under the direction of the DNI pursuant to section 102A, and consistent with section 1.6(d) of Executive Order 12333, the CIA is authorized to protect CIA sources and methods

from unauthorized disclosure.[3] As demonstrated in Parts III and IV of this Declaration, acknowledging the existence or nonexistence of records responsive to Plaintiff's FOIA request would reveal information that concerns intelligence sources and methods, which the National Security Act is designed to protect.

29. Accordingly, the fact of the existence or nonexistence of records responsive to Plaintiff's FOIA request is exempt from disclosure under FOIA exemption (b)(3) pursuant to the National Security Act. In contrast to Executive Order 13526, this statute does not require the CIA to identify and describe the damage to the national security that reasonably could be expected to result should the CIA confirm or deny the existence or nonexistence of records regarding any CIA role or interest in the topics in Plaintiff's FOIA request. Nonetheless, I refer the Court to the paragraphs above for a description of the damage to the national security that is reasonably likely to ensue should anything other than a Glomar response be provided by the CIA in this case.

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[3] Section 1.6(d) of Executive Order 12333, as amended, 3 C.F.R. 200 (1981), *reprinted in* 50 U.S.C. 3001 note at 25(formerly codified at 50 U.S.C.A. § 401 note at 25 (West Supp. 2009)), and as amended by Executive Order 13470, 73 Fed. Reg. 45,323 (July 30, 2008) requires the Director of the Central Intelligence Agency to "[p]rotect intelligence and intelligence sources, methods, and activities from unauthorized disclosure in accordance with guidance from the [DNI][.]"

V. CONCLUSION

30. In this case, the fact of the existence or nonexistence of records responsive to Plaintiff's requests is itself a properly classified fact, as explained above. Accordingly, I have determined the only appropriate response is for the CIA to neither confirm nor deny the existence or nonexistence of such records under FOIA exemptions (b)(1) and (b)(3).

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

Executed this 30th day of October 2019.

Antoinette B. Shiner
Information Review Officer
Litigation Information Review Office
Central Intelligence Agency