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 REPLY IN SUPPORT OF DEFENDANT CIA'S MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiff Government Accountability Project ("Plaintiff" or "GAP") seeks, via Freedom of Information Act ("FOIA") requests, disclosure of Defendant Central Intelligence Agency's ("Defendant" or "CIA") records, documents, and communications related to: (1) civil nuclear cooperation with Middle Eastern countries, most notably Saudi Arabia; (2) the Middle East Marshall Plan; (3) negotiation of a U.S.-Saudi "123" Civil Nuclear Cooperation Agreement; (4) the IP3 Corporation and its proposal for nuclear and cyber cooperation with various Middle Eastern countries; and (5) Westinghouse, including its March 2017 bankruptcy and the subsequent policy response of the U.S. Government. Compl. ¶ 85.

Defendant moved for summary judgment on the basis of the sufficiency of Defendant's *Glomar* response to Plaintiff's FOIA requests, in which the CIA claimed it can neither confirm nor deny the existence or nonexistence of any of the requested records. In its motion for summary judgment, the CIA explained in detail the legal bases justifying its responses and submitted a thorough sworn declaration in support of its respective position. Plaintiff's opposition fails to rebut that showing; thus, Summary Judgment in Defendant's favor is proper.

In its Opposition to Defendant's Motion for Summary Judgment ("Pl. Opp. Memo"), Plaintiff offers no arguments to rebut the sound national security bases set forth in the Defendant's Motion for Summary Judgment justifying invocation of the *Glomar* response. To the contrary, Plaintiff appears to conflate the irrelevant issue of Plaintiff's own subjective motivation or underlying purpose behind Plaintiff's FOIA requests – which appears largely unconnected to the CIA – with the only relevant issue of whether Plaintiff's requests, on their face, call for CIA to search for information in its holdings, the existence or nonexistence of which would implicate national security concerns. Indeed, Plaintiff spends approximately half of its brief explaining the historical underpinnings that led to its FOIA request. Not until page 11 does Plaintiff suggest some

tenuous connection between its requests and the CIA, and even here, Plaintiff relies on the representations of employees of IP3 and vague references to the Intelligence Community as a whole, not the CIA specifically.

However, where Plaintiff does discuss the CIA, Plaintiff acknowledges that the CIA's role in counterproliferation "includes an *undercover/clandestine element* in 'confront[ing] the threat of weapons of mass destruction." Pl. Opp. Memo at 3 (emphasis added). Although, as Plaintiff notes, the CIA has acknowledged that it plays a covert role in counterproliferation, for the reasons discussed in the Shiner Declaration ("Shiner Decl."), the CIA does not and cannot comment on specific intelligence activities related to efforts involving nuclear materials. Plaintiff concedes as much in its recognition that U.S. policy with respect to nuclear technology—the basis of Plaintiff's FOIA request—includes "obvious national security implications." *Id.* at 21. Thus, as Plaintiff seems to recognize, confirming the existence or non-existence of records responsive to Plaintiff's requests would reveal highly sensitive, classified national security information. Accordingly, and for the reasons explained in the Shiner Declaration, disclosure of whether any such information existed in the CIA's holdings was properly withheld through the CIA's assertion of a *Glomar* response. This Court should therefore grant Defendant's Motion for Summary Judgment and deny Plaintiff's Cross-Motion for Summary Judgment.

ARGUMENT

I. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT

A. CIA Properly Asserted a Comprehensive *Glomar* Response

Plaintiff initially sought four categories of documents from the CIA and claims to have provided additional information that Plaintiff thought would help the CIA focus its request. Plaintiff now argues that the CIA mischaracterized its FOIA request by interpreting the request as

seeking intelligence information, as opposed to the extent to which the U.S. government sought to provide nuclear technology to Saudi Arabia outside of the statutorily mandated process. However, Plaintiff fails to offer a cognizable argument for why such information, if it exists in the CIA's holdings, is not intelligence information.

In evaluating any FOIA request, 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. *See* Shiner Decl. ¶ 13. Here, the CIA has determined that responding to the Plaintiff's FOIA request would reveal intelligence information, a determination is entitled to "special deference." *Morley v. CIA*, 508 F.3d 1108, 1124 (D.C. Cir. 2007). This is because the CIA is best positioned to make judgments about the ramifications to national security from the release of such information. *See Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 76 (2d Cir. 2009) ("Recognizing the relative competencies of the executive and judiciary, we believe that it is bad law and bad policy to 'second-guess the predictive judgments made by the government's intelligence agencies'"); *see also, e.g. Judicial Watch v. Dep't of Def.*, 715 F.3d 937, 943 (D.C. Cir. 2013); *Larson v. Dep't of State*, 565 F.3d 857, 865 (D.C. Cir. 2009).

Indeed, the acknowledgment of any such documents in the CIA's holdings would be contrary to the purpose of the FOIA, through which "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 v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (emphasis added) (quoting H.R. Rep. No. 89-1497, at 6 (1966), reprinted in 1966 U.S.C.C.A.N. 2418, 2423). Here, although Plaintiff reasons that the

release of documents would shed light on the alleged relationship between administration officials and other outside groups, Plaintiff's rationale is no different or more compelling than that of any plaintiff seeking documents in a FOIA case, nor do Plaintiff's arguments outweigh the harm to national security underlying the CIA's *Glomar* response.

Plaintiff notes that *Glomar* responses like the one that the CIA provided "are permitted only when confirming or denying the existence of records would itself 'cause harm cognizable under an FOIA exemption.'" *Am. Civil Liberties Union ("ACLU") v. CIA*, 710 F.3d 422, 426 (D.C. Cir. 2013) (quoting *Roth v. U.S. Dep't of Justice*, 642 F.3d 1161, 1178 (D.C. Cir. 2011)). Plaintiff further emphasized that the CIA bears the burden of proving that the information falls within the exemptions it has invoked. Here, the Shiner Declaration meets both standards. As Ms. Shiner explains, the mere confirmation or denial of the existence or nonexistence of "any form of assistance regarding nuclear technology" would in itself reveal a classified fact: namely, whether the CIA has an intelligence interest in or connection to a particular subject—in this case assisting the acquisition of nuclear reactors by foreign countries—or whether the CIA utilizes particular sources or methods that would enable the CIA to collect or hold the type of information sought in the FOIA request. Shiner Decl. ¶ 15.

Moreover, the classified facts that would be revealed by the confirmation or denial of the existence or nonexistence of any such records fall squarely within Exemptions 1 and 3. For example, the Shiner Declaration explains that "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." Shiner Decl. ¶ 23. Moreover, in arguing that efforts by outside individuals and

entities like IP3 to enlist the assistance of the CIA and other agencies in implementing its Middle East Marshall Plan do not fall within the protection of Exemptions 1 and 3 as their disclosure would not reveal "a classified relationship with the agency," Plaintiff ignores the fact that the majority of CIA relationships with outside entities are, in fact, classified and fall squarely within the ambit of Exemptions 1 and 3. Accordingly, if the CIA did have documents indicating a relationship with IP3, any other company, or even a foreign government, acknowledging the existence of those documents would itself reveal a classified fact. Such an acknowledgment clearly falls within FOIA Exemption 1, which 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).

For these reasons, and for the reasons discussed in more detail in the Shiner Declaration, the CIA has clearly met this Circuit's requirement that the justification for proving that information falls within a FOIA exemption be just "logical" or "plausible." *Larson v. Dep't of State*, 565 F.3d 857, 862 (D.C. Cir. 2009) (quoting *Wolf v. CIA*, 473 F.3d 370, 374-75 (D.C. Cir. 2007)). Because the Shiner declaration demonstrates that the *Glomar* response is both logical and plausible "to justify the invocation of a FOIA exemption in the national security context," the CIA's *Glomar* response was appropriately asserted. *Benjamin v. 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); *see also* Shiner Decl. ¶¶ 23-25.

B. CIA Engaged in Legal and Appropriate Conduct

Plaintiff contends that the CIA cannot properly rely on a *Glomar* response to cover up embarrassing or possibly illegal conduct. However, Plaintiff misattributes the White House's

purported "stonewalling" of the House Oversight Committee to the CIA's validly invoked Glomar response in a poorly crafted effort to suggest that the CIA has been involved in embarrassing or illegal conduct.

As discussed above, the CIA validly invoked a Glomar response to protect any information that could reveal the CIA's role or interest in sensitive nuclear discussions and activities. While Plaintiff acknowledges that the requested information has "obvious national security implications"—an assertion that seems to be at odds with Plaintiff's argument that Exemptions 1 and 3 do not apply—Plaintiff then engages in baseless speculation and hyperbole to suggest that the House Oversight Committee's characterization of the Trump Administration somehow applies to the CIA. However, speculation and self-interested characterization of facts entirely unrelated to the *CIA's* motives—as opposed to those the House Oversight Committee attributed to the White House—do not overcome the "presumption of good faith" accorded to Agency declarations. *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991). Indeed, this presumption of good faith "cannot be rebutted by *purely speculative* claims" such as those the Plaintiff puts forth. *Id.* (emphasis added).

* * *

CONCLUSION

For the reasons set forth above and the reasons stated in the CIA's motion for summary judgment, the CIA properly characterized GAP's FOIA request and the CIA engaged in legal and appropriate conduct. Accordingly, the Court should grant the CIA's motion for summary judgment and deny Plaintiff's cross-motion for summary judgment.

Dated: July 24, 2020
Washington, DC

Respectfully submitted,

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