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. 19-449 (RDM)

REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The Court should grant summary judgment to Plaintiff Government Accountability Project ("GAP"), deny Defendant Central Intelligence Agency's motion for summary judgment, and conclude that the CIA improperly asserted a "*Glomar*" response to GAP's Freedom of Information Act ("FOIA") request. Because the CIA failed to respond to GAP's Statement of Material Facts Not in Genuine Dispute despite having an additional seven months to do so, the Court should accept as admitted the facts laid out in that document and the legal conclusions that flow from them.

The CIA has failed to meet its burden of showing that merely disclosing whether it has responsive documents would reveal anything protected by the FOIA Exemptions 1 or 3. The fact that the CIA plays a role in nuclear nonproliferation is publicly known, and the D.C. Circuit has in any case held that an agency cannot employ a "*Glomar*" response to shield itself from a FOIA request that seeks records about U.S. government activities writ large—and not the specific involvement of the agency. *See ACLU v. CIA*, 710 F.3d 422, 428 (D.C. Cir. 2013). Nor has the CIA established how disclosing the existence or nonexistence of records detailing extremely

unusual efforts by International Peace Power & Prosperity ("IP3") Corporation to lobby the CIA and other components of the federal government to deliver civil nuclear technology to Saudi Arabia could expose the agency's intelligence activities, sources, and methods. Instead, the CIA is relying on an overbroad and unsupported interpretation of the first category of records GAP requested in a thinly veiled effort to justify a blanket "*Glomar*" response. *See Pub. Employees for Envtl. Responsibility v. U.S. Envtl. Prot. Agency*, 314 F. Supp. 3d 68, 79 (D.D.C. 2018).

In addition, the CIA has failed to rebut GAP's assertion, supported by factual statements the CIA has ignored, that the CIA's "*Glomar*" response is being used to cover up embarrassing or possibly illegal conduct in violation of Exec. Or. 13526, 75 Fed. Reg. 707 (Dec. 29, 2009), specifically a sustained effort by private entities and administration officials to bypass the protections of Section 123 of the Atomic Energy Act in order to provide Saudi Arabia with nuclear technology.

I. The Court Should Accept as Admitted GAP's Statement of Facts

Instead of responding to GAP's Statement of Material Facts Not in Genuine Dispute ("GAP's SMF"), ECF No. 26-2, the CIA has chosen to ignore Plaintiff's factual assertions. Accordingly, the Court should accept as admitted the facts identified by GAP, pursuant to Local Rule of Civil Procedure 7(h)(1), which permits the Court to "assume that facts identified by the moving party in its statement of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion." *See also Ladd v. Chemonics Int'l, Inc.*, 603 F. Supp. 2d 99, 105 (D.D.C. 2009) (accepting as admitted a party's unrebutted factual assertions where "properly supported by the record"). Local Rule 7(h) "places the burden on the parties and their counsel, who are most familiar with the litigation and the record, to crystallize for the district court the material facts and relevant portions of the record." *Jackson v.*

Finnegan, Henderson, Farabow, Garrett & Dunner, 101 F.3d 145, 151 (D.C. Cir. 1996) (referring to language that is now located at Local Rule 7(h)).

The CIA has now twice failed to file a response to GAP's SMF by the deadline the Court established: it ignored the Court's December 6, 2019 deadline to file a response, *see* Minute Order (Oct. 18, 2019) ("Defendant's reply shall be due on or before December 6, 2019"), and it failed to file a response to GAP's SMF on its new deadline of July 24, 2020, *see* Minute Order (Jul. 14, 2020). The CIA should not be given a third bite at the apple when the prejudice to Defendant is further delay in the processing of GAP's FOIA request—the precise harm that this litigation is seeking to remedy.

GAP's factual assertions are material to GAP's arguments that the CIA's "*Glomar*" response is improper. GAP's SMF explains that then-National Security Advisor Michael Flynn and other administration officials engaged with Thomas Barrack, Jr., the head of the Trump Inauguration Committee, and the IP3 Corporation about a plan to work with Russia to build or transport nuclear reactors in or to the Middle East—the so-called "Middle East Marshall Plan." GAP's SMF ¶¶ 4-8. GAP's SMF asserts that engagement on the plan continued after NSC staff raised concerns about compliance with Section 123 of the Atomic Energy Act, which requires consultation with experts at several federal agencies and review by Congress to ensure the protection of American interests. *Id.* ¶¶ 1-2, 9-13.[1] GAP's SMF describes the "efforts inside the White House to rush the transfer of highly sensitive U.S. nuclear technology to Saudi Arabia in

[1] The Atomic Energy Act, 42 U.S.C. §2153 *et seq.*, mandates a peaceful nuclear cooperation agreement for all significant U.S. nuclear cooperation with foreign countries (a "123 Agreement"). 123 Agreements must be presented to the president in writing and submitted to Congress for a period of review. GAP's SMF ¶ 1. According to the Department of Energy, the United States has 23 such agreements in place. *See* National Nuclear Security Administration, 123 Agreements for Peaceful Cooperation, *available at* https://www.energy.gov/nnsa/123-agreements-peaceful-cooperation. The United States has no 123 Agreement with Saudi Arabia.

potential violation of the Atomic Energy Act and without review by Congress as required by law—efforts that may be ongoing to this day." *Id.* ¶ 14. GAP's SMF establishes that IP3 met with and briefed senior administration officials, including then-Director of the CIA Mike Pompeo. *Id.* ¶¶ 16-18, 29-35. These facts support the two arguments that GAP advanced in its opening brief: first, that the records requested involve efforts by non-governmental private individuals to lobby the CIA and not the CIA's intelligence methods and sources; and second, that the CIA's "*Glomar*" response is intended to avoid disclosure of potentially embarrassing information or unlawful activities by the CIA or other components of the U.S. government.

II. The CIA has not established that confirming or denying whether it has records responsive to GAP's request would harm cognizable national security interests

The CIA has not adequately articulated why disclosing the existence or non-existence of records responsive to GAP's FOIA request would cause harm to national security interests cognizable under Exemptions 1 or 3. The CIA advances two insufficient arguments in support of its "*Glomar*" response. First, it claims that it cannot disclose whether or not it plays a role in the conversations or deliberations that are the subject of GAP's FOIA. Second, the CIA claims that disclosing whether or not it has records would reveal classified activities, sources, and methods. Neither argument stands up to scrutiny, and both reflect an impermissible attempt by the CIA to misconstrue GAP's FOIA request as being broader than it is so that the CIA can claim that responding could harm vague, unspecified national security interests.

GAP's FOIA request sought records relating to efforts by private entities and individuals, including the IP3 Corporation, to lobby and coordinate with the Trump administration to advance a so-called "Middle East Marshall Plan" that bypassed protocols intended to protect United States interests in order to provide Saudi Arabia with nuclear technology. From Defendant CIA, GAP requested records regarding: "(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. GAP identified specific White House staff likely to have been referenced in relevant records, *id.* ¶ 87, as well as specific individuals at the IP3 Corporation, a private entity, for which the CIA would likely have correspondence: "(1) Keith Alexander; (2) Michael ('Mike') Hewitt; (3) Jack Keane; (4) Robert ('Bud') McFarlane; (5) Stuart Solomon; and (6) Frances Fragos Townsend." *id.* ¶ 88.[2] In follow-up correspondence, GAP clarified that the reference to "cooperation with various Middle Eastern countries" should be interpreted to mean cooperation between the United States and Egypt, Jordan, and Saudi Arabia. GAP's SMF ¶ 25.

First, with respect to categories one and three of GAP's FOIA request, the CIA has proffered no reason to believe that disclosing whether it has documents would reveal whether the CIA itself—as opposed to some other U.S. entity—entertained an irregular and potentially unlawful proposal from the IP3 Corporation to bring nuclear technology to the Middle East. *See ACLU v. CIA*, 710 F.3d at 428 ("The CIA has proffered no reason to believe that disclosing whether it has any documents at all about drone strikes will reveal whether the Agency itself—as opposed to some other U.S. entity such as the Defense Department—operates drones."). Instead, in its reply brief, the CIA doubles down on this legally insufficient defense by asserting that

> the mere confirmation or denial of the existence or nonexistence of 'any form of assistance regarding nuclear technology' would reveal itself a classified fact: namely, whether the CIA has an intelligence interest in or connection to a particular subject—in

[2] GAP included these six names in its FOIA request and did not—as Defendant insinuates, *see* Mem. of Points and Authorities in Reply in Support of Defendant CIA's Mot. for Summary J. and in Opposition to P.'s Mot. for Summary J. ("Def.'s Reply Br."), ECF No. 46, at 3—provide them to the CIA after the fact. *See* GAP's SMF ¶ 22; Compl. ¶ 88.

> 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.

Def.'s Reply Br. at 4.

But as GAP has already established, the fact that the CIA plays a role in nonproliferation and the creation of 123 Agreements is not classified. The Director of the CIA is a regular attendee of the National Security Council and the CIA has acknowledged that it plays a role in nonproliferation. GAP's SMF ¶ 3. Further, the Atomic Energy Act requires that the CIA Director be consulted in the process of preparing a classified annex to a Nuclear Proliferation Assessment Statement if a 123 Agreement is ultimately pursued. *See* 42 U.S.C. § 2153(a)(9).[3] It is no state secret that the CIA is involved in conversations about nuclear proliferation, and under *ACLU v. CIA*, that consideration is in any case irrelevant because on its face, GAP's FOIA request seeks records that would establish the extent to which any U.S. entity—not just the CIA—participated in efforts to bring civil nuclear technology to the Middle East.[4]

Second, the CIA offers no coherent rationale for asserting a "*Glomar*" response to the second, fourth, and fifth categories of records GAP requested (respectively, records relating to the Middle East Marshall Plan, IP3 Corporation's proposal for nuclear and cyber cooperation with various Middle Eastern countries, and the Westinghouse bankruptcy).[5] These categories of

[3] The fact that the CIA has a legal responsibility to provide classified information if a 123 Agreement is pursued does not mean that any form of CIA participation in conversations about civil nuclear agreements is classified. The CIA does not rely on its responsibilities under the Atomic Energy Act as a basis for its "*Glomar*" Response. *See* Decl. of Antoinette B. Shiner ("Shiner Decl."), ECF No. 24-3.

[4] Indeed, Plaintiff submitted nearly identical requests to the other defendant agencies. *See* Compl. ¶¶ 70 (State), 96 (Commerce), 105 (Treasury), 115 (Defense); & 127 (Energy).

[5] Westinghouse Electric Company is a producer of nuclear reactors. When the IP3 Corporation conceived and pursued the Middle East Marshall Plan, Barrack was considering buying a stake

records all relate to efforts by well-connected private entities and individuals lobbying multiple components of the U.S. government, including the CIA, to support their financially motivated efforts to bring civil nuclear technology to Saudi Arabia. As the House Committee on Oversight and Reform's second interim staff report details, IP3 met with and briefed high-level stakeholders, including then-CIA Director Pompeo, and distributed briefing and presentation materials to them. GAP's SMF ¶ 18. The evidence in the record shows that IP3 sought and obtained meetings with senior members of the administration, including cabinet level officials from multiple officials, including the CIA, *id.* ¶¶ 5, 16-18, and that IP3 officials initiated contact with the CIA and others to pursue their own agendas, *id.* ¶ 29.

Requiring the CIA to confirm or deny that it has records that could demonstrate that it was on the receiving end of a sophisticated lobbying effort by private entities to influence U.S. nuclear policy would not reveal sensitive information about the agency's intelligence activities, sources, and methods. The closest the CIA comes to defending this remarkable proposition is its generalized claim that "the majority of CIA relationships with outside entities are, in fact, classified and fall squarely within the ambit of Exemptions 1 and 3,"[6] and that "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." Def.'s Reply Br. at 5.[7] Accepting the CIA's claim would permit the agency to assert a

in Westinghouse. GAP's SMF ¶ 6. Barrack served as a key intermediary between incoming Trump administration officials and the IP3 Corporation. *See id.* ¶ 5.

[6] The CIA offers no citation to support this assertion, nor is there supporting evidence in the record. Accordingly, the Court should give it no weight for the purpose of ruling on the parties' cross motions for summary judgment.

[7] The CIA's claim that meetings with IP3 or other private companies could implicate intelligence interests is not supported by the Shiner Declaration, which discusses the CIA's intelligence interest in not revealing whether "the CIA may have participated in discussions with *U.S.*

"*Glomar*" response whenever a request for any records implicated the CIA's relationship with a third party, a breathtaking proposition that has no support in fact or law. It is also beside the point because in this case, the Court is not confronted with a generic relationship with a third party; rather, there is uncontested evidence in the record that IP3 initiated contact with the CIA to advocate for a policy from which IP3 planned to profit. Neither FOIA Exemption 1 nor 3 protects the mere existence of that relationship.

Finally, the CIA should not be permitted to rely on an overbroad and unsupported interpretation of the first category of records GAP requested—civil nuclear cooperation with Middle Eastern countries, most notably Saudi Arabia—so that it can issue a "*Glomar*" response for categories that clearly do not implicate intelligence activities, sources, and methods. In other contexts, this Court has previously instructed that an agency cannot interpret FOIA requests "far more broadly that the text supports in a thinly veiled effort to make the request more complex and burdensome than it is." *Pub. Employees for Envtl. Responsibility*, 314 F. Supp. 3d at 79.

The CIA is adopting the same tactic here. GAP's FOIA request unambiguously describes a discrete campaign by U.S. government officials and private entities to bypass standard protocols for civil-nuclear agreements, identifies specific government officials and IP3 representatives likely to be included on relevant correspondence, and suggests specific components of the CIA that are most likely to have responsive information. Compl. ¶¶ 86-89. When the CIA asked GAP to clarify what Middle Eastern countries GAP was referring to, GAP explained that it was referring to Egypt, Jordan, and Saudi Arabia. *Id.* ¶ 94. GAP also clarified

Government officials, foreign diplomats, or foreign intelligence services regarding these topics." Shiner Decl. ¶ 23 (emphasis added). *See also id.* ¶ 25 ("The CIA utilizes *foreign officials, nationals, and intelligence services* to acquire intelligence information or support CIA intelligence collection activities.") (emphasis added). IP3 is none of these.

that the term "civil nuclear cooperation" should be interpreted to mean any form of assistance regarding the acquisition of nuclear material, equipment, or technology by foreign countries; funds or financing to acquire nuclear material, equipment, or technology; and efforts by U.S. entities and persons to promote the acquisition of civilian nuclear reactors and related services by foreign countries. *Id.* GAP received no additional requests for clarification from the CIA. *Id.* ¶ 95. In light of the clear direction GAP gave to the CIA and GAP's efforts to focus—not broaden—the scope of its request, the CIA should not be permitted to adopt an overly broad interpretation of GAP's request to justify a "*Glomar*" response.

III. The CIA has not rebutted GAP's evidence that CIA's "*Glomar*" response may conceal embarrassing or unlawful conduct.

The record contains evidence that controverts the CIA's boilerplate contention, Shiner Decl. ¶ 21 n.2, that its "*Glomar*" response is not motivated by bad faith. As GAP explained in its opening brief, "Summary judgment is warranted on the basis of agency affidavits when the affidavits describe 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*." *Miller v. Casey,* 730 F.2d 773, 776 (D.C.Cir.1984) (quotation omitted) (emphasis added). Simply put, the CIA has failed to meet the standard articulated in *Miller*.

As GAP's SMF details, the actions that are the subject of GAP's FOIA request are being investigated by the House Committee on Oversight and Reform. The committee has released two staff reports detailing "efforts inside the White House to rush the transfer of highly sensitive U.S. nuclear technology to Saudi Arabia in potential violation of the Atomic Energy Act and without review by Congress as required by law—efforts that may be ongoing to this day." GAP's SMF ¶ 14. The first interim report relied on "multiple whistleblowers" who "came forward to express

'significant concerns about the potential procedural and legal violations connected with rushing through a plan to transfer nuclear technology to Saudi Arabia.'" *Id.* ¶ 15 (quoting Interim Staff Report, Whistleblowers Raise Grave Concerns with Trump Administration's Efforts to Transfer Sensitive Nuclear Technology to Saudi Arabia ("First Interim Staff Rpt."), Feb. 2019, https://oversight.house.gov/sites/democrats.oversight.house.gov/files/Trump%20Saudi%20Nuclear%20Report%20-%202-19-2019.pdf, at 2). The Committee's second interim staff report, which was based on a review of more than 60,000 pages of documents obtained by the committee—mostly from private individuals and entities—concluded that "contacts between private and commercial interests and high-level Trump Administration officials were more frequent, wide-ranging, and influential than previously known—and continue to the present day." *Id.* ¶ 16. The Committee concluded that the administration showed a "'willingness to let private parties with close ties to the President wield outsized influence over U.S. policy towards Saudi Arabia.'" *Id.* ¶ 34 (quoting the Second Interim Staff Report, Corporate and Foreign Interests Behind White House Push to Transfer U.S. Nuclear Technology to Saudi Arabia ("Second Interim Staff Rpt."), July 2019, https://oversight.house.gov/sites/democrats.oversight.house.gov/files/Trump%20Saudi%20Nuclear%20Report%20July%202019.pdf, at 3). The Committee also found that those efforts to wield influence "'raise serious questions about whether the White House is willing to place the potential profits of the President's friends above the national security of the American people and the universal objective of preventing the spread of nuclear weapons.'" *Id.* ¶ 35 (quoting the Second Interim Staff Rpt. at 3). In response to the investigation by the House Oversight Committee the White House refused to produce a single document, "and other agencies . . . stonewalled the Committee's requests." Second Interim Staff Rpt. at 10.

The CIA makes no serious effort to rebut this evidence that its "*Glomar*" response is motivated by an attempt to conceal potentially embarrassing or unlawful conduct. The two paragraphs devoted to the matter in the CIA's reply brief contain no references to the record, *see* Def.'s Reply Br. at 5-6, and the CIA filed no response to GAP's Statement of Facts. Nor does the CIA address the substance of Plaintiff's arguments that the records requested could reveal potentially embarrassing or unlawful conduct—including an apparent effort to bypass the requirements of the Atomic Energy Act. GAP's SMF ¶ 9. What the CIA refers to as "baseless speculation," Def.'s Reply Br. at 6, is in fact the investigative findings of the House Committee on Oversight and Reform that are backed by whistleblower accounts and documentary evidence obtained from private entities, including individuals named in GAP's FOIA request. *See* GAP's SMF ¶¶ 14-18, 26-36. Whatever presumption of good faith this Court must afford to agency affidavits does not supersede the standard articulated in *Miller*, 730 F.2d at 776, that summary judgment is inappropriate where an agency affidavit is "*controverted by either contrary evidence in the record nor by evidence of agency bad faith*." *Id.* (emphasis added).

Finally, there is no legal basis for the CIA's suggestion that a "*Glomar*" response can only be pierced by evidence of bad faith *by the CIA*—as opposed to other elements of the United States government. *See* Def.'s Br. at 6 (distinguishing between the "CIA's motives" and "those the House Oversight Committee attributed to the White House"). Executive Order 13526, on which the government relies, provides in relevant part:

> In no case shall information be classified, continue to be maintained as classified, or fail to be declassified in order to:
>
> (1) conceal violations of law, inefficiency, or administrative error;
> (2) prevent embarrassment to a person, organization, or agency;

Exec. Or. 13526, 75 Fed. Reg. 707 (Dec. 29, 2009). *See also* Shiner Decl. ¶ 21 n.2 (parroting this language). On its face, Executive Order 13526 states that no information shall be classified to "conceal violations of law, inefficiency or administrative error" or to "prevent embarrassment to a person, organization, or agency." Executive Order 13526 does not restrict this limitation on classification to violations of law by the classifying agency or embarrassment to the classifying agency, its officials, and constituent parts. For this reason, to the extent that the Court finds that that Plaintiffs have put forth evidence that the CIA's "*Glomar*" response is motivated by an effort to conceal violations of law by or embarrassment to any component of the United States government, including the White House, it should rule in GAP's favor.

CONCLUSION

For the foregoing reasons, Defendant CIA's motion for summary judgment should be denied, Plaintiff's motion for summary judgment should be granted, and the CIA should be directed to process GAP's request as soon as possible and provide GAP with a determination within 30 days of the Court's decision on this matter.

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Respectfully submitted,

_*/s/ Conor M. Shaw*___________________

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