Case No. 12-4345

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY,
a New Jersey non-profit corporation,

Plaintiff-Appellant,

v.

FEDERAL BUREAU OF INVESTIGATION, and
UNITED STATES DEPARTMENT OF JUSTICE,

Defendants-Appellees.

On Appeal from the
United States District Court for the District of New Jersey,
Case No. 2:11-cv-2553-ES-CLW

REPLY BRIEF of PLAINTIFF-APPELLANT

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INTRODUCTION

This Freedom of Information Act ("FOIA") appeal asks this Court to determine whether, based on the record before the court below, the FBI may keep secret the discrete, public source information about New Jersey racial and ethnic groups that Plaintiff seeks. Defendants' brief focuses instead on a very different issue: whether release of the contested records in their *entirety* would cause the harms that FOIA Exemption 7, which applies to law enforcement records, and Exemption 1, which applies to classified information, were designed to prevent. But this is a straw man that mischaracterizes Plaintiff's request. Plaintiff does not seek disclosure of entire records and does not dispute that the records at issue contain *some* exempt information that is properly withheld. Plaintiff only asks Defendants to isolate and disclose limited census and demographic data from those documents—information that is, by its nature, general and non-specific.

Evidence in the record and common sense both indicate that Defendants can do so without revealing any specific investigation targets or sources, classified information, or unknown law enforcement techniques properly withheld under Exemptions 7 and 1. The district court made errors of law and fact in holding otherwise. Defendants oppose this point by incorrectly suggesting that Plaintiff

seeks entire records and grossly exaggerating the risks of disclosure. But the harms they identify are not tied to the modest nature of the information Plaintiff seeks, and FOIA case law and evidence in the record contradict Defendants' assertion that segregation and disclosure are impossible. This Court should thus reverse the district court's Exemptions 7A, 1, and 7E rulings as to any publicly-available racial and ethnic information in the withheld records, and its holding that Defendants properly segregated and disclosed non-exempt information.

Defendants also fail to justify the use of a secret, non-adversarial process to adjudicate FOIA exclusion claims. Defendants' argument for an entirely secret process as a matter of first recourse is contrary to the FOIA's purpose of disclosure, its legislative history, and the Glomar doctrine, which courts created to accommodate government secrecy concerns. Unlike Plaintiff's alternative Glomar-based proposal, Defendants' secret process would not protect the interests of the courts, FOIA litigants, or the public, and Defendants do not show that it could. Defendants' arguments also entirely ignore the inability of a secret and one-sided process to protect the government's own asserted secrecy interest, and overstate any purported negative consequences that might result from Plaintiff's proposed procedure. This Court should thus vacate the district court's Section

552(c) ruling and establish the use of a Glomar-like procedure for the adjudication of FOIA exclusion claims.

ARGUMENT

I) The District Court Erred in Allowing the FBI to Keep Secret Publicly-Available Racial and Ethnic Information About New Jersey Communities.

Defendants cannot keep secret publicly-available racial and ethnic information from seventeen documents withheld in full under Exemption 7A, 1, or 7E. The FOIA thus requires them to segregate and disclose this information for the reasons discussed below.

A) Disclosure of publicly-available racial and ethnic information about New Jersey communities cannot reasonably be expected to cause harm under Exemption 7A.

The parties do not dispute that the withheld records were compiled for law enforcement purposes or that each contains *some* information that may be properly withheld under Exemption 7A. The parties' sole dispute concerns whether Defendants have shown that they can keep secret the discrete, publicly-available racial and ethnic information that Plaintiff seeks because disclosure could reasonably be expected to harm FBI investigations. Defendants fail to meet their Exemption 7A burden for three principal reasons.

First, Defendants assert that they may sustain their Exemption 7A claim over entire documents because they are "used by intelligence analysts and special agents for ongoing investigations" and contain some information identifying targets, discussing threats, and recommending investigation tactics. Br. for Appellees ("Defs.' Br.") 26–27. But Defendants' document-based arguments fail to address, much less explain, how disclosure of the specific and limited information sought—absent disclosures of target- or conduct-specific information that Plaintiff expressly does *not* seek—could reasonably be expected to interfere with investigations and prosecutions. *See* Br. of Pl.-Appellant ("Pl.'s Br.") 26–27.

Plaintiff *only* seeks disclosure of census data, population statistics, and demographic information about racial or ethnic communities subjected to FBI intelligence collection. Disclosure of this general, community-wide, public-source information cannot reasonably be expected to identify specific suspects or witnesses, or to permit suspects to construct false alibis or defenses, or destroy evidence, as Defendants contend. *See* Defs.' Br. 28–29; *Campbell v. Dep't of Health and Human Servs.*, 682 F.2d 256, 259 (D.C. Cir. 1982). Suspects might be tipped off, and the harms Defendants assert may occur, if Defendants were to

disclose conduct- or target-specific descriptors, such as age, physical appearance, occupation, or gender—but Plaintiff explicitly does not seek this information.

Moreover, even if the FBI were somehow to draw a legitimate link between an entire racial or ethnic community and a specific person or group under investigation, disclosure of *only* publicly-available, community-wide data cannot reasonably be expected to harm those specific investigations because there are often multiple criminal or terrorist organizations that target any particular racial or ethnic community, as Defendants' own documents show.[1]

Defendants' assertion that disclosure of publicly-available racial and ethnic information will cause harm by revealing the "focus or scope of FBI investigations" or FBI "areas of interest" also fails. *See* Defs.' Br. 28–30, 32. Because Plaintiff seeks information concerning entire communities—not suspected persons or groups—disclosure cannot reasonably be expected to reveal the scope or focus of any specific investigation. *See Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1114 (D.C. Cir. 2007) ("[I]t is not sufficient for an agency merely to

[1] *See* JA-825 (Decl. of Nusrat J. Choudhury ("Choudhury Decl.") Ex. K), DDE #21-5 at 2 (noting the existence of multiple "Sunni terrorist groups" and groups that "use an extreme and violent interpretation of the Muslim faith" of interest to FBI Detroit Field office); JA-772 (Choudhury Decl. Ex. D), DDE #21-5 at 2 (referring to multiple "Russian criminal enterprises" in the San Francisco area).

state that disclosure would reveal the focus of an investigation; it must rather demonstrate *how* disclosure would reveal that focus."). While it would inform the public to know that the FBI is collecting intelligence on, for example, New Jersey's Chinese and Russian communities (as the FBI has already disclosed for other states), disclosure of census data or population statistics would not reveal any specific angle to investigations of suspected Chinese or Russian criminal syndicates.[2] The salient point is not only that the information sought is publicly-available, but that it concerns communities as a whole—not specific investigation targets, subjects, or witnesses.[3]

Nor would disclosure reveal any *unknown* FBI investigative interest. Surely an individual engaged in criminal conduct knows they bear the risk of FBI investigation, and the public is already well aware of the FBI's racial and ethnic

[2] Arguing to the contrary would be akin to claiming that in the 1980s, disclosure of FBI interest in Southern Italian communities would have tipped off the Gambino crime family to an FBI investigation of which it was entirely unsuspecting.

[3] Plaintiff's challenge is thus to Defendants' improper invocation of Exemption 7A over a particular *type* of information—publicly-available community-wide data—and is not premised, as Defendants contend, either on an argument that "public source information must be released under FOIA as a matter of course," Defs.' Br. 30, or on Plaintiff's intended use of that information, *see* Defs.' Br. 31 (citing *Consumers' Checkbook Ctr. for the Study of Servs. v. U.S. Dep't of Health and Human Servs.*, 554 F.3d 1046, 1051 (D.C. Cir. 2009)).

mapping program, *see* Pl.'s Br. 30, 36. Criminals can, and likely have, deduced that if their organizations or networks have any arguably "ethnic aspects," the FBI is already targeting those communities for intelligence collection and mapping through the Domain Management program.[4] The only additional information Plaintiff seeks are the identities of the New Jersey communities being mapped, and disclosure of that information cannot reasonably reveal any unknown investigatory scope, focus, or leads as discussed above.

Defendants insist that they can sustain their Exemption 7A claims over even limited, publicly-available information because they interpret the exemption to apply categorically to the entire contents of documents used in ongoing investigations. *See* Defs.' Br. 25–28 (describing "the risk that would be posed to enforcement proceedings by releasing such *documents*") (emphasis supplied). The fact that the records may be part of ongoing investigations, however, is not dispositive of whether Exemption 7A categorically applies to their entire contents. *Cf. Dickerson v. Dep't of Justice*, 992 F.2d 1426, 1433–34 (6th Cir. 1993) (FBI disclosed public source information from files concerning active investigation into

[4] For the same reason, disclosure of the information sought would not disclose the "FBI's internal practices" or "aid others in circumventing future FBI investigations," as Defendants suggest. Defs.' Br. 30–31 (citing *Blackwell v. FBI*, 680 F. Supp. 2d 79, 92 (D.D.C. 2010) (internal quotation marks omitted)).

Jimmy Hoffa's disappearance and asserted Exemption 7A only over non-public information).[5] Nor does this fact discharge Defendants' burden to show that disclosure of the limited data sought "could reasonably be expected to cause some articulable harm" to investigations, *Manna v. U.S. Dep't of Justice*, 51 F.3d 1158, 1164 (3d Cir. 1995); in this case, evidence shows that it would not. *See* Pl.'s Br. 28–30; *cf. Mead Data Cent., Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977) ("The focus of the FOIA is information, not documents . . . .").

Contrary to Defendants' contention, the Hardy Declaration fails to establish that Exemption 7A applies to publicly-available racial and ethnic information, and does not merit deference. *See* Defs.' Br. 32–33. While Defendants emphasize the declaration's length and the fact that it describes individual documents, they fail to show how the declaration *explains* with reasonable specificity how the discrete, community-wide, publicly-available information Plaintiff seeks is withholdable under Exemption 7A. *See* Pl.'s Br. 27–28; Defs.' Br. 32; *Campbell*, 682 F.2d at

[5] Defendants have not identified a single case—and Plaintiff is aware of none—finding that records consulted in ongoing investigations can, per se, be reasonably expected to cause articulable harm to those investigations. *Cf.*, *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 241 (1978) (recognizing categorical application of Exemption 7A to witness statements); *Wright v. Occupational Safety and Health Admin.*, 822 F.2d 642, 647 (7th Cir. 1987) (same for records concerning witness identities and statements).

259 (application of Exemption 7A requires explanation of how harm will flow from "particular kinds" of records).

Nor does the Hardy Declaration deserve deference in light of the evidence contradicting its assertions of harm. *See* Pl.'s Br. 28–30 (describing disclosure of publicly-available racial and ethnic information from FBI documents similar to those kept secret here). Defendants misconstrue the import of this evidence. Plaintiff does not allege that these disclosures demonstrate a waiver of Defendants' Exemption 7A claim under the public domain doctrine. *See* Defs.' Br. 35. Rather, the disclosures undermine the Hardy Declaration's assertions and concretely illustrate that release of the discrete information Plaintiff seeks will not harm specific investigations. *See* Pl.'s Br. 30.[6]

Finally, Defendants insist that publicly-available racial and ethnic information is so "intermingled" or "intertwined" with Exemption 7A information

[6] For example, Defendants' partial release of a Domain Intelligence Note—a type of document they seek to withhold in full here—shows that release of *only* the publicly-available information in the document, including census data, would not reveal target identities or any investigation scope, focus, or area of interest. *See* Pl.'s Br. 28–29 & n.15. Yet, that disclosure would still inform the public that the FBI is studying Central American and Hispanic populations—information that is critically important in light of the FBI's use of community data to target further intelligence collection and practice of conducting suspicionless assessment investigations. *See* Pl.'s Br. 7–8 & nn.4–5.

that they cannot segregate and disclose it. Defs.' Br. 29–30. But for the reasons set forth in Section I.D, their arguments fail to factually support this claim and evidence in the record contradicts it. *See infra* 16–19; *see also* Pl.'s Br. 39–41.

B) Exemption 1 does not apply to the publicly-available racial and ethnic information about New Jersey communities that Defendants withhold.

In the proceedings below, Defendants failed to provide a straightforward answer to the threshold question of whether the portions of ten records kept secret under Exemption 1 even include any census data, population statistics, or other community-wide, publicly-available racial and ethnic information. *See* Pl.'s Br. 31–32 & n.18. The district court did not specifically address that question, although Plaintiff had raised it. *See* JA-016–017 (Op.), DDE #35 at 12–13; JA-1002–03 (Pl.'s Reply Br.), DDE #27-1 at 19–20. Instead, it permitted Defendants to withhold the entirety of ten documents under Exemption 1—even though Defendants claimed the exemption only over portions of those documents.[7] But if these discrete withholdings do not contain the specific information Plaintiff seeks, there is no Exemption 1 dispute, and this Court should clarify that the district

[7] *See* Pl.'s Br. 31 & n.17. The district court held that Defendants "met [their] burden to justify [their] Exemption 1 withholdings." JA-016 (Op.), DDE #35 at 12. It found that Defendants "properly withheld" eight Domain Intelligence Notes and "properly den[ied] ACLU's FOIA request pursuant to Exemption One" as to two other documents. JA-016–17 (Op.), DDE #35 at 12–13.

court's Exemption 1 ruling excludes any publicly-available racial and ethnic information in the ten records. Defendants still fail to answer the threshold question in this case, s*ee* Defs.' Br. 42–43, although they have done so in a related case and can do so here.[8]

Assuming that Defendants' Exemption 1 withholdings include publicly-available information about New Jersey racial and ethnic communities, Defendants have failed to show that disclosure of this information will plausibly cause national security harm, as Exemption 1 requires.

As an initial matter, publicly-available information about New Jersey communities is not *itself* withholdable under Exemption 1 as classified foreign relations information or intelligence sources or methods. *See* Pl.'s Br. 33–34 (describing Defendants' failure to show that this information constitutes foreign relations information or intelligence sources or methods); *id*. at 34–36 (explaining

[8] Defendants have clearly stated, in response to a similar FOIA request, that they "did *not* invoke Exemption 1 to withhold any public source information, including public source information about race or ethnicity" and that "to the extent any public source information was withheld from responsive records, such information was withheld pursuant to Exemption 7(A)." Brief for Appellees at 37, *Am. Civil Liberties Union of Mich. v. FBI*, No. 12-2536 (filed April 5, 2013), ECF. No. 006111646531 (emphasis in original).

Defendants' failure to explain how disclosure of information sought would logically harm national security).

Defendants argue for the contrary proposition by relying primarily on the Hardy Declaration's description of Defendants' procedures for classifying information. *See* Defs.' Br. 42. But descriptions of classification procedures are entirely irrelevant to the key Exemption 1 issue in this case: whether disclosure of census data, population statistics, and other publicly-available racial and ethnic information would logically or plausibly cause national security harm. *See Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 73 (2d Cir. 2009). Defendants do not identify any portions of their submissions that make this showing with the required specificity. *See* Pl.'s Br. 33–37; *see, e.g.*, Defs.' Br. 42–43 (citing JA-111–12, 167–68 (Decl. of David. M. Hardy ("Hardy Decl."), DDE #20-2 at 19–20, 75–76).[9] The presence of *some* classified information within the ten records does not satisfy Defendants' Exemption 1 burden. *See Rugiero v. U.S. Dep't of Justice*, 257 F.3d 534, 553 (6th Cir. 2001) ("[The] agency cannot justify withholding an entire

[9] Nor do the portions of the Hardy Declaration that Defendants cite address whether Hardy classified any publicly-available racial or ethnic information. *See* Defs.' Br. 42–43.

document simply because it contains some material exempt from disclosure."); *Krikorian v. Dep't of State*, 984 F.2d 461, 467 (D.C. Cir. 1993) (same).

Defendants also rely on the Hardy Declaration's assertion that the documents "concern investigatory focuses of which the mere acknowledgement of intelligence gathering and investigative activity would cause [] serious damage to the National Security." *See* Defs.' Br. 43 (citing JA-167–68 (Hardy Decl.), DDE #20-2 at 75–76). But the Hardy Declaration provided that conclusory assertion as justification for Defendants' refusal to segregate and disclose *non-exempt* information; it does not discharge Defendants burden to show that the public source information Plaintiff seeks is itself withholdable under Exemption 1.[10] And, as discussed above, because disclosure of the limited information Plaintiff seeks would not reveal the focus of investigations, *see supra* 5–7, that assertion does not support withholding demographic information under Exemption 1.

Finally, Defendants argue that Exemption 1 applies to the FBI's "use" of publicly-available information in intelligence activities. *See* Defs.' Br. 43. But

[10] To the extent that Defendants cite this portion of the Hardy Declaration to assert that publicly-available information is so intertwined with classified information in the ten records that it cannot be segregated and disclosed, Defendants fail to factually support that claim and evidence in the record contradicts it. *See* Pl.'s Br. 39–41; *infra* 16–19.

they do not adequately support this claim and evidence in the record contradicts it. As an initial matter, it is simply illogical to conclude that the use of data about New Jersey communities derived from the U.S. Census and other domestic sources constitutes foreign relations information "gathered by the United States either about or from a foreign country," as Defendants appear to argue. *See* JA-120–21 (Hardy Decl.), DDE #20-2 at 27–28 ¶ 35; Pl.'s Br. 33–34 & n.19. Moreover, to the extent that Defendants now contend that the use of publicly-available census data and similar information in intelligence activities is itself a classified intelligence source or method, that argument fails. As Plaintiff has shown at length, and Defendants do not dispute, the fact that Defendants use this information—and have done so with respect to specific racial and ethnic communities—is widely known. *See supra* 6; Pl.'s Br. 36. The Bureau's use of this information from the records in this case cannot be withheld under Exemption 1 because disclosure would at most provide additional evidence of a widely known practice, s*ee* Pl.'s Br. 36, and therefore would not logically or plausible cause national security harm. *See Wash. Post v. U.S. Dep't of Def.*, 766 F. Supp. 1, 9 (D.C. Cir. 1991) ("It is a matter of common sense that the presence of information in the public domain makes the disclosure of the information less likely to cause damage to the national security."

(quotation marks omitted)) . Defendants entirely fail to address this issue. *See* Defs.' Br. 42–43.

C) Exemption 7E does not justify withholding publicly-available racial and ethnic information.

On appeal, Defendants argue that the Hardy Declaration provides a sufficient factual basis for the district court's sweeping ruling that Exemption 7E applies to all information in the contested records, including (implicitly) the publicly-available racial and ethnic information Plaintiff seeks. *See* Defs.' Br. 48. The fundamental problem with that argument cannot be remedied on appeal: in the proceedings below, Defendants conceded that the factual record in this case does not support their assertion of Exemption 7E. Defendants told the district court that their submissions did not "discuss[] in detail" their Exemption 7E claim and asked to cure this deficiency through additional briefing and factual submissions if the court ruled against them on their Exemption 7A arguments. JA-76 (Defs.' Mem. in Supp. of Defs.' Mot. for Summ. J.), DDE #20-1 at 24 n.6. Because the record before this Court is the same as that before the court below, Defendants cannot rebut the conclusion that the district court lacked an adequate factual basis for its Exemption 7E ruling. *See Davin v. U.S. Dep't of Justice*, 60 F.3d 1043, 1049 (3d Cir. 1995) (requiring government to provide "full and specific" explanation for

Exemption 7E claim to provide the district court an adequate foundation for review).

Defendants' attempt to retroactively rely on an inadequate record should fail. But even if this Court were to determine that the record before it is adequate, the limited type of information Plaintiff seeks cannot be withheld as law enforcement techniques or procedures under Exemption 7E.

Courts are clear that Exemption 7E cannot be used to withhold information about investigative techniques and procedures that are "routine and generally known" to the public. *Rosenfeld v. U.S. Dep't of Justice*, 57 F.3d 803, 815 (9th Cir. 1995); *Davin*, 60 F.3d at 1064. Because the FBI's use of racial and ethnic information in its Domain Management program is well-known, Exemption 7E does not permit the withholding of information about *which* racial and ethnic communities it is surveilling. *See* Pl.'s Br. 36. Defendants' arguments to the contrary focus entirely on information Plaintiff expressly does not seek: how the collection or use of racial or ethnic data in intelligence activities might be limited or expanded, Defs.' Br. 45, the manner in which this information is analyzed, *id*. at 46, how this research is compiled, *id*., or the resulting "overviews and analyses of threats," *id*. at 47. Defendants fail to explain how, without disclosure of this other

information, release of census data, population statistics or other publicly-available racial and ethnic information would disclose unknown law enforcement techniques or procedures.

Evidence also demonstrates that publicly-available information of the sort Plaintiffs seek has been disclosed in similar documents without revealing *any* of the law enforcement techniques and procedures that Defendants suggest. *See* Pl.'s Br. 28–30, 36 (discussing disclosures of racial and ethnic information from documents released in response to this and similar requests). These disclosures directly contradict Defendants' claim that release of the same information from the seventeen withheld-in-full records would reveal protected information. Should this Court find that the factual record is adequate for a ruling on Defendants' Exemption 7E claim, it should conclude that Exemption 7E does not apply to any publicly-available racial or ethnic information in the contested records.

D) Defendants failed to meet their burden to segregate and disclose non-exempt, publicly-available racial and ethnic information about New Jersey communities.

Defendants argue that they met their burden to segregate and disclose non-exempt information because their declarations describe with reasonably specificity their efforts to fulfill this obligation. *See* Defs.' Br. 48–49. But Defendants fail to

provide the factual basis required to show that segregation and disclosure of the non-exempt information sought is not possible. *See* Pl.'s Br. 39–41. Contrary to Defendants' contention, neither the Hardy Declaration's description of their process for making their segregability decision nor its description of the documents themselves provide the required factual recitation of where and how non-exempt information is dispersed in the documents so as to justify non-disclosure. *See* Pl.'s Br. 39–40; *Abdelfattah v. U.S. Dep't of Homeland Sec.*, 488 F.3d 178, 186–87 (3d Cir. 2007).

Defendants' fall-back argument is that "much of the information deemed responsive to plaintiff's request is highly sensitive law enforcement and intelligence information that is covered by more than one FOIA exemption." Defs.' Br. 49. But this assertion is precisely the sort of "blanket declaration that all facts are so intertwined [as] to prevent disclosure" that courts reject. *Elec. Privacy Info. Ctr. v. Dep't of Justice*, 584 F. Supp. 2d 65, 74 (D.D.C. 2008). Without the required description of where and how non-exempt information, including the publicly-available racial and ethnic information Plaintiff seeks, is located in the

withheld-in-full records, this Court cannot conclude that exempt information is so "intermingled" or "intertwined" as not to be disclosable.[11]

Finally, as Plaintiff has shown and Defendants have not refuted, the record conclusively demonstrates that Defendants failed to carry out their burden to disclose all reasonably segregable, non-exempt information, including the publicly-available racial and ethnic information Plaintiff seeks. *See* Pl.'s Br. 39–41. But should this Court determine that the record before it is inconclusive, in camera inspection of the contested records is necessary to inform a "responsible de

[11] The cases Defendants rely upon for the proposition that public source information may be kept secret when intertwined with exempt information are clearly distinguishable. *See* Defs.' Br. 30. The concern in *CIA v. Sims*, that release of the "public sources of information that interest the [CIA]" would disclose agency activities to foreign governments is inapposite, 471 U.S. 159, 176–77 (1985), because it is already widely known that the FBI is using census data and other publicly-available population information in intelligence collection. *See* JA-718–19 (Choudhury Decl. Ex. A), DDE #21-3 at 32–33 (Fed. Bureau of Investigation, DIOG § 4.3); *see, e.g.*, JA-604–05 (Hardy Decl. Ex. I), DDE #20-18 at NKGEOMAP 743, 746–47, 753 (use of foreign born population statistics in intelligence note). The public source information found to be non-segregable in *Blackwell v. FBI*, related to FBI "internal practices," which is not the case here. 680 F. Supp. 2d 79, 92 (D.D.C. 2010). Finally, the plaintiff in *Juarez v. Department of Justice*, did not seek the segregation and disclosure of limited, public source information. 518 F.3d 54, 61 (D.C. Cir. 2008). While the agency affidavits in that case may have justified the refusal to segregate and disclose non-exempt information from the sixteen pages at issue, here Defendants acknowledge that lengthy records contain public source information, but fail to explain adequately why discrete public source census data or population statistics cannot be isolated and disclosed. *See* Pl.'s Br. 40 & n.23.

novo determination" as to whether Defendants properly segregated and disclosed non-exempt information. *Ray v. Turner*, 587 F.2d 1187, 1195 (D.C. Cir. 1978). Because this Court may not conduct in camera review of records that were not before the court below, if it determines the factual record is not dispositive, it should remand so Plaintiff may request in camera review in the district court.

II) This Court Should Establish a Fair and Transparent Process for Adjudicating Disputes Over an Agency's Possible Reliance on a FOIA Exclusion.

The parties do not dispute that the government has an interest in keeping secret the existence of records that fall within the FOIA's exclusion provision. Nor do they dispute that the process by which courts adjudicate exclusion claims should protect this interest. The parties' sole dispute concerns whether this Court should reject the district court's use of a secret and one-sided process and establish a procedure for resolving exclusion claims akin to the familiar "Glomar" process. Defendants incorrectly contend that the use of Glomar-like procedures in the exclusion context is contrary to the FOIA and unnecessary because of the availability of ex parte, in camera procedures. Defs.' Br. 50–57. This Court should reject the categorical use of ex parte, in camera proceedings for the adjudication of FOIA exclusion claims.

A) The FOIA's statutory purpose and legislative history support the use of Glomar-like procedures to adjudicate FOIA exclusion claims.

It is true that the FOIA's text distinguishes between "exclusions" and "exemptions," and that "'the Government need not even acknowledge the existence of excluded information.'" Defs.' Br. 52 (quoting *Steinberg v. U.S. Dep't of Justice*, No. 93-2409-LFO, 1997 WL 349997, at *1 (D.D.C. June 18, 1997)). It is also true that the relevant legislative history "shows that Congress created the 1986 exclusions to offer greater protection to certain classes of law enforcement records than provided by the FOIA exemptions." Defs.' Br. 52. But it does not follow that the entirely secret and one-sided process the government prefers for adjudicating exclusion claims is consistent with the FOIA's purpose or envisioned by the legislative history, as Defendants contend. *See* Defs.' Br. 52 (asserting that FOIA's statutory text and legislative history "compel[]" the categorical use of ex parte, in camera proceedings to adjudicate exclusion claims). To the contrary, both the statute and its legislative history support the fair and transparent process Plaintiff asks this Court to adopt.

Defendants' insistence on a secret process as a first recourse—rather than a last resort—is contrary to the FOIA statute's "strong presumption in favor of disclosure." *Pub. Citizen. Inc. v. Rubber Mfrs. Ass'n*, 533 F.3d 810, 813 (D.C. Cir.

2008). Indeed, case law applying the FOIA makes clear that any procedures for adjudicating government secrecy claims should be as public and adversarial as possible before courts resort to ex parte, in camera proceedings. *See Roth v. U.S. Dep't of Justice*, 642 F.3d 1161, 1185 (D.C. Cir. 2011) ("Reviewing documents in camera is no substitute for the government's obligation to provide detailed public indexes and justifications whenever possible." (quotation marks omitted)); *Wilner*, 592 F.3d at 75–76 (2d Cir. 2009) ("A court should only consider information *ex parte* and *in camera* that the agency is unable to make public if questions remain after the relevant issues have been identified by the agency's public affidavits and have been tested by plaintiffs."); *Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976) (emphasizing need to "create as complete a public record as is possible" prior to resort to in camera review); *see also EPA v. Mink*, 410 U.S. 73, 93 (1973) (in camera inspection "need not be automatic").

For this reason, Defendants' sweeping argument that "national security interests permit ex parte submissions," Defs.' Br. 56–57, does not justify their request for a categorical rule requiring adjudication of all FOIA exclusion claims through secret proceedings. Indeed, the cases Defendants cite actually support Plaintiff's argument that ex parte proceedings are "inconsistent" with normal

judicial procedures and should be a *last* resort when adjudicating exclusion claims. *Heine v. Raus*, 399 F.2d 785, 791 (4th Cir. 1968); *see Solar Sources, Inc. v. United States*, 142 F.3d 1033, 1044 (7th Cir. 1998) ("[S]ubmission of documents and declarations *in camera* should be accompanied by as much of a public record as possible." (quotation marks omitted)); *Vaughn v. Rosen*, 484 F.2d 820, 825 (D.C. Cir. 1973) (recognizing that in camera review is "conducted without benefit of criticism and illumination by a party with the actual interest in forcing disclosure").

In arguing for the categorical use of secret proceedings, Defendants also ignore explanatory statements by congressional sponsors of the FOIA's exclusion provision. These statements indicate that Congress expected the government "to withhold the fact of the existence or nonexistence of specific records" as set forth in the Glomar case—i.e., to issue a Glomar response, which is what Plaintiff proposes. 132 Cong. Rec. H9455-05 (daily ed. Oct. 8, 1986) (statement of Reps. English and Kindness) (discussing *Phillippi*, 546 F.2d at 1012); 132 Cong. Rec. S14270-01 (daily ed. Sept. 30, 1986) (statement of Sen. Leahy).[12]

[12] The FOIA's text also supports this conclusion. The Section 552(c)(2) and Section 552(c)(3) exclusions mirror the "official acknowledgement" doctrine in Glomar cases. Pursuant to statutory text, official confirmation of an informant's status removes information from the ambit of Section 552(c)(2); and declassification of the fact of the existence of the specific categories of FBI records

Doctrinally, courts devised the Glomar process to permit public and adversarial adjudication of FOIA withholding claims while accommodating agency assertions that the very fact of the existence of requested records is itself withholdable information. *See Roth*, 642 F.3d at 1178; *see* Pl.'s Br. 46. And Glomar cases are regularly adjudicated without the need for in camera inspection. *See, e.g.*, *Larson v. Dep't of State*, 565 F.3d 857, 870 (D.C. Cir. 2009) (rejecting request for in camera inspection where agency declarations were adequate and the record lacked evidence contradicting their withholding claims).

Both legislative history and FOIA case law thus make clear that Glomar-like procedures are appropriately applied to the adjudication of FOIA exclusion claims.

B) The Attorney General's Memorandum does not support the categorical use of secret and one-sided process to resolve FOIA exclusion disputes.

Defendants' heavy reliance on the Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act ("AG Memorandum") to argue for the categorical use of secret procedures is flawed. *See* Defs.' Br. 52–53 (citing AG Memorandum § G(4) (Dec. 1987), *available at*

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described in Section 552(c)(3) removes them from the scope of that exclusion. 5 U.S.C. § 552(c)(2)–(3). Similarly, the government may not issue Glomar responses where it has already acknowledged "the existence of [responsive] agency records *vel non*." *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007).

http://www.justice.gov/oip/86agmemo.html). As the government itself notes, the AG Memorandum represents only "'the government's standard litigation policy.'" Defs.' Br. 53 (quoting AG Memorandum 30). That policy amounts merely to the government's preference concerning the process for adjudicating FOIA exclusions, and neither of the two unpublished district court cases the government cites in support of that preference provide legal authority that is in any way binding on this Court. *See Steinberg*, 1997 WL 349997, at *1; *Beauman v. FBI*, Civ. No. 92-7603 (C.D. Cal. Apr. 28, 1993).

Moreover, Defendants rely on cases that do not support their request for judicial deference to the AG Memorandum's preference for secret adjudication. *See* Defs.' Br. 53–54. *Barnhart v. Walton* is easily distinguishable. 535 U.S. 212 (2002). In *Barnhart*, the Supreme Court held that the Social Security Administration was entitled to so-called *Chevron* deference when it interpreted the Social Security Act, a statute authorizing the agency to administer the payment of disability insurance benefits. *See id*. at 215, 221–22. Here the FOIA does not authorize Defendants to administer any federal program, and the statute itself tells courts how much deference is due to agency interpretations. *See* 5 U.S.C.

§ 552(a)(4)(B) (requiring de novo review of agency decisions to withhold information).

Defendants cite only a single FOIA case in support—and that case does not even demonstrate the deference that Defendants request here. In *National Archives and Records Administration v. Favish (N.A.R.A.)*, the Supreme Court determined that a FOIA exemption applied in light of a "background of law, scholarship, and history" against which Congress had enacted a 1974 amendment to the relevant exemption. 541 U.S. 157, 169 (2004). The Court simply cited as *additional* support an earlier 1967 Attorney General memorandum that represented a "consistent interpretation of the exemption." *Id*. But in this case, the AG Memorandum merely represents the Attorney General's after-the-fact interpretation of its FOIA obligations. *See Benavides v. D.E.A.*, 968 F.2d 1243, 1248 (D.C. Cir. 1992) (concluding that the AG Memorandum "is not part of the legislative history," represents "only the Justice Department's post-enactment interpretation of the law, and is entitled to be taken seriously only to the extent that it makes persuasive arguments about what Congress intended"), *opinion modified on other grounds on reh'g*, 976 F.2d 751 (D.C. Cir. 1992).

Even if this Court were inclined to defer to the AG Memorandum, the sole scenario it offers to explain why a Glomar procedure is purportedly inappropriate for the exclusion context—a FOIA request "seeking records on named persons or entities," AG Memorandum § G(4)—is easily handled under Plaintiff's proposed procedure. In response to any such FOIA request, the FBI could state that a portion of the request seeks records that would be excludable under Section 552(c)(1), but that it can neither confirm nor deny the existence of such excludable records. The FOIA requester would bring an exclusion claim challenging that determination.[13] The FBI could then argue that the determination was proper because 1) the FOIA request is so broad as to encompass records about unsuspecting targets of ongoing criminal investigations, 2) those records are law enforcement records properly withheld under Exemption 7A, 3) disclosure could reasonably be expected to inform the targets that they are currently under investigation, and 4) to confirm or deny the existence of the records would harm those ongoing criminal investigations. The FOIA requester could respond with evidence establishing that certain subjects of ongoing investigations are already

[13] Alternatively, the FBI could respond that it does not interpret the request as seeking excludable records, in which case the FOIA requester would not bring an exclusion claim.

aware that they are investigation targets, and argue that Section 552(c)(1) does not apply to the portion of the request seeking those records. *See* 5 U.S.C. § 552(c)(1)(B)(i).[14] The court would then decide the extent to which the government's determination was proper.

At no point would this process disclose the existence of excludable records or the government's reliance on a FOIA exclusion. The AG Memorandum thus fails to provide any persuasive explanation for why a Glomar procedure is inappropriate for adjudicating FOIA exclusion claims.

C) The adjudication of FOIA exclusion claims through a Glomar-like procedure best protects the interests at stake without causing negative consequences.

Defendants fail to address the negative consequences of disfavored secret process for courts, the public, and FOIA requesters. *See* Pl.'s Br. 51–56. They even entirely ignore the fact that secret and one-sided adjudication will not protect their own asserted interest in secrecy in the event of an adverse judicial ruling by a lower court that is later reversed on appeal. *See* Pl.'s Br. 53–55. Defendants

[14] The requester could also argue that Section 552(c)(1) would not apply to the portions of the request seeking records concerning closed investigations, disclosure of which could not reasonably be expected to harm ongoing investigations as Section 552(c)(1) requires. *See* 5 U.S.C. § 552(c)(1)(B)(ii).

instead present vastly overstated claims that negative consequences will result from the use of a Glomar-like procedure in the FOIA exclusion context.

Defendants contend that a Glomar-like process would always require the government to respond in the affirmative when asked whether it interprets a FOIA request to seek records that would fall under the FOIA's exclusion provision (whether or not they exist) in order to prevent disclosing when an exclusion is (or is not) at play. Defs.' Br. 55. But the Glomar procedure did not open the floodgates of litigation, and neither will use of analogous procedures here. As in the Glomar context, adjudication of Section 552(c) claims through a Glomar-like procedure *may* result in *some* litigation concerning exclusions when no responsive records exist or no exclusion could apply. But Defendants would not need to respond affirmatively when it is patently unreasonable to interpret a FOIA request as seeking records that fall under Section 552(c) due to the subject matter of the request or the type of records requested.[15] And precisely *because* the

[15] For example, it would be unreasonable to interpret a FOIA request seeking records about the number of bullet-proof vests the FBI purchased in 2012 as requesting information falling under any of the three FOIA exclusions. *See* 5 U.S.C. § 552(c)(1) (certain records concerning ongoing criminal investigations of unsuspecting targets); *id*. § 552(c)(2) (records identifying undisclosed names of confidential informants); *id*. § 552(c)(3) (FBI records concerning counterintelligence or foreign intelligence information where existence or

government's response would not disclose the existence (or nonexistence) of the requested records, a statement that the government *does* interpret a request as seeking excludable records would *not* reveal whether the government in fact relied on an exclusion. *See* 5 U.S.C. § 552(c).[16] The fact that it may simply be *easier* for Defendants to rely on a secret, one-sided process does not tip the scales against use of a Glomar-like procedure.

Defendants also argue that use of a Glomar-like procedure would require it to simply parrot the terms of the exclusion provision in its briefing, whereas in camera review would allow the court to examine exclusion claims "in a concrete, rather than hypothetical, context." Defs.' Br. 55. But both arguments misconstrue

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nonexistence of records itself is classified information). Defendants' statement that they do not interpret such a request as seeking excludable records would not reasonably permit FOIA requesters to piece together with any certainty situations in which the government has in fact relied on an exclusion.

[16] In the adjudication process laid out in Plaintiff's opening brief, the government would indicate in its response to a FOIA request whether it determined that the request (or a portion of it) seeks excludable records, without confirming or denying that those records exist. *See* Pl.'s Br. 48. Because Defendants did not make such a statement here, Plaintiff asked the district court to order the government to address this issue even though the litigation had already progressed. *Id.* Should this Court remand for adjudication of the exclusion claim through the proposed procedure, a Glomar-like response would still preserve Defendants' asserted secrecy interest because Defendants would neither confirm nor deny the existence of any excludable records.

Plaintiff's proposal. Under Plaintiffs' procedure, the government's briefing would be nearly identical to Glomar briefing; it would concern the specifics of the FOIA request and whether the FOIA allows the government to refuse to answer it. *See, e.g.*, *Wilner*, 592 F.3d at 75 (discussing parties' briefing concerning whether Exemption 6 precludes acknowledgment of existence of requested records).

This Court should thus vacate the district court's Section 552(c) ruling and remand for adjudication consistent with Plaintiff's proposal.

CONCLUSION

For the foregoing reasons and those expressed in Plaintiff's opening brief, Plaintiff respectfully requests that the Court: 1) reverse the judgment of the district court and hold that Defendants improperly withheld publicly-available racial and ethnic information under Exemptions 7A and 1; 2) reverse the judgment of the district court and hold that it lacked an adequate factual basis to permit Defendants' withholding of publicly-available racial and ethnic information under Exemption 7E; 3) reverse the judgment of the district court, hold that Defendants failed to segregate and disclose non-exempt information, and remand for segregation and disclosure of publicly-available racial and ethnic information from

the withheld records; and 4) vacate the district court's Section 552(c) ruling and remand for adjudication consistent with Plaintiff's proposal.

Respectfully submitted,

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May 17, 2013

CERTIFICATE OF COMPLIANCE

1. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-point Times New Roman.

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4. I, Nusrat J. Choudhury, hereby certify that I have been admitted before the bar of the United States Court of Appeals for the Third Circuit and that I am a member of good standing of the Court.

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CERTIFICATE OF SERVICE

I hereby certify that I caused the fore-going Reply Brief of Plaintiff-Appellant to be served through this court's CM/ECF filing system this 17th day of May, 2013 to:

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