U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street
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January 13, 2020

BY ECF
Hon. Edgardo Ramos
U.S. District Judge
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

Re: *ACLU v. Department of Defense et al.*,
No. 17 Civ. 9972 (ER)

Dear Judge Ramos:

We write respectfully on behalf of defendants the Department of Defense ("DOD"), Department of Justice and Department of State (collectively, the "government") in response to the pre-motion conference letter submitted on January 8, 2020 (ECF No. 23), by plaintiffs the American Civil Liberties Union and American Civil Liberties Union Foundation (collectively, the "ACLU") in this Freedom of Information Act ("FOIA") action.

History of the Litigation

The pre-motion letter is the first action the ACLU has taken to prosecute this case since filing the complaint over two years ago. The complaint was filed on December 21, 2017. (ECF No. 1). In the complaint, the ACLU sought to compel the defendant agencies to process and release an alleged document titled "Principles, Standards, and Procedures," or "PSP." Complaint ¶¶ 1-2. Following service of the complaint, the government timely filed its answer on February 1, 2018. (ECF No. 14). In its answer, the government asserted a so-called "Glomar" response, explaining that the government could not confirm or deny the existence of records responsive to the FOIA request, or respond to factual allegations concerning the alleged PSP document, without revealing information that is exempt from disclosure under FOIA. *See Wilner v. NSA*, 592 F.3d 60, 68 (2d Cir. 2009) (approving use of Glomar response where revealing whether or not responsive records exist would disclose information that is protected under one or more FOIA exemptions).

The ACLU took no apparent steps in relation to this case for over a year. On June 27, 2019, the ACLU sent a letter to the government's counsel, arguing that DOD's disclosure of a separate document served to waive the Glomar response to the FOIA request. (ECF No. 23, Exh. A). The government responded to the ACLU's letter on September 13, 2019, explaining that DOD had no authority to declassify the information at issue, and advising the ACLU that the government was therefore maintaining its Glomar response to the FOIA request. (ECF No. 23, Exh. B). The ACLU waited another nearly four months before filing its pre-motion letter with the Court.

The Glomar Response Remains Proper

According to the complaint, the alleged PSP document replaced a May 2013 Presidential Policy Guidance ("PPG") titled "Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities." Complaint ¶ 2. Although the PPG was publicly released in redacted form, whether or not its procedures remain in place, or have been rescinded, modified or replaced, is both classified and protected from disclosure by the National Security Act, 50 U.S.C. § 3024(i)(1), as amended. The government therefore cannot confirm or deny whether the defendant agencies possess records responsive to the ACLU's FOIA request without revealing information that is exempt from public disclosure under FOIA exemptions 1 and 3, 5 U.S.C. § 552(b)(1), (3).

The ACLU contends that the government's Glomar response is no longer valid, citing a document disclosed by DOD. But that disclosure is immaterial, as DOD does not have authority to declassify the information at issue. Outside of certain limited exceptions that do not apply here, under Executive Order ("E.O.") 13526, national security information can be declassified or downgraded only by (1) the official who authorized the original classification, (2) his or her current successor in function, (3) a supervisory official of the originator or successor, or (4) an official delegated declassification authority in writing by the agency head or the senior agency official of the originating agency. E.O. 13526 § 3.1(b). The PPG was originally classified by the National Security Council ("NSC"), not DOD, and the NSC has not delegated declassification authority, in writing or otherwise, to DOD. Executive Order 13526 further provides that "[c]lassified information shall not be declassified automatically as a result of any unauthorized disclosure of identical or similar information." E.O. 13526 § 1.1(c). Thus, any unauthorized disclosure by DOD would not result in declassification. Information concerning the current status of the PPG—including whether or not it has been replaced by the alleged PSP document or any other procedures—therefore remains currently and properly classified.

Because DOD has no authority to declassify this information, the official acknowledgment doctrine is inapplicable. "[T]he law will not infer official disclosure of information" classified by one government entity from "release of information by another agency, or even by Congress." *Wilson v. CIA*, 586 F.3d 171, 186 (2d Cir. 2009) (citing cases). The disclosure of the DOD document therefore cannot serve as an official acknowledgment of the existence or nonexistence of the alleged PSP document.

As the government will demonstrate in its motion papers, moreover, the Glomar response remains logical and plausible. In the judgment of senior national security officials, public disclosure of the existence or nonexistence of specific procedures and standards currently in place for approving direct action against terrorist targets outside the United States and areas of active hostilities—and, in particular, whether the procedures and standards set forth in the PPG remain in place—could reasonably be expected to cause harm to the national security. This judgment is entitled to "substantial weight and deference" from the Court. *ACLU v. DOJ*, 681 F.3d 61, 71 (2d Cir. 2012). Contrary to the ACLU's argument, the disclosure of the DOD document does not render the government's Glomar response illogical or implausible. *See Wilson*, 586 F.3d at 192, 196 (holding that CIA had "provided 'rational and plausible' reasons for continued classification" of former employee's dates of service despite employee's disclosure of CIA letter containing

"identical information" to Congress and publication of letter in Congressional Record). Accordingly, the Glomar response should be upheld, and the ACLU's complaint dismissed in its entirety.

The *New York Times* Lawsuit

As noted in a footnote of the ACLU's pre-motion letter, the New York Times recently filed an action against DOD seeking the alleged PSP document under FOIA, and designated that action as related to this case. *New York Times v. DOD*, 20 Civ. 43. Service of the *New York Times* complaint was completed on January 9, 2020, and DOD's answer is due on February 7, 2020. The government has no objection to consolidating the briefing of motions for summary judgment in both cases, provided that the government is not required to submit briefing prior to filing its answer in the *New York Times* case.

We thank the Court for consideration of this letter.

Very truly yours,

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cc: Counsel of Record (via ECF)
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