U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street, 3rd floor
New York, New York 10007

September 11, 2017

BY ECF
The Honorable Paul A. Engelmayer
United States District Judge
Thurgood Marshall United States Courthouse
40 Foley Square
New York, New York 10007

Re: *ACLU,* et al. *v. DOD,* et al., No. 17 Civ. 3391 (PAE)

Dear Judge Engelmayer:

We write respectfully on behalf of defendant Central Intelligence Agency ("the CIA") in response to the ACLU's letter dated September 1, 2017 (Dkt. No. 29), to describe the bases for the CIA's anticipated cross-motion and opposition to the ACLU's anticipated motion for summary judgment against the CIA.

The Freedom of Information Act ("FOIA") request at issue in this case seeks records "related to a January 29, 2017 U.S. raid in al Ghayil, Yemen (the 'al Ghayil Raid' or the 'Raid')," including records pertaining to "the legal and factual bases for the Raid; the process by which the government evaluated and approved the Raid; why certain areas of Yemen were 'temporarily' designated areas of active hostilities; and the extent of civilian deaths that resulted from the Raid." (Complaint, Dkt. No. 1 ¶ 2). The ACLU submitted this FOIA request to the CIA, the State Department, and various components of the Department of Defense and Department of Justice. On July 31, 2017, the CIA issued a *Glomar* response with respect to the request, declining to confirm the existence or non-existence of records responsive to the ACLU's request. As detailed below, the CIA's *Glomar* response was proper because the existence or non-existence of responsive CIA records is a matter that is properly classified and statutorily protected, and thus exempt from disclosure under FOIA Exemptions 1 and 3.

Legal Standards

Where an agency's acknowledgment of whether records do or do not exist "would cause harm cognizable under a FOIA exemption," the agency may issue a *Glomar* response, whereby the agency "may refuse to confirm or deny the existence of records." *Wilner v. NSA,* 592 F.3d 60, 68 (2d Cir. 2009).

FOIA Exemption 1 protects from disclosure records and information that are properly classified pursuant to an Executive Order. 5 U.S.C. § 552(b)(1). The relevant Executive Order in this case is Executive Order ("EO") 13526, 75 Fed. Reg. 707 (Dec. 29, 2009), which "allows an agency to withhold information that (1) 'pertains to' one of the categories of information specified in the Executive order, . . . and (2) if 'unauthorized disclosure of the information could reasonably be expected to cause identifiable and describable damage to the national security.'" *N.Y. Times v. DOJ*, 756 F.3d 100, 104 (2d Cir. 2014) (quoting EO 13526 §§ 1.1, 1.4). Among other categories, the Executive Order permits the classification of information pertaining to "intelligence activities (including covert action), intelligence sources or methods, or cryptology." EO 13526 § 1.4(c). A *Glomar* response is expressly permitted under EO 13526 "whenever the fact of [the] existence or nonexistence [of requested records] is itself classified under this order or its predecessors." EO 13526 § 3.6(a).

FOIA Exemption 3 applies to matters "specifically exempted from disclosure" by certain statutes. 5 U.S.C. § 552(b)(3). One such statute is § 102A(i)(1) of the National Security Act of 1947 ("NSA"), as amended, which states: "the Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 3024(i)(1); *see ACLU v. DOJ*, 681 F.3d 61, 72-73 (2d Cir. 2012). Material that would reveal information relating to intelligence sources or methods falls within the scope of the NSA's protection and is categorically protected from disclosure. *See, e.g.*, *Larson v. Dep't of State*, 565 F.3d 857, 868-69 (D.C. Cir. 2009). In contrast to Exemption 1, no additional showing of harm to national security is required to justify a withholding under Exemption 3. *See CIA v. Sims*, 471 U.S. 159, 176 (1985); *Fitzgibbon v. CIA*, 911 F.2d 755, 762 (D.C. Cir. 1990).

The CIA's *Glomar* Response Is Proper

Here, the CIA's *Glomar* response is proper because, if the CIA either confirmed or denied the existence of responsive records, that would tend to confirm that the CIA either did or did not have an intelligence and/or operational role with respect to the raid that is the focus of the ACLU's FOIA request. That information pertains to intelligence sources or methods and thus is categorically protected under § 102A(i)(1) of the NSA and exempt from disclosure under FOIA Exemption 3. Moreover, as will be further detailed in the CIA's motion, such information is properly classified under EO 13526 and its disclosure could reasonably be expected to cause identifiable and describable damage to national security. The CIA's *Glomar* response is therefore also justified under FOIA Exemption 1.

Contrary to the ACLU's contention (Dkt. No. 29 at 2-3), no "official acknowledgment" has waived the CIA's right to assert a *Glomar* response pursuant to FOIA Exemptions 1 and 3. Under the official acknowledgment doctrine, the Court examines whether the government is precluded from withholding particular information as classified if the same information has been the subject of a prior, official, and authorized disclosure. *See Wilson v. CIA*, 586 F.3d 171, 186 (2d Cir. 2009) (setting forth standard for official disclosure); *N.Y. Times*, 756 F.3d at 120 n.19 (recognizing that *Wilson* "remains the law of this Circuit"). "In the *Glomar* context, the 'specific

information' at issue is not the contents of a particular record, but rather 'the existence *vel non*' of any records responsive to the FOIA request." *ACLU v. CIA*, 710 F.3d 422, 427 (D.C. Cir. 2013). A plaintiff can overcome a *Glomar* response based on official acknowledgment only "by showing that the agency has already disclosed the fact of the existence (or nonexistence) of responsive records, since that is the purportedly exempt information that a *Glomar* is designed to protect." *Id.*; *accord Wilner*, 592 F.3d at 70 ("An agency only loses its ability to provide a *Glomar* response when the existence or nonexistence of the particular records covered by the *Glomar* response has been officially and publicly disclosed.").

The ACLU has shown no such disclosure in this case. The ACLU erroneously argues that statements by former White House Press Secretary Sean Spicer during a February 2, 2017, press conference "detailed the CIA's participation in the Raid's planning and approval process." (Dkt. No. 29 at 2). In fact, the transcript cited by the ACLU[1] demonstrates that Mr. Spicer made no mention of the CIA or any CIA role with regard to the raid—let alone that the CIA possesses documents relating to the raid. Mr. Spicer merely stated that CIA Director Mike Pompeo, among several other advisors and officials, was present at a dinner meeting at which the raid was discussed. (*See id.* at 2-3). Director Pompeo is one of the President's advisors on national security matters, and his presence at the dinner meeting conveys no more than that the President consulted with him and other advisors before authorizing the raid. It does not disclose either the existence or non-existence of any CIA records responsive to the ACLU's FOIA request.

Accordingly, the government intends to oppose the ACLU's motion and to file a cross-motion for summary judgment upholding CIA's *Glomar* response. We thank the Court for its consideration of this matter.

Respectfully submitted,

JOON H. KIM
Acting United States Attorney

By: */s/ Elizabeth Tulis*
ELIZABETH TULIS
REBECCA TINIO
Assistant United States Attorneys
Tel.: (212) 637-2725/2724
elizabeth.tulis@usdoj.gov
rebecca.tinio@usdoj.gov

cc: Counsel of record (by ECF)

[1] *See* Press Briefing by Press Secretary Sean Spicer, 2/2/2017, #7, *available at* https://www.whitehouse.gov/the-press-office/2017/02/02/press-briefing-press-secretary-sean-spicer-222017-7.