**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

AMERICAN CIVIL LIBERTIES UNION and AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

*Plaintiffs*,

v.

DEPARTMENT OF DEFENSE, DEPARTMENT OF JUSTICE, and DEPARTMENT OF STATE,

*Defendants*.

No. 17 Civ. 09972 (ER)

Hon. Edgardo Ramos
United States District Judge

# REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT & IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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## INTRODUCTION

The ACLU brought this lawsuit to enforce its Freedom of Information Act ("FOIA") request for the Trump administration's Principles, Standards, and Procedures, or "PSP."[1] In response to the ACLU's request, Defendants have maintained their Glomar responses, refusing to either confirm or deny that the PSP exists—but there is no doubt that it does. As the ACLU explained in its opening brief, the Defense Department has already authored and publicly distributed a report (the "Report") acknowledging both that the PSP exists and that it supersedes its Obama-era predecessor, the "PPG." *See* Exhibit 2.7 to Declaration of Charles Hogle at 109, ECF No. 34-8 ("Hogle Decl. Ex. 2.7"). Because it has officially acknowledged the existence of the PSP, the Defense Department has waived its ability to issue a Glomar response to the ACLU's request. ACLU Br. 10–21. Moreover, regardless of the Defense Department's waiver, all three Defendants' Glomar responses are unlawful because they are illogical and implausible. ACLU Br. 22–25.

The government's reply does not seriously grapple with the ACLU's arguments.[2] Instead, as discussed below, it misstates the law of official acknowledgment, misreads the Report, ignores critical facts, and fails to specifically identify a single logical or plausible justification for the Defendants' Glomar responses.

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[1] Mem. of Law in Supp. of Pls.' Cross-Mot. for Partial Summ. J. & in Opp. to Defs.' Mot. for Summ. J. 2–3 (Mar. 25, 2020), ECF No. 33 ("ACLU Br.").

[2] Reply Mem. of Law in Further Supp. of Defs.' Mot. for Summ. J. & in Opp. to Pls.' Cross-Mots. for Summ. J. (Apr. 15, 2020), ECF No. 35 ("Gov't Reply").

## ARGUMENT

### I. The Defense Department has waived its ability to issue a Glomar response through official acknowledgment even if it does not have the authority to declassify the information at issue.

The government takes the radical position that *no matter what* the Defense Department knew, did, or said, it could not have officially acknowledged the existence of the PSP because it did not have the authority to declassify the current status of the PPG. Gov't Reply 2; *see also* Gov't Br. 15 (asserting that declassification authority belongs only to the National Security Council ("NSC")). Indeed, according to the government, no agency can ever officially acknowledge classified information unless it has the authority to declassify that information. Gov't Reply 2; *see also* Gov't Br. 15. But that rule does not originate in FOIA precedent: the government has invented it. As explained below, the government's proposed rule has never been endorsed by the Second Circuit and conflicts with the decisions of the D.C. Circuit.

1. The government asserts that in *Wilson v. CIA*, 586 F.3d 171 (2d Cir. 2009), the Second Circuit "held that an official lacking declassification authority did not officially disclose the classified information at issue." Gov't Reply 6. That is descriptively accurate, but legally misleading. In *Wilson*, the Second Circuit held that when the CIA's personnel department privately transmitted classified information to a former employee who remained bound by a confidentiality agreement, the transmittal did not qualify as a public disclosure and therefore did not amount to an official acknowledgment. *Wilson*, 586 F.3d at 187–88; *see also id.* at 174 n.2. This was so, the court held, even though the former employee later disclosed the information to Congress on her own initiative. *Id.* at 189 ("A former employee's public disclosure of classified information cannot be deemed an 'official' act of the Agency."). Thus, the Second Circuit's reasoning in *Wilson* hinged on whether the party responsible for publicly disclosing the classified

information was the CIA or the former employee.[3] Whether the CIA (or the CIA's personnel department) had the authority to *de*classify the information played no role in the court's analysis. *See generally* ACLU Br. 16–17 (discussing *Wilson*).

The government accuses the ACLU of "overlook[ing] the Second Circuit's statement in *Wilson* that 'the law will not infer official disclosure of information classified by [*one government entity*] from . . . statements made by a person not authorized to speak for the [*classifying agency*].'" Gov't Reply 3 (alterations in government brief) (emphases added). But as those brackets suggest, that is not what the Second Circuit said. What the court said was, "the law will not infer official disclosure of information classified by *the CIA* from . . . statements made by a person not authorized to speak for the *Agency*[.]" *Wilson*, 586 F.3d at 186 (emphasis added). The difference is important. The key plaintiff in *Wilson* was a former CIA agent who sued the agency; she argued that under the official-acknowledgment doctrine, the agency had relinquished the ability to stop her from publishing classified CIA information that she herself, without authorization, had already provided to Congress. Thus, the Second Circuit's *specific* references to information "classified by the CIA" and "a person not authorized to speak for the Agency," *id.*, reflect the actual facts of *Wilson* while fitting comfortably into the court's own

[3] To reach these conclusions, the Second Circuit simply applied two principles that it derived from existing cases: First, a former employee's public disclosure of classified information is not equivalent to a government agency's public disclosure of classified information. *Wilson*, 586 F.3d at 188. Second, a disclosure by one agency or branch of government is not equivalent to a disclosure by another, unrelated agency or branch of government. *Id.* at 189.

As the ACLU has explained, *see* ACLU Br. 17, this reasoning conforms with the Second Circuit's later characterization of waiver by official acknowledgment in *Florez v. CIA*, 829 F.3d 178 (2d Cir. 2016). *See id.* at 186 (waiver by official acknowledgment "is limited only to official and public disclosures made by the same agency providing the *Glomar* response, and therefore does not require the agency to break its silence as a result of statements made by another agency" (cleaned up)).

explanation of its reasoning.

By contrast, the altered, generalized quotation at the heart of the government's argument does not line up with anything else *Wilson* says. *Wilson* does not discuss—at all—a general rule tying waiver by official acknowledgment to classification authority.[4] Indeed, immediately following the phrase seized on by the government, the court cites *Hudson River Sloop Clearwater, Inc. v. Department of Navy*, 891 F.2d 414, 421 (2d Cir. 1989). *Wilson*, 586 F.3d at 186. *Hudson* provides logical support for the court's actual words and the ACLU's reading of them, as it distinguishes public disclosures made by former agency employees from public disclosures made by agencies themselves. *Hudson*, 891 F.2d at 422. But if the government's altered phrase were what appeared in the opinion, the court's citation to *Hudson* would be a non sequitur: *Hudson* does not posit a general rule tying waiver by official acknowledgment to declassification authority. *See* ACLU Br. 21. In short, the government has plucked a fact-specific phrase from *Wilson* and retrofitted it to ratify—without substantive explanation—its own novel and self-serving legal proposition.

2. The government's reliance on *Frugone v. CIA*, 169 F.3d 772 (D.C. Cir. 1999), is equally misguided. According to the government, *Frugone* supports the proposition that "an agency or official of a non-classifying agency lacks authority to officially disclose information that belongs to another agency or entity." Gov't Reply 4. That is incorrect. In the D.C. Circuit's own words, *Frugone* upheld "the CIA's ability to make a *Glomar* response *despite official disclosure* of the same information by the Office of Personnel Management." *ACLU v. CIA*, 710

[4] Nor did declassification factor in the district court's decision. *See Wilson v. McConnell*, 501 F. Supp. 2d 545, 558 n.27 (S.D.N.Y. 2007) (declining to reach whether the CIA's personnel department could make an official disclosure or whether classification authority was "even relevant to an 'official acknowledgment' analysis").

F.3d 422, 429 n.7 (D.C. Cir. 2013) (Garland, C.J.) (emphasis added); *see Frugone*, 169 F.3d at 774; ACLU Br. 16–17. Thus, the government's use of *Frugone*—and its proposed rule linking "official" disclosure to declassification authority—is in direct conflict with how the D.C. Circuit characterizes its own precedent.[5]

3. Relatedly, the government brushes aside the D.C. Circuit's opinion in *Ameziane v. Obama*, 699 F.3d 488 (D.C. Cir. 2012), simply because it did not involve classified information. Gov't Reply 4. That is, of course, true—as the ACLU acknowledged, *see* ACLU Br. 19—but it is beside the point. In *Ameziane*, the D.C. Circuit held that a court order revealing information that the executive branch wished to keep secret would amount to an official acknowledgement of the information. *Ameziane*, 699 F.3d at 492 (citing *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990) and *Afshar v. Dep't of State*, 702 F.2d 1125, 1130 (D.C. Cir. 1983)). The court further held that statements by counsel for the petitioner, a prisoner at Guantánamo, "would be tantamount to, and a sufficient substitute for, official acknowledgement by the U.S. government." *Ameziane*, 699 F.3d at 493. Thus, in *Ameziane*, the D.C. Circuit recognized that disclosure of sensitive government information may be "official" even if the disclosing entity does not, or cannot, re-designate the information as non-sensitive. *Id.* The government fails to grapple with this aspect of *Ameziane*. It asserts that classification makes all the difference, but it does not even attempt to explain why *Ameziane* would have been decided differently if the sensitive information at issue there had been classified—and it can't.

[5] Additionally, as the ACLU noted in its brief, the *Frugone* court was particularly concerned about lending excessive weight to disclosures by agencies "with *no duties* related to national security." *Frugone*, 169 F.3d at 775 (emphasis added); ACLU Br. 20. The facts of this case do not raise the same concern. Regardless of whether the Defense Department's mandate is perfectly coextensive with the NSC's, *see* Gov't Reply 5, it obviously has significant duties related to national security, *see* ACLU Br. 20, which the government does not dispute.

4. Underscoring the radical implications of its argument, the government does not deny that if the Report were still hosted on the live version of the Defense Department's website, its position would not change. *See* ACLU Br. 21. To be clear, the government does not claim that the Report's references to the PSP or PPG were mistakes, or that they are akin to clerical errors in FOIA processing. *See* ACLU Br. 15 n.22. Rather, the government maintains that because of the niceties of the executive's classification regime, the Defense Department's disclosures—no matter how prominent or clear—are legally insignificant. In its opening brief, the ACLU observed that adopting this position would permit executive agencies to distort the public discourse by selectively discussing nominally classified information while remaining free from any disclosure obligations under FOIA, thereby directly undermining the statute's purpose. *See* ACLU Br. 21. The government shrugs off this concern, stating that Executive Order 13,526 subjects agency officials to sanctions for the unauthorized disclosure of classified information. Gov't Reply 5 n.1. But that answer is no answer at all: Congress enacted FOIA precisely because it did not trust the executive to police itself in matters of secrecy and saw a need to safeguard against selective disclosures. *See* ACLU Br. 21 n.29.[6]

## II. The Report unambiguously discloses the existence of the PSP and the fact that it supersedes the PPG.

1. There is no question that where the Report refers to the "CT-PPG," it means the "Presidential Policy Guidance," or "PPG," issued by the Obama administration in 2013. *See* ACLU Br. 10–12. There are several reasons for that, but the most obvious appears in Part 7 of

[6] Nor has the government produced any evidence that any members of the Defense Department responsible for the Report—such as General Waldhauser or Major General Cloutier, *see* Hogle Decl. Ex. 2.7 at 1—have actually been subjected to sanctions for this supposedly unauthorized disclosure.

the Report, footnote 819. *See* Hogle Decl. Ex. 2.7 at 109 n.819.[7] As the ACLU explained in its opening brief, footnote 819 directly links the term "CT-PPG" to the Obama administration's 2013 "PPG," erasing any hypothetical difference between the two. ACLU Br. 11. The government offers no reason to think otherwise—indeed, rather than disputing the ACLU's interpretation of footnote 819, the government simply ignores it.

2. Moreover, the Report creates no ambiguity regarding the relationship between the CT-PPG and the PSP.[8] As the government acknowledges, the Report states that the PSP "supersedes" the CT-PPG. Hogle Decl. Ex. 2.7 at 109. This statement is as unambiguous as it gets. The Report also states that the Army's "investigation revealed several problems with the advise, assist, and accompany activity as it relates to the CT-PPG and the PSP." Hogle Decl. Ex. 2.7 at 111. According to the government, this latter statement "suggests" that the CT-PPG and the PSP "co-exist," rendering the relationship between the two policies ambiguous. Gov't Reply 10. That reading is implausible. It rests on the notion that the authors of the Report made two contradictory statements about the CT-PPG and PSP in the space of three pages. In other words, the government argues that because the Report *could* be read in an incoherent fashion, the Report is ambiguous. But an incoherent interpretation of a document does not make the document ambiguous—it makes the interpretation poor.

A plausible reading, by contrast, is that the Army's investigation revealed problems that

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[7] In its opening brief, the ACLU mistakenly cited the relevant footnote as "footnote 14," *see* ACLU Br. 11, but it is, instead, footnote 819. Counsel regrets the error.

[8] The government repeatedly observes that the Report does not define the term "PSP." Gov't Reply 9–10. As the ACLU explained in its brief, that creates no meaningful ambiguity. ACLU Br. 12. Even if the full title of the policy were not "Principles, Standards and Procedures," it would still match the record described in the ACLU's FOIA request. ACLU Br. 12. That is all that matters.

existed under the CT-PPG and persisted under the PSP. This reading not only harmonizes both sentences, but aligns with common sense: the Report's investigation focuses heavily on the events of October 2 to October 6, 2017. *See* Hogle Decl. Ex. 2.7 at 31–106. According to the Report itself, the CT-PPG remained in effect until at least October 3—after which it was formally superseded by the PSP. *See* Hogle Decl. Ex. 2.7 at 109. Given this timing, "problems with the advise, assist, and accompany activity" under *both* policies would naturally have been relevant to the Report's analysis. *See* Hogle Decl. Ex. 2.7 at 111.

## III. Regardless of the Defense Department's waiver, all three Defendants' justifications for asserting a Glomar response are vague, conclusory, illogical, and implausible.

The government has failed to carry its burden of demonstrating that Defendants' Glomar responses are justified under FOIA Exemptions 1 and 3. Indeed, Defendants' asserted justifications are so vague and conclusory that they would be inadequate even if the Report had never been published. But given that the Report is now part of the record, Defendants' reasons for maintaining their Glomar responses are manifestly illogical and implausible. *See Florez*, 829 F.3d at 184–85; *see also* ACLU Br. 22–25.

1. To justify Defendants' Glomar responses under Exemption 1, the government must "demonstrate" that the current status of the PPG "should remain classified" with enough "specificity . . . to confirm the rationality of [its] decision." *Wilson*, 586 F.3d at 195. It has not done so. The government does not seriously dispute that the unclassified portions of the Knight Declaration, in which the declarant asserts that disclosing the current status of the PPG will enable adversaries to "thwart military and intelligence operations," are conclusory and insufficient. Gov't Reply 11 (citing Knight Decl. ¶ 15). Instead, the government rests its case on paragraphs 16, 17, and 18 of the declaration—all of which are redacted. Gov't Reply 11. Yet no matter what lies behind those redactions, it is neither logical nor plausible to conclude that

merely acknowledging some unspecified change to the government's 2013 policy on the use of force abroad will enable any adversary to "thwart" anything at all. *See* ACLU Br. 23 n.30.

2. The government's efforts under Exemption 3 fare no better. Exemption 3 allows an agency to withhold information "specifically exempted from disclosure by statute[.]" 5 U.S.C. § 552(b)(3). The statute in question here is the National Security Act, which provides that "[t]he Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 3024(i)(1). According to the government, Exemption 3 applies because "revealing the current status of the PPG . . . *could* undermine intelligence operations against transnational terrorist targets," Gov't Reply 13 (citing Knight Decl. ¶ 27) (emphasis added); therefore, the current status of the PPG "relates to" intelligence sources and methods, Gov't Reply 13.

As discussed above, it is neither logical nor plausible that merely acknowledging the existence of guidance that supersedes the PPG, without revealing anything about the contents of the guidance, will "undermine intelligence operations."[9] Gov't Reply 13. Even if it were logical and plausible, the government's justification would boil down to a conclusory assertion, not a specific explanation. The two cases cited by the government, *see* Gov't Reply 13, make the difference clear: they involved records with concrete relationships to "intelligence sources and methods," not vague relationships mediated by hypothetical effects on "intelligence operations." *See ACLU v. DOJ*, 681 F.3d 61, 73 (2d Cir. 2012) (records of interrogation by waterboarding, as well as photograph of prisoner who was tortured in CIA custody, were exempt from disclosure);

[9] The vacated order cited by the government does not justify Defendants' Glomar responses. Gov't Reply 13 (citing *ACLU v. DOJ*, No. 15 Civ. 1954 (CM), 2016 WL 8259331, at *42–65 (S.D.N.Y. Aug. 8, 2016), *vacated*, 894 F.3d 490 (2d Cir. 2018)). On the contrary, it illustrates the difference between acknowledging the *existence* of a policy and revealing the *contents* of the policy. *See* ACLU Br. 23 n.30.

*CIA v. Sims*, 471 U.S. 159, 173 (1985) (identifies and institutional affiliations of researchers who conducted CIA's MKULTRA program were exempt from disclosure).

3. Even if the government's justifications for Defendants' Glomar responses were not otherwise deficient, they would be illogical and implausible because the Report—an official Defense Department document that was distributed to the news media and is part of the evidentiary record—flatly states that the PSP exists and supersedes the PPG. Hogle Decl. Ex. 2.7 at 109; *see* ACLU Br. 24–25. To minimize the relevance of this disclosure, the government asserts that it is nothing but an "oblique reference" to the status of the PPG and "is not an official statement of policy by the White House"; therefore, it is unlikely to be noticed by adversaries or spur a response from foreign governments. Gov't Reply 11–12 (citing Knight Decl. ¶ 23). But at least publicly, the government offers no specific reason to believe that "terrorists," "other adversaries," or "foreign governments" would take note of, and perhaps feel compelled to respond to, an official statement issued by the White House (or NSC), even while ignoring an official Defense Department statement signed by a General. *See* ACLU Br. 25 n.31.

The Defense Department's official acknowledgment, coupled with the government's illogical and implausible justifications for invoking Exemptions 1 and 3, make it clear that Defendants' Glomar responses are precisely the sort of "fiction of deniability" that the law will not tolerate. *ACLU v. CIA*, 710 F.3d at 431.

## CONCLUSION

For the foregoing reasons, the Court should grant the ACLU's cross-motion for partial summary judgment, deny the government's motion for summary judgment, and order the Defendant agencies to search for records responsive to the ACLU's request.

Dated: May 6, 2020

Respectfully submitted,

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