UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION and AMERICAN CIVIL LIBERTIES UNION FOUNDATION, Plaintiffs, v. DEPARTMENT OF DEFENSE, CENTRAL INTELLIGENCE AGENCY, DEPARTMENT OF JUSTICE, and DEPARTMENT OF STATE, Defendants.	17 Civ. 3391 (PAE)

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT, AND IN SUPPORT OF DEFENDANT THE CENTRAL INTELLIGENCE AGENCY'S CROSS-MOTION FOR SUMMARY JUDGMENT

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Defendant the Central Intelligence Agency respectfully submits this memorandum of law in opposition to Plaintiffs' motion for partial summary judgment, and in support of its cross-motion for summary judgment pursuant to Federal Rule of Civil Procedure 56.

PRELIMINARY STATEMENT

Plaintiffs brought this action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, seeking to compel disclosure of information pertaining to "the United States' January 29, 2017 raid in al Ghayil, Yemen." Specifically, Plaintiffs seek the disclosure of documents pertaining to "[t]he legal and policy bases," decision-making processes, "[b]efore-the-fact" and "after-action" assessments, and casualties associated with the described raid.

The Central Intelligence Agency ("CIA") properly has refused to confirm or deny the existence of responsive records, providing a "Glomar" response. Disclosure of the existence or nonexistence of responsive CIA records would tend to confirm that the CIA either did or did not have an intelligence interest or operational role in the described raid, facts that are currently and properly classified. This information is also statutorily protected by the National Security Act, which exempts from disclosure information relating to intelligence sources or methods. The accompanying declaration of Antoinette B. Shiner, the Information Review Officer for the Litigation Information Review Office at the CIA, establishes that providing a substantive response to Plaintiffs' FOIA requests would therefore reveal information properly protected by FOIA Exemptions 1 and 3. Binding precedent requires the Court to accord deference to the Government's determinations in this regard, particularly in the national security context. Furthermore, there has been no official acknowledgment or disclosure as to whether CIA records responsive to these FOIA requests exist, and therefore no waiver of the CIA's entitlement to assert the Glomar response.

For these reasons, the Court should deny Plaintiffs' motion for partial summary judgment, and grant the CIA's cross-motion for summary judgment.

BACKGROUND

This matter arises from FOIA requests submitted by Plaintiffs to the Defendant agencies, and components thereof, on March 15, 2017. *See* Dkt. No. 37, Ex. 1 (the "Requests"). In the Requests, Plaintiffs seek disclosure of the following records relating to "the United States' January 29, 2017 raid in al Ghayil, Yemen (the 'al Ghayil Raid')"[1]:

> [A]ny and all records—including legal and policy memoranda, guidance documents, before-the-fact assessments, and after-action reports—that pertain to:
>
> (1) The legal and policy bases in domestic, foreign, and international law upon which the government evaluated or justified the al Ghayil Raid, including but not limited to records related to the designation of parts of Yemen as "areas of active hostilities," and the legal and factual basis that the government uses in designating such areas;
>
> (2) The process by which the government approved the al Ghayil Raid, including which individuals possessed decision-making authority and the evidentiary standard by which the factual evidence was evaluated to support the determination;
>
> (3) The process by which the decision was made to designate three parts of Yemen as "areas of active hostilities";
>
> (4) Before-the-fact assessments of civilian or bystander casualties of the raid and the "after-action" investigation into the raid; and
>
> (5) The number and identities of individuals killed or injured in the al Ghayil Raid, including but not limited to the legal status of those killed or injured, with these separated out by individuals intentionally targeted and collateral casualties or injuries.

Id. at 2, 5.

Plaintiffs filed this action on May 8, 2017. *See* Dkt. No. 1. By letter dated July 31, 2017, the CIA declined to confirm or deny the existence or nonexistence of responsive records,

[1] For convenience and ease of reference, the Government will also refer herein to the incident that is the focus of the Requests as the "al Ghayil Raid," or the "Raid."

explaining that to do so would reveal information that is protected by FOIA Exemptions 1 and 3, 5 U.S.C. § 552(b)(1), (b)(3). *See* Dkt. No. 37, Ex. 2. This is known as a "Glomar" response, and is proper if the fact of the existence or non-existence of agency records falls within a FOIA exemption. *See Wilner v. NSA*, 592 F.3d 60, 67-68 (2d Cir. 2009); *Phillippi v. CIA*, 546 F.2d 1009, 1011 (D.C. Cir. 1976) (acknowledging CIA refusal to confirm or deny existence of records regarding activities of a ship named Hughes Glomar Explorer).

On September 18, 2017, the Court conducted a pre-motion conference with respect to the parties' requests for permission to file partial or complete summary judgment motions relating only to the CIA's response to the Requests. *See* Dkt. No. 33. During that conference, the Court referenced Plaintiffs' (incorrect) contention that CIA Director Mike Pompeo's reported attendance at a January 2017 meeting of advisors to the President, during which the planned Raid was reportedly discussed, constituted an official acknowledgment that the CIA had a role or intelligence interest in the Raid. The Court queried Government counsel as to whether or why the CIA would provide a Glomar response as to a hypothetical memo or other record reflecting only the simple fact of Director Pompeo's attendance at such a meeting. The CIA does not interpret the Requests as seeking documents of that nature; however, in order to clarify its response in light of the Court's questions, in this matter the CIA is not asserting a Glomar response as to records reflecting simply the Director's attendance at that reported meeting. Rather, as described by the CIA's declarant, the CIA conducted a reasonable search for any such records in all locations in which it was reasonably likely that they would reside, and uncovered no responsive records. *See* Declaration of Antoinette B. Shiner dated November 9, 2017 ("Shiner Dec.") ¶ 10. The CIA otherwise maintains its Glomar response to the Requests, which

clearly focus on seeking the disclosure of substantive, internal deliberative and evaluative documents pertaining to the Raid. *Id.* ¶ 11.

ARGUMENT

I. Legal Standards for Summary Judgment in FOIA Actions

A. The Freedom of Information Act

FOIA represents a balance struck by Congress "'between the right of the public to know and the need of the Government to keep information in confidence.'" *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (quoting H.R. Rep. No. 89-1497, at 6 (1966)); *Ctr. for Constitutional Rights v. DOD*, 968 F. Supp. 2d 623, 631 (S.D.N.Y. 2013), *aff'd*, 765 F.3d 161 (2d Cir. 2014). Thus, while FOIA requires disclosure under certain circumstances, the statute also recognizes "that public disclosure is not always in the public interest," *CIA v. Sims*, 471 U.S. 159, 166-67 (1985), and mandates that records need not be disclosed if "the documents fall within enumerated exemptions." *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7 (2001); *see also John Doe Agency*, 493 U.S. at 152 (FOIA exemptions are "intended to have meaningful reach and application").

Most FOIA actions are resolved through motions for summary judgment. *See, e.g.*, *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994); *N.Y. Times Co. v. DOJ*, 915 F. Supp. 2d 508, 531 (S.D.N.Y. 2013), *aff'd in part, rev'd in part on other grounds*, 756 F.3d 100 (2d Cir. 2014). The defendant agency bears the burden of proving that the withheld information falls within the exemptions it invokes. *See* 5 U.S.C. § 552(a)(4)(B). Summary judgment is warranted on the basis of agency declarations when those submissions "'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.'" *Wilner*, 592 F.3d at 73 (quoting *Larson v. Dep't of State*, 565 F.3d 857, 862 (D.C. Cir. 2009)). An agency's declaration in support of its determinations is "accorded a presumption of good faith." *Long v. Office of Pers. Mgmt.*, 692 F.3d 185, 191 (2d Cir. 2012) (quoting *Carney*, 19 F.3d at 812).[2]

B. Special Considerations in National Security Matters

Although courts review *de novo* an agency's withholding of information pursuant to a FOIA request, "*de novo* review in FOIA cases is not everywhere alike." *Assoc. of Retired R.R. Workers, Inc. v. U.S.R.R. Ret. Bd.*, 830 F.2d 331, 336 (D.C. Cir. 1987). Decades of precedent firmly establish that courts owe "special deference" to the Executive's predictions of national security harm that may attend public disclosure of classified records, so long as such predictions appear logical or plausible. *Morley v. CIA*, 508 F.3d 1108, 1124 (D.C. Cir. 2007). Accordingly, "[i]n the national security context, [the Court] 'must accord *substantial weight* to an agency's affidavit concerning the details of the classified status . . . .'" *ACLU v. DOJ*, 681 F.3d 61, 69 (2d Cir. 2012) (quoting *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007)). Deference is mandated because, as the courts have recognized, predictions of national security harm are inherently speculative, and only the agencies with expertise in the area are in a position to make such judgments. *See, e.g.*, *Wilner*, 592 F.3d at 76 (explaining that "it is bad law and bad policy to second-guess the predictive judgments made by the government's intelligence agencies" regarding whether disclosure of information "would pose a threat to national security") (quotation marks omitted); *ACLU*, 681 F.3d at 70-71; *Judicial Watch, Inc. v. DOD*, 715 F.3d

[2] The CIA has not submitted a Local Civil Rule 56.1 statement, as "the general rule in this Circuit is that in FOIA actions, agency affidavits alone will support a grant of summary judgment," and a Local Civil Rule 56.1 statement "would be meaningless." *Ferguson v. FBI*, No. 89 Civ. 5071 (RPP), 1995 WL 329307, at *2 (S.D.N.Y. June 1, 1995), *aff'd*, 83 F.3d 41 (2d Cir. 1996); *N.Y. Times. Co. v. DOJ*, 872 F. Supp. 2d 309, 314 (S.D.N.Y. 2012); *see also* Dkt. No. 36 ("Pl. Br.") at 2 n.1.

937, 943 (D.C. Cir. 2013); *Larson*, 565 F.3d at 865 ("[t]he judiciary is in an extremely poor position to second-guess the predictive judgments made by the government's intelligence agencies" regarding national security questions) (quotation marks omitted); *Halperin v. CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980) ("[T]he court is not to conduct a detailed inquiry to decide whether it agrees with the agency's opinions; to do so would violate the principle of affording substantial weight to the expert opinion of the agency."); *accord Fitzgibbon v. CIA*, 911 F.2d 755, 766 (D.C. Cir. 1990) (disapproving the district court's use of "its own calculus as to whether or not harm to the national security or to intelligence sources and methods would result from disclosure"); *see also Sims*, 471 U.S. at 179 (intelligence officials must "be familiar with 'the whole picture' as judges are not," and their decisions "are worthy of great deference given the magnitude of the national security interests and potential risks at stake"); *Frugone v. CIA*, 169 F.3d 772, 775 (D.C. Cir. 1999) ("courts have little expertise" in international or intelligence matters, and may not dismiss "facially reasonable concerns"); *Amnesty Int'l USA v. CIA*, 728 F. Supp. 2d 479, 508 (S.D.N.Y. 2010) (deferring to executive declarations predicting harm to national security from disclosure).

Because assessment of harm to national security is entrusted to the Executive Branch, "the government's burden is a light one," and "plausible" and "logical" government arguments for nondisclosure should be sustained. *ACLU v. DOD*, 628 F.3d 612, 624 (D.C. Cir. 2011); *Wilner*, 592 F.3d at 73; *ACLU*, 681 F.3d at 69.

C. The Glomar Response

It is well settled that "'an agency may refuse to confirm or deny the existence of records where to answer the FOIA inquiry would cause harm cognizable under a FOIA exception.'" *Wilner*, 592 F.3d at 68 (quoting *Gardels v. CIA*, 689 F.2d 1100, 1103 (D.C. Cir. 1982)). Indeed,

a Glomar response "is the only way in which an agency may assert that a particular FOIA statutory exemption covers the 'existence or nonexistence of the requested records' in a case in which a plaintiff seeks such records." *Id.* (quoting *Phillippi*, 546 F.2d at 1012); *see Larson*, 565 F.3d at 861 (FOIA exemptions "cover not only the content of protected government records but also the fact of their existence or nonexistence, if that fact itself properly falls within the exemption"). "[W]hen the [a]gency's position is that it can neither confirm nor deny the existence of the requested records, there are no relevant documents for the court to examine other than the affidavits which explain the [a]gency's refusal." *Wolf*, 473 F.3d at 374 n.4 (internal quotation marks omitted). In order to maintain the effectiveness and integrity of the Glomar response, "the CIA invokes the response consistently, including instances in which the CIA does not possess records responsive to a particular request. If the Agency answered with a Glomar response only in instances where it possesses responsive records, that response could have the effect of confirming classified information." Shiner Dec. ¶ 15.

When issuing a Glomar response to a FOIA request, the "agency must tether its refusal to respond to one of the nine FOIA exemptions." *Wilner*, 592 F.3d at 68 (internal quotation marks and citation omitted). An agency declaration in support of a Glomar response "should 'explain [] in as much detail as possible the basis for [the agency's] claim that it can be required neither to confirm nor to deny the existence of the requested records.'" *Id.* (quoting *Phillippi*, 546 F.2d at 1013). An agency "need only proffer one legitimate basis for invoking the Glomar response . . . FOIA Exemptions 1 and 3 are separate and independent grounds in support of a Glomar response." *Id.* at 72. Courts in this Circuit have repeatedly upheld Glomar responses where, as here, confirming or denying the existence or nonexistence of a record would either reveal classified information that is protected by FOIA Exemption 1, or disclose information prohibited

by statute that is protected by FOIA Exemption 3. *See, e.g.*, *Wilner*, 592 F.3d at 75 (Exemption 3); *Weberman v. NSA*, 668 F.2d 676, 678 (2d Cir. 1982) (Exemptions 1 and 3); *ACLU v. DOD*, 752 F. Supp. 2d 361, 364-65 (S.D.N.Y. 2010) (Exemption 1); *Amnesty Int'l*, 728 F. Supp. 2d at 511-14 (Exemptions 1 and 3); *Earth Pledge Found. v. CIA*, 988 F. Supp. 623, 627-28 (S.D.N.Y. 1996) (Exemptions 1 and 3). Here, the CIA has submitted the Shiner Declaration, which explains why the fact of the existence or nonexistence of the purported records is exempt from disclosure pursuant to FOIA Exemptions 1 and 3, each of which independently justifies the CIA's Glomar response. *See generally* Shiner Dec.

II. The CIA's Glomar Response Was Proper Pursuant to FOIA Exemption 1

The CIA's Glomar response in this case was proper because the existence or non-existence of CIA records responsive to the Requests is a matter that is properly classified and thus exempt from disclosure under FOIA Exemption 1. 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 interest and/or operational role with respect to the Raid. As explained below, that information is properly classified and its disclosure could reasonably be expected to cause identifiable and describable damage to national security.

FOIA Exemption 1 protects from disclosure records and information that are properly classified pursuant to an Executive Order ("EO"). 5 U.S.C. § 552(b)(1). The relevant Order in this case is 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 Co. v. DOJ*, 756 F.3d 100, 104 (2d Cir. 2014) (quoting EO 13526 §§ 1.1, 1.4). Among other categories, EO

13526 permits the classification of information pertaining to "intelligence activities (including covert action), intelligence sources or methods, or cryptology," and "foreign relations or foreign activities of the United States, including confidential sources." EO 13526 §§ 1.4(c), (d). 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." *Id.* § 3.6(a). In considering whether Exemption 1 applies, "little proof or explanation is required beyond a plausible assertion that information is properly classified." *Morley*, 508 F.3d at 1124. FOIA "bars the courts from prying loose from the government even the smallest bit of information that is properly classified or would disclose intelligence sources or methods." *Afshar v. Dep't of State*, 702 F.2d 1125, 1130 (D.C. Cir. 1983).

The Shiner Declaration establishes that a confirmation or denial by the CIA that responsive CIA records exist would, in this case, tend to reveal information that has properly been determined to be classified under EO 13526. The Declaration explains that the fact of the existence or nonexistence of the requested records falls under Exemption 1 because it pertains, per EO 13526 §§ 1.4(c) and (d), to "intelligence activities (including covert action), [or] intelligence sources or methods" and "foreign relations or foreign activities of the United States, including confidential sources." Shiner Dec. ¶ 13. Because the CIA's mandate includes the "collect[ion] and analy[sis of] foreign intelligence," as well as "conduct[ing] counterintelligence," substantively responding to the Requests could "tend to show a particular intelligence activity or otherwise reveal previously undisclosed information about CIA sources, capabilities, authorities, interests, relationships with domestic or foreign entities, strengths, weaknesses, and/or resources." *Id.* ¶ 15. The Declaration notes particularly that "many of the CIA's activities are conducted clandestinely—because the effective collection of foreign

intelligence and the conduct of counterintelligence and covert action operations requires such secrecy." *Id.* ¶ 16. Therefore, "[h]ypothetically, if the CIA were to respond to [the Requests] by admitting that it possessed responsive records, it would indicate that the CIA had some involvement in the raid or, at a minimum, an intelligence nexus to the operation, such as providing intelligence to support it. Such a response would reveal specific clandestine intelligence sources, methods and activities of the CIA by showing the Agency's involvement in this operation, and in Yemen more generally"—facts that are properly classified and protected from disclosure by statute (as discussed further below). *Id.* "The converse would also be revealing of the Agency's intelligence practices and activities. Denying the existence of responsive documents would tend to confirm the Agency's inability successfully to carry out the purported operational activities." *Id.* A Glomar assertion is the only response that does not implicate these concerns. "An agency that did not have some role in the operation or outcome would not possess the documents" that are responsive to the Requests. *Id.* ¶ 18. "On the other hand, confirming that the CIA maintains records about the legal and policy basis for the raid, the processes involved in its approval, and/or after-the-fact assessments would all indicate the CIA's involvement in some aspect of this operation—the confirmation or denial of which is a classified fact." *Id.*

The Shiner Declaration further explains that the unauthorized disclosure of this information could reasonably be expected to cause damage to national security. For example, "such an admission or denial would potentially reveal broader intelligence priorities of the Agency and sensitive details about the CIA's intelligence methods and activities, including the CIA's possible relationships with foreign liaison partners, which could, in turn, be exploited by adversaries. This request is specific to Yemen and this operation—an acknowledgement that the

Agency was involved in this area of the world and in this capacity would be revealing of the broader CIA priorities." *Id.* ¶ 19.

In arguing that a substantive response to the Requests would not actually reveal protected information about the CIA's involvement or non-involvement in the Raid, Plaintiffs lean heavily on a misreading of the D.C. Circuit's opinion in *ACLU v. CIA*, 710 F.3d 422 (D.C. Cir. 2013), to which Plaintiffs refer as the *Drones FOIA* case. *E.g.*, Pl. Br. at 13-14. That case involved a very broad FOIA request seeking records pertaining to the use of unmanned drones to carry out targeted killings. *ACLU*, 710 F.3d at 425. The CIA issued a Glomar response on the ground that to respond to this request would reveal whether it had an intelligence interest in such drone strikes. *Id.* at 428. In rejecting the Glomar response, the D.C. Circuit reasoned that, in light of public statements about remote drone strikes made by government officials, including most pertinently multiple statements by the CIA Director himself, "it is neither logical nor plausible for the CIA to maintain that it would reveal anything not already in the public domain to say that the Agency 'at least has an intelligence interest' in such strikes." *Id.* at 430. Therefore, the D.C. Circuit reasoned, "as it is now clear that the Agency does have an interest in drone strikes, it beggars belief that it does not also have documents relating to the subject." *Id.* at 431.

The *Drones FOIA* case is distinguishable from the present case in a number of key respects. First, the Requests at issue here are more specific than the FOIA request at issue in the *Drones FOIA* case. While that FOIA request broadly sought any documents relating to drones used by the CIA and the Armed Forces, *id.* at 425, the instant Requests seek five specifically defined categories of documents pertaining to the Raid, such as the legal and policy bases justifying the Raid, the process by which the Government obtained approval of the Raid, casualty assessments, and after-action reports. An agency's possession of these types of core operational

records would obviously be more likely if that agency played a substantive role in the Raid itself. Thus, as the Shiner Declaration explains, revealing whether or not the CIA possessed records responsive to these specific, detailed categories would tend to indicate whether "the CIA had some involvement in the raid or, at a minimum, an intelligence nexus to the operation . . . The converse would also be revealing of the Agency's intelligence practices and activities." Shiner Dec. ¶ 16. The Shiner Declaration therefore conclusively rebuts Plaintiffs' facially unlikely contention that a substantive response to the Requests would not itself reveal whether the CIA played an operational or intelligence role in the Raid. Pl. Br. at 12-14.

Moreover, as discussed further below, the official acknowledgments analyzed by the D.C. Circuit in the *Drones FOIA* case far outstrip anything on which the Plaintiffs rely here. There is no official acknowledgment in this case by the CIA Director, or any other government official, of the CIA's role or interest, if any, in the al Ghayil Raid. There is therefore no basis to simply assume that the CIA must possess records about the Raid, whether or not the CIA played any role in it.

Plaintiffs assert that because the Requests "did not specifically seek any information concerning the CIA's involvement in or connection to the Raid itself . . . any responsive record the CIA possesses (and perhaps even all) may well relate only to the U.S. government's involvement in the Raid generally, and not the CIA's operational and or intelligence role specifically. That the CIA possesses documents relating to U.S. government activity abroad in which it does not necessarily play a role itself is obvious." Pl. Br. at 14. That the CIA would possess legal and policy rationales justifying a specific overseas operation, after-action reports

for such an operation, or documents relating to the approval of a foreign operation "in which it does not necessarily play a role itself" is, in fact, far from obvious.[3]

Apart from the CIA's role in conducting intelligence and foreign activities, providing a substantive response to the Requests in this case would also tend to reveal the presence or absence of a CIA intelligence interest in the Raid—which Plaintiffs *concede*. *See* Pl. Br. at 16 ("Here, if the CIA were to substantively respond to the Request, the agency would indeed disclose its intelligence interest in the Raid."). Contrary to Plaintiffs' contention, however (*see* Pl. Br. at 19-22), the CIA's intelligence interest, if any, in the Raid is also a currently and properly classified fact (and, as discussed below, protected by Exemption 3). As the Shiner Declaration explains, "intelligence interests are, in fact synonymous with intelligence sources and methods," information about which may properly be classified pursuant to EO 13526 § 1.4(c). Shiner Dec. ¶ 17. "Intelligence interests show the strategic direction of the Agency's intelligence practice—showcasing the topics upon which the Agency chooses to focus. . . . [T]he topics that are of interest to the CIA and U.S. Government consumers of the CIA's intelligence would be revealing of the U.S. Government's policy objectives." *Id.* Unauthorized disclosure of the CIA's intelligence interests "could reasonably be expected to cause irreparable harm and impair the Agency to carry out its core functions. An admission or denial of the CIA's interest in a particular area or event may benefit a foreign intelligence service or terrorist organization by enabling it to redirect its resources to identify particular CIA sources, circumvent the CIA's

[3] In addition, if, in searching for documents responsive to the Requests, the CIA located "[r]ecords originated by other federal agencies or CIA records containing other federal agency information," CIA regulations direct that such information "shall be forwarded to such agencies . . . for action under their regulations and direct response to the requester." 32 C.F.R. § 1900.22(b); *see also* EO 13526 § 3.6(b). Therefore, Plaintiffs assume far too much in asserting that "any responsive record," if any, the CIA might itself release in this case (or list on its own *Vaughn* index) would relate only to other agencies' involvement in the Raid, "and not the CIA's operational or intelligence role specifically." Pl. Br. at 14.

monitoring efforts, and generally enhance its intelligence or deception activities at the expense of the United States. Moreover, such a response would reveal the targets of the CIA's collection efforts as well as the requirements placed upon it by the government consumers of the Agency's intelligence products. As a result, the CIA's efforts may be thwarted or made more difficult, reducing the CIA's effectiveness, requiring a diversion of CIA resources, and resulting in a loss of valuable intelligence." *Id.*

The Shiner Declaration therefore also directly contradicts Plaintiffs' bald assertion that intelligence interests are not protected because they do not implicate intelligence sources or methods. Pl. Br. at 21-22. Plaintiffs' cramped view of intelligence sources and methods is inconsistent with the CIA's real-world operations and concerns, as explained in the Shiner Declaration, as well as with governing case law recognizing the CIA's very broad discretion to determine what would constitute an unauthorized disclosure of intelligence sources and methods (as discussed further below in connection with Exemption 3). For example, as the Supreme Court wrote in *Sims*, "it is the responsibility of the Director of Central Intelligence, not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process," and even "superficially innocuous information" might reveal valuable intelligence sources and methods. *Sims*, 471 U.S. at 178, 180. Furthermore, EO 13526 permits the classification of information that "pertains to" intelligence sources and methods (EO 13526 § 1.4(c)); "[a]s [the D.C. Circuit] has previously noted, 'pertains is not a very demanding verb.'" *ACLU v. DOJ*, No. 15-5217, 2016 WL 1657953, at *11 (D.C. Cir. Apr. 21, 2016) (quoting *Judicial Watch*, 715 F.3d at 941).

It is certainly both logical and plausible that the fact of the existence or nonexistence of CIA records responsive to the Requests, which seek substantive, detailed, internal information about the al Ghayil Raid in Yemen, would pertain to, for example, intelligence activities (including covert action), intelligence sources or methods, and foreign relations or foreign activities of the United States, including confidential sources. *See* EO 13526 §§ 1.4(c), (d). Whether the CIA operates in Yemen in general, and whether the CIA had an intelligence or operational role in the al Ghayil Raid in particular, are plainly the types of intelligence and foreign activities that the Government may rightfully decline to divulge. *See, e.g.*, *ACLU*, 681 F.3d at 70 (upholding invocation of Exemption 1 where disclosure would reveal the existence of a classified intelligence activity); *Ctr. for Constitutional Rights*, 968 F. Supp. 2d at 638 (Glomar response appropriate where response by CIA would reveal whether CIA had particular intelligence interest). The objective of preserving the integrity of the CIA's interest in such foreign operations is a vital one. *See Wolf*, 473 F.3d at 376 (noting that confirmation or denial would thwart effectiveness of intelligence methods used overseas).

It is, again, both logical and plausible that the disclosure of information tending to indicate whether or not, for example, the CIA operates in Yemen; whether or not the CIA was able to, or did, provide intelligence support in connection with the Raid; whether or not the Raid was an intelligence priority for the CIA; whether or not the CIA communicated or coordinated with other agencies about the Raid; or whether or not the CIA may possibly have relationships with foreign liaison partners in or connected to Yemen, "would reveal specific clandestine intelligence sources, methods and activities of the CIA." Shiner Dec. ¶ 16. Disclosing the number and nature of responsive (even if exempt) documents in the CIA's possession, if any, would tend to reveal information about any or all of these topics. The Shiner Declaration

provides logical, persuasive reasons for the CIA's determination that the existence or nonexistence of the records requested here is a properly classified fact. Accordingly, the CIA's Glomar response is justified by Exemption 1.

III. The CIA's Glomar Response Was Proper Pursuant to Exemption 3

The CIA's Glomar response is also justified by FOIA Exemption 3, because a substantive response to the Requests would tend to reveal information that is specifically exempted from disclosure by statute, in this case information relating to intelligence sources and methods. *See* 5 U.S.C. § 552(b)(3).

One statute that specifically exempts certain information from disclosure 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*, 681 F.3d at 72-73. It is well established that the NSA is an exempting statute within the meaning of Exemption 3. *See, e.g.*, *Sims*, 471 U.S. at 167-68; *Amnesty Int'l*, 728 F. Supp. 2d at 501; *N.Y. Times Co. v. DOD*, 499 F. Supp. 2d 501, 512 (S.D.N.Y. 2007); *Earth Pledge Found.*, 988 F. Supp. at 627. Courts have recognized that not just the Director of National Intelligence, but also the CIA and other members of the intelligence community, may rely upon the amended NSA to withhold information under FOIA. *See, e.g.*, *Larson*, 565 F.3d at 865. 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.*, *id.* at 868-69. Furthermore, Exemption 3 protects against the disclosure not only of intelligence sources and methods themselves, but also of information that would tend to disclose an intelligence source or method, *see, e.g.*, *Halperin*, 629 F.2d at 147-50, or information that "relates to" an intelligence source or method protected by the NSA. *ACLU*, 681 F.3d at 73.

In contrast to Exemption 1, Exemption 3 does not require a showing that any fact is classified, nor does Exemption 3 require any showing of harm to national security to justify a withholding. *See Phillippi v. CIA*, 655 F.2d 1325, 1329 (D.C. Cir. 1981); *Sims*, 471 U.S. at 176; *Fitzgibbon*, 911 F.2d at 761-62. Instead, the agency must merely show that the information falls within the ambit of the applicable exempting statute. *Wilner*, 592 F.3d at 72; *Larson*, 565 F.3d at 868. Indeed, the CIA's authority to withhold information under the NSA is broader than its classification authority under EO 13526. *Cf. Gardels*, 689 F.2d at 1107 (executive order governing classification of documents "was not designed to incorporate into its coverage the CIA's full statutory power to protect all of its 'intelligence sources and methods'"). As discussed above, the CIA's discretion in determining what would constitute an unauthorized disclosure of intelligence sources and methods is very broad. *See Sims*, 471 U.S. at 168-73; *see also Hunt v. CIA*, 981 F.2d 1116, 1120 (9th Cir. 1992) (describing CIA's discretion to withhold information under Exemption 3 as "a near-blanket FOIA exemption"). Indeed, the Supreme Court in *Sims* rejected "any limiting definition that goes beyond the requirement that the information fall within the Agency's mandate to conduct foreign intelligence." 471 U.S. at 169. To establish that the information at issue falls within the scope of the NSA, the CIA must demonstrate that answering the request could reasonably be expected to lead to the unauthorized disclosure of intelligence sources or methods. *Gardels*, 689 F.2d at 1103.

Here, as addressed above, the CIA has amply met its burden of demonstrating that the confirmation or denial of the existence of responsive records could reasonably be expected to result in the unauthorized disclosure of intelligence sources and methods, including operations abroad, or of information relating to intelligence sources and methods, which is categorically protected under § 102A(i)(1) of the NSA. *See generally* Shiner Dec. As explained in the Shiner

Declaration, information about the CIA's involvement or non-involvement in the al Ghayil Raid (for example, whether the CIA was able to, or did, provide intelligence support for the Raid) would tend to disclose information about the CIA's "clandestine intelligence sources, methods and activities." Shiner Dec. ¶ 16. In addition, the CIA's intelligence sources and methods are "synonymous" with its intelligence interests, *id.* ¶ 17, which Plaintiffs concede would be revealed if the CIA were to substantively respond to the Requests. Pl. Br. 16. This information is exempted from disclosure under Exemption 3. Courts routinely uphold such explanations as a valid basis to provide a Glomar response under Exemption 3 and the NSA. Accordingly, the CIA's Glomar response to the Request was proper under Exemption 3, separate and independent from its propriety under Exemption 1.

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At the September 18, 2017 conference, the Court inquired as to what information would be reflected in a *Vaughn* index if the CIA were to provide a substantive response to the Requests, or whether some type of "hypothetical" *Vaughn* refraining from disclosing protected information could be provided consistent with the agency's Glomar response. To be clear, because a Glomar response protects the classified fact of whether the agency possesses responsive records, courts have regularly held that an agency need not provide a *Vaughn* index when it has given a Glomar response to a FOIA request; to hold otherwise would prevent agencies from ever asserting a Glomar response. *See, e.g., Bassiouni v. CIA*, 392 F.3d 244, 245-46 (7th Cir. 2004); *Roman v. NSA*, No. 07-CV-4502 (JFB) (WDW), 2009 WL 303686, at *6 n.6 (E.D.N.Y. Feb. 9, 2009), *aff'd,* 354 F. App'x 591 (2d Cir. 2009); *ACLU*, 710 F.3d at 432 (requiring *Vaughn* index only after the court first held a Glomar response unjustified). Where, as here, the agency's declaration

establishes the propriety of its Glomar response, "the courts need not go further," *Larson*, 565 F.3d at 867.

An agency that is properly asserting a Glomar response therefore cannot be required to produce a *Vaughn* index, even on the theory that the index could mask information that would be protected under the relevant FOIA exemptions (here, Exemptions 1 and 3).[4] There is no *Vaughn* index that could be produced consistent with the agency's Glomar response, because any such index would necessarily reveal the classified fact of whether the CIA has in its possession documents responsive to the FOIA requests. Even a *Vaughn* index that attempted to mask classified information or information relating to sources and methods would still tend to confirm, simply by acknowledging the existence of documents, whether the CIA did or did not have an intelligence interest in, or any involvement with, the al Ghayil raid, as explained in the Shiner Declaration. *See* Shiner Dec. ¶¶ 14-18.

With respect to the type of response the agency might produce in the event that this Court were to find that its Glomar response was not justified, when agencies locate no responsive records after a reasonable search, they generally provide a narrative response conveying that fact. If responsive agency records are located but are withheld in whole or in part pursuant to one or more FOIA exemptions, agencies can provide their response in a number of different formats, depending upon the nature of the documents located. This could include anything from declarations providing categorical descriptions of documents, to a "no-number, no-list response, *see N.Y. Times*, 756 F.3d at 105 n.2, to a "typical" *Vaughn* index, which "lists the titles and descriptions of the responsive documents that the Government contends are exempt from disclosure . . . with cites to claimed FOIA exemptions for each document listed." *N.Y. Times Co.*

[4] Indeed, Plaintiffs have given no indication that they would find a "stripped down" or "minimalist" *Vaughn* index to be appropriate in this case. *See* Pl. Br. at 24-25.

v. DOJ, 758 F.3d 436, 438-39 (2d Cir. 2014). "In the usual case, the index is public and relatively specific in describing the kinds of documents the agency is withholding." *ACLU*, 710 at 432.

The Court also inquired at the September 18, 2017 conference about the fact that no other Defendant agency has provided a Glomar response to the Requests. The fact that different agencies of the government have unique functions, mandates, and equities, as a general matter and with respect to particular operations, does not call into question the CIA's Glomar response in this case. With respect to this matter, the Department of Defense ("DOD") has publicly acknowledged the military raid in Yemen that took place in late January 2017. *See, e.g.*, *Servicemember killed in raid on al-Qa'ida headquarters in Yemen*, (Jan. 29, 2017), http://www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/1063707/servicemember-killed-in-raid-on-al-qaida-headquarters-in-yemen/. For the DOD to confirm or deny the existence of responsive DOD records relating to that raid, therefore, would not in itself necessarily reveal a heretofore unacknowledged, classified fact (the fact of the DOD's involvement in the late January raid). With respect to the other Defendant agencies, it is public knowledge that components within the Departments of Justice and State might be consulted and might provide advice to other agencies, including on global military activities or operations. *See, e.g.*, *Practicing Law in the Office of the Legal Adviser*, https://www.state.gov/s/l/3190.htm (Department of State); 28 C.F.R. § 0.25(a) (Office of Legal Counsel within the Department of Justice). Because one executive agency (DOD) has publicly acknowledged the military operation at issue in this case, confirmation by the Departments of State and Justice of the existence or nonexistence of responsive records would, again, not in itself necessarily disclose a heretofore unacknowledged, classified fact.

On the other hand, and as discussed further below, there has been no official acknowledgment of the CIA's involvement or non-involvement in the Raid, the disclosure of which "would tend to show a particular intelligence activity or otherwise reveal previously undisclosed information about CIA sources, capabilities, authorities, interests, relationships with domestic or foreign entities, strengths, weaknesses, and/or resources," and would cause harm because "such an admission or denial would potentially reveal broader intelligence priorities of the Agency and sensitive details about the CIA's intelligence methods and activities." Shiner Dec. ¶¶ 15, 19. Courts have frequently upheld the propriety of CIA Glomar responses to particular FOIA requests, even in cases where other agencies substantively respond to the same requests. *See, e.g.*, *ACLU*, 752 F. Supp. 2d at 368-69 (upholding CIA's Glomar response even though DOD produced records); *Ctr. for Constitutional Rights*, 968 F. Supp. 2d at 626 (upholding CIA's Glomar response where DOD and Federal Bureau of Investigation admitted to possessing responsive materials). As discussed above, the CIA's Glomar response in this matter was proper.

IV. There Has Been No Official Acknowledgment of the Existence or Non-Existence of Responsive CIA Records

Finally, the CIA's Glomar response in this case is proper because, contrary to Plaintiffs' contention, there has been no "official acknowledgment" of the existence or non-existence of CIA records responsive to the Requests. *See* Pl. Br. at 15-19.

"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." *Wilner*, 592 F.3d at 70; *accord ACLU*, 710 F.3d at 427 (a plaintiff can overcome a Glomar response by claiming official acknowledgment only by showing that there has already been disclosure of "the fact of the existence (or nonexistence) of responsive records,

since that is the purportedly exempt information that a *Glomar* is designed to protect"). The Second Circuit applies a "strict test" to determine the applicability of this doctrine, specifying that the protected information that a party seeks to obtain must be: "(1) [ ]as specific as the information previously released, (2) match[ ] the information previously disclosed, and (3) [ ] made public through an official and documented disclosure." *Wilson v. CIA*, 586 F.3d 171, 186 (2d Cir. 2009) (quoting *Wolf*, 473 F.3d at 378) (internal quotation marks and alterations omitted); *see also Hudson River Sloop Clearwater, Inc. v. Dep't of Navy*, 891 F.2d 414, 421 (2d Cir. 1989) (Exemptions 1 and 3 "may not be invoked to prevent public disclosure when the government has *officially* disclosed the *specific* information being sought.") (emphasis in the original); *N.Y. Times Co.*, 756 F.3d at 120 & n.19 (recognizing that *Wilson* "remains the law of this Circuit" although suggesting that matching may not "require absolute identity" of information), *opinion amended on denial of reh'g*, 758 F.3d 436 (2d Cir. 2014), *supplemented*, 762 F.3d 233 (2d Cir. 2014). The *Wilson* requirements are stringently applied, so that, for example, "widespread public discussion of a classified matter" does not suffice to infer an official disclosure. *Wilson*, 586 F.3d at 186 (citations omitted). As the D.C. Circuit has noted, a strict test for official disclosure is necessary; otherwise, the Government would have "a strong disincentive ever to provide its citizenry with briefings on any kind of sensitive topics." *Public Citizen v. Dep't of State*, 11 F.3d 198, 203 (D.C. Cir. 1993).

Plaintiffs do not come close to demonstrating that there has been an official acknowledgment of the existence or non-existence of responsive CIA records in this case. Plaintiffs rely entirely on three comments made by then-Press Secretary Sean Spicer during press briefings in January and February, 2017. *See* Pl. Br. at 4-5, 16-19; Dkt. No. 37, Exs. 4-6. None of those comments even refers to the CIA at all (except in using Director Pompeo's title), much

less acknowledges any CIA role or interest, or lack thereof, in the al Ghayil Raid. One of the comments, made during a briefing on January 31, 2017, does not even refer to the Raid or the country of Yemen, but simply references Director Pompeo as a possible resource for the President in generally considering tactics against terrorists. *See* Dkt. No. 37, Ex. 6 at 18-19.

Plaintiffs lean heavily on a comment made by Secretary Spicer during a briefing on February 2, 2017, in which the Secretary described "a dinner meeting, which included the President, the Vice President, Secretary Mattis, Chairman Dunford, Chief of Staff Priebus, Jared Kushner, Chief Strategist Bannon, General Flynn, and CIA Director Pompeo where the [Raid] was laid out in great extent." *Id.*, Ex. 5 at 11. This reference to Director Pompeo's attendance at a meeting at which the Raid was discussed, possibly among other agenda items, falls far short of an official acknowledgment that the CIA had any agency interest or involvement in the Raid. (Indeed, it is notable that that single comment is the only reference to Director Pompeo in a much lengthier discussion of the planning of the Raid, which refers multiple times to the involvement of DOD, U.S. Central Command ("CENTCOM"), and other Executive Branch officials, including Secretary Mattis and General Flynn. *Id.* at 11-12.) Director Pompeo's presence at such a meeting is not surprising, given that he "manages intelligence, collection, analysis, covert action, counterintelligence, and liaison relationships with foreign intelligence services." Shiner Dec. ¶ 11. However, "[a] statement about his presence at a meeting with the President, where advisors from other government agencies with an intelligence arm were present, does not constitute an official confirmation or denial of CIA's interest or involvement in the raid or whether or not the Agency has . . . records" responsive to the Requests. *Id.*

Finally, Secretary Spicer's characterization of the al Ghayil raid as "an intelligence-gathering raid," again with no reference whatsoever to the CIA or even Director Pompeo,

likewise falls far short of an official acknowledgment with respect to the CIA. Dkt. No. 37, Ex. 4 at 12. Plaintiffs imply that any and all intelligence-related governmental activity must be conducted by the CIA, Pl. Br. at 17, but the CIA is not the only government agency with an "intelligence arm," Shiner Dec. ¶ 11, and it is far from the only member of the Intelligence Community. 50 U.S.C. § 3003(4) (listing agencies of the U.S. intelligence community).

These three comments are in no way comparable to the significant official acknowledgments that the D.C. Circuit analyzed in the *Drones FOIA* case, on which Plaintiffs again heavily rely. Pl. Br. at 15-16. In *Drones FOIA*, the D.C. Circuit pointed to multiple public statements about unmanned drone strokes made by the President, the President's counterterrorism advisor John Brennan, and, most pertinently, then-CIA Director Leon Panetta himself. *ACLU*, 710 F.3d at 429-31. In this case, Plaintiffs can point to nothing even remotely similar that would tend to disclose the existence or nonexistence of CIA records responsive to the Requests.

Plaintiffs cursorily suggest that the CIA may not assert a Glomar response in this case because "it has been common knowledge for some time that the CIA conducts counterterrorism and intelligence operations in Yemen." Pl. Br. at 17 (citation and internal quotation marks omitted). Even if Plaintiffs supported this claim with reference to some official or authoritative factual source, which they do not[5], the law is clear that general statements of this nature do not constitute official acknowledgments. *See, e.g.*, *ACLU*, 752 F. Supp. 2d at 367 ("[E]ven if a fact . . . is the subject of widespread media and public speculation . . . its official acknowledgment by

[5] Plaintiffs misleadingly export this "common knowledge" quote from dicta in *N.Y. Times Co.*, 756 F.3d at 118, in which the Second Circuit was discussing not the al Ghayil Raid, or CIA operations or Yemen generally, but rather a single drone strike in 2011. *Id.*

an authoritative source might well be new information that could cause damage to the national security.") (internal quotation marks omitted) (citing *Afshar*, 702 F.2d at 1130).

Moreover, even if the CIA itself avowed a "general" interest in Yemen, that would not be an official acknowledgment of the agency's specific interest or involvement in a particular operation. Pursuant to the first *Wilson* requirement, "[p]rior disclosure of similar information does not suffice; instead, the *specific* information sought by the plaintiff must already be in the public domain by official disclosure." *Wolf*, 473 F.3d at 378 (emphasis in original). Courts therefore frequently distinguish between general and specific acknowledgments related to the same subject matter. For example, in *Wilner*, the Second Circuit held that the government's public acknowledgment of the existence and purpose of a clandestine intelligence program did not preclude a Glomar response to a request for specific surveillance methods used, the targets of surveillance, and information obtained. 592 F.3d at 69-70; *see also Amnesty Int'l*, 728 F. Supp. 2d at 512 (CIA did not waive its right to invoke a Glomar response to request for specific records regarding details of use of enhanced interrogation techniques with respect to specific detainees notwithstanding acknowledgment that CIA used enhanced interrogation techniques for such detainees, because "[a] general acknowledgment . . . is not equivalent to 'specific information sought.'" (quoting *Wolf*, 473 F.3d at 378)). Similarly, while the Second Circuit held in another case that it has been officially acknowledged that both DOD and CIA have an unspecified "operational role" in the use of targeted lethal force, the Court specifically declined to define the nature of the agencies' respective roles. *N.Y. Times. Co.*, 756 F.3d at 122 n.22.

None of the three Sean Spicer comments cited by Plaintiffs contains an official acknowledgment of any connection between the CIA and the al Ghayil Raid. Therefore, no official acknowledgment waived the CIA's entitlement to assert a Glomar response in this case.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion for partial summary judgment, and grant the CIA's cross-motion for summary judgment.

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Respectfully submitted,

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