

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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AMERICAN CIVIL LIBERTIES UNION))
And AMERICAN CIVIL LIBERTIES))
UNION FOUNDATION,))
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Plaintiffs,))
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v.))
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CENTRAL INTELLIGENCE AGENCY,))
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Defendant.))
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Case No. 17-cv-3391 (PAE)

DECLARATION OF ANTOINETTE B. SHINER,
INFORMATION REVIEW OFFICER,
LITIGATION INFORMATION REVIEW OFFICE,
CENTRAL INTELLIGENCE AGENCY

I, ANTOINETTE B. SHINER, hereby declare and state:

I. INTRODUCTION

1. I currently serve as the Information Review Officer ("IRO") for the Litigation Information Review Office ("LIRO") at the Central Intelligence Agency ("CIA" or "Agency").

2. Prior to becoming the IRO for LIRO, I served as the IRO for the Directorate of Support ("DS") for over sixteen months. In that capacity, I was responsible for making classification and release determinations for information originating within the DS. Prior to serving in the DS, I was the Deputy IRO for the Director's Area of the CIA for over three years. In that role, I was responsible for making classification and release determinations for information originating within the Director's Area, which

included, among other offices, the Office of the Director of the CIA, the Office of Congressional Affairs, the Office of Public Affairs, and the Office of General Counsel. I have held other administrative and professional positions within the CIA since 1986, and have worked in the information review and release field since 2000.

3. As the IRO for the LIRO, I am currently responsible for the classification review of CIA documents and information that may be the subject of court proceedings or public requests for information under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. I am a senior CIA official and hold original classification authority at the TOP SECRET level under written delegation of authority pursuant to section 1.3(c) of Executive Order No. 13,526, 75 Fed. Reg. 707 (Jan. 5, 2010), reprinted in 50 U.S.C.A. 435 note at 268 (West Supp. 2012) ("E.O. 13526"). This means that I am authorized to assess the current, proper classification of CIA information, up to and including TOP SECRET information, based on the classification criteria of E.O. 13526 and applicable regulations.

4. Through the exercise of my official duties, I have become familiar with this civil action and the underlying FOIA request. I make the following statements based upon my personal knowledge and information made available to me in my official capacity. I am submitting this declaration in support of the Motion for Summary

Judgment filed by the United States Department of Justice in this proceeding.

5. The purpose of this declaration is to explain and justify, to the greatest extent possible on the public record, the CIA's actions in responding to Plaintiffs' FOIA request.

II. PROCEDURAL HISTORY

6. By letter dated 15 March 2017, Plaintiffs submitted a FOIA request to the CIA, requesting "any 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."

Plaintiffs also sent the request to Defendants Department of Defense, Department of Justice and Department of State.

7. By letter dated 16 March 2017, the CIA notified Plaintiff that it had received its request and assigned it reference number "F-2017-01094." A copy of the letter is attached as Exhibit A.

8. On 8 May 2017, Plaintiffs filed the instant action. CIA asserted the Glomar response, neither confirming nor denying the existence or nonexistence of records responsive to Plaintiffs' FOIA request pursuant to FOIA Exemptions 1 and 3.¹

9. On 1 September 2017, Plaintiffs filed a pre-motion letter with the Court, wherein they argued that CIA's Glomar response was not sustainable in light of a purported official acknowledgment made by then-Press Secretary Sean Spicer, regarding the al Ghayil Raid. Plaintiffs quoted a 2 February 2017 press briefing during which Mr. Spicer stated, in reference to the al Ghayil Raid, that the President held a dinner meeting at the White House on 25 January 2017 "where the operation was laid out in great extent." Mr. Spicer also noted that CIA Director Pompeo was one of the attendees at the meeting.

¹ "Glomar" is derived from the case Phillippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1976), which upheld the CIA's use of the "neither confirm nor deny" response to a FOIA request for records concerning CIA's reported contacts with the media regarding Howard Hughes's ship, the "Hughes Glomar Explorer."

III. SEARCHES FOR RESPONSIVE RECORDS

10. Given that White House Press Secretary Spicer indicated that CIA Director Pompeo was present at a White House meeting where the raid was discussed, the Agency conducted a search in the Office of the Director, which would maintain, *inter alia*, records about the Director's attendance at different meetings and any related background material relevant to a particular meeting. Each of the searches included paper and electronic records. Employees conducted the searches of paper and electronic records using terms such as "Yemen," "al Ghayil," and "raid" in each of the relevant records systems to locate responsive documents. Agency search professionals also reviewed the Director's calendar for 25 January 2017, the date of the meeting indicated by Sean Spicer. The searches covered the time frame from 17 January 2017 to 15 February 2017 and were conducted in all locations in which it is reasonably likely that responsive records would reside, and used search terms and methods calculated to locate those documents. These searches yielded no responsive records.

11. CIA Director Pompeo manages intelligence, collection, analysis, covert action, counterintelligence, and liaison relationships with foreign intelligence services. 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 responsive records. Accordingly, as explained below, the CIA has asserted a Glomar response for the remainder of Plaintiffs' request because it would reveal a classified fact - namely whether the Agency has been involved in the operation that extended beyond the Director's possible attendance at a meeting in which the raid was discussed.

IV. APPLICABLE EXEMPTIONS

12. As explained below, acknowledging the existence or nonexistence of records responsive to Plaintiffs' request would reveal a classified and/or statutorily-protected fact within the meaning of FOIA Exemptions 1 and 3.

A. Exemption 1

13. Exemption 1 provides that FOIA does not require the production of records that are: "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). Consistent with sections 1.1(a) and 3.6(a) of Executive Order 13526,² and as described below, I have determined that the fact of the existence or nonexistence of the requested records is currently and properly classified and pertains to "intelligence activities (including covert action), [or] intelligence sources or

² Section 1.1(a) sets forth the procedural standards for classification, which have been satisfied in this case. Section 3.6(a) provides that "[a]n agency may refuse to confirm or deny the existence or nonexistence of requested records whenever the fact of their existence or nonexistence is itself classified under this order or its predecessors."

methods" and "foreign relations or foreign activities of the United States, including confidential sources" within the meaning of sections 1.4(c) and 1.4(d) of the Executive Order.³

14. In most cases, upon receipt of a FOIA request, a federal agency will conduct searches for any responsive documents in their holdings and provide the requester with all segregable, non-exempt information contained in those records. In those instances, the fact that records responsive to a given request exist is not itself classified or otherwise exempt. However, in cases such as this one, where a confirmation or denial would itself reveal a classified fact, the Agency routinely asserts a Glomar response in order to protect that fact from disclosure.

15. Given the CIA's mandate to collect and analyze foreign intelligence and to conduct counterintelligence, there are many times when the Agency cannot reveal whether or not it possesses records on a particular subject -- especially when substantively responding to a request 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. Accordingly, in order to

³ My determination that the existence or nonexistence of the requested records is classified has not been made to conceal violations of law, inefficiency, or administrative error; to prevent embarrassment to a person, organization, or agency; to restrain competition; or to prevent or delay the release of information that does not require protection in the interests of national security.

maintain the effectiveness 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.

16. In this case, Plaintiffs seek five categories of records from four defendant government agencies concerning the al Ghayil Raid. At the outset, it is important to note 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. Hypothetically, if the CIA were to respond to this request 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 protected from disclosure by Executive Order 13526 and statute. 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.

17. I note that Plaintiff has indicated that the Agency's intelligence interest does not qualify as an intelligence source or method. To the contrary, intelligence interests are, in fact, synonymous with intelligence sources and methods. Intelligence interests show the strategic direction of the Agency's intelligence practice -- showcasing the topics upon which the Agency chooses to focus. As previously noted, the Agency has a unique intelligence gathering role - much of the information obtained by the CIA is accomplished through clandestine means -- and it not otherwise obtainable. Even the 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. Such a revelation 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 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 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.

18. As each of the five categories of records requested by Plaintiffs relate to the al Ghayil raid, a response other than a Glomar would implicate all of the concerns outlined above. An agency that did not have some role in the operation or outcome would not possess the documents that fit the five categories outlined by Plaintiff. 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.

19. Additionally, confirming or denying the existence or nonexistence of responsive records could reasonably be expected to cause damage to national security 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, 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.

20. For these reasons, I have determined that confirming the existence or nonexistence of records responsive to this request could reasonably be expected to cause damage to national security and is therefore a currently and properly classified fact exempt from disclosure pursuant to Exemption 1.

B. Exemption 3

21. Exemption 3 provides that FOIA does not apply to matters that are:

specifically exempted from disclosure by statute (other than section 552b of this title), if that statute (A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld

5 U.S.C. § 552(b)(3).

22. Section 102A(i)(1) of the National Security Act of 1947, as amended, 50 U.S.C. § 3024 (the "National Security Act"), provides that the Director of National Intelligence ("DNI") "shall protect intelligence sources and methods from unauthorized disclosure." Accordingly, the National Security Act constitutes a federal statute which "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue." 5 U.S.C. § 552(b)(3). Under the direction of the DNI pursuant to section 102A, and consistent with section 1.6(d) of

Executive Order 12333, the CIA is authorized to protect CIA sources and methods from unauthorized disclosure.⁴

23. Accordingly, the fact of the existence or nonexistence of records responsive to Plaintiff's FOIA request is exempt from disclosure under Exemption 3 pursuant to the National Security Act. In contrast to Executive Order 13526, this statute does not require the CIA to identify and describe the damage to the national security that reasonably could be expected to result from confirmation of the existence or nonexistence of records regarding any CIA involvement in the al Ghayil raid. Nonetheless, I refer the Court to the discussion above for a description of the damage to the national security that is reasonably likely to ensue should anything other than a Glomar response be provided by the CIA in this case. Exemptions 1 and 3 thus apply independently and co-extensively to Plaintiffs' FOIA request.

V. CONCLUSION

24. In this case the existence or nonexistence of the requested records is itself a properly classified fact and would reveal intelligence activities, intelligence sources and methods, and U.S. foreign relations and foreign activities that this fact must remain classified. Accordingly, I have determined the only

⁴ Section 1.6(d) of Executive Order 12333, as amended, 3 C.F.R. 200 (1981), reprinted in 50 U.S.C. 3001 note at 25 (formerly codified at 50 U.S.C.A. § 401 note at 25 (West Supp. 2009)), and as amended by Executive Order 13470, 73 Fed. Reg. 45,323 (July 30, 2008) requires the Director of the Central Intelligence Agency to "[p]rotect intelligence and intelligence sources, methods, and activities from unauthorized disclosure in accordance with guidance from the [DNI][.]"

appropriate response is for the CIA to neither confirm nor deny the existence of the requested records under FOIA Exemptions 1 and 3.

* * *

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed this 9th day of November 2017.

Antoinette B. Shiner

Antoinette B. Shiner
Information Review Officer
Litigation Information Review Office
Central Intelligence Agency