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)

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANT THE CENTRAL INTELLIGENCE AGENCY'S CROSS-MOTION FOR SUMMARY JUDGMENT

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Defendant the Central Intelligence Agency ("CIA") respectfully submits this reply memorandum of law in further support of its cross-motion for summary judgment pursuant to Federal Rule of Civil Procedure 56. Plaintiffs' consolidated memorandum of law in opposition to the CIA's cross-motion for summary judgment and in further support of Plaintiffs' motion for partial summary judgment (Dkt. No. 47) ("Pl. Opp.") does not set forth any valid or persuasive reasons why the CIA's Glomar response in this case was not proper.

ARGUMENT

I. Plaintiffs Misstate the Legal Standards that Govern the CIA's Glomar Response, and Mischaracterize the Glomar Response Itself

First, Plaintiffs misstate the legal standards that apply to the CIA's Glomar response, and fundamentally mischaracterize the Glomar response itself. Throughout their brief, Plaintiffs repeatedly contend that "it is neither logical nor plausible that the [CIA] would not have any . . . records" responsive to the Requests, and profess disbelief as to a supposed assertion (which appears only in Plaintiffs' brief) that the CIA "had *nothing to do* with the Raid" (emphasis in the original). Pl. Opp. at 3, 5, 12, 13, 21. But these contentions are far afield from the actual nature and import of the CIA's Glomar response and are irrelevant to the applicable legal analysis, as explained in the CIA's opening brief and in the governing case law. CIA Br. at 6. A Glomar response signifies neither a denial of the existence of responsive records, nor an assertion that responsive records exist but must be exempted from disclosure—those are substantive FOIA responses. Rather, the CIA's Glomar response represents a refusal to either confirm or deny the existence of records responsive to the Requests, because to do so would itself cause harm cognizable under, here, FOIA Exemption 1 (which protects classified information from disclosure) and Exemption 3 (which protects information relating to or tending to reveal an

intelligence source or method). *Id.*; *see generally* Declaration of Antoinette B. Shiner Dated November 9, 2017 (Dkt. No. 44) ("Shiner Dec.").

Plaintiffs also misapply the "logical or plausible" standard. Courts analyzing Glomar responses do not speculate about whether it is logical or plausible that the agency actually possesses responsive records. Rather, the question, under the applicable legal analysis, is whether an agency's invocation of particular identified exemptions in connection with its Glomar response is logical or plausible. *Wilner v. NSA*, 592 F.3d 60, 75 (2d Cir. 2009) (in discussing the Glomar doctrine, holding that "an agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible" (citation and quotation marks omitted)); *see also, e.g.*, *Platsky v. NSA*, No. 15 Civ. 1529 (ALC), 2016 WL 3661534, at *6-7 (S.D.N.Y. July 1, 2016) (the agencies' invocations of Exemptions 1 and 3 were logical and plausible, and therefore their Glomar responses were proper). In this case, the CIA logically and plausibly tethered its Glomar response to Exemptions 1 and 3; it is logical and plausible that disclosing the CIA's possession or non-possession of core operational documents relating to a particular foreign military operation would tend to disclose information pertaining to: (1) the properly classified fact of whether or not the CIA was involved in that military operation, or (2) protected intelligence sources or methods. CIA Br. at 8-21; Shiner Dec. ¶¶ 12-23. The "logical or plausible" standard does not require the CIA to prove with certitude that a FOIA response would *necessarily* or, as Plaintiffs contend, "inevitably" reveal a specific classified fact or intelligence source or method (Pl. Opp. Br. 18-24); in this case, however, the Shiner Declaration would support such a conclusion. *See* Shiner Dec. ¶¶ 16-23.

Finally, while the CIA agrees that the Court's review of the CIA's Glomar response is *de novo*, the law is clear not only that a "reasonably detailed" agency declaration is entitled to a

presumption of good faith, *e.g.*, *Wilner*, 592 F.3d at 69, but indeed that courts must accord "substantial weight" to declarations involving national security matters, provided that the agency's justifications "are not controverted by contrary evidence in the record or by evidence of . . . bad faith," *id.* at 68 (citation and quotation marks omitted). CIA Br. at 5-6; *see, e.g.*, *ACLU v. DOJ*, 681 F.3d 61, 69 (2d Cir. 2012); *ACLU v. DOD*, 628 F.3d 612, 624 (D.C. Cir. 2011).

II. Responding to the FOIA Requests Would Tend to Reveal Whether or Not the CIA Was Involved in the al-Ghayil Raid, Which is a Properly Classified Fact

Plaintiffs devote the majority of their opposition brief to their (incorrect) assertions that former White House Press Secretary Sean Spicer officially acknowledged a CIA intelligence interest in the al-Ghayil Raid, and that in any event, such an intelligence interest would not be protected under any FOIA Exemption. Nowhere, however, do Plaintiffs rebut the key proposition, which is logical and plausible and established by the Shiner Declaration, that the fact of the CIA's *involvement or non-involvement* in the al-Ghayil Raid is itself properly classified and therefore protected from disclosure by Exemption 1. *See* Shiner Dec. ¶¶ 16-21. The CIA's involvement or non-involvement in the al-Ghayil Raid logically and plausibly "pertains to" two categories of information that may, per Executive Order ("EO") 13526, be properly classified: (1) "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); CIA Br. at 8-9; Shiner Dec. ¶ 13. Unlike the publicly acknowledged *military* operation associated with the Raid, "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 require[] such secrecy." Shiner Dec. ¶ 16. Therefore, "the Agency's involvement [or non-involvement] in this operation" is a fact "protected from disclosure by EO 13526 and statute," *id.*, which Plaintiffs do

not contest. It is entirely logical and plausible that the CIA's admission that it either possesses or does not possess the core operational documents sought by the Requests, including legal and policy analyses of the Raid, approval documents, and before-the-fact and after-event assessments of the Raid, would "indicate the CIA's involvement in some aspect of this operation," since "[a]n agency that did not have some role in the operation or outcome would not possess the documents that fit the five categories outlined by" the Requests. Shiner Dec. ¶ 18.

The Shiner Declaration also establishes, as required by EO 13526, how the disclosure of the CIA's involvement or non-involvement in the al-Ghayil could reasonably be expected to cause harm to the national security. CIA Br. at 8; Shiner Dec. ¶¶ 17, 19. The Shiner Declaration correctly points to the specificity of the Requests in this case, which focus on "Yemen and this operation [the al-Ghayil Raid]," *id.* ¶ 19. If the CIA's involvement or non-involvement in the al-Ghayil Raid were disclosed, specific classified information about the CIA's activities and priorities would be revealed. If it were revealed that the CIA was involved in the Raid, a "foreign intelligence service or terrorist organization" could, by focusing on the particular details and circumstances of the Raid, "identify particular CIA sources, circumvent the CIA's monitoring efforts," and discover "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." *Id.* ¶¶ 17, 19. Conversely, a lack of responsive CIA documents could tend to reveal the absence of particular CIA sources, monitoring efforts, or targets pertaining to al-Ghayil and the group or individuals who were the focus of the Raid. *Id.* ¶ 16. Plaintiffs do not rebut the governing case law emphasizing the "special deference" that courts owe to such logical or plausible predictions of national security harm that may flow from the public disclosure of classified information. *See Wilner*, 592 F.3d at 76 ("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; CIA Br. at 5-6.

Exemption 1 alone constitutes a sufficient basis for the agency's Glomar response in this case. *See Wilner*, 592 F.3d at 68 (an agency "need only proffer one legitimate basis for invoking the Glomar response"). Plaintiffs do not come close to rebutting the logic or plausibility of the CIA's invocation of Exemption 1 here. Pl. Opp. at 19-23. For example, Plaintiffs do not claim, nor could they, that the CIA's involvement or non-involvement in the al-Ghayil operation has been officially acknowledged or otherwise publicly disclosed. Plaintiffs assert that "many of the purportedly protected facts that the CIA claims would be revealed have already been publicly acknowledged," Pl. Opp. at 22, but Plaintiffs do not mention the key protected fact—whether or not the CIA played a role in the al-Ghayil Raid. Even Plaintiffs' more limited claims of official or public disclosure are unfounded. Contrary to Plaintiffs' assertions, there has been no acknowledgment, for example, that "the CIA communicated or coordinated with other agencies about the Raid" (which Plaintiffs attempt to conflate with a single White House meeting where, according to then-Press Secretary Spicer, the Raid was apparently described to a diverse group of Presidential advisors including Director Pompeo). *Id.* There has likewise been no official acknowledgment of any governmental policy objective associated specifically with any *CIA* involvement or non-involvement in the al-Ghayil Raid (for example, hypothetically relating to covert counterintelligence activity, which is part of the CIA's mandate, Shiner Dec. ¶¶ 15-16), as opposed to more general governmental objectives associated with the publicly acknowledged *military* aspect of the Raid. Pl. Opp. at 22-23.

Plaintiffs conclusorily attempt to argue that a substantive response to the Requests would reveal nothing about whether the CIA "played any sort of role, much less the specifics of that role," in the al-Ghayil Raid, speculating that it is "plainly conceivable" that the CIA's possession of the very particular types of documents sought by the Requests might mean nothing in particular, and "might not even relate to the Raid" or "even relate to the CIA at all." *Id.* at 19-20. But these speculations about inferences that could "conceivably" be drawn from an acknowledgment that the CIA possesses documents responsive to the Requests ignore the most obviously logical and plausible conclusion that would flow from an acknowledgment: that the CIA "ha[d] some role in the operation or outcome" of the al-Ghayil Raid. Shiner Dec. ¶ 18; *see Wilner*, 592 F.3d at 75 ("Confirming or denying the *mere existence* of specific records in a general surveillance program would logically be both confirming or denying that the NSA was targeting a specific individual *and* confirming or denying that the NSA is conducting a general surveillance program. Either disclosure would be information with respect to the activities of the NSA and therefore exempt under FOIA." (citation and quotation marks omitted)). Plaintiffs similarly dismiss out of hand the notion that any harm could flow from a disclosure that the CIA did not possess records about the Raid, Pl. Opp. at 21, but Plaintiffs' musings are specifically and concretely rebutted by the Shiner Declaration. *See* Shiner Dec. ¶¶ 16-20. Moreover, as the Shiner Declaration notes, "in order to 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." *Id.* ¶ 15.

III. There Has Been No Official Acknowledgment of the Existence or Non-Existence of CIA Records Responsive to the Requests, and Plaintiffs Seek to Vastly Expand the Official Disclosure Doctrine

Plaintiffs wrongly assert that a CIA "intelligence interest" in the Raid has been officially acknowledged, thereby waiving the CIA's ability to assert a Glomar response here. *E.g.*, Pl. Opp. at 3 ("[b]ecause the government has officially acknowledged the CIA's intelligence interest in the Raid, it is neither logical nor plausible that the agency would not have any responsive records"). Plaintiffs also fundamentally mischaracterize the official acknowledgment or disclosure doctrine, and seek to introduce a novel and unduly expansive test for official acknowledgment that is not supported by the case law. Pl. Opp. at 4-13. They also misunderstand the nature of the "intelligence interest" that would be revealed if the CIA disclosed the existence or nonexistence of responsive records.

First, the number of statements that Plaintiffs contend constitute an official acknowledgment in this case appears to have shrunk to one: then-Press Secretary Spicer's reference during a briefing on February 2, 2017, to Director Pompeo's presence (among a variety of other presidential advisors) at a dinner meeting during the course of which the Raid was described. Dkt. No. 37 ("1st Diakun Dec."), Ex. 5 at 11.[1] Although other agencies, officials, and advisors are mentioned numerous times during the briefing, then-Press Secretary Spicer referred to Director Pompeo only once, and to the CIA not at all. *Id.* at 11-12. In an evident attempt to bolster the single Spicer reference from February 2, 2017, Plaintiffs proffer a handful of brief, non-specific remarks by past CIA directors that summarily and generally referred to Yemen or the group al-Qaeda in the Arabian Peninsula ("AQAP"), but do not mention *any* actual CIA

[1] As to another comment made by then-Press Secretary Spicer about the Raid (referring to it as an "intelligence-gathering" operation) that Plaintiffs previously claimed constituted an official acknowledgment, Plaintiffs now concede that the comment is not "a *direct* acknowledgment about the CIA's involvement in the Raid." Pl. Opp. at 8.

operation in Yemen, much less CIA involvement or a CIA intelligence interest in the 2017 al-Ghayil Raid. Pl. Opp. at 9. Here, Plaintiffs introduce their own official acknowledgment test, urging the Court to read the Spicer remark "against a backdrop of publicly known facts, other relevant evidence, and common sense." *Id.* at 6. By stitching together various general and unrelated remarks, Plaintiffs fast-forward to the conclusion not only that a CIA "intelligence interest" in the Raid has been officially acknowledged, but also that "it is neither logical nor plausible that the agency would not have any responsive records" relating to the Raid. *Id.* at 3.

Plaintiffs are wrong on both counts. Plaintiffs' reliance on general remarks by CIA directors, unrelated to any CIA operation let alone the 2017 Raid, only highlights the absence of any actual official acknowledgment of CIA involvement or intelligence interest in the al-Ghayil Raid. Nor does the official acknowledgment test permit courts to speculate, as Plaintiffs invite the Court to do, as to whether it is "plausible" that an agency might have documents relating to a specific matter like the Raid simply because some larger issue, like the existence of terrorist activity in Yemen, would seem logically to be of some interest to the agency. As explained in the CIA's opening brief, "[a]n 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 (emphasis added); *see* CIA Br. at 21-22. Plaintiffs have not identified any official acknowledgment that the CIA has records relating to the Raid, and that is the end of the official acknowledgment inquiry.

Plaintiffs contend that the three-pronged test for official disclosure set forth in *Wilson v. CIA*, 586 F.3d 171, 186 (2d Cir. 2009), which demands, among other things, that the protected information that a party seeks to obtain must be "as specific as the information previously released," has been called into question and does not apply in Glomar cases. Pl. Opp. at 5-6.

But in the very case cited by Plaintiffs, the Second Circuit reaffirmed that *Wilson* "remains the law of this Circuit," *N.Y. Times Co. v. DOJ*, 756 F.3d 100, 120 & n.19 (2d Cir. 2014), and numerous courts have referenced and applied the three-part *Wilson* test in evaluating official acknowledgment claims, including the district court on remand in the very same case. *See ACLU v. DOJ*, No. 15 Civ. 1954 (CM), 2016 WL 8259331, at *3-4 (S.D.N.Y. Aug. 8, 2016) (applying the *Wilson* test "stringently"); *ACLU v. DOJ*, No. 12 Civ. 794 (CM), 2015 WL 4470192, at *3-4 (S.D.N.Y. July 16, 2015) (same), *aff'd in part, rev'd in part*, 844 F.3d 126 (2d Cir. 2016). The *Wilson* test has also been applied by numerous courts in cases involving Glomar responses. *See, e.g.*, *Moore v. CIA*, 666 F.3d 1330, 1333-34 (D.C. Cir. 2011); *Ctr. for Constitutional Rights v. DOD*, 968 F. Supp. 2d 623, 638-39 (S.D.N.Y. 2013), *aff'd*, 765 F.3d 161 (2d Cir. 2014); *ACLU v. DOD*, 752 F. Supp. 2d 361, 366-67 (S.D.N.Y. 2010); *Amnesty Int'l USA v. CIA*, 728 F. Supp. 2d 479, 512-13 (S.D.N.Y. 2010).

In addition, numerous other courts, even if they do not specifically mention *Wilson*, have nevertheless consistently affirmed that to show an official acknowledgment, "the *specific* information sought by the plaintiff must already be in the public domain by official disclosure"; "[p]rior disclosure of similar information does not suffice." *Amnesty Int'l USA*, 728 F. Supp. 2d at 512-13 (quoting *Wolf v. CIA*, 473 F.3d 370, 378-79 (D.C. Cir. 2007)); *see also, e.g.*, *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). Indeed, all three cases upon which Plaintiffs rely in support of their novel official acknowledgment analysis, Pl. Opp. at 6, reaffirm the well-established test requiring courts to look for prior disclosures of the *specific* information sought by the plaintiff—which, in Glomar cases, is the disclosure of the

existence or nonexistence of responsive records. *See ACLU v. CIA*, 710 F.3d 422, 427 (D.C. Cir. 2013) ("*Drones FOIA*") ("A plaintiff mounting an official acknowledgment argument must bear the initial burden of pointing to specific information in the public domain that appears to duplicate that being withheld . . . [a]s we have explained, the public domain exception is triggered when the prior disclosure establishes the *existence* (or not) or records responsive to the FOIA request, regardless whether the contents of the records have been disclosed" (citations and quotation marks omitted); *Florez v. CIA*, 829 F.3d 178, 186 (2d Cir. 2016) (same); *N.Y. Times Co.*, 756 F.3d at 120 (applying the *Wilson* test).[2]

In lieu of pointing to a specific official acknowledgment that the CIA possesses or does not possess records responsive to the Requests about the Raid, Plaintiffs offer conclusory, broad contentions like the following: "[T]he reason that Director Pompeo's presence at the dinner is unsurprising is that the agency's intelligence interest in operations like the Raid, and in the Raid itself, is obvious." Pl. Opp. at 7. Plaintiffs seem to suggest that they do not need to identify any official acknowledgment of the CIA's intelligence interest in *any* military operation in which

[2] These three cases are also all factually distinct from this matter. As discussed in the CIA's opening brief (CIA Br. at 12, 24), the D.C. Circuit in *Drones FOIA* rejected the Glomar response in that case because of numerous, clear official acknowledgments of a CIA intelligence interest in drone strikes, including the CIA's public filing of pleadings in another litigation "acknowledging that it does have documents concerning targeted killings." *Drones FOIA*, 710 F.3d at 429-32. In *N.Y. Times Co.*, the agency's "main argument for the use of [the] Glomar" response "evaporate[d]" because of statements made by a prior CIA Director that "already publicly identified CIA as an agency that had an operational role in targeted drone killings." Finally, in *Florez*, the Second Circuit made clear that it was not actually rejecting the CIA's Glomar response with respect to the FOIA plaintiff's request for records concerning his father, but remanded to the district court to consider the matter anew in light of intervening disclosures by the FBI of the same type of information that he also sought from the CIA. *Florez*, 829 F.3d at 183-87. By contrast, here, Plaintiffs have identified *no official statements* indicating that the CIA was involved in the Raid, let alone that the agency would have the types of operational records that Plaintiffs are seeking. Thus, Plaintiffs have fallen far short of identifying any official acknowledgment or sufficiently specific public disclosure that would waive the CIA's ability to maintain its Glomar response to the Requests pertaining to the al-Ghayil Raid.

intelligence is gathered in order to overcome a CIA Glomar response, because the Court can simply assume that the CIA's intelligence interest is "obvious." Not so. Plaintiffs cannot avoid their burden to identify a specific, official acknowledgment establishing the CIA's possession or non-possession of the particular types of core operational documents sought by the Request, relating to the al-Ghayil Raid. Plaintiffs have failed to meet that burden here.

IV. The Shiner Declaration Establishes that a FOIA Response Would Tend to Reveal Statutorily Protected Information Relating to the CIA's Intelligence Sources or Methods

Plaintiffs reiterate their spurious contention that, even leaving aside the issue of whether a CIA intelligence interest in the al-Ghayil Raid has been officially acknowledged (which it has not), the existence or nonexistence of any such agency interest would not be protected by any FOIA exemption, and therefore cannot justify the CIA's Glomar response.[3] Pl. Opp. at 14-19. The CIA's opening brief explained at length why any CIA intelligence interest in the Raid would pertain to properly classified information under Exemption 1, and would also relate to protected intelligence sources and methods under Exemption 3 (which does not require the CIA to demonstrate that disclosure of the withheld information would harm the national security). CIA Br. at 13-21. The Shiner Declaration establishes that the hypothetical acknowledgment of a CIA "intelligence nexus" to the al-Ghayil Raid, "such as providing intelligence to support it," would tend to reveal statutorily protected information, namely, "specific clandestine intelligence sources, methods and activities of the CIA." Shiner Dec. ¶ 16. Furthermore, admitting or denying a CIA intelligence interest in a particular military operation like the al-Ghayil Raid would tend to reveal a specific CIA intelligence priority (or the absence of such a priority) and

[3] Plaintiffs *conceded* in their opening brief that a substantive FOIA response in this matter would disclose the presence or absence of a CIA intelligence interest in the al-Ghayil Raid. *See* Dkt. No. 36 at 16.

"may benefit a foreign intelligence service or terrorist organization" by enabling it, essentially, to focus on the circumstances of that specific operation or event to better "identify particular CIA sources, circumvent the CIA's monitoring efforts . . . reveal the targets of the CIA's collection efforts," and "generally enhance its intelligence or deception activities at the expense of the United States. *Id.* ¶ 17. Finally, the CIA's opening brief explained that, under the governing case law, the CIA has very broad discretion in determining what disclosures could reasonably be expected to lead to the unauthorized exposure of intelligence sources and methods. *See, e.g.*, *CIA v. Sims*, 471 U.S. 159, 169 (1985) (rejecting "any limiting definition that goes beyond the requirement that the information fall within the Agency's mandate to conduct foreign intelligence"); *Gardels v. CIA*, 689 F.2d 1100, 1103 (D.C. Cir. 1982); CIA Br. at 16-17.

While Plaintiffs accuse the CIA of advancing an unduly broad view of its protected intelligence interest, Pl. Opp. at 15-16, in fact the situation is reversed; Plaintiffs cite general, cursory references to, for example, the entire country of Yemen, AQAP, and "intelligence-gathering" operations generally, in order to contend that "it is implausible that the CIA does not have an intelligence interest" in the specific, one-time Raid in al-Ghayil, Yemen that is the focus of the Requests. *E.g.*, *id.* at 8-9. To be clear, the CIA is not resting its Glomar response on any supposed need to protect all intelligence sources and methods relating to "an entire topic." *Id.* at 17. Rather, the Shiner Declaration explains that the Requests are "specific to Yemen and this operation [the al-Ghayil Raid]," and directly addresses the concerns implicated by the CIA's admission or denial of the existence of CIA records responsive to the Requests, which could tend to show whether the CIA had an intelligence interest or nexus to the Raid. Shiner Dec. ¶¶ 16-18.

In contrast, Plaintiffs continue to contend that then-Press Secretary Spicer's summary characterization of the Raid as an "intelligence-gathering" operation in itself "helps establish

why it is implausible that the CIA does not have an intelligence interest in it." Pl. Opp. at 5, 7 n.3, 8. Plaintiffs offer no response to the obvious point, raised in the CIA's opening brief, that the United States Intelligence Community is comprised of numerous agencies, including certain offices "within the Department of Defense" and "intelligence elements of" the various branches of the Armed Forces, 50 U.S.C. §§ 3003(4)(G), (H), and that even more agencies have intelligence-gathering arms. CIA Br. at 24; Shiner Dec. ¶ 11. Although Plaintiffs refer repeatedly to the D.C. Circuit's remark in the *Drones FOIA* case that the CIA is the "Central *Intelligence* Agency," 710 F.3d at 430, the Court's rejection of the Glomar response in that case rested not on the mere fact that the CIA is engaged in intelligence matters, but on specific statements (including the CIA's own concession in public litigation filings) acknowledging that the CIA had an intelligence interest in drone strikes. *Id.* at 429-32. Likewise, Plaintiffs wrongly suggest that whenever CIA analysts so much as "monitor[] developments" in a "hotspot," or express "concern" about a group such as AQAP, the agency has acknowledged an intelligence interest in any future specific operations or military events implicating that "hotspot" or group. Pl. Opp. at 9. That is simply not the law.

Nor can Plaintiffs establish an official acknowledgment by arguing that the CIA could plausibly have had an intelligence interest in the Raid. The relevant question is not whether it is plausible or implausible that the CIA would have an intelligence interest in the al-Ghayil Raid; it is whether the agency has logically and plausibly established that confirming or denying the existence of responsive records would reveal an intelligence interest in the Raid. The CIA has established that its invocation of Exemption 3 with respect to the Requests is logical and plausible, because, as Plaintiffs concede, to acknowledge or deny possession of core operational documents relating to the Raid would tend to reveal *whether or not* the CIA had an intelligence

nexus to or interest in the Raid, which could reveal particular CIA intelligence sources and methods that are statutorily protected. *See, e.g.*, *Gardels*, 689 F.2d at 1102-03 (upholding Glomar response to request by a student at the University of California for "documents revealing covert CIA connections with or interest in the University").

V. The CIA's Search for Records Corresponding to the Spicer Briefing Highlights the Proper Scope of Its Glomar Response

Plaintiffs attempt to draw a negative inference from the CIA's good-faith searches, prompted by questions from the Court during the September 18, 2017 pre-motion conference, for documents reflecting Director Pompeo's presence at a meeting with the President and other advisors at which the Raid was described, consistent with then-Press Secretary Spicer's remarks during the February 2, 2017 press briefing. CIA Br. at 3; Shiner Dec. ¶ 10. In no way did the CIA's searches for these records "undercut[] the logic and plausibility of its claim that harm would result from providing an ordinary FOIA response in this case," or "defeat" its Glomar response. Pl. Opp. at 8 n.4, 21-22. To the contrary, the CIA's searches for these documents highlight the appropriately considered scope of its Glomar response to the Requests. Although the CIA did not read the Requests as seeking any such documents, the CIA agreed with the Court's suggestion at the pre-motion conference that documents reflecting Director Pompeo's mere presence at the meeting, as described at the Spicer press briefing, would not implicate any classified information, covert or clandestine agency activity, protected agency intelligence interest, or agency intelligence source or method, because the Spicer remarks about the meeting reflected only Director Pompeo's performance of his general duties as one of many Presidential advisors, and did not implicate or acknowledge broader CIA involvement or intelligence interest in the Raid itself. *See* Shiner Dec. ¶ 11 (noting the range of Director Pompeo's duties and observing that his individual presence "at a meeting with the President, where advisors from

other government agencies with an intelligence arm were present," would not constitute an official confirmation or denial of the *CIA's* interest or involvement in the Raid). In contrast, the acknowledgment of the CIA's possession or non-possession of the particular types of documents sought in the Requests, including analyses of the legal and policy bases for the Raid, approval documents, and before-the-fact and after-event evaluations of the operation, would tend to reveal protected information about the *agency's* "involvement in the raid or, at a minimum . . . intelligence nexus to the operation, such as providing intelligence to support it." *Id.* ¶ 16.

VI. Plaintiffs' Assertion that the CIA May Not Assert a Glomar Response When Other Agencies Substantively Respond to FOIA Requests Is Baseless

Finally, as discussed in the CIA's opening brief in response to additional questions from the Court at the pre-motion conference, the fact that other Defendant agencies are providing substantive responses to the Requests—where the Department of Defense ("DOD") has acknowledged its operational involvement in the Raid and it is publicly known that components within the Departments of State and Justice may provide legal consultation and advice regarding military operations like the Raid—in no way "demonstrates the impropriety of the CIA's Glomar response." Pl. Opp. at 23; CIA Br. at 20-21. Plaintiffs suggest that the CIA may not assert a Glomar response because one of its functions is also to "consult[] with other agencies on global military (and intelligence) activities," Pl. Opp. at 24, but this contention misses the mark for a number of reasons.

First, Plaintiffs' proposition is, again, overbroad. If taken at face value, the natural conclusion would be that the CIA could never assert a Glomar response, because any acknowledgment that responsive CIA records exist could be interpreted as signifying only the CIA's consultation with another agency or component. No precedent supports this proposition. To the contrary, as noted in the CIA's opening brief, numerous courts have upheld CIA Glomar

responses in cases where other Defendant agencies provide FOIA responses, given the CIA's unique activities and equities. CIA Br. at 21; *see also, e.g.*, *Whitaker v. CIA*, 64 F. Supp. 3d 55, 63-65 (D.D.C. 2014) (Department of State provided FOIA response).

Second, unlike the Department of State Office of the Legal Adviser and the Office of Legal Counsel within the Department of Justice, the CIA has a "mandate to collect and analyze foreign intelligence and to conduct counterintelligence," and "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 require[] such secrecy." Shiner Dec. ¶¶ 15-16. As explained above, such activities can be properly classified under EO 13526, and also involve statutorily protected intelligence sources and methods. Furthermore, even if the CIA is not directly operationally involved in a particular operation, its provision of intelligence to supporting an operation being conducted by other agencies can itself be protected under, for example, Exemptions 1 and 3, which Plaintiffs do not acknowledge. *Id.* ¶ 16. Because of these core CIA functions that do not apply to many other agencies, it is often appropriate for the CIA to assert a Glomar response even where other defendant agencies provide substantive FOIA responses, because a confirmation or denial of the CIA's possession of responsive records would itself tend to reveal protected information. *Id.* ¶¶ 14-15.

In short, the CIA has asserted a Glomar response because it is a properly classified and statutorily protected fact whether or not the CIA was involved in, or had an intelligence interest in, this particular Raid, and that fact would be revealed if the CIA confirmed the existence or non-existence of responsive records. That fact simply is not at issue in the DOD's response to the Requests, or the responses of the other defendant agencies. DOD's possession of responsive records—which is unsurprising given that DOD has acknowledged conducting the Raid—would

not reveal any CIA involvement or interest or lack thereof. The same is true for the other defendant agencies.

CONCLUSION

For the foregoing reasons and those set forth in the CIA's opening brief, the Court should deny Plaintiffs' motion for partial summary judgment, and grant the CIA's cross-motion for summary judgment.

Dated: New York, New York
December 13, 2017

Respectfully submitted,

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