IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, AMERICAN CIVIL LIBERTIES UNION OF MONTANA FOUNDATION, INC.,

Plaintiffs,

v.

DEPARTMENT OF DEFENSE, DEPARTMENT OF HOMELAND SECURITY, DEPARTMENT OF THE INTERIOR, DEPARTMENT OF JUSTICE,

Defendants.

18-cv-154-DWM

PLAINTIFFS' REPLY IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

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I. The Army Corps of Engineers and the Bureau of Land Management conducted inadequate searches.

The government's continued insistence that the Army Corps's search for responsive records met its burden under FOIA is wrong.

The Army Corps should have searched for responsive records in its regional offices because responsive records were likely to be found there. *See* Pls.' Br. 12–14. Plaintiffs' argument is not that it is "invariably true that records are always more likely to be found in regional offices than in headquarters." Gov't Reply 1. Nor did Plaintiffs cite *Jefferson v. DOJ*, 168 F. App'x 448 (D.C. Cir. 2005), for that proposition. Rather, Plaintiffs argue that *Jefferson* holds that an agency must search locations "that are likely to turn up the information requested." *Id.* at 450. Other cases agree. *See, e.g.*, *The Few, the Proud, the Forgotten v. U.S. Dep't of Veterans Affairs*, 254 F. Supp. 3d 341, 357 (D. Conn. 2017) (rejecting adequacy of search where record evidence made it likely that records would be found in a different office); *El Badrawi v. DHS*, 583 F. Supp. 2d 285, 302–03 (D. Conn. 2008) (rejecting adequacy of search where agency failed to address likelihood that responsive records would be found in an overseas office); *see also Citizens Comm'n on Human Rights v. FDA*, 45 F.3d 1325, 1328 (9th Cir. 1995) (finding that a search was adequate where the FDA searched its main office and "seven of its divisional offices"). None of these cases hinge on an "admi[ssion that]

responsive records were *more* likely to be found" elsewhere. Gov't Reply 2 (emphasis added). They turned on the presence of record evidence that rendered the government's searches unreasonable.

Here, the record shows that a search of Army Corps field offices—in particular, the Omaha office—would "likely . . . turn up" responsive records, *Jefferson*, 168 F. App'x at 450, because personnel from field offices were included on multiple emails regarding relevant meetings and conference calls. *See* USA_USACE_00060–68, ECF No. 35-1. The Keystone XL Pipeline is proposed to run through Montana, South Dakota, and Nebraska. All three of these states fall under the Army Corps's "Omaha District Headquarters" office, and there are numerous specialized offices in each state.[1] However, the Army Corps "focused its records search" on "the only places at *Headquarters* USACE that would possess records responsive to ACLU's FOIA request." Bartlett Second Suppl. Decl. ¶ 2, ECF No. 36 (emphasis added).[2] Additionally, Plaintiffs cited dozens of BLM

[1] Army Corps of Engineers, District Locations, Omaha District, https://www.nwo.usace.army.mil/Locations.

[2] Plaintiffs raised similar questions about the BLM's search, which only focused on the Montana office. The agency has agreed to comply with the search relief that Plaintiffs seek—namely, searching its Washington office, and specifically Ryan Sklar's files, for responsive records. Gov't Reply 9–10 (citing Decl. of Keiosha Alexander, Army Corps ¶¶ 10–11, ECF No. 51). There is no need for the Court to rule on the adequacy of the BLM's search at this time as Plaintiffs will reevaluate their adequacy-of-search claim as to the BLM once the results of the agency's new search are provided to them.

records that implicate Army Corps personnel whose records were not searched. *See* Pls.' Br. 15–17. The Army Corps includes approximately 37,000 personnel,[3] but only two employees' records were searched. *See* Bartlett Decl. ¶ 7, ECF No. 21. Capt. Ryan Hignight and Thomas O'Hara, Army Corps officials based in the Omaha office, appear repeatedly in the four Army Corps documents generated by the BLM's search. *See, e.g.*, USA_ACE_00056; USA_ACE_00063; USA_ACE _00065; USA_ACE_00067–68, ECF No. 35-1. There are also dozens of references to Montana-based Army Corps personnel in the BLM disclosure. *See* Pls.' Br. 16–17. In the aggregate, the record indicates that numerous Army Corps personnel have been involved in pipeline protest planning, and it was unreasonable to limit the agency's search to just two of them.

The government's arguments to the contrary are without merit. The government concedes that "[a]n agency . . . 'must revise its assessment of what is "reasonable" in a particular case to account for leads that emerge during its inquiry.'" Gov't Reply 3 (quoting *Campbell v. DOJ*, 164 F.3d 20, 28 (D.C. Cir. 1998)).[4] But the government claims that "the leads that emerged from BLM indicated only that additional non-responsive records existed at ACE headquarters,

[3] Army Corps of Engineers, About Us, https://www.usace.army.mil/About.aspx.

[4] That concession explains why the government's insistence that its search was adequate because it "conformed to agency organizational structure," Gov't Reply 1, is irrelevant.

not that additional responsive records would be found in regional offices." *Id.* at 4. This conclusion is wrong on both counts. The government argues that the BLM-referred documents "are non-responsive," *Id.* at 3 (citing Bartlett Decl. ¶ 9, ECF No. 21), because they "pertained to communication about environmental planning, not security," *Id.* at 3. But the records are obviously responsive to Plaintiffs' Request, which concerned pipeline protests. *See, e.g.*, USA_ACE_00064, ECF No. 35-1. And as described above, records were likely to be found in regional offices.

The government also continues to insist that the Army Corps "was never involved in any interagency law enforcement meetings," Gov't Reply 6, because the "interagency team meetings 'never came to fruition,'" *id.* at 5, so it did not need to search additional files related to such meetings. As Plaintiffs pointed out, an Army Corps official *signed the sign-in sheet* at a "Pipeline Planning Meeting" in Miles City, Montana. *See* Pls.' Br. 18 (citing USA_BLM_00167, ECF No. 35-2).[5] The government responds that the Miles City sign-in is not relevant to the adequacy of its search because the Miles City meeting "did not involve the 'interagency team' discussed by BLM," Gov't Reply 5–6. But whether any

[5] The February 16, 2017 pipeline-planning meeting covered, among others, "issues that the state may face due to pipeline construction and hear some lessons learned from agencies that assisted in North Dakota," the need for "coordination" among law enforcement officials and "with Trans Canada security personnel" regarding "additional training needs to deal with protest activity." USA_BLM_00091, ECF No. 35-2.

particular meeting[6] or team came to fruition is neither here nor there. To put it clearly: the Army Corps knew that one of its officials signed into a coordination meeting, and Plaintiffs' Request sought records related to travel to meetings or speaking engagements about pipeline protests. *See* Request at 6, ECF No. 37-1. It was unreasonable for the agency not to search for responsive records *at least* in the files of the official that attended the Miles City meeting, Pls.' Br. 18, and that alone is sufficient to undermine the agency's adequate-search claim.

II. The Army Corps of Engineers and the Bureau of Land Management failed to adequately justify certain withholdings.[7]

A. The Army Corps has failed to justify its withholding in full of the email with subject line "[EXTERNAL] Re: Keystone XL, Ft. Peck" and its attachment.

Plaintiffs challenged the Army Corps's withholding under Exemptions 5 and 7(A) of a December 17, 2016 email and attachment "contain[ing] a discussion between the Chief of the Operational Protection division . . . and an Intelligence Specialist with the District of Montana's US Attorney's Office." Amended Army

[6] The record suggests that the Army Corps was at least invited to other relevant meetings. For example, a February 22, 2017 meeting on the "Keystone XL Pipeline" was convened by BLM Montana, and Michele Fromdahl of the Army Corps was invited. *See* USA_BLM_00017-1.

[7] Plaintiffs respectfully submit that the Court should reject the government's claims of exemption as to the records discussed in this section because the agency has not met its burden under FOIA. In the alternative, the Court should require the agency to provide these records for *in camera* inspection. *See, e.g.*, *Wiener v. FBI*, 943 F.2d 972, 979 (9th Cir. 1991); *Doyle v. FBI*, 722 F.2d 554, 556 (9th Cir. 1983); *Dow, Lohnes & Albertson v. Presidential Comm'n on Broad. to Cuba*, 624 F. Supp. 572, 575 (D.D.C. 1994).

Corps *Vaughn* Index at 2, ECF No. 30-1; *see* Pls.' Br. 29–32. The government argues that these documents are withholdable under Exemption 5's deliberative-process privilege because "they were prepared to assist in reaching security decisions related to permitting or approval of the Keystone pipeline." Gov't Reply 15. The government further argues that the records "provide information to inform the ongoing decision-making process surrounding pipeline security." *Id.* at 15–16; *see* Bartlett Decl. ¶ 10.

The agency cannot prevail on its Exemption 5 claim because an agency asserting the deliberative process privilege "must identify a specific decision to which the document is pre-decisional." *Sierra Club, Inc. v. U.S. Fish & Wildlife Serv.*, 925 F.3d 1000, 2019 WL 2297454, at *7 (9th Cir. May 30, 2019) (quotation marks omitted). The government argues that it need not identify a specific decision because "certain decisions . . . can lead to connected decisions," Gov't Reply 17. This is nonsense. The very case the government cites to support its contention that it need only point to a "specific decision-making *process*," *id.* (emphasis added), "reject[ed] the government's primary argument that a *continuing process* of agency self-examination is enough to render a document 'predecisional' and hold, instead, that the agency *must identify a specific decision* to which the document is predecisional." *Maricopa Audubon Soc'y v. U.S. Forest Service*, 108 F.3d 1089,

1094 (9th Cir. 1997) (emphasis added).[8] Any other rule, the court explained, "would be a serious warping of the meaning of the word" "predecisional." *Id.* (quoting *Assembly of the State of Cal. v.U.S. Dep't of Commerce*, 968 F.2d 916, 921 (1992)); *see also Sensor Sys. Support, Inc. v. FAA*, 851 F. Supp. 2d 321, 328 (D.N.H. 2012); *Access Reports v. DOJ*, 926 F.2d 1192, 1194–95 (D.C. Cir. 1991).

The government also seeks to withhold these records under Exemption 7(A), arguing that their disclosure "would undermine ACE's and other agencies' law enforcement proceedings related to the pipeline." Gov't Reply 20. Regardless of whether the Army Corps qualifies as a "law enforcement agency" for the purposes of Exemption 7(A),[9] that exemption only permits the withholding of information only to the extent that its release "could reasonably be expected to interfere with

[8] Accordingly, in that case, the Ninth Circuit held that records were withholdable under the deliberative-process privilege because they were "prepared for the purpose of advising [a superior] as to how to respond to *specific allegations* of unethical and even illegal conduct," not as "merely part of a routine and ongoing process." *Maricopa*, 108 F.3d at 1094 (emphasis added).

[9] A federal law enforcement purpose must be shown in order for the government to meet the threshold requirement for Exemption 7. *See, e.g.*, *Pratt v. Webster*, 673 F.2d 408, 420 (D.C. Cir. 1982). "[A]n agency which has a 'mixed' function, encompassing both administrative and law enforcement functions, must demonstrate that it had a purpose falling within its sphere of enforcement authority in compiling the particular document." *Church of Scientology v. U.S. Dep't of Army*, 611 F.2d 738, 748 (9th Cir. 1979), *overruled on other grounds by Animal Legal Def. Fund v. FDA*, 836 F.3d 987 (9th Cir. 2016). "Mixed function" agencies face a more rigorous standard and a fact-specific review is required to determine if the document they are seeking to withhold was compiled with a legitimate law enforcement purpose. *See, e.g.*, *Simon v. DOJ*, 752 F. Supp. 14, 18 (D.D.C. 1990).

enforcement proceedings," 5 U.S.C. § 552 (b)(7)(A), that are "pending or reasonably anticipated." *Mapother v. DOJ*, 3 F.3d 1533, 1540 (D.C. Cir. 1993); *accord Van Bourg, Allen, Weinberg & Roger v. NLRB*, 751 F.2d 982, 985 (9th Cir. 1985).[10]

The government claims that the record "arose in connection with the investigation of possible threats to ACE personnel and property," Gov't Reply 22, but that is not the standard that the agency must meet under Exemption 7(A). The government also argues that disclosure would "undermine ACE's law enforcement proceedings by revealing its monitoring tactics and coordination with other agencies." *id.* at 21. But the agency has not shown these proceedings are related to a "case in court." *Shannahan v. IRS*, 672 F.3d 1142, 1150 (9th Cir. 2012) (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978)).

[10] The cases that the Government cites are not to the contrary. *See, e.g.*, *Adair v. Mine Safety and Health Admin*., No. 08-1573, 2009 WL 9070947, at *3 (D.D.C. Sept. 23, 2009) (holding that the "purpose of Exemption 7(A) is to prevent disclosures which might prematurely reveal the government's cases in court, its evidence and strategies, or the nature, scope, direction, and focus of its investigations, and thereby enable suspects to establish defenses or fraudulent alibis or to destroy or alter evidence"); *Cudzich v. INS*, 886 F. Supp. 101, 106 (D.D.C. 1995) (holding that under Exemption 7(A), "the government must establish that a law enforcement proceeding is pending or prospective" and "that some distinct harm is likely to result if the record or information requested is disclosed").

B. The Army Corps has failed to justify redactions in USA_ACE_00065–66.

Plaintiffs have also challenged the withholding of a paragraph on USA_ACE_00065—a June 12, 2017 email regarding communications topics related to the Keystone XL Pipeline—under Exemption 5's deliberative-process privilege. *See* USA_ACE_00065, ECF No. 35-1 (Sykes Decl. Ex. 5, ECF No. 41-5); *see* Pls.' Br. 32–33. The government continues to assert that its withholding under Exemption 5 is proper because the "redacted material contains concerns and recommendations in support of the ongoing pipeline security decision-making process." Gov't Reply 17. But as explained above, identifying a decision-making "process" is insufficient under Exemption 5. *See Maricopa*, 108 F.3d at 1094; *see also supra* Part II.A. Allowing the government to rely on Exemption 5 in this manner would "effectively swallow the FOIA's rule of broad disclosure." *Sensor Sys. Support, Inc.*, 851 F. Supp. 2d at 331.

C. The BLM has failed to justify the withholding of USA_BLM_00017-2.

The BLM continues to assert that information in USA_BLM_00017-2, ECF No. 35-2 (Sykes Decl. Ex. 7, ECF No. 41-7), is protected by the attorney–client privilege[11] because it contains "[m]aterial [which] includes confidential

[11] The BLM withdrew its claim of attorney–client protection over USA_BLM_00057–58, ECF No. 35-2 (Sykes Decl. Ex. 6, ECF No 41-6). *See*

communications between the Bureau of Land Management and counsel in the Office of the Solicitor for the purpose of relaying facts to counsel and seeking legal advice on agency action." BLM Suppl. *Vaughn* Index at 1, ECF No. 53-1. The agency further states that "[i]n the e-mail, Jim Stobaugh of BLM discusses what he believed to be BLM's forthcoming actions. He also asks Karan Dunnigan of the Solicitor's Office about the content of and agency response to the attached Presidential Memorandum." *Id.*

But there is no evidence, either in the BLM's original or supplemental *Vaughn* Indices, that Jim Stobaugh was seeking anything other than policy advice from the Office of the Solicitor. Policy advice is not privileged; to qualify for the privilege, a communication must contain *legal* advice. *See* Pls.' Br. 36–37; *see also In re Cty. of Erie*, 473 F.3d 413, 419–20 (2d Cir. 2007).

D. The BLM has failed to justify the withholding of USA_BLM_00043.

The BLM continues to defend its withholding of a paragraph in a "Communication Plan" concerning the Keystone XL Pipeline, *see* USA_BLM_00043, ECF No. 35-2 (Sykes Decl. Ex. 8, ECF No. 41-8), but its arguments do not hold up, *see* Pls.' Br. 37–40. The government now says that the Plan is predecisional with respect to "media and security issues surrounding

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Gov't Reply 11–12 (citing re-release of the document as USA_BLM_00168–69, ECF No. 52-1).

BLM's right-of-way decision, which had not occurred." Gov't Reply 19. But even if the right-of-way decision was a future decision, the Plan's approach to communicating that future decision appears to have been final.[12] Further, contrary to the government's argument, the purpose of the information includes educating the *public*, rather than "to inform BLM staff's public relations and security decisions." Gov't Reply 19. Finally, context suggests that the information contained in the Plan is factual, and that it would not "reveal the government's deliberations." *Citizens for Resp. & Ethics in Washington v. DHS*, 514 F. Supp. 2d 36, 46 (D.D.C. 2007) (quoting *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997) (citations omitted)).

III. The FBI's *Glomar* Response is Unlawful.

The FBI continues to miss the mark in arguing that its "neither confirm nor deny" response to Plaintiffs' Request was lawful. The agency continues to baldly assert that "confirming or denying the existence of records would itself cause harm

[12] Of course, even when agencies mark documents as "drafts"—which the Army Corps did not do here—courts have "made clear that [such a] designat[ion] . . . does not automatically make it privileged under the deliberative process privilege." *Brennan Ctr. for Justice v. DHS*, 331 F. Supp. 3d 74, 96 (S.D.N.Y. 2018) (quoting *Wilderness Soc'y v. DOI*, 344 F. Supp. 2d 1, 14 (D.D.C. 2004) (citations omitted)). The government points to a single "placeholder" on the first page of the document in suggesting that it is "clearly still preliminary," Gov't Reply 19, but that is simply not credible. And the government does not respond to Plaintiffs' argument that "apart from a missing date, there is absolutely no indication on the face of the document that it is any kind of draft—it bears no comments or tracked changes, and appears final in its form." Pls.' Br. 40 n.25.

under Exemptions 7(A) and (E)," Gov't Reply 23, but it has not explained *how* that is so, and it has not responded to the vast majority of Plaintiffs' arguments to the contrary.

First, the FBI continues to misunderstand the role of a *Glomar* response and its burden to justify one. As Plaintiffs have explained, to justify its *Glomar* response, the FBI must demonstrate by a "particularly persuasive affidavit," *Florez v. CIA*, 829 F.3d 178, 182 (2d Cir. 2016), that responding to the Request in a normal fashion would logically and plausibly cause harm under a FOIA exemption. *See* Pls.' Br. 41–43.[13] To put it plainly, this means that the FBI must be able to logically and plausibly show that to say, "Yes, the FBI possesses records responsive to the Request," or "No, it doesn't," would "interfere with enforcement proceedings," 5 U.S.C. § 552(b)(7)(A), or would "disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law," *id.* § 552(b)(7)(E). The FBI has not even remotely met that burden.

[13] Of course, this Court is not bound by *Florez*, but it is persuasive authority. Both the D.C. and Second Circuits—the two courts with the most extensive experience in these cases—agree that *Glomar* responses must be justified by "particularly persuasive" affidavits. *See N.Y. Times Co. v. DOJ*, 756 F.3d 100, 122 (2d Cir. 2014) (quoting *ACLU v. CIA*, 710 F.3d 422, 433 (D.C. Cir. 2013)). As Plaintiffs explained, that is for good reason—because a *Glomar* response cuts off an agency's FOIA responsibilities at the pass, and can only prevail in exceptional circumstances.

For example, to justify its *Glomar* with Exemption 7(A), the FBI argues that responding "yes" (or "no") to the Request would "tip[] off criminals that certain activities, and perhaps not others, have been detected; and would allow criminals/terrorists to take countermeasures." Gov't Reply 24 (citing Hardy Decl. ¶ 12, ECF No. 32). But its explanation fails to show how a general "yes" or "no" would say anything about "certain activities" or "others." Similarly, the FBI contends that responding "yes" would "confirm threats have been detected" and "disclose the scope of the FBI's investigative capabilities and vulnerabilities"; it also contends that responding "yes" would "alert the public of the FBI's level of interest and the scope of resources available to thwart the threat(s), and afford criminals and/or terrorists the opportunity to alter their behaviors." *Id.* (emphasis removed) (quoting Hardy Decl. ¶ 12, ECF No. 32). And the agency contends that responding "no" would "reveal any current criminal and/or terrorist activities are potentially free from FBI detection." *Id.* at 25 (emphasis removed) (quoting Hardy Decl. ¶ 19–20, ECF No. 32).

These arguments are not logical or plausible. Responding "yes" would merely reveal that the FBI has "[l]egal and policy analyses [or] recommendations related to law enforcement funding for and staffing around oil pipeline protests," records related to "[t]ravel of federal employees to speaking engagements, private and public meetings, panels, and conferences" related to pipelines, "[m]eeting

agendas" or similar materials from such events, or "[c]ommunications between federal employees and state or local law enforcement entitites or employees thereof, [or] between federal employees and private security companies or employees thereof, discussing cooperation in preparation for oil pipeline protests." Request at 6, ECF No. 37-1. Responding "no" would merely disclose the opposite. In no case would answering the Request reveal to the public any specific information about "threats" (a word that does not appear in the substance of the Request, which focuses on *protests*), specific "activities," or the "scope" of any law enforcement interest in pipeline protests.

The FBI's arguments as to Exemption 7(E) are similarly off-base. The agency contends that responding to the Request by saying "yes" or "no" would reveal information about the "FBI's strategy, level of applied resources, or capability and vulnerability in detection of and thwarting threats to the pipeline." Gov't Reply 25 (citing Hardy Decl. ¶ 24, ECF No. 32). But again, a binary answer to the Request would not logically or plausibly reveal anything of the sort. Likewise, responding would not "highlight the pipelines upon which the FBI is focusing its resources," Gov't Reply 27. As Plaintiffs explained, Pls.' Br. 46, the Request does not concern a specific pipeline, and responding that the agency does or does not have responsive records would not require it to name one.

Second, it is true that Plaintiffs' Request seeks records that the agency may later determine are withholdable under FOIA, but that is beside the point at this stage. To be sure, disclosure of specific records might "show the trigger" for an FBI investigation. Gov't Reply 27. But concerns over what the disclosure of particular records or portions thereof are premature. Indeed, that is why Plaintiffs seek partial summary judgment as to the FBI—to compel the agency to search for records and to provide specific justifications for withholding them. If the agency's argument is that the universe of responsive records is categorically exempt under FOIA, that argument fails, because the agency's burden under the statute is to justify the withholding of information on a case-by-case basis. If it were otherwise—if an agency could, without even searching for responsive records, predetermine that any responsive records it finds will be withholdable—FOIA would become a dead letter. The agency *does not know what records it possesses* until it searches; it therefore cannot meet its burden to justify withholding of unknown records.

Third, the government is simply wrong to contend that other agencies' disclosures have no bearing on whether the FBI's *Glomar* response is lawful. As an initial matter, that responsive FBI records exist is an undisputed fact in the record. As Plaintiffs explained, *see* Pls.' Br. 48–49, the BLM revealed that the FBI *does* have responsive records: both USA_BLM_00060 and USA_BLM_00061

indicate that they are "FBI Document[s] addressed in [the FBI's] response" to the Request. By itself, the government's revelation that the FBI has records responsive to the Request defeats its *Glomar*. *See ACLU v. DOD* (*Yemen Raid FOIA*), 322 F. Supp. 3d 464, 475 (S.D.N.Y. 2018). Moreover, the FBI has been party to conversations and meetings concerning the topics sought by the Request, which undermines any interest the agency seeks to protect through its blanket *Glomar* response. *See* Pls.' Br. 49–50 (citing BLM records).[14] And an FBI employee even wrote an email to a large group of federal officials describing him- or herself as being the "primary point of contact between the FBI HQ and the pipeline industry"—someone whose role it is to "examine the challenges and best practices associated with the protection of oil and natural gas critical infrastructure with locally based federal, state and municipal officials." USA_BLM_00067, ECF No. 35-2. That is only a portion of the evidence in the record that renders the FBI's *Glomar* response illogical and implausible. *See* Pls.' Br. 50–51 (describing other records obtained from federal agencies and the State of Montana that indicate FBI involvement in pipeline issues).

The government does not contest that all of these disclosures are relevant record evidence that the Court must weigh in evaluating whether the FBI's *Glomar*

[14] The government argues that emails "copying FBI employees" do not "provid[e] any indication the FBI possesses responsive records." Gov't Reply 29. This is neither logical nor plausible. If an FBI employee received an email that is a responsive record, the FBI possesses responsive records.

response is logical or plausible. *See* Gov't Reply 29 (discussing *Florez*, 829 F.3d at 186–87); *see also* Pls.' Br. 51–52 (discussing application of *Florez* to this case). Instead, it asserts that other agencies' disclosures cannot constitute "official acknowledgment[s]." Gov't Reply 29. Plaintiffs submit that any record specifically involving the FBI could be considered an "official acknowledgment" under the prevailing doctrine. *See* Pls.' Br. 43–45. But regardless, Plaintiffs do not need to show that there is an "official acknowledgment by the FBI that it has responsive records." Gov't Reply 29–30. As they explained, *see* Pls.' Br. 51–52, it is enough that the record in this case undermines the *Glomar* response. *See Florez*, 829 F.3d at 187 ("It defies reason to instruct a district court to deliberately bury its head in the sand to relevant and contradictory record evidence solely because that evidence does not come from the very same agency seeking to assert a Glomar response in order to avoid the strictures of FOIA."); *see also Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982).

CONCLUSION

For the reasons above, Plaintiffs respectfully ask this Court to deny Defendants' motion for summary judgment and grant Plaintiffs' cross-motion for partial summary judgment. Plaintiffs further request that the Court issue an order directing: (1) the Army Corps to conduct new, adequate searches including field offices, and promptly release all responsive records or justify their withholding; (2)

the Army Corps and the BLM to promptly release the improperly withheld or redacted material identified above; and (3) the FBI to conduct a search for responsive records.

DATED this 26th day of June, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E) and this Court's Order, the attached brief is proportionately spaced, has a typeface of 14 points and contains 4,435 words, excluding the caption and certificates of service and compliance.

DATED this 26th day of June, 2019.

/s/ Emerson Sykes
Emerson Sykes

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of June, 2019, a true and correct copy of the above and foregoing document was duly served upon the following counsel of record and interested parties by CM/ECF:

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