[ORAL ARGUMENT NOT YET SCHEDULED]

No. 11-5320

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES FOUNDATION,

Plaintiffs-Appellants,

v.

CENTRAL INTELLIGENCE AGENCY,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), appellee hereby certifies as follows:

A. Parties and Amici.

The parties before this Court and the district court are: plaintiffs-appellants the American Civil Liberties Union and American Civil Liberties Union Foundation, and defendant-appellee the Central Intelligence Agency. The Department of Justice, Department of Defense, and Department of State were defendants before the district court, but are not parties on appeal.

On appeal, the Bureau of Investigative Journalism, Campaign for Innocent Victims in Conflict, Center for Constitutional Rights, Center on National Security at Fordham Law, the Constitutional Project, First Amendment Coalition, Human Rights Watch, International Commission of Jurists, and National Security Archive are participating as amici in support of plaintiffs-appellants. In the district court, the Washington Legal Foundation and the Allied Education Foundation were amici in support of defendant.

B. Ruling Under Review.

Plaintiffs-appellants appeal from the district court's opinion and order (Rosemary M. Collyer, J.) of September 9, 2011, granting summary judgment in favor of the Central Intelligence Agency and denying plaintiffs-appellants' motion for

partial summary judgment. The district court's opinion is published at 808 F. Supp. 2d 280 (D.D.C. 2011).

C. Related Cases.

This case has not previously been before this Court or any other court. Other than the two cases plaintiffs have identified as "potentially related," *see American Civil Liberties Union* v. *U.S. Department of Justice*, No. 12-CIV-0794 (S.D.N.Y.); *New York Times Co.* v. *U.S. Department of Justice*, No. 11-CIV-9336 (S.D.N.Y.), counsel is not aware of any related cases within the meaning of Circuit Rule 28(a)(1)(C).

Respectfully submitted,

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GLOSSARY

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CIA.. . . . . Central Intelligence Agency

FOIA. . . . . Freedom of Information Act

JA.. . . . . Joint Appendix

UAV.. . . . . Unmanned aerial vehicle

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BRIEF FOR APPELLEE

STATEMENT OF JURISDICTION

In this action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, plaintiffs invoked the jurisdiction of the district court pursuant to 5 U.S.C. § 552(a)(4)(B), 28 U.S.C. § 1331, and 5 U.S.C. §§ 701-706. Joint Appendix ("JA") 11. The district court entered summary judgment for defendant-appellee, the Central Intelligence Agency ("CIA" or "the Agency"), on September 9, 2011. JA 296. That

judgment became final on October 26, 2011, when the parties voluntarily dismissed the remaining defendants. JA 297-98. Plaintiffs filed a timely notice of appeal on November 9, 2011. JA 299; Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

This appeal arises out of the CIA's "*Glomar* response," refusing to confirm or deny the existence of any records responsive to the FOIA request that plaintiffs submitted to the CIA for records about any use of unmanned aerial vehicles (or "drones") for targeted killing, because stating whether or not any such records exist would reveal information protected from disclosure by both FOIA Exemption 1, 5 U.S.C. § 552(b)(1) (classified national defense and foreign policy matters), and FOIA Exemption 3, 5 U.S.C. § 552(b)(3) (matters specifically exempted from disclosure by another statute). The sole issue on appeal is whether the district court correctly held that the CIA had not previously officially acknowledged the existence of any responsive records and therefore had not waived its ability to refuse to confirm or deny the existence of such records.

STATUTES AND REGULATIONS

The pertinent statutory provisions are attached as an addendum to this brief.

STATEMENT OF THE CASE

Plaintiffs-appellants, American Civil Liberties Union and American Civil Liberties Union Foundation (collectively "plaintiffs"), filed a FOIA request on January 13, 2010, seeking records from the Department of Defense, the Department of Justice, the State Department, and the CIA, relating to any government use of unmanned aerial vehicles, or "drones," to carry out targeted killings. JA 89-104. Only the CIA's FOIA response is at issue in this appeal. JA 297-98.

On March 9, 2010, the CIA issued a *Glomar* response pursuant to FOIA Exemptions 1 and 3, indicating that it could neither confirm nor deny whether any responsive records exist.[1] JA 64. Plaintiffs filed an administrative appeal challenging the CIA's response. JA 67-79. Prior to the resolution of that administrative appeal, plaintiffs filed a complaint in district court on June 1, 2010. JA 10-20.[2]

The CIA subsequently moved for summary judgment, and plaintiffs cross-moved for summary judgment against the CIA. JA 5-6. On September 9, 2011, the

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[1] An agency decision's to neither confirm nor deny the existence of responsive records is referred to as a "'*Glomar* response,' taking its name from the *Hughes Glomar Explorer*, a ship built (we now know) to recover a sunken Soviet submarine, but disguised as a private vessel for mining manganese nodules from the ocean floor." *Bassiouni* v. *CIA*, 392 F.3d 244, 246 (7th Cir. 2004).

[2] Pursuant to the CIA's FOIA regulations, *see* 32 C.F.R. § 1900.42(c), the Agency stopped processing plaintiffs' administrative appeal once plaintiffs filed suit in district court. JA 84.

district court granted summary judgment in favor of the CIA. JA 265-95; JA 296. The court held that the Agency's *Glomar* response was authorized by FOIA Exemptions 1 and 3, and rejected plaintiffs' argument that the Agency had officially acknowledged the existence of responsive records that indicate CIA involvement in drone strikes and, thus, could not use a *Glomar* response. JA 265-95. Plaintiffs appeal. JA 299-300.

STATEMENT OF THE FACTS

A. Statutory Background

The Freedom of Information Act, 5 U.S.C. § 552, generally provides access to certain agency records and other information unless exempted by the statute. Section 552(a) provides that "[e]ach agency shall make available to the public" records in its possession unless the information is specifically exempted by one of Section 552(b)'s nine statutory exemptions. If one or more exemption applies, however, the agency is authorized to withhold the information at issue. 5 U.S.C. § 552(b).

In particular, FOIA Exemption 1, 5 U.S.C. § 552(b)(1), "protects matters 'specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and * * * [are] in fact properly classified pursuant to such Executive order.'" *Larson* v. *Department of State*, 565 F.3d 857, 861 (D.C. Cir. 2009) (quoting 5 U.S.C. § 552(b)(1))). Pursuant

to Executive Order 13,526, an agency may withhold classified information, including "intelligence activities," "intelligence sources or methods," and "foreign relations or foreign activities of the United States." *See* Exec. Order No. 13,526, § 1.4(c)-(d), 75 Fed. Reg. 707, 709 (Dec. 29, 2009); *see also Wolf* v. *CIA*, 473 F.3d 370, 375 (D.C. Cir. 2007).

FOIA Exemption 3, 5 U.S.C. § 552(b)(3), shields from disclosure records that are "specifically exempted from disclosure by statute * * * provided that such statute (A) 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). The Central Intelligence Agency Act of 1949, as amended, 50 U.S.C. § 403-4 *et seq.*, exempts the CIA from any law requiring the publication or disclosure of several categories of information relating to the CIA's operations, including its "functions." *See* 50 U.S.C. § 403g; *see also Goland* v. *CIA*, 607 F.2d 339, 351 (D.C. Cir. 1978) (holding that intelligence sources and methods are CIA "functions" that are exempt from disclosure). And the National Security Act of 1947, as amended, provides that the "Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure." *See* 50 U.S.C. § 403-1(i)(1).

In addition to withholding records that are exempt, an agency may also refuse to confirm or deny the existence or nonexistence of records responsive to a FOIA request if a particular FOIA exemption "would itself preclude the acknowledgment of such documents." *Minier* v. *CIA*, 88 F.3d 796, 800 (9th Cir. 1996); *accord Electronic Privacy Information Center* v. *NSA*, No. 11-5233, ___ F.3d ___, 2012 WL 1654943, at *2 (D.C. Cir. May 11, 2012); *Moore* v. *CIA*, 666 F.3d 1330, 1333 (D.C. Cir. 2011); *Wolf* v. *CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007); *Wilner* v. *NSA*, 592 F.3d 60, 71 (2d Cir. 2009); *see also* Exec. Order 13,526, § 3.6(a), 75 Fed. Reg. at 719 (expressly authorizing agency to "refuse to confirm or deny the existence or nonexistence of requested records whenever the fact of their existence or nonexistence is itself classified"). Such a response is referred to as a *Glomar* response.

If, however, the agency has previously officially disclosed whether or not there are records that would be responsive to the FOIA request at issue, then the agency is precluded from issuing a *Glomar* response with respect to those records. *Moore*, 666 F.3d at 1333; *Wolf*, 473 F.3d at 378-79; *Wilner*, 592 F.3d at 70 ("If the government has admitted that a specific record exists, a government agency may not later refuse to disclose whether that same record exists or not.").

A "strict test applies to claims of official disclosure." *Moore*, 666 F.3d at 1333 (internal quotation marks omitted). The FOIA plaintiff must demonstrate that the information requested is "as specific as the information previously released," "match[es] the information previously disclosed," and "already ha[s] been made public through an official and documented disclosure." *ACLU* v. *U.S. Department of Defense*, 628 F.3d 612, 620-21 (D.C. Cir. 2011). If the information has been previously officially disclosed, the agency must either (1) produce the records whose existence was previously disclosed or (2) establish that the contents of those records are exempt. *Moore*, 666 F.3d at 1333; *Wolf*, 473 F.3d at 379-80.

B. Plaintiffs' FOIA Request and Proceedings Below

On January 13, 2010, plaintiffs submitted a FOIA request to several U.S. Government agencies, including the CIA, seeking "records pertaining to the use of unmanned aerial vehicles ('UAVs') – commonly referred to as 'drones,' and including the MQ-1 Predator and MQ-9 Reaper – by the CIA and the Armed Forces for the purpose of killing targeted individuals." JA 48. Specifically, that request sought ten categories of records created after September 11, 2001, pertaining to:

1. The "legal basis in domestic, foreign and international law upon which unmanned aerial vehicles ('UAVs' or 'drones") can be used to execute targeting killings," including:

(a) "who may be targeted by a drone strike";

(b) "whether drones may be used against individuals who are selected or nominated as targets by a foreign government";

(c) limits on civilian casualties or "efforts that must or should be taken to minimize civilian casualties";

(d) "the verification, both in advance of a drone strike and following it, of the identify and status or affiliation of individuals killed";

(e) "where, geographically or territorially, drones may be used to execute targeted killings" and whether they may be used outside Afghanistan and Iraq;

(f) "whether drones can be used by the CIA or other government agencies aside from the Armed Forces"; and

(g) "whether and to what extent government contractors can be involved in planning or providing support for" the use of drones.

2. "[A]greements, understandings, cooperation or coordination between the U.S. and the governments of Afghanistan, Pakistan, or any other country regarding the use of drones to effect targeted killings in the territory of those countries";

3. "[T]he selection of human targets for drone strikes and any limits on who may be targeted by a drone strike";

4. "[C]ivilian casualties in drone strikes," including "measures regarding the determination of the likelihood of civilian casualties, measures to limit civilian casualties, and guidelines about when drone strikes may be carried out despite a likelihood of civilian casualties";

5. The "assessment or evaluation of individual drone strikes after the fact";

6. Any "geographical or territorial limits on UAVs to kill targeted individuals";

7. The "number of drone strikes that have been executed for the purpose of killing human targets, the location of each such strike, and the agency of the government or branch of the military that undertook each such strike";

8. The "number, identity, status, and affiliation of individuals killed in drone strikes," including: "the number (including estimates) of individuals killed in each drone strike"; the number of individuals "of each particular status or affiliation killed in each drone strike" (including "the number of individuals of unknown status");

9. "[W]ho may pilot UAVs, who may cause weapons to be fired from UAVs, or who may otherwise be involved in the operation of UAVs for the purpose of executing targeted killings"; and

10. The "training, supervision, oversight, or discipline of UAV operators and others involved in the decision to execute a targeted killing using a drone[.]" JA 51-54.[3]

The CIA responded to plaintiffs' request on March 9, 2010. JA 64. The Agency stated that, "[i]n accordance with section 3.6(a) of Executive Order 12958, as amended, the CIA can neither confirm nor deny the existence or nonexistence of records responsive to your request." JA 64.[4] Invoking FOIA Exemptions 1 and 3 as justification for its *Glomar* response, the CIA explained that, "[t]he fact of the existence or nonexistence of requested records is currently and properly classified and is intelligence sources and methods information that is protected from disclosure by section 6 of the CIA Act of 1949, as amended." JA 64.

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[3] Plaintiffs subsequently abandoned their request for the information in category 2 and in category 1, insofar as it requested records regarding the understanding, cooperation, or involvement of foreign governments in drone strikes. JA 268.

[4] Executive Order No. 12,958, 60 Fed. Reg. 19,825 (Apr. 17, 1995), was superseded by Executive Order 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009).

Plaintiffs filed an administrative appeal. JA 67-79. While that administrative appeal was pending, plaintiffs filed suit in the United States District Court for the District of Columbia. JA 10-20. Plaintiffs argued that neither Exemption 1 nor Exemption 3 applied to the requested information but, even if one or both exemptions did apply, the CIA was nevertheless precluded from issuing a *Glomar* response because the Agency had already officially acknowledged the existence of responsive records. Plaintiffs and the CIA cross-moved for summary judgment.

In support of its motion for summary judgment, the CIA filed a declaration by Mary Ellen Cole, the Information Review Officer for the CIA's National Clandestine Service. JA 21-45. That declaration explained that the National Clandestine Service is the directorate of the CIA "responsible for conducting the CIA's foreign intelligence and counterintelligence activities." JA 21. The Cole Declaration stated that "the CIA can neither confirm nor deny the existence or nonexistence of responsive records because the existence or nonexistence of any such records is a currently and properly classified fact that is exempt from release under FOIA exemptions (b)(1) and (b)(3)." JA 23. The declaration further explained that, if the CIA were to acknowledge the existence or nonexistence of responsive records, such acknowledgment "would reveal information that concerns intelligence activities, intelligence sources and methods, and U.S. foreign relations and foreign activities,

the disclosure of which reasonably could be expected to cause damage to the national security of the United States." JA 23.

The Cole Declaration also stated that "no authorized CIA or Executive Branch official has disclosed whether or not the CIA possesses records regarding drone strikes or whether or not the CIA is involved in drone strikes or has an interest in drone strikes." JA 43-44. The declaration further explained that, "[i]f the CIA was precluded from issuing a *Glomar* response to FOIA requests as a result of [unsourced statements or statements by former government officials], the U.S. Government's ability to protect classified information would be eviscerated, thereby causing significant and far reaching damage to the U.S. national security." JA 44.

C. District Court Decision

The district court held that the CIA was entitled to summary judgment, reasoning that the CIA's *Glomar* response was independently justified under both FOIA Exemptions 1 and 3. JA 295. With respect to Exemption 3, the court held that the agency had demonstrated that disclosing the existence or nonexistence of responsive records would reveal the "functions" of CIA personnel (including their involvement or noninvolvement in drone strikes and any related intelligence interest in drone strikes), and therefore that the agency properly invoked the CIA Act's protections. JA 271-74. The court also held that the *Glomar* response was justified

because the information sought relates to "intelligence sources and methods" protected by the National Security Act. JA 275-81. And the court held that the *Glomar* response was independently justified by FOIA Exemption 1 because the CIA had demonstrated that the existence or nonexistence of responsive records was properly classified. JA 289-94.

The district court rejected plaintiffs' argument that the Agency was precluded from issuing a *Glomar* response, concluding that the CIA had not previously officially acknowledged the existence of responsive records relating to the use of drones to target individuals. JA 289. To the extent plaintiffs relied on various statements by then-CIA Director Leon Panetta, the district court concluded that such statements "did not officially disclose the CIA's involvement in the drone strike program." JA 283; *id.* ("Even if Director Panetta were speaking squarely on the issue of drone strikes, he never acknowledged the CIA's involvement in such program."); JA 284 n.5 ("even if Director Panetta had confirmed that the drone program exists, the statements offered by Plaintiffs did not specifically acknowledge that the CIA is involved directly or indicate whether the CIA has responsive records"). Indeed, the district court noted that several of the statements on which plaintiffs relied expressly noted that the CIA had refused to acknowledge whether or not it has an intelligence interest or any involvement in drone strikes. JA 285 ("the article specified that the

CIA formally declined to acknowledge U.S. participation in the use of unmanned aerial vehicles in Pakistan"); JA 287 ("[T]he statements cited by Plaintiffs demonstrate that the CIA has carefully and specifically refused to acknowledge any role or interest in such program").

The district court concluded, therefore, that plaintiffs "fail[ed] to cite any official disclosure containing the *exact* information sought by Plaintiffs." JA 286; *see also* JA 287 ("Plaintiffs seek exactly what is *not* publicly available – an official CIA acknowledgment of the fact that it is or is not involved in the drone strike program."). The court found that all of the statements cited by plaintiffs "lacked a specific reference to any particular CIA action except that the CIA was involved in undefined, aggressive operations in Pakistan. In all of the statements cited by Plaintiffs, Director Panetta's references to 'we' or 'our' could have just as easily referred to the joint efforts of all U.S. military and civilian resources dedicated in Afghanistan and Pakistan." JA 286-87. The court concluded that "the tenor, deliberate ambiguity, and explicit disclaimers of involvement in targeted attacks in the statements cited by Plaintiffs" illustrate that the CIA has not acknowledged any role or intelligence interest in any drone program. JA 287.

Moreover, the district court noted that Director Panetta's statements certainly did *not* confirm the existence of any CIA records on the use of drones responsive to

plaintiffs' FOIA request. JA 288 (citing *Wolf*, 473 F.3d at 379, and *Wilner*, 592 F.3d at 70, for the proposition that an agency may not issue a *Glomar* response as to particular records when the agency has already officially acknowledged the existence of those particular records). The district court explained that, "[t]here is nothing in the various statements submitted by Plaintiffs which speaks to any records [in the 10 categories requested by plaintiffs]; only by inference from former Director Panetta's statements might one conclude that the CIA might have some kind(s) of documentation somewhere." JA 288.

Finally, the court emphasized that, under this Court's precedent concerning official disclosures, plaintiffs could not rely on "speculation or overt factual assertions of the CIA's involvement in drone strikes" that have been in media reports, nor on statements by unidentified or unofficial sources. JA 288-89; *see also* JA 293 ("[t]he fact that the public may already speak freely of the existence of drones, or speculate openly that such a program may be directed in part or in whole by the CIA," does not eliminate the requirement that the information must be officially acknowledged before it is required to be disclosed under FOIA).

SUMMARY OF ARGUMENT

Plaintiffs seek disclosure under FOIA from the CIA of records that relate to the use of unmanned aerial vehicles, or "drones," to conduct targeted killings of

individuals. CIA asserted a "*Glomar* response," refusing to confirm or deny whether records responsive to plaintiffs' FOIA request exist. A *Glomar* response is appropriate where, as here, acknowledging whether or not responsive records exist is itself covered by a FOIA exemption.

On appeal, plaintiffs have expressly waived any argument that the CIA improperly invoked FOIA Exemptions 1 and 3. Rather, plaintiffs argue only that the CIA's *Glomar* response is precluded because the Agency has officially acknowledged that it has records that would be responsive to their request. Plaintiffs also appear to narrow the scope of their request for purposes of this appeal, stating (Br. at 2) that the issue in this case concerns the Agency's *Glomar* response as it pertains to records relating to "the CIA's use of drones to carry out targeted killings," which appears no longer also to include records about the lethal use of drones by the Armed Forces and any involvement or intelligence interest by the CIA related thereto.

Regardless of whether plaintiffs seek records of any CIA involvement or intelligence interest in U.S. drone strikes generally, or the alleged use of drones by the CIA specifically, or both, the district court properly held that plaintiffs failed to establish official disclosure by the CIA of the existence of any records that would be responsive to such request and that the CIA therefore is not prevented from providing a *Glomar* response. Instead of citing any direct statements to that effect by an

authorized official, plaintiffs rely on vague and ambiguous statements by former CIA Director Leon Panetta and President Obama, none of which expressly acknowledges the information that plaintiffs seek here: that the CIA possesses responsive records relating to drone strikes.

Plaintiffs alternatively suggest that such an official disclosure may be inferred from those statements, particularly if those statements are considered in the context of media reports and statements by other government officials, which purportedly acknowledge the CIA's involvement in drone strikes. But an official disclosure cannot be premised on speculation or inference by the public or media, or on statements made by unauthorized or unofficial government sources. Accordingly, this Court should affirm the entry of summary judgment for the CIA based on the Agency's *Glomar* response.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's grant of summary judgment. *See Larson* v. *Department of State*, 565 F.3d 857, 862 (D.C. Cir. 2009).

ARGUMENT

I. THE DISTRICT COURT PROPERLY UPHELD THE CIA'S *GLOMAR* RESPONSE, CORRECTLY REJECTING PLAINTIFFS' CONTENTION THAT THE EXISTENCE OR NONEXISTENCE OF RESPONSIVE RECORDS HAD BEEN OFFICIALLY DISCLOSED.

A. A *Glomar* Response Is Appropriate When An Agency Can Neither Confirm Nor Deny The Existence Of Requested Records Without Revealing Information That Is Exempt From Disclosure Under FOIA.

The FOIA generally mandates disclosure of Government records unless the requested information falls within an enumerated exemption. *See* 5 U.S.C. § 552(b). Notwithstanding the FOIA's "liberal congressional purpose," the statutory exemptions must be given "meaningful reach and application." *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 152 (1989). "Requiring an agency to disclose exempt information is not authorized[.]" *Minier* v. *CIA*, 88 F.3d 796, 803 (9th Cir. 1996).

Agency decisions to withhold information under the FOIA are reviewed *de novo*, and the agency bears the burden of proving that the withheld information falls within the exemption it invokes. 5 U.S.C. § 552(a)(4)(B); *King* v. *Department of Justice*, 830 F.2d 210, 217 (D.C. Cir. 1987). Generally, an agency may meet its burden under FOIA by submitting a declaration that "describe[s] the justifications for nondisclosure with reasonably specific detail [and] demonstrate[s] that the information withheld logically falls within the claimed exemptions." *Hunt* v. *CIA*,

981 F.2d 1116, 1119 (9th Cir. 1992). A court may grant summary judgment to the Government entirely on the basis of information set forth in such an affidavit, so long as the affidavit is "' not controverted by either contrary evidence in the record nor by evidence of agency bad faith.'" *Larson*, 565 F.3d at 862 (quoting *Miller* v. *Casey*, 730 F.2d 773, 776 (D.C. Cir. 1984)). "'Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears 'logical' or 'plausible.'" *Id.* (quoting *Wolf* v. *CIA*, 473 F.3d 370, 374-75 (D.C. Cir. 2007)).

The same standard applies when the Government issues a *Glomar* response, refusing to acknowledge whether or not responsive records exist: in such circumstances, the agency's affidavit must explain how the fact of the existence or non-existence of responsive records constitutes information protected by a FOIA exemption. *Phillippi* v. *CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976); *Electronic Privacy Information Center*, 2012 WL 1654943 at *2; *Wolf*, 473 F.3d at 374 ("In determining whether the existence of agency records *vel non* fits a FOIA exemption, courts apply the general exception review standard established in non-*Glomar* cases.").

A *Glomar* response is appropriate where, as here, confirming or denying whether responsive records exist would itself cause the harm that a given FOIA exemption is intended to prevent. *See, e.g., Electronic Privacy Information Center*,

2012 WL 1654943 at *2; *Wilner* v. *NSA*, 592 F.3d 60, 68 (2d Cir. 2009) ("The *Glomar* doctrine is well settled as a proper response to a FOIA request because it 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."), *cert. denied*, 131 S. Ct. 387 (2010); *Bassiouni* v. *CIA*, 392 F.3d 244, 246 (7th Cir. 2004) ("Every appellate court to address the issue has held that the FOIA permits the [agency] to make a '*Glomar* response' when it fears that inferences * * * or selective disclosure could reveal classified sources or methods of obtaining foreign intelligence."); *Minier*, 88 F.3d at 800 ("[A] government agency may issue a 'Glomar Response,' that is, refuse to confirm or deny the existence of certain records, if the FOIA exemption would itself preclude the acknowledgment of such documents."); *Gardels* v. *CIA*, 689 F.2d 1100, 1103 (D.C. Cir. 1982) ("[A]n agency may refuse to confirm or deny the existence of records where to answer the FOIA inquiry would cause harm cognizable under an FOIA exception.").

"In reviewing an agency's *Glomar* response, this Court exercises caution when the information requested 'implicat[es] national security, a uniquely executive purview.'" *Electronic Privacy Information Center*, 2012 WL 1654943 at *2 (quoting *Center for National Security Studies* v. *Department of Justice*, 331 F.3d 918, 926-27

(D.C. Cir. 2003)). Indeed, the Supreme Court has cautioned that "weigh[ing] the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising" national security is a task best left to the Executive Branch. *CIA* v. *Sims*, 471 U.S. 159, 180 (1985); *see also Center for National Security Studies*, 331 F.3d at 928 ("[T]he judiciary is in an extremely poor position to second-guess the executive's judgment in [the] area of national security."); *Halperin* v. *CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980) ("Judges * * * lack the expertise necessary to second-guess * * * agency opinions in the typical national security FOIA case.").

As a result, in the FOIA context, courts have "consistently deferred to executive affidavits predicting harm to the national security, and have found it unwise to undertake searching judicial review." *Center for National Security Studies*, 331 F.3d at 927; *see also Wilner*, 592 F.3d at 69 ("The '[a]ffidavits submitted by an agency are accorded a presumption of good faith."); *Students Against Genocide* v. *Department of State*, 257 F.3d 828, 840 (D.C. Cir. 2001) ("[S]ubstantial weight [is] owed to agency explanations in the context of national security, to qualify for withholding under Exemptions 1 and 3."); *Salisbury* v. *United States*, 690 F.2d 966, 970 (D.C. Cir. 1982) (noting that agencies possess "unique insights" into the adverse effects that might result from public disclosure of classified information); *Gardels*,

689 F.2d at 1104-05 ("Once satisfied that proper procedures have been followed and that the information logically falls into the exemption claimed, the courts 'need not go further to test the expertise of the agency, or to question its veracity when nothing appears to raise the issue of good faith.'").

The existence of media reports based on unsourced comments and other unofficial statements that relate to the information that a FOIA requester seeks from the Government does not diminish the importance of a *Glomar* response by an agency, particularly in the area of national security and foreign affairs. That is because, "[a]s a practical matter, foreign governments can often ignore unofficial disclosures of CIA activities that might be viewed as embarrassing or harmful to their interests." *See Wilson* v. *CIA*, 586 F.3d 171, 186 (2d Cir. 2009). Official government acknowledgment of whether media or other unofficial claims are accurate or not, is a different matter. *See Afshar* v. *Department of State*, 702 F.2d 1125, 1130-31 (D.C. Cir. 1983) ("official acknowledgment by an authoritative source might well be new information that could cause damage to the national security"); *ACLU*, 628 F.3d at 625 (recognizing "that even if information exists in some form in the public domain that does not mean that official disclosure will not cause harm cognizable under a FOIA exemption").

B. The District Court Correctly Determined That The CIA's *Glomar* Response Here Was Proper Under FOIA Exemptions 1 And 3.

The district court concluded that the CIA's affidavit here was sufficient to establish that the Government's *Glomar* response was justified under both Exemptions 1 and 3. JA 270-94. On appeal, plaintiffs do not dispute that FOIA Exemptions 1 and 3 may apply to the information at issue, or that a *Glomar* response is proper where revealing the existence or nonexistence of responsive records would disclose information protected by those exemptions. *See* Plaintiffs' Opening Brief ("Br.") at 8 n.5 ("Before the district court, Plaintiffs argued that * * * the CIA's invocation of the Glomar doctrine was unlawful because the mere existence of the drone program was not protected by any FOIA exemption. Plaintiffs do not pursue this argument here[.]"); *see also* Br. at 15 ("assuming" the "existence of the [alleged] drone program" is protected under Exemptions 1 and/or 3). Their sole claim is that the CIA officially disclosed information that precludes its reliance on *Glomar*.

C. The Agency Has Not Officially Disclosed The Existence Or Nonexistence Of Records That Would Be Responsive To Plaintiffs' FOIA Request.

The sole issue plaintiffs raise on appeal is whether, assuming that the district court correctly decided that FOIA Exemptions 1 and 3 could justify the CIA's *Glomar* response, the CIA is nonetheless precluded from invoking the *Glomar*

response because the Agency has officially acknowledged the existence of CIA records concerning the lethal use of drones. Although plaintiffs' FOIA request sought several discrete categories of records concerning the lethal use of drones "by the CIA and the Armed Forces," JA 48, on appeal plaintiffs appear to narrow the scope of their request to "the CIA's use" of lethal drones. Br. at 2. In any event, regardless of whether plaintiffs maintain their broader request or now focus only on a narrow characterization, their contention that the CIA cannot use a *Glomar* response because it has officially acknowledged an involvement or intelligence interest in drone strikes (and records related thereto) is without merit. Plaintiffs misconstrue both the nature and scope of the "official acknowledgment" doctrine, as well as various statements that they contend constitute official disclosures.

"[W]hen information has been 'officially acknowledged,' its disclosure may be compelled even over an agency's otherwise valid exemption claim." *Fitzgibbon* v. *CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990). This Court, however, has recognized that "'[a] strict test applies to claims of official disclosure.'" *Moore* v. *CIA*, 666 F.3d at 1333 (quoting *Wilson* v. *CIA*, 586 F.3d 171, 186 (2d Cir. 2009)). To constitute an official disclosure, "(1) the information requested must be as specific as the information previously released; (2) the information requested must match the information previously disclosed; and (3) the information requested must already

have been made public through an official and documented disclosure." *ACLU* v. *U.S. Department of Defense*, 628 F.3d 612, 620-21 (D.C. Cir. 2011).

As a result, "[a] plaintiff asserting a claim of prior disclosure bears the burden of pointing to 'specific information in the public domain that appears to duplicate that being withheld.'" *Electronic Privacy Information Center*, 2012 WL 1654943 at *4 (quoting *Wolf*, 473 F.3d at 378); *Moore*, 666 F.3d at 1333 ("in order to overcome an agency's *Glomar* response based on an official acknowledgment, the requesting plaintiff must pinpoint an agency record that both matches the plaintiff's request and has been publicly and officially acknowledged by the agency"); *Wilner*, 592 F.3d at 70 (agency is only "precluded from making a *Glomar* response if the existence or nonexistence of the *specific records* sought by the FOIA request has been the subject of an official public acknowledgment") (emphasis added). Plaintiffs have failed to satisfy this exacting standard to foreclose the CIA's *Glomar* response.

Moreover, an agency may be found to have waived its ability to issue a *Glomar* response only if a disclosure is "official and documented." *See ACLU*, 628 F.3d at 620-21. A statement by an unnamed agency official cannot constitute an official disclosure. *See Wilson*, 586 F.3d at 186 ("statements made by a person not authorized to speak for the Agency" do not constitute an official disclosure). Also, a former official of an agency is not authorized to make an official disclosure on the agency's

behalf. *See Afshar*, 702 F.2d at 1134; *cf. Frugone* v. *CIA*, 169 F.3d 772, 774 (D.C. Cir. 1999) (noting that public disclosure by OPM does not foreclose another federal agency, the CIA, from issuing a *Glomar* response). And speculation by journalists or members of the public cannot constitute official disclosure, "no matter how widespread." *Wolf*, 473 F.3d at 378; *see also Electronic Privacy Information Center*, 2012 WL 1654943 at *4 ("national media are not capable of waiving [an agency's] statutory authority to protect information").

Yet plaintiffs' official disclosure argument here rests heavily on just these types of statements. *See, e.g.,* Br. at 30-39. Plaintiffs acknowledge (Br. at 36), as they must, that these statements may not be used to support a claim of official disclosure. Plaintiffs nevertheless weave them into nearly every page of their argument, attempting to bolster a case that rests upon nothing more than a few stray statements of former CIA Director Leon Panetta and remarks made by President Obama (that post-date the district court's decision) – none of which officially acknowledges the existence of any responsive records.

1. Director Panetta's Statements Do Not Acknowledge The CIA's Participation In Drone Strikes Nor The Existence Of Such Records.

Plaintiffs first rely (Br. at 16-17) on a statement made by then-CIA Director Panetta before the Pacific Council on International Policy on May 18, 2009, during a question and answer session:

> Q: [Audience member] . . . You mentioned that you believe the strategy in Pakistan is working – the President's strategy in Pakistan in the tribal regions, which is the drone – the remote drone strikes. You've seen the figures recently from David Kilcullen and others that the strikes have killed 14 midlevel operatives and 700 civilians in collateral damage. And his assessment as a counterinsurgency expert is it's creating more anti-Americanism than it is disrupting al-Qaeda networks.
>
> And then secondly, President Musharraf told me when he was in office that the Pakistan nukes are safer than those in the former Soviet Union. Do you agree with that? Safely guarded – more safely guarded?
>
> A: [Panetta] . . . On the first issue, obviously because these are covert and secret operations I can't go into particulars. I think it does suffice to say that these operations have been very effective because they have been very precise in terms of the targeting and it involved a minimum of collateral damage. I know that some of the – sometimes the criticisms kind of sweep into other areas from either plane attacks or attacks from F-16s and others that go into these areas, which do involve a tremendous amount of collateral damage. And sometimes I've found in discussing this that all of this is kind of mixed together. But I can assure you that in terms of that particular area, it is very precise and it is very limited in terms of collateral damage and, very frankly, it's the only game in town in terms of confronting and trying to disrupt the al-Qaeda leadership.

JA 114-15.

The district court properly concluded that this statement "did not officially disclose the CIA's involvement in the drone strike program." JA 283. The court explained that, "[e]ven if Director Panetta were speaking squarely on the issue of drone strikes, he never acknowledged the CIA's involvement in such program. That Director Panetta acknowledged that such a program exists and he had some knowledge of it, or that he was able to assess its success, is simply not tantamount to a specific acknowledgment of the CIA's involvement in such program, nor does it waive the CIA's ability to properly invoke Glomar." JA 283. Indeed, Director Panetta's statement does not even explicitly acknowledge whether the U.S. Government is involved in such operations. Moreover, Director Panetta's statement does not confirm whether or not the CIA possesses responsive records related to any drone strikes, which is the relevant inquiry here, *see Moore*, 666 F.3d at 1333-34 ("in order to overcome an agency's *Glomar* response based on an official acknowledgment, the requesting plaintiff must pinpoint an agency record that both matches the plaintiff's request and has been publicly and officially acknowledged by the agency"); *Wolf*, 473 F.3d at 379 (holding that plaintiff was entitled to disclosure only of the specific records, the existence of which was previously disclosed); *Wilner*, 592 F.3d at 70 ("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.").[5]

Plaintiffs contend that the district court's interpretation of Director Panetta's remarks "defies logic." Br. at 21. They argue that because the "sitting CIA Director" "referenced the existence" of drone strikes in Pakistan, his statement "surely comprises an acknowledgment." Br. at 21. Yet plaintiffs do not even specify exactly what that statement purportedly acknowledges. Plaintiffs also ignore the fact that Director Panetta never even mentioned the term "drones" or "unmanned aerial vehicles" in his answer. Even if one accepts plaintiffs' reading of Director Panetta's statement as referring to drone strikes, however, at most he recognizes that drone strikes occur in Pakistan; he says nothing about whether the CIA possesses records about such drone strikes or whether the CIA is involved or has an intelligence interest in such drone strikes.

Moreover, as explained in the Cole Declaration, and recognized by the district court, whether or not the CIA is involved in and maintains records relating to drone

[5] Plaintiffs dispute the relevant standard, Br. at 23, but this Court's precedent clearly establishes that plaintiffs must demonstrate that the existence of a specific record has already been officially disclosed. In any event, this dispute is not determinative in this case because the cited statements do not satisfy either standard: they do not establish the existence of specific CIA records concerning any drone strikes, nor do they establish that the CIA is involved in any drone strikes.

strikes is a classified fact that is covered by Exemption 1. JA 23, 26-34; JA 290. Plaintiffs' suggestion that Director Panetta intended to disclose what would be classified information (based on plaintiffs' reading) at this question and answer session – notwithstanding the district court's more plausible interpretation – flies in the face of the Second Circuit's admonition that "the law will not infer official disclosure of information classified by the CIA." *Wilson*, 586 F.3d at 186.

Plaintiffs next rely on an article in *The Washington Post* from March 2010, in which Director Panetta is quoted as referring to "the most aggressive operation that CIA has been involved in in our history," and stating that "[t]hose operations are seriously disrupting al-Qaida." Br. at 17; JA 124. But plaintiffs misstate the article, asserting that "Mr. Panetta *described the drone strikes* as 'the most aggressive operation that CIA has been involved in * * *.'" Br. at 17 (emphasis supplied). The article itself did not put it that way, referring instead to Director Panetta's description of "the CIA's war against extremists in Pakistan" (a description which itself is merely the reporter's characterization, not an official disclosure). JA 124. Plaintiffs speculate that the "operations" to which Director Panetta referred must be drone strikes, because, as they construe the article, it "is largely about the CIA's drone program." Br. at 22. But Director Panetta did not specify what CIA operations he was discussing, or state that he was referring to drone strikes. Indeed, even the article

did not attribute such meaning to his statements: the article referred to "[r]elentless attacks" and "an increasingly aggressive campaign * * * including more frequent strikes," but did not state that Director Panetta was commenting specifically about drone strikes, much less about drone strikes allegedly carried out by the CIA. JA 124. In addition, as the district court noted, given that "the article specified that the CIA formally declined to acknowledge U.S. participation in the use of unmanned aerial vehicles in Pakistan," "it would be contradictory under the circumstances to read Director Panetta's reference to the CIA operations as a specific reference to drone strikes." JA 285.

Plaintiffs' reliance on articles in which Director Panetta allegedly "acknowledged the targets of particular drone strikes" (Br. at 17) fares no better. Plaintiffs point to a March 2010 *Wall Street Journal* article, which quotes Director Panetta stating that, "'[w]e now believe that al-Yemeni, who was one of the top 20 [al Qaeda leaders], was one of those who was hit,'" and praising the fact that "'we g[o]t a high value target.'" Br. at 17-18 (quoting JA 127-28). For further support, plaintiffs then cite an interview with ABC News, in which Director Panetta stated that, "we are engaged in the most aggressive operations in the history of the CIA in that part of the world," and then subsequently noted that "[w]e just took down number three in [Al Qaida's] leadership a few weeks ago." Br. at 18; JA 134. Again,

however, Director Panetta did not acknowledge any specific CIA operations, much less state that the CIA was involved in drone strikes. Director Panetta's use of the word "we" did not necessarily refer to the CIA, specifically; the district court correctly recognized that it "could have just as easily referred to the joint efforts of all U.S. military and civilian resources dedicated in Afghanistan and Pakistan." JA 287.

Plaintiffs also rely on statements made by Panetta after the district court's opinion in this case and when he was no longer the Director of the CIA (Panetta became Secretary of Defense on July1, 2011). Br. at 19-21. Even assuming that this Court may take judicial notice of those statements, those statements do not officially acknowledge that the CIA possesses responsive records concerning drone strikes. Plaintiffs cite an interview in which Panetta "nodded in response" to the interviewer's statement, "'You killed al-Awlaki,'" Br. at 20. Although plaintiffs construe Panetta's nodding as a substantive response, it is at least as plausibly interpreted as merely acknowledging the interviewer's statement, while Panetta was waiting for the interviewer to pose a question. *See* 60 Minutes, *The Killing of Anwar al-Awlaki* (CBS Jan.29, 2012), *available at* http://bit.ly/wEx57M. But even assuming plaintiffs correctly interpreted Panetta's nod as a signal of agreement, that does not address whether al-Awlaki was killed in a drone strike, let alone whether the CIA was

involved in any such strike. As noted, Panetta was serving as Secretary of Defense, *not* as CIA Director, both at the time of al-Awlaki's death and at the time of the interview. Although the media has reported that al-Awlaki was killed in a drone strike, *see, e.g.,* Br. at 32-35 & n. 20, 22 (citing news articles), Panetta's gesture in no way constitutes an official acknowledgment that the CIA possesses responsive records regarding drone strikes.

Plaintiffs further rely on Panetta's statement in that same interview in which he referred to a "recommendation [to the President] that the CIA Director makes in my prior role * * * ." *See* Br. at 20-21. Contrary to plaintiffs' contention, that statement plainly says nothing about drone strikes.

Plaintiffs quote a statement by former Director Panetta, after he became Secretary of Defense, in which he stated: "'I have a hell of a lot more weapons available to me in this job than I had at the CIA, although the Predators aren't bad.'" Br. at 19. The same article quoted him as saying that he "'was very familiar with [the use of Predators] in my past job.'" Br. at 20. Contrary to plaintiffs' suggestion, however, those vague statements do not constitute official confirmation of CIA records relating to drone strikes. As for his aside of "although Predators aren't bad," this statement is too ambiguous to constitute an official disclosure that the CIA possesses responsive records concerning drone strikes. And even if this comment

could be read as acknowledging that Predators were "available" to the CIA, it does not acknowledge that the Agency uses them for lethal purposes, as opposed to surveillance and intelligence-gathering. Indeed, even the article acknowledged that "Panetta stopped short of confirming that CIA Predators were conducting airstrikes." *U.S.: Defense Secretary Refers to CIA Drone Use*, L.A. Times, Oct. 7, 2011, *available at* http://lat.ms/roREDq.

In sum, former Director Panetta's statements did not officially acknowledge whether or not the CIA possesses responsive records relating to drone strikes.

2. The President's Statements Do Not Officially Acknowledge That The CIA Conducts Drone Strikes Or Possesses Records Concerning Drone Strikes.

Plaintiffs also refer to several statements made by President Obama that post-date the district court's decision. Br. at 24-26. As with statements made by Panetta, however, these statements do not officially acknowledge that the CIA possesses responsive records regarding drone strikes.

Plaintiffs first rely upon a video forum, during which the President "acknowledged that the *United States* carries out targeted killings using drones in Pakistan." Br. at 24 (emphasis added). That statement does not disclose whether or not the CIA carries out drone strikes or maintains responsive records regarding drone strikes. The remarks did not even mention the CIA. *See President Obama Hangs*

Out With America, White House Blog (Jan. 30, 2012), http://www.whitehouse.gov/blog/2012/01/30/president-obama-hangs-out-america.

Plaintiffs speculate that the President must have been speaking about CIA involvement in drone strikes. They base this inference upon the President's reference to drone strikes in the Federally Administered Tribal Areas of Pakistan, and cite media reports stating that the Department of Defense does not conduct drone strikes in Pakistan. Br. at 25 & n. 15. It is precisely this sort of unbridled speculation that is insufficient to support a claim of official disclosure. *See Wilson*, 586 F.3d at 186 ("the law will not infer official disclosure"); *Wolf*, 473 F.3d at 378 (insisting "on exactitude" before finding an official disclosure).

Indeed, plaintiffs' argument piles inference upon inference. They base their contention that the Department of Defense does not conduct drone strikes in Pakistan not upon any official sources, but upon unsourced statements in two media reports. *See* Br. at 25 n.15; *'US Drone' Hits Pakistan Funeral*, Al Jazeera, June 24, 2009, http://aje.me/yKZJWO (quoting an unnamed Department of Defense official as stating that "'[t]here are no US military strike operations being conducted in Pakistan'"); Karen DeYoung, *U.S. Launches Airstrike Against al-Qaeda Affiliate in Yemen*, Wash. Post, Jan. 31, 2012, http://wapo.st/zSgzxq (stating, without reference to any source, that "the CIA has had sole responsibility for hundreds of drone strikes

[in Pakistan]"). But neither the statement of an unnamed agency official nor the unattributed statement of a newspaper reporter can constitute official disclosure. *See Wilson*, 586 F.3d at 186 ("statements made by a person not authorized to speak for the Agency" do not constitute an official disclosure); *ACLU*, 628 F.3d at 621-22 ("'it is one thing for a reporter or author to speculate or guess that a thing may be so or even, quoting undisclosed sources, to say that it is so; it is quite another thing for one in a position to know of it officially to say that it is so."); *Afshar*, 702 F.2d at 1130 ("even if a fact * * * is the subject of widespread media and public speculation" it does not constitute official acknowledgment).

Moreover, even if plaintiffs could demonstrate an official disclosure regarding Department of Defense activities in Pakistan, which they cannot, it would require an additional degree of speculation to infer that the President must have intended to disclose that the CIA, as opposed to some other agency or entity of the United States, is involved in drone strikes. Accordingly, plaintiffs' interpretation of President Obama's statement as acknowledging the CIA's role in drone strikes in Pakistan is based on a series of unofficial speculations and is not an official disclosure of CIA involvement as plaintiffs claim, let alone an acknowledgment as to the existence of any CIA records about the same.

Plaintiffs also attempt to find official disclosure in two statements by the President referring generally to al-Awlaki's death. But plaintiffs' characterization of those statements as acknowledging "particular CIA drone strikes" (Br. at 26) is misleading. The President's statements make no reference to either the CIA or to drone strikes. They discuss al-Awlaki's death as a "significant milestone in the broadr effort to defeat al Qaeda and its affiliates," and laud the "intelligence community" for its efforts in that regard. It is plaintiffs – not the President – who inject references to supposed CIA drone strikes, based upon only media reports.

Moreover, President Obama's general statement that al-Awlaki's death was "'a tribute to our intelligence community,'" Br. at 26, is unavailing. This statement does not explicitly identify the CIA, nor does it mention drone strikes. The President's comments regarding the "intelligence community" (which is made up of seventeen federal organizations, not just the CIA) may well have been intended to praise the community for its role in collecting and analyzing intelligence that may have contributed to this effort. The President's statements do not constitute official disclosure of whether or not the CIA possesses responsive records concerning drone strikes.

Finally, plaintiffs argue that even if none of these statements (or those of Director Panetta) by themselves constitutes official acknowledgment of CIA

responsive records concerning drone strikes, they should be considered collectively. *See* Br. at 26-29. Plaintiffs suggest that the number of consistent statements counsels in favor of finding that there has been an official acknowledgment. Br. at 27. But the volume of disclosures, from whatever source, is not the test for official disclosure, and plaintiffs fail to cite any "official acknowledgment" FOIA cases in support of that proposition. *Cf. Wilson*, 586 F.3d at 186 (requiring official disclosure to be by authorized official); *Wolf*, 473 F.3d at 378 (speculation, "no matter how widespread," cannot constitute official disclosure). More significantly, however, even if considered collectively, those statements do not explicitly acknowledge that the CIA has responsive records regarding drone strikes.

3. Statements By Former CIA Officials Or Unidentified Government Officials Cannot Waive the Agency's Ability To Refuse To Confirm Or Deny The Existence Of Responsive Records.

Plaintiffs also cite media reports containing statements by former CIA officials and unidentified government officials. Although plaintiffs concede that none of these statements alone constitutes an official acknowledgment, Br. at 30, 36, they nevertheless contend that, collectively, these statements "make the CIA's Glomar invocation in this case particularly suspect, and particularly unseemly, and that they warrant particularly searching review by this Court." Br. at 30. Plaintiffs, however,

fail to meet their burden of showing that such statements officially acknowledge the existence of any CIA records regarding drone strikes.

Plaintiffs cite remarks made in 2011 by the CIA's *former* Acting General Counsel, John Rizzo, *see* Br. at 30, but plaintiffs readily acknowledge that "Mr. Rizzo was not in the employ of the CIA when he made these comments, and * * * plaintiffs do not suggest that his comments, taken alone, establish official acknowledgement [sic]." Br. at 30. Indeed, the district court recognized in rejecting plaintiffs' reliance on Mr. Rizzo's statements, that such statements by a former official cannot constitute official acknowledgment. *See* JA at 293 n. 6; *see also Afshar*, 702 F.2d at 1134 (holding that disclosures in books written by former CIA officials could not be treated as "official disclosures"); *Wilson* v. *CIA*, 586 F.3d 171, 189 (2d Cir. 2009) ("A former employee's public disclosure of classified information cannot be deemed an 'official' act of the [Central Intelligence] Agency."); *Phillippi* v. *CIA*, 655 F.2d 1325, 1330-31 (D.C. Cir. 1981) (information reported in book by former CIA Director was not official disclosure). For that reason, plaintiffs' reliance (Br. at 31) on comments by former Director of National Intelligence Dennis Blair is also misplaced.

Plaintiffs contend that the White House's counterterrorism advisor, John Brennan, has disclosed the CIA's involvement in drone strikes, citing an article in the *Los Angeles Times*. *See* Br. at 31 & n.18. But that article made clear that Mr.

Brennan said no words to that effect; to the contrary, the author made clear that he was inferring such meaning: "'Brennan *presumably* was referring to covert strikes by the CIA and the Joint Special Operations Command[.]'" Br. at 31 (emphasis added). Nor did Mr. Brennan's recent remarks on the President's counterterrorism strategy acknowledge one way or the other the existence of any CIA intelligence interest in, or involvement in, drone strikes. *See The Ethics and Efficacy of the President's Counterterrorism Strategy*, Transcript of Remarks by John O. Brennan (April 30, 2012), *available at* http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy. Although Mr. Brennan officially acknowledged that the United States conducts drone strikes, *id.* ("the United States Government conducts targeted strikes against specific al-Qa'ida terrorists, sometimes using remotely piloted aircraft, often referred to publicly as drones"), he did not reveal whether the *CIA* (as opposed to another federal entity such as the Department of Defense) is involved in these drone strikes, or any other specific details. *Id.*

Plaintiffs also cite a number of media reports, quoting various unnamed and/or former government officials, that allegedly discuss the CIA's involvement in drone strikes. *See* Br. at 31-36. Plaintiffs argue that the "sheer volume of these statements * * * *suggests* an official policy on the part of the agency and, more to the point, underlines that the existence of the CIA's drone strike program has been disclosed."

Br. at 36-37 (emphasis added). That argument, however, has been repeatedly rejected by the courts. As this Court has recognized, "[a]n agency's official acknowledgment * * * cannot be based on mere public speculation, *no matter how widespread*." *Wolf*, 473 F.3d at 378 (emphasis added); *see also Electronic Privacy Information Center*, 2012 WL 1654943 at *4 n.5 ("national media are not capable of waiving [an agency's] statutory authority to protect information"); *ACLU*, 628 F.3d at 621-22 ("It is one thing for a reporter or author to speculate or guess that a thing may be so or even, quoting undisclosed sources, to say that it is so; it is quite another thing for one in a position to know of it officially to say that it is so"); *Fitzgibbon*, 911 F.2d at 765 (recognizing "a critical difference between official and unofficial disclosures"); *Hudson River Sloop Clearwater, Inc.* v. *Department of Navy*, 891 F.2d 414, 421 (2d Cir. 1989) (statements made by a person without authority to speak for the agency cannot constitute official disclosure).

These binding precedents are based upon the principle that, even if there is speculation about a fact, unless an agency officially confirms that fact, the public does not know whether it is so. *See Wilson*, 586 F.3d at 186 ("As a practical matter, foreign governments can often ignore unofficial disclosures of CIA activities that might be viewed as embarrassing or harmful to their interests."); *Afshar*, 702 F.2d at 1130-31 ("official acknowledgment by an authoritative source might well be new

information that could cause damage to the national security"); *ACLU*, 628 F.3d at 625 (recognizing "that even if information exists in some form in the public domain that does not mean that official disclosure will not cause harm cognizable under a FOIA exemption"). Indeed, if the law were to the contrary, agencies would be required to confirm sensitive and/or classified information in a FOIA case whenever an inadvertent disclosure or unauthorized leak of the requested information had previously occurred. *Cf. Frugone*, 169 F.3d at 775 (if another agency's disclosure could constitute official acknowledgment on behalf of the CIA, then "those with no duties related to national security - could obligate agencies with responsibility in that sphere to reveal classified information"). Agencies would likewise be forced to issue official denials in FOIA cases whenever the plaintiffs cited false reports from unofficial sources about purportedly classified operations.

Even in cases where there arguably has been some limited official acknowledgment of the information relating to the subject-matter at issue, courts have nevertheless upheld the Government's use of the *Glomar* response. As the Second Circuit explained in *Wilner*, "an agency may invoke the *Glomar* doctrine in response to a FOIA request regarding a publicly revealed matter. 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." 592 F.3d at 70; *accord Electronic Privacy Information Center*, 2012 WL 1654943 at *4 (rejecting plaintiff's argument that same information requested under FOIA had been published on agency's website); *Wolf*, 473 F.3d at 379 (holding that plaintiffs were entitled to disclosure only of the specific records whose existence had been previously disclosed, but not to any others concerning the same subject). Plaintiffs nowhere assert that the CIA has officially disclosed the existence of particular records that fall within their FOIA request.

Finally, plaintiffs argue that because "the use of drones is not a secret method of killing," Br. at 37, "the CIA's claim that the Glomar invocation serves a legitimate purpose" is undermined, Br. at 39. Plaintiffs' argument is wide of the mark. Notwithstanding widespread reports that drone strikes occur, the CIA has never confirmed or denied whether it has any involvement or intelligence interest in any of those drone strikes, or whether it maintains any records relating to those drone strikes. Thus, responding to plaintiffs' FOIA request would, in fact, reveal information that has *not* been officially disclosed, *i.e.*, whether the CIA has responsive records regarding the use of drone strikes.

The Court should reject plaintiffs' attempt to cobble together an official CIA acknowledgment by combining together the substance of various news reports, unofficial statements, and imprecise statements by former CIA Director Panetta and

President Obama. This Court has repeatedly recognized that there is a "strict test" for official acknowledgment. *See*, *e.g*, *Moore*, 666 F.3d at 1333. That "insistence on exactitude recognizes 'the Government's vital interest in information relating to national security and foreign affairs.'" *Wolf*, 473 F.3d at 378. Plaintiffs' very efforts to try to piece together such an official acknowledgment from these disparate sources demonstrate that there has not, in fact, been any prior, truly official acknowledgment within the meaning of that longstanding precedent. Indeed, it is just such an official acknowledgment that plaintiffs seek to obtain, for the first time, from this suit.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel for appellee hereby certifies that the foregoing Brief for Appellee satisfies the requirements of Federal Rule of Appellate Procedure 32(a)(7) and D.C. Circuit Rule 32(a). The brief was prepared in Times New Roman, 14-point font, and, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(2), contains 9,740 words according to the count of Corel Wordperfect X5.

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CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2012, I served the foregoing Brief for Appellee by causing an electronic copy to be served on the Court via the ECF system and eight paper copies via hand delivery, and by causing one copy to be served on the following counsel via the ECF system:

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ADDENDUM

5 U.S.C. § 552:

(a) Each agency shall make available to the public information as follows:

* * *

(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

* * *

(b) This section does not apply to matters that are--

(1) (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;

* * *

(3) 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

(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.