IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN CIVIL LIBERTIES UNION, et al.,	
Plaintiffs,	
v.	Civil Action No. 1:10-cv-00436-RMC
DEPARTMENT OF JUSTICE, et al.,	
Defendants.	

DEFENDANT CIA'S MOTION FOR SUMMARY JUDGMENT

Defendant United States Central Intelligence Agency ("the CIA") hereby moves for summary judgment pursuant to Fed. R. Civ. P. 56(b) and Local Rule 7(h)(2).

Dated: October 1, 2010

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT CIA'S MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

INTRODUCTION 1

BACKGROUND 1

ARGUMENT 4

I. THE APPLICABLE FOIA AND SUMMARY JUDGMENT STANDARDS 4

II. THE CIA PROPERLY DECLINED TO CONFIRM OR DENY THE EXISTENCE OR NONEXISTENCE OF RECORDS RESPONSIVE TO PLAINTIFFS' REQUEST PURSUANT TO EXEMPTIONS 1 AND 3 7

A. The CIA's Glomar Response Is Proper Under Exemption 1 9

1. An Original Classification Authority Has Classified the Information 10

2. The United States Owns, Produces, or Controls the Information 11

3. The Information Falls Within the Protected Categories Listed in Section 1.4 of E.O. 13526. 11

4. An Original Classification Authority Has Properly Determined that the Unauthorized Disclosure of the Requested Information Could Be Expected to Result in Damage to the National Security and Has Identified that Damage 14

B. The CIA's Glomar Response Is Proper Under Exemption 3 16

1. The CIA's Glomar Response is Proper Under the CIA Act 17

2. The CIA's Glomar Response is Proper Under the NSA 19

III. THE CIA HAS NOT OFFICIALLY ACKNOWLEDGED THE EXISTENCE OR NONEXISTENCE OF RESPONSIVE RECORDS 21

CONCLUSION 25

TABLE OF AUTHORITIES

CASES

*Afshar v. Dep't of State,
702 F.2d 1125 (D.C. Cir. 1983) ..... passim

Am. Civil Liberties Union v. U.S. Dep't of Justice,
265 F. Supp. 2d 20 (D.D.C. 2003) 7

Ass'n of Retired R.R. Workers, Inc. v. U.S. R.R. Ret. Bd.,
830 F.2d 331 (D.C. Cir. 1987) 6

Assassination Archives & Research Ctr. v. CIA,
334 F.3d 55 (D.C. Cir. 2003) 17

Baker v. CIA,
580 F.2d 664 (D.C. Cir. 1978) 18

Bassiouni v. C.I.A.,
392 F.3d 244 (7th Cir. 2004) 13

*CIA v. Sims,
471 U.S. 159 (1985) ..... passim

Ctr. for Nat'l Sec. Studies v. DOJ,
331 F.3d 918 (D.C. Cir. 2003) 5, 6

Dep't of the Interior v. Klamath Water Users Protective Ass'n,
532 U.S. 1 (2001) 5

*Fitzgibbon v. CIA,
911 F.2d 755 (D.C. Cir. 1990) ..... passim

Frugone v. CIA,
169 F.3d 772 (D.C. Cir. 1999) 7, 8, 10

Gardels v. CIA,
689 F.2d 1100 (D.C. Cir. 1982) 8, 17

Goland v. CIA,
607 F.2d 339 (D.C. Cir. 1978) 18

Halperin v. CIA,
629 F.2d 144 (D.C. Cir. 1980) 20

John Doe Agency v. John Doe Corp.,
493 U.S. 146 (1989) 4, 5

King v. U.S. Dep't of Justice,
830 F.2d 210 (D.C. Cir. 1987) 5, 7, 10

Kissinger v. Reporters Comm. for Freedom of the Press,
445 U.S. 136 (1980) ("Under 5 U.S.C. § 552(a)(4)(B)[,] 5

Krikorian v. Dep't of State,
984 F.2d 461 (D.C. Cir. 1993) 17

*Larson v. Dep't of State,
565 F.3d 857 (D.C. Cir. 2009) ..... passim

*Military Audit Project v. Casey,
656 F.2d 724 (D.C. Cir. 1981) ..... passim

Miller v. Casey,
730 F.2d 773 (D.C. Cir. 1984) 19

Minier v. Central Intelligence Agency,
88 F.3d 796 (9th Cir. 1996) 5

Moore v. Bush,
601 F. Supp. 2d 6 (D.D.C. 2009) 3

Morley v. CIA.,
699 F. Supp. 2d 244 (D.D.C. 2010) 9

*Phillippi v. CIA,
655 F.2d 1325 (D.C. Cir. 1981) 3, 7, 23, 25

Public Citizen v. Dep't of State,
11 F.3d 198 (D.C. Cir. 1993) 22

Ray v. Turner,
587 F.2d 1187 (D.C. Cir. 1978) 6

Reliant Energy Power Generation, Inc. v. FERC,
520 F. Supp. 2d 194 (D.D.C. 2007) 5

*Riquelme v. CIA,
453 F. Supp. 2d 103 (D.D.C. 2006) 15, 18, 20

SafeCard Servs., Inc. v. SEC,
926 F.2d 1197 (D.C. Cir. 1991) 6

Schlesinger v. CIA,
591 F. Supp. 60 (D.D.C. 1984) 24

Snepp v. United States,
444 U.S. at 510 23

Students Against Genocide v. Dep't of State,
50 F. Supp. 2d 20 (D.D.C. 1995) 23

Talbot v. CIA,
578 F. Supp. 2d 24 (D.D.C. 2008) 19

*Valfells v. CIA,
No. 09-1363, 2010 WL 2428034 (D.D.C. June 17, 2010),
appeal docketed sub nom Thomas Moore, III v. CIA,
No. 10-5248 (D.C. Cir. Aug. 24, 2010) ..... passim

Vaughn v. Rosen,
484 F.2d 820 (D.C. Cir. 1973) 13

Wheeler v. CIA,
271 F. Supp. 2d 132 (D.D.C. 2003) 9

*Wilner v. Nat'l Sec. Agency,
592 F.3d 60 (2nd Cir. 2009) ..... passim

Wilson v. CIA,
586 F.3d 171 (2nd Cir. 2009) 23

*Wolf v. CIA,
473 F.3d 370 (D.C. Cir. 2007) ..... passim

STATUTES

5 U.S.C. § 552(a) *et seq* ..... passim

*50 U.S.C. § 401 *et seq* 19

50 U.S.C. § 403-1(i)(1) 17, 19

*50 U.S.C. § 403-4 *et seq* 18

50 U.S.C. § 403g.....17

RULES AND REGULATIONS

32 C.F.R. §1900.42(c).....4

OTHER AUTHORITIES

Executive Order No. 12958, 60 Fed. Reg. 19825 (Apr. 17, 1995) 10

United States Intelligence Activities, Exec. Order No. 12333,
46 Fed. Reg. 59941 (Dec. 4, 1981) 19

Exec. Order No. 13470, 75 Fed. Reg. 45325 (July 30, 2008).....19

*Classified National Security Information, Exec. Order No. 13526,
75 Fed. Reg. 707 (Dec. 29, 2009) ..... passim

INTRODUCTION

Pursuant to the Freedom of Information Act ("FOIA"), Plaintiffs American Civil Liberties Union and American Civil Liberties Union Foundation (collectively, "the ACLU") have sought a variety of records from Defendant Central Intelligence Agency ("CIA") related to "the use of unmanned aerial vehicles ('UAVs') — commonly referred to as 'drones' … — by the CIA and the Armed Forces for the purposes of killing targeted individuals." The types of records sought include, for example, targeting information, damage assessments, information about cooperation with foreign governments, and legal opinions about general and specific uses of weaponized drones to conduct these alleged strikes. The CIA has informed Plaintiffs that it can neither confirm nor deny the existence or nonexistence of records responsive to this request without compromising the national security concerns that animate FOIA's disclosure exemptions — specifically the exemptions set forth at 5 U.S.C. §§ 552 (b)(1) and (b)(3) ("Exemption 1" and "Exemption 3"). The CIA's determination in this regard is proper and entitles it to summary judgment.

BACKGROUND

This action arises from several FOIA requests from Plaintiffs to the CIA, the Department of Defense ("DOD"), the Department of State ("State"), and the Department of Justice ("DOJ"). Plaintiffs' requests, dated January 13, 2010, seek records pertaining to the following ten categories of information, each of which concerns "drone strikes": [1]

1. The "legal basis in domestic, foreign and international law" for such drone strikes, including who may be targeted with this weapon system, where and why;

[1] The ACLU's request uses the term "drone strike" to mean "targeted killing" with a drone. This Memorandum and accompanying declaration will use the term "drone strikes" for convenience while not confirming or denying the CIA's involvement or interest in such drone strikes. *See* Declaration of Mary Ellen Cole ("Cole Decl.") ¶ 7, Exhibit A at 5 ("CIA Request").

2. "Agreements, 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. "The 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;"
5. The "assessment or evaluation of individual drone strikes after the fact;"
6. "[G]eographical or territorial limits on the use of UAVs to kill targeted individuals;"
7. The "number of drones strikes the 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;"
9. "[Wh]o 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."

See Declaration of Mary Ellen Cole ("Cole Decl.") Exhibit A (the "CIA Request"). In the original request, most of these categories include several sub-categories seeking specific information about drone strikes.

By letter dated March 9, 2010, the CIA issued a final response to Plaintiffs' request stating 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 [Plaintiffs'] request," citing FOIA Exemptions 1 and 3, because "[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." This response is commonly known as a Glomar response.[2] The CIA also informed Plaintiffs that they had a right to appeal the finding to the Agency Release Panel (the body within the CIA that considers FOIA appeals). *See* Cole Decl. ¶ 8, Exhibit B.

By letter dated April 22, 2010, Plaintiffs appealed the March 9 determination. *See* Cole Decl. ¶ 9, Exhibit C. CIA acknowledged receipt of Plaintiffs' letter challenging the CIA's Glomar response and noted that arrangements would be made for its consideration by the appropriate members of the Agency Release Panel. *Id*. ¶ 10, Exhibit D. While this appeal was pending, Plaintiffs filed an Amended Complaint in this matter on June 1, 2010, adding the CIA as a co-defendant to their previously-filed lawsuit against DOD, State, and DOJ. As a result of the filing of the Amended Complaint, and pursuant to its FOIA regulations at 32 C .F.R. §1900.42(c), the CIA terminated the administrative appeal proceedings on June 14, 2010. *Id.* ¶ 11, Exhibit E.

[2] *See Moore v. Bush*, 601 F. Supp. 2d 6, 14 n.6 (D.D.C. 2009) ("The '*Glomar*' response is named after the ship involved in *Phillippi v. Cent. Intelligence Agency,* 546 F.2d 1009, 1011 (D.C. Cir. 1976). In that case, the FOIA requester sought information regarding a ship named the 'Hughes Glomar Explorer,' and the CIA refused to confirm or deny whether it had any relationship with the vessel because to do so would compromise national security or would divulge intelligence sources and methods.").

ARGUMENT

As set forth below and in the attached declaration, whether or not the CIA possesses responsive records concerning drone strikes is a currently and properly classified fact that is exempt from disclosure under FOIA Exemptions 1 and 3. Official CIA acknowledgment of the existence or nonexistence of responsive records would reveal sensitive national security information concerning intelligence activities, intelligence sources and methods, and the foreign relations and foreign activities of the United States. To confirm the existence of responsive records would provide important insights into the CIA's interests and activities to terrorist organizations, foreign intelligence services, or other hostile groups; conversely, to confirm the nonexistence of responsive records would provide these same entities with valuable information about potential gaps in the CIA's interests and capabilities. *See* Cole Decl. ¶ 19, 21, 24-25. Because the CIA has properly asserted a Glomar response, it is entitled to a grant of summary judgment in its favor.

I. THE APPLICABLE FOIA AND SUMMARY JUDGMENT STANDARDS

FOIA's "basic purpose" reflects a "general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *John Doe Agency v. John Doe Corp.*, 493 U .S. 146, 152 (1989) (internal citation omitted). "Congress recognized, however, that public disclosure is not always in the public interest[.]" *CIA v. Sims*, 471 U.S. 159, 166-67 (1985). Accordingly, in passing FOIA, "Congress sought 'to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy.'" *John Doe Agency*, 493 U .S. at 152 (quoting H.R. Rep. No. 89-1497, at 6 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2423). As this Circuit has recognized, "FOIA represents a balance struck by

Congress between the public's right to know and the government's legitimate interest in keeping certain information confidential." *Ctr. for Nat'l Sec. Studies v. DOJ*, 331 F.3d 918, 925 (D.C. Cir. 2003) (citing *John Doe Agency*, 493 U.S. at 152).

FOIA mandates disclosure of government records unless the requested information falls within one of nine enumerated exemptions. *See* 5 U.S.C. § 552(b). "A district court only has jurisdiction to compel an agency to disclose improperly withheld agency records," *i.e.*, records that do "not fall within an exemption." *Minier v. CIA*, 88 F.3d 796, 803 (9th Cir. 1996); *see also* 5 U.S.C. § 552(a)(4)(B) (providing the district court with jurisdiction only "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant"); *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980) ("Under 5 U.S.C. § 552(a)(4)(B)[,] federal jurisdiction is dependent upon a showing that an agency has (1) 'improperly' (2) 'withheld' (3) 'agency records.'"). While narrowly construed, FOIA's statutory exemptions "are intended to have meaningful reach and application," *John Doe Agency*, 493 U.S. at 152; *see also Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001).

Summary judgment is the procedural vehicle by which most FOIA actions are resolved. *Reliant Energy Power Generation, Inc. v. FERC*, 520 F. Supp. 2d 194, 200 (D.D.C. 2007); *Valfells v. CIA*, No. 09-1363, 2010 WL 2428034, *2 (D.D.C. June 17, 2010), *appeal docketed sub nom Thomas Moore, III v. CIA,* No. 10-5248 (D.C. Cir. Aug. 24, 2010). The government bears the burden of proving that the withheld information falls within the exemptions it invokes. *See* 5 U.S.C. § 552(a)(4)(B); *King v. U.S. Dep't of Justice*, 830 F.2d 210, 217 (D.C. Cir. 1987). In a FOIA case, a court may grant summary judgment to the government entirely on the basis of information set forth in an agency's affidavits or declarations that provide "the justifications for

nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981). Such declarations are accorded "a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents." *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (internal quotation marks omitted); *Valfells*, 2010 WL 2428034, *2.

In reviewing the applicability of FOIA Exemptions 1 and 3 for purposes of deciding Defendant CIA's Motion for Summary Judgment, it is important to note that the information sought by Plaintiffs directly "implicat[es] national security, a uniquely executive purview." *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 926-27. While courts review *de novo* an agency's withholding of information pursuant to a FOIA request, "de novo review in FOIA cases is not everywhere alike." *Ass'n of Retired R.R. Workers, Inc. v. U.S. R.R. Ret. Bd.*, 830 F.2d 331, 336 (D.C. Cir. 1987). Although *de novo* review provides for "an objective, independent judicial determination," courts nonetheless defer to an agency's determination in the national security context, acknowledging that "the executive ha[s] unique insights into what adverse affects might occur as a result of public disclosure of a particular classified record." *Ray v. Turner*, 587 F.2d 1187, 1194 (D.C. Cir. 1978) (internal quotation marks omitted). Courts have specifically recognized the "propriety of deference to the executive in the context of FOIA claims which implicate national security." *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 927-28.

For these reasons, courts have "consistently deferred to executive affidavits predicting harm to the national security, and have found it unwise to undertake searching judicial review." *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 927; *Larson v. Dep't of State*, 565 F.3d 857, 865 (D.C.

Cir. 2009) ("Today we reaffirm our deferential posture in FOIA cases regarding the 'uniquely executive purview' of national security."). Consequently, "in the national security context, the reviewing court must give 'substantial weight'" to agency declarations. *Am. Civil Liberties Union v. U.S. Dep't of Justice*, 265 F. Supp. 2d 20, 27 (D.D.C. 2003) (quoting *King*, 830 F.2d at 217); *see Fitzgibbon v. CIA*, 911 F.2d 755, 766 (D.C. Cir. 1990) (holding that the district court erred in "perform[ing] its own calculus as to whether or not harm to the national security or to intelligence sources and methods would result from disclosure"); *Frugone v. CIA*, 169 F.3d 772, 775 (D.C. Cir. 1999) (because "courts have little expertise in either international diplomacy or counterintelligence operations, we are in no position to dismiss the CIA's facially reasonable concerns" about the harm that disclosure could cause to national security). Accordingly, FOIA "bars the courts from prying loose from the government even the smallest bit of information that is properly classified or would disclose intelligence sources or methods." *Afshar v. Dep't of State*, 702 F.2d 1125, 1130 (D.C. Cir. 1983).

The following discussion and accompanying declaration establish that, pursuant to these standards of review, the CIA's Glomar response is appropriate in this case, and the CIA is therefore entitled to summary judgment in its favor.

II. THE CIA PROPERLY DECLINED TO CONFIRM OR DENY THE EXISTENCE OR NONEXISTENCE OF RECORDS RESPONSIVE TO PLAINTIFFS' REQUEST PURSUANT TO EXEMPTIONS 1 AND 3

"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." *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 68 (2nd Cir. 2009) (quoting *Phillippi v. CIA*, 546 F.2d 1009, 1012 (D.C. Cir. 1976)). The invocation of a Glomar response is appropriate

when "to confirm or deny the existence of records … would cause harm cognizable under an FOIA exception." *Gardels v. CIA*, 689 F.2d 1100, 1103 (D.C. Cir. 1982).

The CIA has properly invoked Exemptions 1 and 3 in response to Plaintiffs' request. "These exemptions cover not only the content of protected government records but also the fact of their existence or nonexistence, if that fact itself properly falls within the exemption." *Larson*, 565 F.3d at 861 (citing *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007)). "FOIA Exemptions 1 and 3 are independent; agencies may invoke the exemptions independently and courts may uphold agency action under one exemption without considering the applicability of the other." *Larson*, 565 F.3d at 862-63 (citing *Gardels*, 689 F.2d at 1106-07).

The CIA invokes a Glomar response "consistently in all cases where the existence or nonexistence of records responsive to a FOIA request is a classified fact, including instances in which the CIA does not possess records responsive to a particular request." Cole Decl. ¶ 18. For example, "[i]f the CIA were to invoke a Glomar response only when it actually possessed responsive records, the Glomar response would be interpreted as an admission that responsive records exist." *Id*. Such a "practice would reveal the very information that the CIA must protect in the interest of national security." *Id*.

Courts in this Circuit have consistently upheld Glomar responses where, as here, confirming or denying the existence of records would either reveal classified information protected by FOIA Exemption 1 or disclose information protected by statute in contravention of FOIA Exemption 3. *See*, *e.g.*, *Larson,* 565 F.3d at 861-62 (upholding the National Security Agency's use of the Glomar response to plaintiffs' FOIA requests regarding past violence in Guatemala pursuant to Exemptions 1 and 3); *Frugone*, 169 F.3d at 774-75 (finding that CIA properly refused to confirm or deny the existence of records concerning plaintiff's alleged

employment relationship with CIA pursuant to Exemptions 1 and 3, despite the allegation that another government agency seemed to confirm plaintiff's status as a former CIA employee); *Morley v. CIA.*, 699 F. Supp. 2d 244, 257-58 (D.D.C. 2010) (upholding CIA's Glomar response to plaintiff's request concerning covert CIA operations pursuant to Exemptions 1 and 3); *Wheeler v. CIA*, 271 F. Supp. 2d 132, 140 (D.D.C. 2003) (ruling that CIA properly invoked a Glomar response to plaintiff's request for records concerning plaintiff's activities as a journalist in Cuba during the 1960s pursuant to Exemption 1). Here, the CIA has submitted a detailed declaration explaining why the fact of the existence or nonexistence of the requested records is exempt from disclosure pursuant to FOIA Exemptions 1 and 3. The CIA has examined each of the individual requests and properly determined that the fact of existence or nonexistence of responsive CIA records is protected from disclosure under Exemptions 1 and 3. Cole Decl. ¶ 5.

A. The CIA's Glomar Response Is Proper Under Exemption 1

Exemption 1 of FOIA "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 . . . in fact properly classified pursuant to such Executive order.'" *Larson*, 565 F.3d at 861; *see* 5 U.S.C. § 552(b)(1). Executive Order 13526 governs the classification of national security information. *See* Classified National Security Information, Exec. Order No. 13526, 75 Fed. Reg. 707 (Dec. 29, 2009) ("E.O. 13526"); *see also Wolf v. CIA*, 473 F.3d 370, 375 (D.C. Cir. 2007).[3] Notably, section 3.6(a) of E.O. 13526 expressly authorizes an agency to "refuse to confirm or deny the existence" of the records. *See also Wilner*, 592 F.3d at 71 (observing that "the Executive Order specifically countenances the Glomar Response, permitting a classifying agency

[3] E.O. 13526 superseded Executive Order No. 12958, 60 Fed. Reg. 19825 (Apr. 17, 1995).

to refuse to confirm or deny the existence or nonexistence of requested records whenever the fact of their existence or nonexistence is itself classified") (internal citations omitted).

An agency can establish that it has properly withheld information under Exemption 1 if it demonstrates that it has met the classification requirements of E.O. 13526. Section 1.1 of the Executive Order sets forth the following four requirements for the classification of national security information: (1) an original classification authority classifies the information; (2) the United States Government owns, produces, or controls the information; (3) the information is within one of eight protected categories listed in section 1.4 of the Order; and (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in a specified level of damage to the national security, and the original classification authority is able to identify or describe the damage. E.O. 13526, § 1.1(a). As noted above, when it comes to matters affecting the national security, courts accord "substantial weight" to an agency's declarations concerning classified information, *King*, 830 F.2d at 217, and deference to the expertise of agencies involved in national security and foreign relations. *Fitzgibbon*, 911 F.2d at 766; *Frugone*, 169 F.3d at 775. Given that the CIA has met both the procedural and substantive prerequisites for classification under the Executive Order, the existence or nonexistence of responsive CIA records is exempt from disclosure under FOIA Exemption 1.

1. An Original Classification Authority Has Classified the Information

Mary Ellen Cole, the Information Review Officer for the CIA's National Clandestine Service, has affirmed that she holds original classification authority under a delegation of authority pursuant to section 1.3(c) of E.O. 13526. Cole Decl. ¶ 3. She found that "the existence or nonexistence of responsive records is a currently and properly classified fact . . . the disclosure

of which reasonably could be expected to cause damage to the national security of the United States." *Id.* at ¶ 5. Thus, the information withheld satisfies the Executive Order's classification requirement that an original classification authority classified the information.

2. The United States Owns, Produces, or Controls the Information

The Cole Declaration confirms that the fact of the existence of nonexistence of records responsive to Plaintiffs' requests is owned by and under the control of the United States Government. *Id.* at ¶ 30. Accordingly, the withheld information satisfies the second classification requirement regarding U.S. Government information.

3. The Information Falls Within the Protected Categories Listed in Section 1.4 of E.O. 13526

The CIA has determined, and has articulated with reasonable specificity, that the information protected from disclosure falls squarely within certain delineated categories of information set forth in sections 1.4(c) and (d) of E.O. 13526. Cole Decl. ¶¶ 32-38.[4] First, Section 1.4(c) of the Order permits the classification of information concerning "intelligence activities (including covert action), intelligence sources or methods, or cryptology."). As the Cole Declaration explains:

> Hypothetically, if the CIA were to respond to this request by admitting that it possessed responsive records, it would indicate that the CIA was involved in drone strikes or at least had an intelligence interest in drone strikes – perhaps by providing supporting intelligence, as an example. In either case, such a response would reveal a specific clandestine intelligence activity or interest of the CIA, and it would provide confirmation that the CIA had the capability and resources to be involved in these specific activities – all facts that are protected from disclosure . . . .

[4] The Cole Declaration also asserts that the fact of the existence or nonexistence of the requested records has not been classified in order to conceal violations of law, or inefficiency, administrative error; to prevent embarrassment to a person, organization or agency; to restrain competition; or prevent or delay the release of information that does not require protection in the interest of national security. Cole Decl. ¶ 31.

> On the other hand, if the CIA were to respond by admitting that it did not possess any responsive records, it would indicate that the CIA had no involvement or interest in drone strikes. Such a response would reveal sensitive information about the CIA's capabilities, interests, and resources that is protected from disclosure . . . .

Cole Decl. ¶ 19, 21; *see also* ¶¶ 32, 33, 36.

Although each of the categories requested by Plaintiffs relates to drone strikes in some manner and therefore animates these concerns, some of the categories seek even more detailed information about the CIA's activities, sources, and methods related to drone strikes. For example, several of the requests seek particular types of intelligence and analysis related to drone strikes, such as target selection and "after the fact" evaluations or assessments of individual drone strikes. *See* CIA Request, ¶¶ 3, 4, 5, 7, and 8; Cole Decl. ¶ 22. Confirming the existence or non-existence of records responsive to these requests would therefore divulge whether or not the CIA has an interest in or engages in intelligence analysis related to these activities. Other requests seek information about training and supervision of drone pilots. *See* CIA Request ¶¶ 9, 10. Confirming the existence or nonexistence of such records would reveal whether or not CIA is involved in drone strikes. Cole Decl ¶ 22. Finally, a non-Glomar response to categories 1.B and 2 could reveal information about the existence or nonexistence of any cooperation, contact, or other relationships between the CIA and foreign governments with respect to drone strike operations. Cole Decl. ¶¶ 22, 23, 25, 36-38; *see also Fitzgibbon*, 911 F .2d at 759, 760 (Exemption 3 protects even "nonsensitive contacts" between CIA and foreign officials). All of this information concerns CIA intelligence activities and intelligence sources and methods and thus falls within section 1.4(c).[5]

[5] Furthermore, if CIA were required to respond to Plaintiffs' requests by either confirming or denying whether responsive records exist, the ordinary processing of any such records in FOIA litigation, if they existed, could likely expose additional classified information even if the substantive content of the

Second, section 1.4(d) of the Order permits classification of information concerning "foreign relations or foreign activities of the United States, including confidential sources." The CIA has determined that official acknowledgement of the existence or nonexistence of responsive records would reveal information pertaining to the foreign relations and foreign activities of the United States. "As an initial matter, because CIA's operations are conducted almost exclusively overseas or otherwise concern foreign intelligence matters, they generally are U.S. 'foreign' activities by definition." Cole Decl. ¶ 36. The CIA has likewise determined that official confirmation of the existence or nonexistence of CIA records concerning drone strikes would reveal information that impacts the foreign relations of the United States. As explained in the Cole Declaration, "[a]lthough it is generally known that the CIA conducts clandestine intelligence operations, identifying an interest in a particular matter or publicly disclosing a particular intelligence activity could well cause the affected or interested foreign government to respond in ways that would damage U.S. national interests." Cole Decl. ¶¶ 37-38. "An official acknowledgement that the CIA possesses the requested information," she explains, "could be construed by a foreign government, whether friend or foe, to mean that the CIA has operated undetected within that country's borders or has undertaken certain intelligence operations against its residents." *Id.* Several of the categories also further implicate the foreign relations of the United States by specifically seeking information about potential intelligence cooperation or

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underlying records were protected from disclosure. *See generally Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973) (requiring agencies to prepare an itemized index of withheld documents so that the trial court can make a rational decision about whether the withheld material must be produced). The Cole Declaration explains that this processing could reveal valuable information about depth, breadth, and timing of any potential CIA involvement or interest in drone strikes (or lack thereof). Cole Decl. ¶ 20; *see also Bassiouni v. C.I.A.*, 392 F.3d 244, 245 (7th Cir. 2004) (recognizing that "[a] list of documents could show clusters of dates that reveal when the agency acquired the information. Knowing which documents entered the files, and when, could permit an astute inference [regarding] how the information came to the CIA's attention-and, in the intelligence business, 'how' often means 'from whom.'").

coordination with foreign governments in relation to drone strikes. *See* CIA Request, paragraphs 1.B, 2, 6 & 7. This type of information falls squarely with section 1.4(d) of E.O. 13526.

4. An Original Classification Authority Has Properly Determined that the Unauthorized Disclosure of the Requested Information Could Be Expected to Result in Damage to the National Security and Has Identified that Damage

Finally, the CIA has determined, and explained in reasonably specific detail, that the unauthorized disclosure of this information reasonably could be expected to cause damage to the national security of the United States. As explained in the Cole Declaration, if CIA were to confirm or deny the existence or nonexistence of responsive records, it would reveal whether or not the CIA has an intelligence interest in drone strikes or is involved in drone strikes, as well as potentially revealing the depth and breadth of such an interest or involvement. Cole Decl. ¶¶ 32-35. Such a disclosure would cause damage to national security by providing insight into the CIA's capabilities and interests and by harming foreign relations. *Id*.

As the Cole Declaration explains, "[c]landestine intelligence techniques, capabilities, or devices are valuable only so long as they remain unknown and unsuspected. O nce an intelligence source or method (or the fact of its use in a certain situation) is discovered, its continued successful use by the CIA is seriously jeopardized." Cole Decl. ¶ 34. Furthermore, "terrorist organizations and other hostile groups have the capacity and ability to gather information from myriad sources, analyze it, and deduce means and methods from disparate details to defeat the CIA's collection efforts. T hus, even seemingly innocuous, indirect references to an intelligence source or method could have significant adverse effects when juxtaposed with other publicly-available data." *Id*. ¶ 35; *see also* ¶ 32.

With this understanding, the Cole Declaration explains that "[i]t would greatly benefit hostile groups, including terrorist organizations, to know with certainty what intelligence

activities the CIA is or is not engaged in or what the CIA is or is not interested in." Cole Decl. ¶ 24. "To reveal such information would provide valuable insight into the CIA's capabilities, interests, and resources that our enemies could use to reduce the effectiveness of the CIA's intelligence operations." *Id*. "Terrorist organizations, foreign intelligence services, and other hostile groups use this information to thwart CIA activities and attack the United States and its interests." *Id*. ¶ 32. The Cole Declaration therefore concludes that these "revelation[s] could be expected to cause damage to U.S. national security." Cole Decl. ¶¶ 24-26.

Furthermore, the CIA has determined that confirming the existence or nonexistence of requested CIA records could negatively impact United States foreign relations. The Cole Declaration articulates this concern as follows:

> [A]ny response by the CIA that could be seen as a confirmation of its alleged involvement in drone strikes could raise questions with other countries about whether the CIA is operating clandestinely inside their borders, which in turn could cause those countries to respond in ways that would damage U.S. national interests. Moreover, … some of the individual categories of requested records specifically concern the potential involvement of foreign governments in drone strikes. If the CIA is forced to acknowledge the existence or nonexistence of records responsive to a request concerning the assistance of a foreign partner, such acknowledgement would be seen as a tacit confirmation or denial of a clandestine foreign intelligence relationship and/or the involvement of a foreign government in a clandestine activity. When foreign governments cooperate with the CIA, most of them require the CIA to keep the fact of their cooperation in the strictest confidence. Any violation of this confidence could weaken, or even sever, the relationship between the CIA and its foreign intelligence partners, degrading the CIA's ability to combat hostile threats abroad.

Cole Decl. ¶ 25; *see also Riquelme v. CIA*, 453 F. Supp. 2d 103, 109 (D.D.C. 2006) (upholding CIA's Glomar response under Exemption 1 because "officially acknowledging that the CIA has recruited or collected intelligence information on a foreign national, or conducted clandestine activities in a foreign country, may also qualify for classification on the ground that it could hamper future foreign relations with the government of that country" and a "denial that the CIA

has records ... could serve to damage national security by alerting certain individuals that they are not CIA intelligence targets") (internal quotations and citations omitted).

Although a Glomar response may be vexing to a FOIA requester, it is necessary to ensure that an agency does not reveal classified information simply though a pattern of responses. As the Cole Declaration observes, it would be nonsensical for an agency only to invoke a Glomar response if it had responsive records, and notify requesters when it does not have responsive records, because such an approach would construe a Glomar response as an acknowledgment that responsive records do in fact exist. Cole Decl. ¶ 18. As Ms. Cole notes, "[t]his practice would reveal the very information that CIA must protect in the interest of national security." *Id*. Given these critical national security concerns, Defendant's only protection in circumstances where, as here, the fact of the existence or nonexistence of responsive records is classified, is to provide a consistent response regardless of whether or not it actually possesses responsive records. *Id*.

B. The CIA's Glomar Response Is Proper Under Exemption 3

Information withheld pursuant to Exemption 1 may also be withheld pursuant to Exemption 3. In refusing to confirm or deny the existence or nonexistence of responsive records, the CIA has properly invoked Exemption 3. Exemption 3 sanctions the use of a Glomar response as authorized by a separate 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). To qualify as a statute that permits the withholding of information pursuant to Exemption 3, a court must examine the statute to ascertain whether (1)

the claimed statute is a statute of exemption under FOIA, and (2) whether the withheld material satisfies the criteria of the exemption statute.

The CIA's mandate to withhold information under Exemption 3 is broader than its authority under Exemption 1 pursuant to Executive Order 13526. *See Gardels*, 689 F.2d at 1107 (executive order governing classification of documents "not designed to incorporate into its coverage the CIA's full statutory power to protect all of its 'intelligence sources and methods'"). Most importantly, unlike Section 1.1(a)(4) of Executive Order 13526, these statutes do not require a determination that the disclosure of information would be expected to result in damage to the national security. *See Sims*, 471 U.S. at 167; *Fitzgibbon*, 911 F.2d at 761-62 ("the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within the statute's coverage."); *Krikorian v. Dep't of State*, 984 F.2d 461, 465 (D.C. Cir. 1993). *Compare* 50 U.S.C. §§ 403-1(i)(1), 403g, *with* E.O. 13526, § 1.1(a)(4). Although the CIA has properly determined that the national security would be harmed if any of the information at issue were released, if the Court is satisfied that the CIA's Glomar response is proper under Exemption 3, it need not even conduct the additional analysis required under Exemption 1. *See Assassination Archives & Research Ctr. v. CIA*, 334 F.3d 55, 58 n.3 (D.C. Cir. 2003) ("Because we conclude that the Agency easily establishes that the records ... are exempt from disclosure under Exemption 3, we do not consider the applicability of Exemption 1.").

1. The CIA's Glomar Response is Proper Under the CIA Act

It is well-established that the Central Intelligence Agency Act of 1949, as amended, 50 U.S.C. § 403-4 *et seq.* (the "CIA Act") satisfies the criteria for withholding of information pursuant to Exemption 3. *See Fitzgibbon*, 911 F.2d at 761 (recognizing that courts have determined that the CIA Act is an Exemption 3 statute and noting that "[t]his conclusion is

supported by the plain meaning of the statute, by the legislative history of FOIA, and by every federal court of appeals that has considered the matter"); *Baker v. CIA*, 580 F.2d 664, 667 (D.C. Cir. 1978). Section 6 of the CIA Act exempts CIA from the provision of 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* Cole Decl. ¶ 41. Accordingly, the CIA Act protects information that would reveal the functions of the CIA, which "plainly include clandestine intelligence activities, intelligence sources and methods and foreign liaison relationships." Cole Decl. ¶ 41; *see, e.g., Goland v. CIA*, 607 F.2d 339, 351 (D.C. Cir. 1978) (holding that intelligence sources and methods are "functions" of the CIA within the meaning of the CIA Act, and thus exempt from disclosure under Exemption 3); *Riquelme*, 453 F. Supp. 2d at 111-12 (same). Indeed, Executive Order 12333, as amended, provides that the CIA shall, among other functions, "[c]ollect . . ., analyze, produce, and disseminate foreign intelligence and counterintelligence," "[c]onduct covert action activities approved by the President," and "[c]onduct foreign intelligence liaison relationships." *See* United States Intelligence Activities, Exec. Order No. 12333, 46 Fed. Reg. 59941 (Dec. 4, 1981), amended most recently by Exec. Order No. 13470, 75 Fed. Reg. 45325 (July 30, 2008); *see also* 50 U.S.C. §403-4a(d)(1), 4a(f) (authorizing functions of the CIA, including intelligence collection and coordinating intelligence relationships with foreign governments and international organizations).

The Cole Declaration explains that "acknowledging the existence or nonexistence of the requested records would require the CIA to disclose information about its core functions." Cole Decl. ¶ 41. As described above, confirming the existence or nonexistence of responsive records would reveal whether the CIA has an intelligence interest in drone strikes or is involved in drone strikes, including the existence, breadth and depth of any such interest or involvement, and the

CIA's capabilities or lack thereof with respect to drones. Cole Decl. ¶¶ 19-23. Such a disclosure could also confirm the existence or nonexistence of potential foreign intelligence activities and any cooperation, contact, or other relationship, between the CIA and foreign governments. Cole Decl. ¶¶ 36-38; *see also Fitzgibbon*, 911 F.2d at 762-63. The CIA has therefore determined that acknowledging the existence or nonexistence of the requested records would require the CIA to disclose information about its functions, an outcome the CIA Act expressly prohibits. *Id*.

2. The CIA's Glomar Response is Proper Under the NSA

The National Security Act of 1947, as amended, 50 U.S.C. § 401 et seq. (the "NSA") also satisfies the criteria for withholding of information pursuant to Exemption 3. *See*, *e.g.*, *Sims*, 471 U.S. at 167-68 (finding that the NSA "qualifies as a withholding statute under Exemption 3"); *Miller v. Casey*, 730 F.2d 773, 777 (D.C. Cir. 1984) ("Section 403 [of the NSA] is an Exemption 3 statute."). The NSA provides that the "Director of National Intelligence ("DNI") shall protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 403-1(i)(1); Cole Decl. ¶ 40.[6] In *CIA v. Sims*, the Supreme Court, recognizing the "wide-ranging authority" provided by the NSA to protect intelligence sources and methods, held that it was "the responsibility of the Director of Central Intelligence, not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead

[6] Courts have recognized that not just the DNI, but also CIA and other agencies may rely upon the amended NSA to withhold records under FOIA. *See*, *e.g.*, *Larson*, 565 F.3d at 862-63, 865; *Talbot v. CIA*, 578 F. Supp. 2d 24, 28-29 n.3 (D.D.C. 2008). Furthermore, the President specifically preserved CIA's ability to invoke the NSA to protect its intelligence sources and methods. *See*, *e.g.*, Exec. Order No. 12,333, § 1.6(d) (as revised after the NSA was amended) (reprinted in 50 U.S.C. § 401 note) (requiring that the CIA Director "[p]rotect intelligence and intelligence sources, methods, and activities from unauthorized disclosure in accordance with guidance from the [DNI]"). Here, the CIA has explained that "[u]nder the direction of the DNI … and consistent with section 1.6(d) of Executive Order 12333, the CIA is authorized to protect CIA sources and methods from unauthorized disclosure." Cole Decl. ¶ 40.

to an unacceptable risk of compromising the Agency's intelligence-gathering process." 471 U.S. at 180. The Court observed that Congress did not limit the scope of "intelligence sources and methods" in any way. *Id*. at 183. Rather, it "simply and pointedly protected all sources of intelligence that provide, or are engaged to provide, information the Agency needs to perform its statutory duties with respect to foreign intelligence." *Id*. at 169-70.

Following the invocation of a Glomar response to a FOIA request pursuant to Exemption 3, the only question for the court is whether the agency has demonstrated that responding to the request "can reasonably be expected to lead to unauthorized disclosure of intelligence sources and methods." *Halperin v. CIA*, 629 F.2d 144, 147 (D.C. Cir. 1980); *see*, *e.g.*, *Wolf*, 473 F.3d at 377-78 (relying on the NSA in holding that CIA's affidavits "establish that disclosure of information regarding whether or not CIA records of a foreign national exist would be unauthorized under Exemption 3 because it would be reasonably harmful to intelligence sources and methods"); *Riquelme*, 453 F. Supp. 2d at 111-12 (affirming CIA's Glomar response pursuant to the NSA and CIA Act regarding certain alleged CIA activities in Paraguay and, *inter alia*, information relating to a foreign national because the fact of the existence or nonexistence of such records "are pertinent to the Agency's intelligence sources and methods"). Such broad discretion is proper under the Exemption 3 analysis because even "superficially innocuous information" might reveal valuable intelligence sources and methods. *Sims*, 471 U.S. at 178; *see also Fitzgibbon*, 911 F.2d at 762 ("the fact that the District Court at one point concluded that certain contacts between CIA and foreign officials were 'nonsensitive' does not help [plaintiff] because apparently innocuous information can be protected and withheld").

The Cole Declaration explains in great detail that confirming or denying the existence of the records requested by Plaintiffs can reasonably be expected to lead to unauthorized disclosure

of CIA intelligence sources and methods. *See* Cole Decl. ¶¶ 19-26, 33-35. As further explained therein, "to confirm or deny that the CIA possesses records responsive to Plaintiffs' request could risk the disclosure of the existence or nonexistence of several potential intelligence sources and methods, including the CIA's possible relationships with foreign liaison partners relating to drone strikes, any CIA interest in drone strikes, and the CIA's capabilities relating to that particular device." Cole Decl. ¶ 33. Information about such relationships, interests, activities, and capabilities of the CIA (or lack thereof) is intelligence sources and methods information that is protected from disclosure by the NSA.

Accordingly, the CIA has properly concluded that a Glomar response is necessary to safeguard CIA functions and intelligence sources and methods from unauthorized disclosure. The records sought by Plaintiffs – information that would disclose the existence or nonexistence of clandestine CIA functions, intelligence activities, sources and/or methods – falls squarely within the scope of the protective mandate under the CIA Act and the NSA. Thus, the CIA's decision neither to confirm nor deny the existence of responsive records is justified by Exemption 3.

III. THE CIA HAS NOT OFFICIALLY ACKNOWLEDGED THE EXISTENCE OR NONEXISTENCE OF RESPONSIVE RECORDS

Plaintiffs have alleged in their administrative appeal that the CIA has previously acknowledged "facts at issue in the Request" and that therefore a Glomar response is improper. *See* CIA Appeal at 2. An agency may be compelled to provide information over a valid FOIA exemption claim only when the specific information at issue has already been fully, publicly, and officially disclosed. *See Wolf*, 473 F.3d at 378. Plaintiffs "bear the initial burden of pointing to specific information in the public domain that appears to duplicate that being withheld." *Id*.

(quoting *Afshar*, 702 F.2d at 1130). The Plaintiffs must show (1) that the requested information is "as specfic as the information previously released;" (2) that the requested information "match[es] the previous information;" and (3) that the information has "already . . . been made public through an official and documented disclosure." *Id*. As this Circuit noted in *Wolf*, "the insistence on exactitude recognizes 'the Government's vital interest in information relating to national security and foreign affairs.'" *Id*. (quoting *Public Citizen v. Dep't of State*, 11 F.3d 198, 203 (D.C. Cir. 1993).

The Cole Declaration confirms that the CIA has not officially acknowledged the existence or nonexistence of responsive CIA records related to drone strikes, Cole Decl. ¶ 43, which is the relevant legal inquiry under the Glomar doctrine. *See Wolf*, 473 F.3d at 379; *see also Wilner*, 592 F.3d at 70 ("The Glomar doctrine is applicable … in cases in which the existence or nonexistence of a record is a fact exempt from disclosure under a FOIA exception. An agency is therefore 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."); *Valfells*, 2010 WL 2428034 at *3 ("Resolution of this matter … turns on whether the CIA has already 'officially acknowledged' that it has any record concerning the [subject of the request]."). Nor has it officially acknowledged any of the protected underlying information implicated by Plaintiffs' request, such as any involvement or intelligence interest the CIA may or may not have in drone strikes. Cole Decl. ¶ 43. Plaintiffs have attempted to infer such an acknowledgement from a variety of news sources and quotes, none of which approaches official confirmation that responsive records exist.

Many of the statements cited by Plaintiffs are either unsourced or come from former government officials or are attributed to anonymous individuals. Other statements constitute

attempts at deduction or mere conjecture. As the Second Circuit recently explained, "anything short of [an official] disclosure necessarily preserves some increment of doubt regarding the reliability of the publicly available information." *Wilson v. CIA*, 586 F.3d 171, 195 (2nd Cir. 2009). Morever, "the law will not infer official disclosure . . . from . . . widespread public discussion of a classified matter," and such publicity or statements are insufficient to undermine the CIA's predictions of harm from official confirmation or denial. *See id*. at 195; *see also Wolf,* 473 F.3d at 378 ("An agency's official acknowledgment of information by prior disclosure, however, cannot be based on mere public speculation, no matter how widespread."); *Military Audit Project v. Casey*, 656 F .2d 724, 745 (D.C. Cir. 1981) (explaining importance of maintaining "lingering doubts"); *Students Against Genocide v. Dep't of State*, 50 F. Supp. 2d 20, 25 (D.D.C. 1995) ("[T]here is certainly no 'cat out of the bag' philosophy underlying FOIA so that any public discussion of protected information dissipates the protection which would otherwise shield the information sought."); *see also Snepp v. United States*, 444 U.S. 507, 510 n.3 (1980) (recognizing government's "compelling interest in protecting ... the appearance of confidentiality so essential to the effective operation of our foreign intelligence service").[7]

Plaintiffs also cite statements by former government employees and others not authorized to speak for the CIA. The courts have been clear, however, that "statements made by a person not authorized to speak for the Agency," do not waive a Glomar response. *Wilson*, 586 F.3d at 186-87; *see also Afshar*, 702 F.2d at 1130-31 ("Unofficial leaks and public surmise can often be ignored by foreign governments that might perceive themselves to be harmed by disclosure of

[7] Even in cases where there arguably has been some limited acknowledgement of the alleged information at issue or related topics – which is not the case here – courts have upheld the use of a Glomar response. *See Wilner*, 592 F.3d at 70 ("[T]he fact that the [program's] existence has been made public reinforces the government's continuing stance that it is necessary to keep confidential the details of the program's operations and scope."); *Phillippi v. CIA*, 655 F.2d 1325, 1331 (D.C. Cir. 1981) ("There may be much left to hide, and if there is not, that itself may be worth hiding.").

their cooperation with the CIA, but official acknowledgement may force a government to retaliate."); *Military Audit Project*, 656 F .2d at 744 (requiring "authoritative" disclosure); *Schlesinger v. CIA*, 591 F. Supp. 60, 66 (D.D.C. 1984) (construing official disclosure to mean "direct acknowledgments by an authoritative government source.")

In addition to these non-authoritative media reports, Plaintiffs cite several public statements by CIA Director Leon Panetta to reporters and one by former DNI Dennis Blair to Congress. *See* Cole Decl. ¶ 9, Exhibit C at 3-4 ("CIA Appeal"). Even as selectively quoted in the administrative appeal, none of these statements acknowledge the existence or nonexistence of responsive CIA records. Cole Decl. ¶ 45. Accordingly, the specific information withheld has not been publicly acknowledged. N or, when read accurately, do these statements reveal the protected underlying information, such as the existence or extent of any CIA interest or involvement in drone strikes (or lack thereof) or the existence or extent of any CIA cooperation with foreign governments with respect to drone strikes (or lack thereof). Plaintiffs' administrative appeal did not cite a single official acknowledgment of the information at issue. Instead, Plaintiffs relied on partial quotes and the inferences drawn by journalists. Such sources clearly do not constitute the formal, official acknowledgement that Courts have envisioned as a waiver of FOIA exemptions. *Cf. Wolf*, 473 F.3d at 379 (finding CIA may have waived Glomar response where the CIA Director had read responsive documents into the Congressional record). *See also Valfells,* 2010 WL 2428034 at *4 ("Logical deductions are not, however, official acknowledgments.").

In sum, at no time has the CIA specifically acknowledged the existence or nonexistence of responsive records; nor has the CIA acknowledged CIA interest or involvement in drone strikes as defined by the Plaintiffs. The ACLU apparently believes that its intelligence expertise,

or the intelligence expertise of journalists, is adequate to infer such a conclusion from the publicly available information. However, such inferences, even if the ACLU finds them compelling, do not constitute official acknowledgements on behalf of the CIA. *See Phillippi*, 655 F.2d at 1331; *Military Audit Project*, 656 F.2d at 745; *Afshar*, 702 F.2d at 1130-31.

CONCLUSION

For the foregoing reasons, Defendant CIA respectfully requests that the Court grant summary judgment in its favor.

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Respectfully submitted,

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