UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OPEN SOCIETY JUSTICE INITIATIVE, Plaintiff, v. DEPARTMENT OF DEFENSE *et al.*, Defendants.	No. 20 Civ. 5096 (JMF)
OPEN SOCIETY JUSTICE INITIATIVE, Plaintiff, v. DEPARTMENT OF HEALTH AND HUMAN SERVICES *et al*. Defendants.	No. 20 Civ. 6359 (JMF)

MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANT CENTRAL INTELLIGENCE AGENCY'S MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

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Defendant the Central Intelligence Agency ("CIA" or the "Government"), by its attorney, Audrey Strauss, United States Attorney for the Southern District of New York, respectfully submits this memorandum of law in further support of its motion for summary judgment [Dkt. No. 55] and in opposition to Plaintiff Open Society Justice Initiative's ("OSJI") cross-motion for summary judgment [Dkt. No. 71] in this action brought under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

PRELIMINARY STATEMENT

OSJI's FOIA requests [Dkt. No. 57-1] (the "Requests") cut to the heart of the role of the nation's intelligence agencies in identifying and responding to an unforeseen, once-in-a-century, globally destabilizing pandemic, specific details about which remain classified and unknown. The repeated refrain in OSJI's brief [Dkt. No. 72] ("Pl. Br.") is that, in its view, this case presents no "unusual circumstances" justifying a Glomar response. OSJI is incorrect.

As explained in the Government's opening brief and below, (1) OSJI ignores the detailed explanation provided by the senior CIA official and classification authority outlining how each of the Requests implicates a discrete piece of classified information that, if improperly released, could logically and plausibly be expected to harm national security; (2) OSJI ignores the CIA's logical and plausible explanation of how confirming or denying the existence of records responsive to OSJI's Requests, by their nature, would reveal unknown information about the existence of intelligence activities, intelligence sources and methods, foreign government information, and foreign activities of the United States that would be expected to have created such records; and (3) OSJI advances an interpretation of the official acknowledgment doctrine—that a generic press release addressing the general topic of a national security issue that neither mentions the CIA nor remotely references the actual pieces of requested information broadly

discloses the existence of specific classified records related to that subject matter—that has no basis in Second Circuit case law.

Accordingly, because the CIA has satisfied its light burden of setting forth the national security and intelligence interests at stake, and given the great deference owed to such facially reasonable concerns, this Court should grant summary judgment in favor of the Government and uphold the Glomar response issued in response to OSJI's Requests.

ARGUMENT

A. The CIA Has Justified Its Glomar Response Under Exemption 1

The CIA has explained with requisite specificity how the agency's Glomar response flows plausibly and logically from the requirements of FOIA Exemption 1. Rather than contend squarely with the substance of this reasoning as set forth by the Blaine Declaration [Dkt. No. 57] ("Blaine Decl."), OSJI attacks the CIA's submissions in generic terms, inaccurately suggesting that the agency believes it need "never reveal whether it does or does not have any information" related to national security, Pl. Br. at 15—an outlandish position that the CIA does not anywhere advance. This mischaracterization is belied by any fair reading of the agency's detailed declaration, which instead outlines the discrete harms implicated by the specific requests at issue here.[1]

As the CIA's declarant explains, and OSJI entirely ignores, confirming the existence of CIA "records related to the initial discovery of COVID-19, mitigation efforts, and engagement

[1] OSJI does not contest that three of the four predicates for invoking Exemption 1 are satisfied: that (1) an original classification authority has classified information that (2) is owned by, produced by or for, or under the control of the United States Government, and (3) pertains to certain Classification Categories. Executive Order 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009), §§ 1.1(a)(1)-(2), 1.4(b)-(d). Accordingly, only the fourth and final predicate, whether the Government has articulated how "the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security," remains at issue. *Id.* § 1.1(a)(4).

with both Executive Branch and non-government stakeholders . . . would expose the specific nature of the Agency's role in monitoring and responding" to the pandemic, revealing "whether, how, and to what extent the CIA may have been tracking COVID-19," Blaine Decl. ¶ 18—details that are not publicly known and (it can be said without exaggeration given the sensitivities around when and how world intelligence services first became aware of the danger posed by the novel coronavirus) would have immense ramifications if improperly disclosed. In fact, as set forth below, the declaration addresses each and every particular request and on what basis the Agency cannot respond. The declaration sets forth how each of OSJI's requests directly implicates aspects of this critical information in concrete terms:

- **Requests 1-4, 18, 20:** Confirming or denying the existence of CIA-specific records concerning when the President and the "Executive Branch" were "first informed of" COVID-19 and the resulting response, as well as related White House and Congressional communications and briefings (*see* Requests 1-4, 18, 20), would reveal (1) "whether the CIA possessed the ability to identify and provide . . . an early warning about the virus, or whether initial notice instead came from" a different source, and (2) "the extent to which CIA did or did not gather and share such information" at key points in the course of the crisis with various partners, including foreign allies. Blaine Decl. ¶ 19.

- **Requests 12 – 15:** Confirming or denying the existence of CIA-specific records related to Government action/response plans and associated presidential actions (*see* Requests 12-15) would similarly reveal whether the agency had the ability to, and did, "contribute[ ] to the meetings and documents referenced" with its own intelligence efforts in the early period of the pandemic. Blaine Decl. ¶ 18.

- **Requests 5-11, 19, 21**: Confirming or denying "whether the CIA maintains any record of" specific communications of other United States government agencies and Executive Branch officials (*see* Requests 5-11, 19, 21), which on their face lack "any clear connection to the CIA," would acknowledge whether the CIA has an "intelligence interest" in the communications (to the extent foreign parties are involved) or has an active "counterintelligence interest" in such communications (*i.e.* revealing that foreign intelligence entities have identified them to be of interest and that the CIA is aware of that fact). Blaine Decl. ¶ 18.

- **Request 16:** Confirming or denying the CIA's possession of information about specific potential medications and treatments for COVID-19 (*see* Request 16), in the midst of intense international competition over identifying and employing effective

therapies, would reveal if, and to what extent, "the Agency determined that information about these specific treatments was of significant intelligence value," as well as details about what resources, if any, the CIA devoted to pursuing various avenues of scientific knowledge. Blaine Decl. ¶¶ 20, 21.

- **Request 17**: Confirming or denying whether the CIA possesses records discussing "instructions to classify meetings and/or records relating to" COVID-19 (*see* Request 17) would be tantamount to confirming or denying the existence of the underlying records sought by each of the other requests, which would "have the effect of confirming" the very "classified information" at issue. Blaine Decl. ¶ 14.

As Blaine explains, a compelled response to these particular requests—by revealing the nature of the information collected by the CIA, how it is collected, including the sources from which information was drawn such as foreign governments and liaisons, and the specific individuals, entities, and the scientific research that may have been the subject of the agency's interest, all in the context of intelligence efforts to speedily identify and respond to the pandemic—would provide presently unknown insights to foreign adversaries into "strengths and/or weaknesses in the CIA's intelligence collection and reporting capabilities" with respect to preparing the country for present and future international health crises. *Id*. ¶ 19.

A Glomar response is justified in precisely such circumstances: where "crucial information . . . regarding the agency's priorities, interests, capabilities, activities, and methods," "how intelligence is shared, analyzed, and used throughout the Intelligence Community and Executive Branch," and "how foreign intelligence is acquired, retained and disseminated" is at stake, "sensitive details" that if confirmed one way or another would "reveal[ ] strengths, weaknesses, and gaps in intelligence coverage." *Schaerr v. Dep't of Justice*, 435 F. Supp. 3d 99, 112 (D.D.C. 2020); *see also ACLU v. Dep't of Defense*, 322 F. Supp. 3d 464, 477 (S.D.N.Y. 2018) (agency "entitled not to disclose the existence or not of an intelligence interest as to a particular subject"); *Center for Constitutional Rights v. Dep't of Defense*, 968 F. Supp. 2d 623, 638 (S.D.N.Y. 2013) (finding plausible explanation that revealing whether CIA "has ever had

any interest" in certain individuals, uses certain "means of collecting intelligence," and "cooperates with other agencies . . . for intelligence purposes" "could reasonably be expected to damage national security"); *ACLU v. Dep't of Justice*, 681 F.3d 61, 70 (2d Cir. 2012) (Glomar response required where information would "reveal the existence and scope of a highly classified, active intelligence activity"); *Wolf v. CIA*, 473 F.3d 370, 377 (D.C. Cir. 2007) (upholding Glomar response on basis of declaration explaining that information revealing "sources and methods" and "CIA priorities" could lead to "potential harm"). Indeed, courts routinely uphold Glomar responses where the FOIA requests at issue would reveal "vulnerabilities" in intelligence efforts by exposing "the success or lack of success in collecting information" in contexts that self-evidently implicate the nations' security interests, as the current pandemic certainly does. *Larson v. Dep't of State*, 565 F.3d 857, 866-67 (D.C. Cir. 2009); *see also Students Against Genocide v. Dep't of State*, 257 F.3d 828, 840 (D.C. Cir. 2001) (explanation that information at issue could expose "vulnerabilities" in agency's "specific capabilities, sources and methods" was "sufficiently specific").

OSJI makes no effort to address any of this applicable authority, and the cases that it does cite are either factually and legally inapposite or only further demonstrate how the CIA's declaration by comparison amply satisfies its light burden to assert a Glomar response under Exemption 1. *See ACLU v. Dep't of Defense*, --F.3d--, No. 17 Civ. 9972 (ER), 2020 WL 5913758, at *7 (S.D.N.Y. Oct. 5, 2020) (affirming Glomar response given "deferential posture in FOIA cases regarding the uniquely executive purview of national security," where declaration explained that knowledge of existence of certain presidential guidance on targeting terrorists could undermine intelligence operations and relations with foreign states); *ACLU v. Dep't of Defense*, 901 F.3d 125, 136 (2d Cir. 2018) (explaining in Exemption 3, non-Glomar context that

"[j]udges do not abdicate their judicial role by acknowledging their limitations and deferring to an agency's logical and plausible justification in the context of national security; they fulfill it"); *Amnesty International USA v. CIA*, 728 F. Supp. 2d 479, 514 (S.D.N.Y. 2010) (upholding Glomar response under Exemption 1 where CIA's declarations plausibly "summariz[ed] the potential harm to national security" from release of information about Executive Branch communications, which would necessarily disclose intelligence sources and methods); *Campbell v. Dep't of Justice*, 164 F.3d 20, 31 (D.C. Cir. 1998) (finding in non-Glomar case that while agency cannot rely on bald statement that routine surveillance files are FOIA exempt, "declaration need not exhaustively explain" classification decision, only how material is "logically within the domain of the exemption claimed") (citation omitted).

Accordingly, because the CIA declaration has detailed how OSJI's requests logically and plausibly implicate specific sensitive details regarding the agency's methods and capabilities in responding to the ongoing COVID-19 pandemic, information that falls within the domain of Executive Order 13,526, the Government properly based its Glomar response on Exemption 1. *See CIA v. Sims*, 471 U.S. 159, 179 (1985) ("magnitude of the national security interests and potential risks at stake" means that agency must be afforded "great deference"); *see also Larson v. Dep't of State*, 565 F.3d 857, 865 (D.C. Cir. 2009) (courts should not "second-guess the predictive judgments made by the government's intelligence agencies") (quotation marks omitted); *Frugone v. CIA*, 169 F.3d 772, 775 (D.C. Cir. 1999) (courts should defer to agencies' "facially reasonable concerns").[2]

[2] OSJI appears to suggest that the CIA's explanations of potential harm are undercut because the agency publishes a general description of the COVID-19 pandemic on its website, including the fact that countries have implemented travel restrictions. Pl. Br. at n.28. It cannot be credibly argued that publication of generally known information about the state of the pandemic has any relation to the CIA's explanations of harm that could arise from the release of the specific, classified categories of information OSJI seeks.

B. The CIA Has Independently Justified Its Glomar Response Under Exemption 3

The CIA's Glomar response may be also upheld on the independent basis of its propriety under Exemption 3 and the terms of the National Security Act ("NSA"), as amended, 50 U.S.C. § 3024(i)(1). To begin, OSJI does not contest that the NSA is a withholding statute, *see Sims*, 471 U.S. at 181, and as a consequence, the "sole issue for decision is the . . . inclusion of withheld material within the statute's coverage," *Wilner v. NSA*, 592 F.3d 60, 72 (2d Cir. 2009) (internal quotation marks omitted). OSJI fails to call into question the CIA declarant's logical explanation for why the withheld information falls under the ambit of the NSA.

As courts have long recognized, "there is an important interest to be served by a policy that does not confirm or deny the existence of documents which would establish the existence of intelligence sources and methods. To do otherwise would mean that the CIA could only refuse to confirm or deny the existence of such documents when such documents actually existed, which would itself be a way of identifying those document requests which had identified intelligence operations." *Earth Pledge Foundation v. CIA*, 988 F. Supp. 623, 628 (S.D.N.Y. 1996). Here, as Blaine plausibly describes, given the as-yet enigmatic, foreign origins of COVID-19 and the ongoing international competition over the pandemic response, the existence of CIA records concerning the Government's initial understanding of and response to the spread of COVID-19, as well as certain Executive Branch officials' communications, cannot be confirmed or denied without exposing the intelligence sources and methods underlying the collection of any such information, including the existence of foreign government-placed and foreign liaison-derived sources of intelligence, for whom the CIA's ability to maintain confidentiality is paramount. *See* Blaine Decl. ¶¶ 18, 22, 23, 27. Just as plausible is Blaine's explanation that confirming or denying the existence of CIA records dealing with various emerging therapeutic avenues and

areas of research both within and without the United States would force the agency to acknowledge whether its intelligence-gathering methods include cultivating such scientific information with no obvious connection to the CIA. *See id*. ¶¶ 21, 22, 27. It is well established that the NSA categorically shields such information, where a substantive response "would reveal details" regarding the CIA's sources and programs, including "whether or not the CIA used certain specified methods." *Amnesty International USA*, 728 F. Supp. 2d at 511; *see also New York Times*, 965 F.3d 109, 115 (2d Cir. 2020) (Exemption 3 Glomar response upheld where substantive "response would reveal information that concerns intelligence sources and methods," including fact of CIA connection); *Wilner*, 592 F.3d at 75 (Glomar response appropriate under NSA where "very nature of [plaintiffs'] request . . . establishes that *any response* would reveal" the existence of intelligence method); *Earth Pledge Foundation*, 988 F. Supp. at 627 (upholding Glomar response under Exemption 3 where response to request for certain correspondence would reveal existence *vel non* of sources, compromising confidentiality).

The sole case OSJI cites to support its Exemption 3 argument, *ACLU v. Dep't of Defense*, No. 17 Civ. 9972 (ER), 2020 WL 5913758 (S.D.N.Y. Oct. 5, 2020), is distinguishable. There, the agency declaration was insufficient because it sought to invoke the NSA to avoid confirming or denying the existence of a forward-looking presidential guidance document concerning the targeting of terrorists solely on the basis that "disclosure could reduce the efficacy of operations that may involve the collection of intelligence." *Id*. at *7. By contrast, the Blaine Declaration does not outline a mere attenuated risk of an adverse effect on CIA operations generally; rather, it spells out how the precise information at issue itself would reveal the existence *vel non* of intelligence sources, including from foreign partners acting on assurances of confidentiality, and discrete methodology related to monitoring scientific research. As the *ACLU* court recognized,

where, as here, "disclosing the information at issue would . . . reveal[ ] something about how the CIA collected intelligence" in this manner, the NSA and Exemption 3 compel the agency to withhold the requested information. *Id*.

Thus, because the CIA has explained how a Glomar response is necessary in order to protect discrete intelligences sources and methods related to responding to the COVID-19 pandemic that remain classified and unknown, the NSA and Exemption 3 categorically bar the agency from providing any other response.

C. The CIA Has Not Officially Acknowledged the Existence of the Specific Information Implicated By Requests 2 and 18

OSJI contends that the CIA's Glomar response is precluded as to two requests—for records indicating "the Executive Branch's response when it was first informed of" COVID-19 and for communications between "your agency and the White House regarding" COVID-19, *see* Requests 2, 18—because the agency has already officially acknowledged the existence of responsive records. OSJI rests this assertion on a short press release issued by the Office of the Director of National Intelligence ("ODNI") on April 30, 2020, which read in its entirety:

> The entire Intelligence Community [("IC")] has been consistently providing critical support to U.S. policymakers and those responding to the COVID-19 virus, which originated in China. The [IC] also concurs with the wide scientific consensus that the COVID-19 virus was not manmade or genetically modified.
>
> As we do in all crises, the Community's experts respond by surging resources and producing critical intelligence on issues vital to U.S. national security. The IC will continue to rigorously examine emerging information and intelligence to determine whether the outbreak began through contact with infected animals or if it was the result of an accident at a laboratory in Wuhan.

See IC Statement on Origins of COVID-19, ODNI News Release No. 11-20, available at https://www.dni.gov/index.php/newsroom/press-releases/press-releases-2020/item/2112-

intelligence-community-statement-on-origins-of-covid-19 [last visited Feb. 24, 2021] ("IC Statement"). OSJI's reliance on the official acknowledgment doctrine on this basis is meritless.

The Second Circuit recently addressed the contours of the doctrine in *New York Times v. CIA*, 965 F.3d 109 (2d Cir. 2020) ("*New York Times*"), and *Osen LLC v. United States Central Command*, 969 F.3d 102 (2d. Cir. 2020). In those cases, the Court reaffirmed the "precise and strict test for claims of official disclosure" first adopted in *Wilson v. CIA*, 586 F.3d 171 (2d Cir. 2009): "Classified information that a party seeks to obtain or publish is deemed to have been officially disclosed only if it (1) is as specific as the information previously released, (2) matches the information previously disclosed, and (3) was made public through an official and documented disclosure." *New York Times*, 965 F.3d at 116 (alterations and quotation marks omitted); *see also Osen*, 969 F.3d at 110 ("disclosure of similar information does not suffice; instead, the specific information sought by the plaintiff must already be in the public domain by official disclosure") (citation omitted).[3] OSJI cannot satisfy the specificity and matching requirements of this exacting test, nor can it show that the ODNI-issued press release constituted an official disclosure that can bind the CIA for purposes of the two Requests at issue.

Under the related specificity and matching prongs, OSJI bears the burden of pointing to already-acknowledged information that is "as specific as" that being withheld, to the point that "there cannot be any substantive differences" between the two, and of showing that the "specific information . . . *appears to duplicate* that being withheld." *Osen*, 969 F.3d at 110, 111 (citations omitted) (emphasis in original). OSJI, which tellingly declines to quote any portion of the actual content of the IC Statement, fails to meet this level of precision.

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[3] Although OSJI implies that *Wilson* has somehow lost force, Pl. Br. at 19 & n.29, it neglects to mention that both *New York Times*, which it wholly ignores, and *Osen*, which it quotes only selectively, affirmed the *Wilson* standard in full. *See, e.g.*, *Osen*, 969 F.3d at n.5 ("*Wilson* remains the law in this Circuit").

OSJI's Requests seek two very narrow and discrete pieces of information: whether the CIA has records related to when any component of the Executive Branch first learned of COVID-19 and whether the agency possesses records of related communications with the White House. By contrast, the IC Statement addresses in general terms the IC's support to date to U.S. policymakers, its concurrence with scientific consensus that the COVID-19 is not manmade, and an affirmation of its role of producing critical intelligence on issues vital to national security. Nowhere in the statement's four sentences is there any explicit or implicit mention of the date on which the Executive Branch writ large (let alone which component) first became aware of COVID-19, pandemic-related communications to and from the White House, or the CIA's nexus to either subject. Indeed, the only overlap between the information OSJI seeks and the information addressed by the press release is in the broadest sense of overall topic: as in "all crises," United States intelligence services will play a role in addressing COVID-19 as a national security issue. Thus, OSJI seeks to substitute in place of *Wilson*'s governing "precise and strict test" for disclosure, a broad grant of "blanket subject-matter waiver," the type of imprecise misapplication of the doctrine against which the Second Circuit has warned.[4] *Osen*, 969 F.3d at 113 & n.4 ("general disclosures about the vulnerabilities of" national security-related subjects

[4] By OSJI's logic, a generic statement that the entire IC will support U.S. policymakers by investigating the origins of a hostile power's illicit weapons program would constitute a waiver of the highly classified facts of when the IC (and which among its eighteen agencies and departments) first identified the threat and which agencies may have been communicating with the White House in the aftermath—critical details which are in no way broached as a subject, let alone acknowledged in specific terms, by the statement. Yet that type of indiscriminate subject-matter waiver is precisely what OSJI suggests should apply here, pointing out for instance that prior to 2020, intelligence agencies routinely and publicly recognized the dangers of contagious diseases in Worldwide Threat Assessments. *See* Pl. Br. at 12-13. A public acknowledgment of the issue of terrorism as a national security threat does not mean that intelligence agencies have waived their ability to protect discrete classified information about the emergence of and response to a specific terrorist group. So too here, OSJI's oversimplified reasoning is insufficient to invoke the official acknowledgment doctrine.

are "too broad to trigger the official disclosure doctrine" as to specific records); *see also New York Times*, 965 F.3d at 112-13, 121-22 (statements at national security conference by the United States Special Operations Commander assuming existence of covert program to arm Syrian rebels does not constitute waiver of Glomar response as to existence of specific CIA records related to that subject).

To try and bridge the gap between the generalized topic of the IC Statement and the specific information the Requests seek, OSJI surmises that it would be "implausible" and "difficult to believe" that the CIA does not possess responsive records in light of the scope and impact of the COVID-19 pandemic. Pl. Br. at 21. But such speculation is beside the point. *See Leopold v. CIA*, -- F.3d --, 2021 WL 446152, at *5 (D.C. Cir. Feb. 9, 2021) (official acknowledgment not established by assumption that "it seems wildly unlikely that, in the eight and half years since the Syrian civil war began, the [CIA] has done no intelligence gathering that produced a single record even pertaining to payments to Syrian rebels"). As the Second Circuit has explained, "[t]he consequence of our holding in *Wilson* is that just because the existence of classified activity may be inferred from publicly available information or from official statements, government waiver will not be found unless all legal criteria have been met." *New York Times*, 965 F.3d at 116; *see also Wilson*, 586 F.3d at 186 ("the law will not infer official disclosure of information classified by the CIA from [ ] widespread public discussion of a classified matter") (citing *Wolf*, 473 F.3d at 378). Because the IC Statement does not duplicate to the required degree of specificity information purportedly held by the CIA about when the Executive Branch was first informed of COVID-19 or subsequent White House communications, those legal criteria have not been met.

Similarly unavailing is OSJI's reliance on two cases in which courts found official acknowledgment based on readily distinguishable facts. The prior disclosure found sufficiently specific and duplicative in *ACLU v. Dep't of Defense*, 322 F. Supp. 3d 464 (S.D.N.Y. 2018)—a series of White House press briefings that explicitly acknowledged CIA participation in an intelligence-gathering raid in Yemen that was subject of the FOIA request—is a far cry from the attenuated connection OSJI attempts to draw between the generic IC Statement and supposed confirmation of CIA-specific involvement in the specific topics raised by the Requests. *See id*. at 478. Likewise, the disparity in content between Requests and supposed disclosure here bears no reasonable relation to *New York Times v. Dep't of Justice*, 756 F.3d 100 (2d Cir. 2014), where the information sought, Office of Legal Counsel records related to the targeted killings of United States nationals abroad, had been officially disclosed by the release of a Department of Justice white paper that "virtually parallel[ed]" the very substantive analysis being withheld, as well as by express confirmatory statements by the President, the CIA Director, and the Attorney General. *See id*. at 114-20.

Moreover, OSJI has not shown that the ODNI-issued press release constitutes a public disclosure that can bind the CIA specifically for purposes of responding to the Requests. While the statement was made on behalf of the IC, of which the CIA is a member, neither the CIA nor any other specific component or department within the IC was mentioned by name in relation to any of the intelligence activities referenced in the release. Nothing in its language suggests that it was somehow a "joint" statement made specifically by the ODNI and CIA, as OSJI misleadingly calls it. Pl. Br. at 20. Thus, even assuming for argument's sake that the statement sufficiently implicated the timing of the Executive Branch's initial discovery of COVID-19 and White House communications specifically, it certainly left "ambiguous," and "lingering doubts" remained,

about which specific agencies within the IC—as opposed to the general and vague proposition that the "entire [IC] has been consistently providing critical support," *see* IC Statement[5]—were involved in those particular subjects. *New York Times*, 965 F.3d at 121, 122; *see also Leopold*, 2021 WL 446152, at *4 (even if presidential tweet "revealed *some* program, it did not reveal the existence of Agency records about that alleged program") (emphasis in original). Indeed, this level of generality, avoiding attribution of any specific activities or assessments to any one of the component agencies of the IC, is consistent with the public position purposefully taken by the CIA: for its part, the agency has responded to media inquiries about its role in the COVID-19 response with "repeated, consistent refusal to confirm or deny any specific details related to the CIA's activities in this area." Blaine Decl. ¶ 24. Accordingly, even if the specificity and matching elements had been satisfied, the IC Statement cannot constitute an official disclosure unambiguously linking the relevant information to the CIA.

In sum, "the existence or nonexistence of the *specific records* sought" by the FOIA requests at issue has not been officially and publicly acknowledged by the generically and broadly formulated IC Statement, which includes no details whatsoever concerning the CIA's involvement in either of the topics raised by Requests 2 and 18. *New York Times*, 965 F.3d at 116 (citing *Wilner*, 592 F.3d at 70) (emphasis in original). The official acknowledgment doctrine therefore is not applicable and does not preclude the CIA's Glomar response.

D. A *Vaughn* Index Is Not Required

Finally, OSJI urges the Court to order the CIA to produce an index under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). To the extent that OSJI suggests that an agency may be

[5] OSJI makes much of the fact that the ODNI press release refers to the "entire" IC to argue that the CIA specifically has acknowledged the existence of responsive records. But that phrase cannot bear the weight OSJI assigns to it, as it is used only in relation to the generic reference to unspecified support made in the first sentence of the release.

compelled to issue a *Vaughn* index even in the context of a Glomar response, that contention is unfounded because, of course, the entire purpose of such a response is to prevent "acknowledging even the existence of certain records" where confirmation of that fact "would reveal information entitled to be protected." *New York Times v. Dep't of Justice*, 758 F.3d 436, 438 n.3 (2d Cir. 2014) (citation omitted). To the extent that OSJI makes this application on the premise that the CIA must either confirm or deny the existence of records responsive to its various requests, the request should be denied; for the reasons set forth above, the CIA has satisfied its burden of establishing that its Glomar response is properly tied to FOIA Exemptions 1 and 3 and the relevant information has not been officially acknowledged.

CONCLUSION

The CIA's motion for summary judgment should be granted and OSJI's cross-motion for summary judgment should be denied.

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Respectfully submitted,

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