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

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFF OPEN SOCIETY JUSTICE INITIATIVE'S CROSS-MOTION FOR SUMMARY JUDGMENT

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I. CIA Does Not Meet the Requirements for a Glomar Response

Agencies seeking to withhold information in response to a FOIA request bear the burden of justifying non-disclosure by meeting stringent standards and requirements. For a Glomar response—the most extreme form of non-disclosure permitted under FOIA—the requirements are even more strict. An agency's success in meeting these exacting requirements turns on the contents of its supporting declaration.

First and foremost, the declaration must provide a "logical and plausible" explanation justifying reliance on a particular FOIA exemption. *See N.Y. Times Co.* v. *DOJ*, 756 F.3d 100, 119 (2d Cir. 2014). This standard can be met only by an affidavit or declaration with "reasonably specific detail, demonstrat[ing] that the information withheld logically falls within the claimed exemption, and [is] not controverted by contrary evidence in the record nor by evidence of agency bad faith." *Wilner* v. *NSA*, 592 F.3d 60, 73 (2d Cir. 2009). In reviewing an agency's justification for invoking a FOIA exemption, courts must resolve all doubts in favor of disclosure. *Id.* at 69.

The extreme nature of a Glomar response heightens an agency's burden to provide a logical and plausible justification. Its declaration must not only provide reasonably specific supporting detail but also must be "particularly persuasive" and set forth the "unusual circumstances" warranting the refusal even to confirm or deny the existence of the requested records. *N.Y. Times*, 756 F.3d at 122; *see also Nat'l Day Laborer Org. Network* v. *ICE*, 827 F. Supp. 2d 242, 253 (S.D.N.Y. 2011) (holding that a Glomar response "applies only in rare cases when the very act of confirming or denying the existence of records 'would cause harm cognizable under a[ ] FOIA exception.'" (quoting *Wilner*, 592 F.3d at 68)).

Generalizations fail: "conclusory affidavits that merely recite statutory standards, or are overly vague or sweeping will not carry the government's burden." *ACLU* v. *DOD ("ACLU 2018")*, 322 F. Supp. 3d 464, 473 (S.D.N.Y. 2018) (internal alterations omitted). "Absent a sufficiently specific explanation from an agency, a court's *de novo* review is not possible and the adversary process envisioned in FOIA litigation cannot function." *Halpern* v. *FBI*, 181 F.3d 279, 295 (2d Cir. 1999). Accordingly, the declaration must "giv[e] reasonably detailed explanations why any withheld documents fall within an exemption," *N.Y. Times*, 756 F.3d at 112, and must "educate the Court on the connection between" the act of confirming or denying the existence of specified information and the harm cognizable under the invoked FOIA exemption, *ACLU* v. *DOD ("ACLU 2020")*, No. 17 Civ. 9972, 2020 WL 5913758, at *7 (S.D.N.Y. Oct. 5, 2020).

Thus, under the national-security exemption (FOIA Exemption 1), CIA must demonstrate that the release of "*each item* of information it seeks to withhold," *Ctr. for Const. Rts.* v. *CIA*, 765 F.3d 161, 166 (2d Cir. 2014) (emphasis added), "reasonably could be expected to result in damage to the national security." Exec. Order No. 13,526, 3 C.F.R. § 1.1(a)(4) (2010). And under the statutory-prohibition exemption (FOIA Exemption 3), CIA must demonstrate that "*each item* of information it seeks to withhold," *Ctr. for Const. Rts.*, 765 F.3d at 155 (emphasis added), is "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3).

Against this body of law, CIA somehow contends that its burden in invoking Glomar is just a "light burden." CIA Opp'n Br. at 2, 5. That is wrong. CIA appeals to judicial deference, but the Court may defer to CIA's prophesies of harm to national security or to sources and methods only ***after*** CIA has met its burden of providing a logical and plausible explanation with a particularly persuasive, reasonably specific, and detailed declaration connecting the purported

harm and the requested disclosure and demonstrating that unusual circumstances warrant the extreme Glomar response. *ACLU* v. *DOD*, 901 F.3d 125, 134 (2d Cir. 2018). That is why the Second Circuit held that "concerns of national security and foreign relations do not warrant *abdication of the judicial role*" and "[d]eference to the executive's national security and military judgments is appropriate only where [courts] have sufficient information to evaluate whether those judgments were logical and plausible." *Id.* at 134 (emphasis added) (citing *Holder* v. *Humanitarian L. Project*, 561 U.S. 1, 34 (2010)).

CIA's request for boundless deference, while wrong, is informative. It explains why CIA ignores or barely mentions the legal standards it must satisfy and on which it has the burden of persuasion, *see Florez* v. *CIA*, 829 F.3d 178, 182 (2d Cir. 2016), and why CIA never even references the "particularly persuasive" standard by which its Declaration must be measured. As shown below, CIA has failed to satisfy its burden of persuasion that its reliance on Exemptions 1 and 3 is justified, and this Court therefore has no occasion to defer to CIA's predictions of harm.

A. CIA Has Failed to Justify Invoking Exemption 1

CIA contends that a mere five paragraphs of the Blaine Declaration (paragraphs 4 and 18–21) provide sufficiently specific and particularly persuasive justification for why national security would be harmed by confirming or denying the existence of records for ***twenty-one*** FOIA Request topics. Opp'n Br. at 3–4. CIA's brief's characterization of the Declaration is not evidence upon which this Court can rely,[1] and the five paragraphs of the Declaration themselves do not actually articulate the connection between any harm to national security and the disclosure of the subject matter of each of Plaintiff's individual Request topics. *See Wilson* v. *CIA*, 586 F.3d 171, 195 (2d Cir. 2009) (holding that supporting affidavit must provide enough

[1] *See Kulhawik* v. *Holder*, 571 F.3d 296, 298 (2d Cir. 2009) ("An attorney's unsworn statements in a brief are not evidence.").

"specificity" to "confirm the rationality of [the agency's] decision"); *ACLU 2020*, 2020 WL 5913758, at *7 (holding that the agency's affidavit must "educate the Court on the connection between" the cognizable harm under the asserted exemption and the requested information); *N.Y. Times*, 756 F.3d at 112 (holding that the agency must "giv[e] reasonably detailed explanations why any withheld documents fall within an exemption").

CIA states that paragraph 19 of the Declaration sufficiently describes how harm to national security would result from confirming or denying the existence of information pertaining to Request topics 1–4, 18, and 20. But paragraph 19 addresses only when then-President Trump was informed of the virus. In contrast, Request topics 1–4, 18, and 20 more broadly seek records related to when the Executive Branch was first informed of the virus, President Trump's and the Executive Branch's response when they were informed of the virus, communications between CIA and the White House regarding the virus, and records and communications between any member of the Executive Branch and Congress regarding the virus. Pl.'s Op. Br., Exhibit B at 2–3. Nothing in paragraph 19 of the Blaine Declaration touches on the subject matter of these topics. Rather, paragraph 19 makes generic statements such as how "confirming the existence or nonexistence of *certain records* could reveal strengths and/or weaknesses in the CIA's collection and reporting capabilities . . . ." Blaine Decl. ¶ 19 (emphasis added). Because that explanation is so broad as to apply to any subject whatsoever, it falls short of a particularly persuasive explanation that "educate[s] the court on the connection" between confirming or denying the existence of records on *specified* topics and the purported harm to national security that would result therefrom. *ACLU 2020*, 2020 WL 5913758, at *7. Even as to Request topic 4, which seeks records related to Present Trump's response upon first being informed of the virus, the Declaration fails to actually articulate how confirming or

denying the existence of such records could manifest in harm to national security, and therefore also does not "educate the court" on why Exemption 1 should be applied. *Id.*

CIA further argues that one lone paragraph of the Declaration—paragraph 18—provides a sufficient explanation for how harm to national security could result from confirming or denying the existence of records responsive to ***thirteen*** Request topics, 5–15, 19, and 21.[2] Paragraph 18 does not engage with or acknowledge the subject matter of any of these thirteen topics. Instead, CIA cites generalized, untethered concerns over the potential for revealing its intelligence interest in or involvement with the pandemic, which are not entitled to this Court's deference given the lack of any articulated nexus between the subject of the Request topics and the purported harm. *Id.* For example, why would CIA necessarily disclose the extent of its role in responding to the pandemic simply by confirming or denying the existence of records relating to communications involving Robert Kadlec on asymptomatic spread of the virus? That the Court and Plaintiff are left to ponder this connection demonstrates CIA's fundamental failure to satisfy its burden. Paragraph 18 thus provides exactly the kind of "conclusory . . . overly vague [and] sweeping" statements that precedent forbids. *ACLU 2018*, 322 F. Supp. 3d at 473.

[2] In numerical order, Request topics 5–15, 19, and 21 seek records pertaining to: (5) communications involving the National Center for Medical Intelligence; (6) January 2020 communications involving a State Department epidemiologist; (7) January 2020 communications involving Robert Redfield, the Director of the CDC, and Chinese officials; (8) communications between January 1, 2020 and February 29, 2020 involving Alex Azar, the Secretary for HHS, and then-President Trump; (9) communications between January 1, 2020 and February 29, 2020 involving Dr. Carter Mecher, the senior medical advisor for the Department of Veterans Affairs; (10) communications between January 1, 2020 and February 29, 2020 involving Robert Kadlec, the Assistant Secretary for Preparedness and Response, regarding asymptomatic spread of the virus; (11) communications between January 1, 2020 and February 29, 2020 involving Peter Navarro, President Trump's trade advisor; (12) consideration or exercise of "extraordinary presidential authority"; (13) dates and agendas for the coronavirus task force from the months of January and February 2020; (14) the so-called "Four steps to mitigation" plan in February and/or March 2020; (15) a February 2020 document entitled "U.S. Government Response to the 2019 Novel Coronavirus"; (19) communications between the Executive Branch and non-governmental entities capable of developing or assisting in the development of tests for the virus; and (21) communications between the Executive Branch and the World Health Organization.

CIA also contends that paragraphs 20 and 21 of the Declaration explain how confirming or denying the existence of documents responsive to Request topic 16 could threaten national security. Request topic 16 seeks records pertaining to specific drugs and "other drugs or substances, such as disinfectants, for treating" COVID-19. Pl.'s Op. Br., Exhibit B at 3. While here the Declaration does acknowledge the subject matter of a Request topic, CIA premises the purported harm that would result from confirming or denying the existence of such records on circular logic. CIA explains that if it confirmed the existence of the requested records, "such confirmation would show that the Agency determined that information about these specific treatments was of significant intelligence value," and, "[w]ith governments around the world vying to discover an effective COVID-19 treatment and competing for limited resources needed to pursue promising leads," such a revelation could pose a threat to national security. Blaine Decl. ¶ 21. Why? CIA answers that "revealing whether CIA did or did not determine such scientific research information to be of intelligence value, or that it lacked the capacity to gather such information" poses "a clear risk to national security." Blaine Decl. ¶ 21. Even if this type of reasoning might be sufficient to support redacting a record or withholding a record an agency acknowledges exists (such as through a *Vaughn* index), it is not enough to satisfy the "particularly persuasive" and "unusual circumstances" standards required for a Glomar response.

Finally, CIA claims that paragraph 14 of the Declaration provides a sufficiently detailed justification for issuing a Glomar response for Request topic 17. This Request topic seeks records pertaining to "instructions to classify meetings and/or records relating to" COVID-19. Pl.'s Op. Br., Exhibit B at 3. Paragraph 14 seems to be discussing CIA's general approach when responding to and assessing FOIA requests. It says nothing about the subject matter of Request topic 17, and is therefore deficient for the same reason as paragraphs 18–21.

* * *

Ultimately, CIA's argument is one of philosophy, not evidence. CIA contends that because it is an intelligence agency, whether it even possesses information is always "inextricably linked with the national security interests," Blaine Decl. ¶ 20, and therefore any cursory, generalized justification meets its burden to withhold. As Plaintiff stated in its opening brief, however, that reasoning would give CIA a blanket exemption from the FOIA statute altogether.

B. CIA Has Failed to Justify Invoking Exemption 3

CIA's briefing on Exemption 3 directs the Court to broad principles about the importance of protecting intelligence sources and methods. CIA Opp'n Br. at 7–9. In contrast, however, FOIA enshrines the public's right to know what its government is doing. *ACLU* v. *FBI*, 429 F. Supp. 2d 179, 186 (D.D.C. 2006). This right to know compels CIA to justify its reliance on Exemption 3 with a "particularly persuasive" affidavit that sets forth the "unusual circumstances" warranting a Glomar response and to provide a logical and plausible explanation of how intelligence sources and methods would be revealed by confirming or denying the existence of records for each of the Request topics.

As discussed in Plaintiff's opening brief, CIA's Declaration does not accomplish these ends, Pl.'s Op. Br. at 16–17, and CIA's opposition brief does not and cannot improve upon the Declaration's deficiencies. Like its Declaration, CIA's brief does not draw any connection between the subject matter of any of Plaintiff's Request topics and the possible disclosure of intelligence sources and methods. For example, nothing in the brief or Declaration explains why confirming or denying the existence of records relating to communications involving Robert Kadlec on asymptomatic spread of the virus (Request topic 10), communications involving Peter Navarro (Request topic 11), communications between the Executive Branch and the World

Health Organization (Request topic 20), and dates and agendas for the coronavirus task force (Request topic 13) would jeopardize intelligence sources and methods. *See supra* p. 5 n.2.

CIA's brief argues that confirming or denying the existence of certain records would reveal "whether its intelligence-gathering methods include cultivating" that information. CIA Opp'n Br. at 8. First, this assumes that if CIA has certain information then it must have received it through intelligence gathering. That need not be true, and the Declaration offers no logical or plausible explanation for this assumption. To take just one example from Request topic 13, why is it the case that the records showing the dates and agendas for the coronavirus task force are the product of intelligence gathering? And certainly the absence of those records says nothing about how CIA "cultivates" intelligence, since it surely is not spying on other agencies. Second, this argument presumes that merely confirming or denying the existence of records on a certain subject would reveal sources and methods. Taking the same example from Request topic 13, how would confirming or denying the existence of dates and agendas for the coronavirus task force reveal CIA's sources and methods? This explanation is nowhere to be found in the Declaration, and this Court cannot therefore credit the purported harm that disclosure might entail.

II. CIA Officially Acknowledged Its Interest and Role in the COVID-19 Pandemic

A Glomar response is invalid where "the substance of an official statement and the context in which it is made permits the inescapable inference that the requested records in fact exist." *ACLU 2018*, 322 F. Supp. 3d at 475 (internal quotation marks omitted); *Open Soc'y Just. Initiative* v. *CIA*, No. 19-cv-1329 (PAE), 2020 WL 7231954, at *4 (S.D.N.Y. Dec. 8, 2020). In *Wilson* v. *CIA*, the Court held that, for information that is the subject of a FOIA request to be deemed officially acknowledged or disclosed, it must be "as specific as the information previously released," "match[] the information previously disclosed," and "made public through

an official and documented disclosure." 586 F.3d at 186. While the *Wilson* test continues to apply, the Second Circuit has cast doubt on a "rigid application" of the *Wilson* test. *N.Y. Times*, 756 F.3d at 120 & n.19 (noting application of the test "may not be warranted in view of its questionable provenance.").

CIA argues that its Glomar response as to Request topics 2 and 18 is not invalid under the official-acknowledgment doctrine because Request topics 2 and 18 are narrow in their scope and the Joint Statement is written in general terms. CIA Opp'n Br. at 11.[3] Request topics 2 and 18 seek records related to when any component of the Executive Branch first learned of the virus and communications between CIA and the White House regarding the virus. As discussed in Plaintiff's opening brief, *see* Pl.'s Op. Br. at 20–21, the Joint Statement supports "the inescapable inference that the requested records in fact exist," *ACLU 2018*, 322 F. Supp. 3d at 475, because it acknowledges that the intelligence community (which comprises Executive Branch agencies, including CIA) "has been consistently providing critical support to U.S. policymakers and those responding to the COVID-19 virus, which originated in China." Joint Statement, Pl.'s Op. Br., Exhibit A.

CIA ignores this standard, instead urging this Court to engage in a rigid, outcome-oriented application of the matching test, pointing to cases such as *Wilson*, *New York Times*, and *Osen* v. *U.S. Cent. Command*, 969 F.3d 102 (2d Cir. 2020). But the inescapable-inference analysis has long been applied by courts, including since the decisions in *Wilson*, *New York Times*, and *Osen*. *See, e.g.*, *Open Soc'y Just. Initiative*, 2020 WL 7231954, at *4; *ACLU 2018*, 322 F. Supp. 3d at 475; *James Madison Project* v. *DOJ*, 302 F. Supp. 3d 12, 22 (D.D.C. 2018); *Leopold* v. *CIA*, 380 F. Supp. 3d 14, 24 (D.D.C. 2019). The inescapable-inference analysis is

[3] CIA also states that Plaintiff "tellingly decline[d] to quote any portion of the actual content of the IC Statement," CIA Opp'n Br. at 10, but the entirety of this statement is quoted at pages 6–7 of Plaintiff's opening brief.

thus viewed not as an invalid alternative to the *Wilson* matching test, but as a useful heuristic for determining whether that test has been satisfied.

CIA also argues that the Court cannot attribute the Joint Statement to CIA because it was issued by the Office of the Director of National Intelligence. CIA Opp'n Br. at 13. But the Joint Statement explicitly states that "[t]he *entire* Intelligence Community has been consistently providing critical support to U.S. policymakers and those responding to the COVID-19 virus . . ." and goes on to make further references to the "Intelligence Community" and use the pronoun "we" in describing the Intelligence Community's involvement in responding to the virus. Pl.'s Op. Br., Exhibit A (emphasis added). CIA also admits that it is a member of the Intelligence Community as that term is used in the Joint Statement. CIA Opp'n Br. at 13. There is simply no merit to the argument that the Joint Statement does not apply to CIA.

III. A *Vaughn* Index, While Not Required, Would Diminish Any Concerns about Threats to National Security and Intelligence Sources and Methods

If the Court finds CIA need not now disclose the requested records in full, it should nevertheless order CIA to provide a *Vaughn* index, which would ameliorate any of CIA's legitimate concerns for protecting national security and intelligence sources and methods.

CIA invokes Exemptions 1 and 3 because of purported threats to national security and intelligence sources and methods. However, CIA has already acknowledged on both its website and through the Joint Statement that it has an interest in the COVID-19 pandemic. It is therefore not logical or plausible for CIA to oppose disclosure on the basis that it would reveal its intelligence interest regarding the virus—something it effectively acknowledges anyway, *see* Blaine Decl. ¶ 17 ("it may be fairly inferred that the U.S. intelligence community has an intelligence interest in COVID-19 generally"). Nor has CIA provided a particularly persuasive

and reasonably specific justification that a Glomar response is required to protect national security and intelligence sources and methods for each of Plaintiff's Request topics.

Accordingly, even if the Court finds that CIA is entitled to withhold some information pursuant to Exemption 1 or 3, CIA should still be ordered to provide a *Vaughn* index, which will allow Plaintiff the opportunity to actually assess the basis for any information CIA seeks to withhold and provide the Court with the information and particularity precedent requires in order to permit meaningful judicial oversight.

CONCLUSION

For the foregoing reasons, the Court should deny CIA's motion for summary judgment, grant Plaintiff's cross-motion for summary judgment, and order CIA to either produce records responsive to Plaintiff's FOIA Request or a *Vaughn* index identifying the records it is withholding and its basis for doing so.

Dated: New York, New York
March 26, 2021

Respectfully submitted,

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