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 SUPPORT OF DEFENDANT CENTRAL INTELLIGENCE AGENCY'S
MOTION FOR SUMMARY JUDGMENT

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Defendant the Central Intelligence Agency (the "CIA"), by its attorney, Audrey Strauss, Acting United States Attorney for the Southern District of New York, respectfully submits this memorandum of law in support of its motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure in this action brought under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

PRELIMINARY STATEMENT

Plaintiff Open Society Justice Institute ("OSJI") seeks records from the CIA related to the Executive Branch of the United States Government's initial knowledge of, communications about, and efforts to confront the novel SARS-Co-V-2 coronavirus, now widely referred to as COVID-19. In response to OSJI's FOIA request, the CIA issued a "Glomar" response, stating that it could neither confirm nor deny the existence of responsive records. The CIA properly issued the Glomar response under two separate bases that are compelled by FOIA.

First, because the act of confirming or denying the existence or nonexistence of any responsive records would reveal properly classified information, the disclosure sought by OSJI is precluded by FOIA Exemption 1, 5 U.S.C. § 552(b)(1). Second, responding to the FOIA request would disclose information specifically carved out from disclosure under FOIA by the National Security Act of 1947, 50 U.S.C. § 3001 *et seq*., and is thus prohibited by FOIA Exemption 3, 5 U.S.C. § 552(b)(3). Moreover, the CIA's Glomar response is appropriate because the information at issue is not already in the public domain and has not been the subject of official acknowledgment.

As a consequence, for the reasons described below and in the declaration submitted in support of the Government's motion by a CIA official with appropriate classification authority, the Court should uphold the CIA's Glomar response under FOIA Exemptions 1 and 3.

BACKGROUND

On April 27, 2020, OSJI, a not-for-profit, public interest law center, submitted the FOIA request at issue to the CIA (the "Request"), as part of a series of requests that it submitted to thirteen other federal agencies and agency components seeking information related to the Government's early understanding of and response to the emerging COVID-19 pandemic. *See* Compl. [Dkt. No. 1] ¶¶ 6, 29; *OSJI v. Dep't of Health and Human Servs.* et al., No. 20 Civ. 6359 (JMF), Dkt. No. 27.[1] OSJI's request to the CIA consisted of 21 discrete parts that OSJI identified as falling under three general categories. *See* Request, attached as Ex. A to Declaration of Vanna Blaine ("Blaine Decl.").

The first, "Notice of SARS-CoV-2 and COVID-19," was made up of eleven subparts which together requested: records "indicating when" the Executive Branch and President Trump were "first informed of what is now known as SARS-CoV-2 and/or COVID-19" and "President Trump's response" to that information; and, records "including and/or discussing" communications about COVID-19 in the first few months of 2020 to and from the National Center for Medical Intelligence, an unnamed State Department epidemiologist, Centers for Disease Control and Prevention Robert Redfield, unnamed Chinese officials, Secretary of Health and Human Services ("HHS") Alex Azar, Department of Veterans Affairs senior medical advisor Dr. Carter Mecher, HHS Assistant Secretary for Preparedness and Response Robert Kadlec, and White House trade advisor Peter Navarro. *See* Request, Section I.

The second category, "The Executive Branch's Efforts to Counter SARS-CoV-2," consisted of requests for records: "concerning extraordinary presidential authority, including but not limited to 'presidential emergency actions' relating to" COVID-19, "indicating dates and

[1] OSJI commenced two lawsuits, which have been consolidated, against the various agencies. *See* Order dated Aug. 25, 2020 [Dkt. No. 43].

agendas for meetings and decision of the official White House coronavirus task force during January and February 2020"; "including and/or discussing 'Four steps to mitigation,' a February/March 2020 plan for addressing" COVID-19; "including and/or discussing a February 2020 document titled 'U.S. Government Response to the 2019 Novel Coronavirus'"; "discussing Remdesivir, Chloroquine, Hyrdoxychloroquine [ ], Azithromycin"; and, "including/and or discussing instructions to classify meetings and/or records relating to" COVID-19. *See id*., Section II at 12-17. It also included requests for communications "between your agency and the White House regarding" COVID-19 and between "the Executive Branch and non-government entities (including but not limited to private-sector companies, academic institutions, and/or individuals) capable of developing tests, or assisting in testing, for" COVID-19. *See id*., Section II at 18-19.

The final category sought "Executive Branch SARS-CoV-2 and COVID-19 Communications with Congress, State Governors, and the [World Health Organization ("WHO")]," specifically, records: "including and/or discussing communications (before March 1, 2020) between any member of the Executive Branch and Congress regarding" COVID-19, "including but not limited to briefings to Congress, members of Congress, Congressional Committees or Subcommittees, and/or Congressional staff"; and "including and/or discussing communications between the Executive Branch and [WHO] about" COVID-19. *See id*., Request at Section III.

The CIA provided a final response to the request by letter dated May 12, 2020, notifying OSJI that under Exemptions 1 and 3 and:

> in accordance with Section 3.6(a) of Executive Order 13526, CIA can neither confirm nor deny the existence or nonexistence of records responsive to your request. The fact of the existence or nonexistence of such records is itself currently and properly classified and is intelligence sources

> and methods information protected from disclosure by . . . Section 102(A)(i)(1) of the National Security Act of 1947, as amended.

Letter to Amrit Singh, attached as Ex. B to Blaine Decl., at 3. On June 1, 2020, OSJI submitted an administrative appeal of the agency's decision, asserting that the CIA was not "entitled to refuse to confirm or deny the existence of records" because: OSJI's request "does not seek disclosure of the government's efforts to counter terrorism or hostile military action"; information may not be classified in order to "conceal violations of law, inefficiency, or administrative error," "prevent embarrassment," or "delay release of information that does not require protection in the interest of national security"; "basic scientific research information not clearly related to the national security shall not be classified"; and, "information about the CIA's role in the coronavirus is already in the public domain, as are official government statements acknowledging the intelligence community's role in government's response to the virus." Letter to Agency Release Panel, attached as Ex. C to Blaine Decl., at 2. On July 2, 2020, OSJI subsequently commenced the present action. *See* Compl.

ARGUMENT

Congress's purpose in enacting FOIA was "to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (quoting H.R. Rep. No. 89-1497 at 6 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2423). To that end, FOIA requires federal agencies to make records and other materials generally "available to the public." *See* 5 U.S.C. § 552(a). However, FOIA specifically exempts nine categories of information from that requirement in order to protect specified interests or activities—such as personal privacy, law enforcement, national security, and commercial interests in proprietary information—that could be compromised by public disclosure. *See id.* § 552(b). Ultimately, the goal is to "maintain[ ] a

balance between the public's right to know and the government's legitimate interest in keeping certain information confidential." *Associated Press v. DOJ*, 549 F.3d 62, 64 (2d Cir. 2008) (citations and internal quotation marks omitted).

I. Summary Judgment May Be Granted on the Basis of the CIA's Good-Faith Declaration

Actions brought under FOIA are typically resolved by summary judgment. *See, e.g., Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994). Summary judgment is warranted if a movant shows "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In the context of FOIA, "[a]ffidavits or declarations supplying facts . . . giving reasonably detailed explanations why any withheld documents fall within an exemption are sufficient to sustain the agency's burden." *Carney*, 19 F.3d at 812 (footnote omitted).[2] An agency's justification for invoking a FOIA exemption will be deemed sufficient if it is logical and plausible. *See, e.g.*, *Wilner v. NSA*, 592 F.3d 60, 73 (2d Cir. 2009); *ACLU v. DOJ*, 229 F. Supp. 2d 259, 264 (S.D.N.Y. 2017). Moreover, an agency's declaration in support of its determinations must be accorded a presumption of good faith. *Wilner*, 592 F.3d at 69.

In support of its motion, the CIA has submitted the declaration of Information Review Officer Vanna Blaine, a senior official with original classification authority sufficient to conduct classification reviews at the Top Secret level. Blaine Decl. ¶ 3. The Blaine declaration, which describes in detail the bases of the CIA's application of FOIA exemptions and its justification for asserting a Glomar response, sufficiently demonstrates why summary judgment in favor the CIA is warranted.

[2] Accordingly, in accordance with the practice in this District, the Government has not submitted a Local Rule 56.1 statement. *See New York Times Co. v. DOJ*, 872 F. Supp. 2d 309, 314 (S.D.N.Y. 2012).

II. The CIA Properly Declined to Either Confirm or Deny the Existence of Responsive Records

It is well established that an agency may issue a Glomar response, that is, decline to confirm or deny the existence of certain records, "where to answer the FOIA inquiry would cause harm cognizable under a FOIA exception—in other words, in cases in which the existence or nonexistence of a record is a fact exempt from disclosure under a FOIA exception." *New York Times v. CIA*, 965 F.3d 109, 113 n.1 (2d Cir. 2020) (quoting *Wilner*, 592 F.3d at 70) (alteration omitted). Consistent with the provisions of FOIA, the Glomar doctrine serves to prevent instances in which a compelled response to a request for the existence of documents *vel non* would compromise classified information or otherwise harm national security interests. *See id*. (citing *Phillippi v. CIA*, 546 F.2d 1009, 1012 (D.C. Cir. 1976) (upholding CIA's "neither confirm nor deny" response to a request related to the vessel "Hughes Glomar Explorer")).

An agency that provides a Glomar response has the burden of showing that a particular FOIA exemption applies to the fact of the sought records' existence or nonexistence. *See id*. at 114 ("To properly invoke a Glomar response, an agency must tether its refusal to one of the nine FOIA exemptions.") (citation and internal quotation marks omitted). The agency "may meet its burden by submitting a detailed affidavit showing that the information logically falls within the claimed exemptions." *Wilner*, 592 F.3d at 72-73 (quoting *Minier v. CIA*, 88 F.3d 796, 800 (9th Cir. 1996)). Indeed, in a case involving a Glomar response, "there are no relevant documents for the court to examine other than the affidavits which explain the Agency's refusal." *Wolf v. CIA*, 473 F.3d 370, 374 n.4 (D.C. Cir. 2007) (citation and internal quotation marks omitted).

As is true of all FOIA cases, "[i]n evaluating an agency's Glomar response, a court must accord substantial weight to the agency's affidavits, provided that the justifications for nondisclosure are not controverted by contrary evidence in the record or by evidence of bad

faith." *Wilner*, 592 F.3d at 68 (internal quotation marks, ellipsis, and italics omitted). The Second Circuit has reiterated that such substantial deference must be particularly heeded where "an agency's affidavit concern[s] the details of the classified status of [a] disputed record," and the "agency's justification . . . is sufficient if it appears logical or plausible." *New York Times*, 965 F.3d at 114 (citation omitted); *see also ACLU v. DOJ*, 681 F.3d 61, 69 (2d Cir. 2012).

As described below, under this deferential standard, the Blaine declaration amply satisfies why the CIA's Glomar response was separately appropriate under both FOIA Exemptions 1 and 3, either of which is sufficient to uphold the CIA's response. *See Wilner*, 592 F.3d at 72 (the Government "need only proffer one legitimate basis for invoking the Glomar response and FOIA Exemptions 1 and 3 are separate and independent grounds in support of a Glomar response") (citation omitted).

A. The CIA's Response Was Properly Justified By Exemption 1

To begin with, the CIA's Glomar response was proper on the basis of FOIA Exemption 1. Exemption 1 reflects Congress's concern that the presumption of disclosure be appropriately counterbalanced when national security interests come into play, shielding from disclosure any materials that: "(A) [are] specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1).

Executive Order 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009), lays out the current standard for classification of information in the interest of national defense or foreign policy. Section 1.1(a) of the Executive Order lists four requirements for the classification of national security information. First, an "original classification authority" must classify the information. E.O. 13,526, § 1.1(a)(1). Second, the information be "owned by, produced by or for, or [] under the

control of the United States Government." *Id*. § 1.1(a)(2). Third, an original classification authority must "determine[] that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security" and be "able to identify or describe the damage." *Id.* § 1.1(a)(4).[3] Finally, the information must "pertain to" one or more of eight protected "Classification Categories" listed in Section 1.4 of the Executive Order, which include, as relevant here, "intelligence activities (including covert action) [or] intelligence sources or methods," "foreign government information," and information about "foreign relations or foreign activities of the United States," *id.* § 1.4(b)-(d). E.O. 13,526 specifically authorizes agencies to provide a Glomar response where appropriate: "An agency may refuse to confirm or deny the existence or nonexistence of requested records whenever the fact of their existence or nonexistence is itself classified under this order or its predecessors." *Id.* § 3.6(a).

The Government's burden in this context under Exemption 1 "is a light one." *ACLU v. Dep't of Defense*, 628 F.3d 612, 624 (D.C. Cir. 2011); *accord Morley v. CIA*, 508 F.3d 1108, 1124 (D.C. Cir. 2007) ("[L]ittle proof or explanation is required beyond a plausible assertion that information is properly classified[.]"). That is so because, as courts have long recognized, the judiciary owes "special deference" to the Executive Branch's predictions of national security harm that may attend public disclosure of classified records. *Morley*, 508 F.3d at 1126; *see also New York Times*, 965 F.3d at 114. Such deference flows from the reality that predictions of national security harm "will always be speculative to some extent," *Judicial Watch v. Dep't of*

[3] In its notice of administrative appeal, OSJI argued that the agency improperly issued a Glomar response because OSJI was not seeking information related to efforts "to counter terrorism or hostile military action." Letter to Agency Release Panel at 2. To the extent OSJI suggests that classification is proper only in cases of information implicating terrorism and hostile military action, it misapprehends the applicable standard. As its provisions make clear, E.O. 13,526 contains no such limitation and, as described in more detail *infra*, envisages harm to national security in broad terms.

Defense, 715 F.3d 937, 943 (D.C. Cir. 2013), and only the agencies with expertise in the area are in a position to make such judgments. *See Wilner*, 592 F.3d at 76 ("[I]t is bad law and bad policy to second-guess the predictive judgments made by the government's intelligence agencies.") (quotation marks omitted); *Larson v. Dep't of State*, 565 F.3d 857, 865 (D.C. Cir. 2009) ("The judiciary is in an extremely poor position to 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 have little expertise" in international or intelligence matters, and may not dismiss "facially reasonable concerns"); *see also CIA v. Sims*, 471 U.S. 159, 179 (1985) (intelligence officials are "familiar with 'the whole picture,' as judges are not," and their decisions "are worthy of great deference given the magnitude of the national security interests and potential risks at stake").

The Government has met its burden of demonstrating that the CIA's Glomar response was proper under Exemption 1. At the threshold, there is no dispute that the purported records at issue are under the putative control of the United States Government, and Vanna Blaine, a CIA official with the appropriate classification authority, has affirmed that the existence or non-existence of the purported records is in fact properly classified. Blaine Decl. ¶ 12 & n.2. Moreover, the CIA declarant has adequately set forth how OSJI's request implicates one or more classification categories under E.O. 13,526 that, in the event of a compelled substantive response, "could reasonably be expected to cause damage to national security" by exposing "intelligence activities, capabilities, authorities, sources, and methods," *id*. ¶ 15, and information about foreign governments and the United States' foreign relations and activities, *id*. ¶ 22.[4]

[4] Should OSJI renew its conclusory assertion that the CIA's classification determination was improperly made in order to conceal violations of law or prevent embarrassment, Letter to Agency Release Panel at 2, such a bald allegation is insufficient to overcome the CIA's declaration to the contrary. *See, e.g.*, *Schaerr v. DOJ*, 435 F. Supp. 3d 99, 113 n.9 (D.D.C. 2020)

Specifically, although "it may be fairly inferred that the U.S. intelligence community has an intelligence interest in COVID-19 generally, the specific contours of the CIA's role," if any, in identifying and responding to the pandemic are not known. *Id*. ¶ 17. As explained by the agency's declarant, "the nature of the intelligence information collected by the CIA, the manner by which the CIA collects such information, and the particular analysis that the Agency applies to collected intelligence" in the context of the COVID-19 pandemic, to the extent that such intelligence and analysis exists, constitute sensitive national security information. *Id*. ¶ 16.

A compelled response would reveal presently unknown aspects of that sensitive information, such as whether "correspondence between specific individuals and organizations identified by Plaintiff," which on their face lack "any clear connection to the CIA," were in fact "of any intelligence interest," and whether the CIA in some way "contributed to the meetings and documents referenced" in the Request. *Id*. ¶ 18. It would also expose "the extent to which CIA may or may not have relied on foreign partnerships" with other governments and international entities, *id*. ¶ 22, and to what extent "foreign intelligence or counterintelligence information, and any underlying intelligence sources or methods of collection" played a part in any relevant CIA activities, *id*. ¶ 18. Furthermore, it would force the CIA to confirm whether as part of its activities it maintains records about certain specific drugs and avenues of scientific research, and whether the CIA relied on foreign intelligence sources for this vital information. *Id*. ¶ 22.[5] Such

(rejecting plaintiff's assertion of improper motive where "affidavits have explicitly stated that the *Glomar* responses were not issued to cover up a violation of law, and the plaintiff has not submitted any evidence to support his contention").

[5] OSJI's assertion in its administrative appeal that the CIA's classification determination is improper because only "basic scientific information" is at issue is without merit. Letter to Agency Release Panel at 2. OSJI's speculative characterization of the purported information at issue is beside the point in face of the agency's declaration outlining that the information logically pertains to key intelligence activities.

information squarely implicates the type of intelligence interests, that is to say, sources and methods, and foreign information that the Glomar doctrine and Exemption 1 are meant to shield. *See ACLU v. Dep't of Defense*, 322 F. Supp. 3d 464, 477 (S.D.N.Y. 2018) ("Courts have upheld *Glomar* responses in the . . . context of FOIA requests directed to the CIA involving particular individuals."); *Center for Constitutional Rights v. Dep't of Defense*, 968 F. Supp. 2d 623, 638 (S.D.N.Y. 2013) (Glomar response appropriate where substantive response would reveal focus of CIA's interests and "whether the CIA cooperates with other agencies . . . for intelligence purposes"); *Wolf*, 473 F.3d at 376–77 (explaining that it is "plausible that either confirming or denying an Agency interest in a foreign national reasonably could damage sources and methods by revealing CIA priorities"); *Krikorian v. Dep't of State*, 984 F.2d 461, 465 (D.C. Cir. 1993) (Exemption 1 covers information obtained from foreign sources, release of which would "jeopardize 'reciprocal confidentiality'").

Moreover, the agency has outlined how release of this information reasonably could result in harm to national security. Release would disclose to adversaries the "strengths and/or weaknesses in the CIA's intelligence collection and reporting capabilities," including, for instance, "whether and how the CIA may have been tracking COVID-19 in the earliest days of the pandemic" and "whether the CIA possessed the ability to identify and provide the White House with an early warning about the virus." Blaine Decl. ¶ 19. It would reveal, in the midst of fierce, ongoing global competition over COVID-19-related research, whether the CIA "possesses any specific information related to particular potential treatments for COVID-19." *Id*. ¶ 21. And, compelled disclosure would compromise the ability of the CIA to work with governments and foreign partners and sources, whose trust in the integrity of U.S. intelligence efforts would be undermined. *Id*. ¶ 23. Courts have long recognized that such articulated harms more than satisfy

the Government's light burden under Exemption 1. *See Schaerr*, 435 F. Supp. 3d at 112 (Glomar appropriate where disclosing whether records exist would "provide crucial information . . . regarding the agency's priorities, interests, capabilities, activities, and methods"); *ACLU*, 681 F.3d at 70 (explaining that disclosure must not "reveal the existence and scope of a highly classified, active intelligence activity") (citing *Doherty v. DOJ*, 775 F.2d 49, 52 (2d Cir. 1985)); *Larson*, 565 F.3d at 866–67 (Exemption 1 applies where the information "reveal vulnerabilities" and expose "the success or lack of success in collecting information" in the context of "projects or plans relating to national security"); *Students Against Genocide v. Dep't of State*, 257 F.3d 828, 840 (D.C. Cir. 2001) (upholding Exemption 1 redaction of information revealing "vulnerabilities and of [intelligence agency]'s specific capabilities, sources and methods").

Ultimately, the Request seeks to compel the CIA to confirm its potential possession of specific records related to—and thereby "expose the specific nature of the Agency's role in," Blaine Decl. ¶ 18—the discovery of, and dissemination of knowledge about, the virus as it emerged, as well as formulation of the substantive response to the crisis. The CIA's possible involvement in these events is the type of intelligence activity that courts have recognized may be properly classified and must not be disclosed. Accordingly, because the CIA has outlined plausible and logical reasons for why the information sought by the Request is protected by Exemption 1, the Court should uphold the agency's Glomar response.

B. The CIA's Response Was Also Properly Tethered to Exemption 3

Separate and apart from Exemption 1, the CIA's Glomar response was independently justified under FOIA Exemption 3. Exemption 3 protects records "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3). In weighing the validity of this exemption, a court must first consider whether the statute identified by the agency is in fact a withholding statute,

and then whether the withheld material satisfies that statute's criteria. *See Sims*, 471 U.S. at 167; *A. Michael's Piano Inc. v. FTC*, 18 F.3d 138, 143 (2d Cir. 1994). "Exemption 3 differs from other FOIA exemptions in that its applicability depends less on the detailed factual contents of specific documents; the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within the statute's coverage." *Wilner*, 592 F.3d at 72 (internal quotation marks omitted). As relevant to this action, section 102A(i)(1) of the National Security Act of 1947, as amended, 50 U.S.C. § 3024(i)(1) (formerly codified at 50 U.S.C. § 403-1(i)(1)) (the "NSA"), prohibits the unauthorized disclosure of intelligence sources and methods.[6]

As explained by Blaine, the CIA's response to the Request was appropriate on the basis of Exemption 3 and the NSA. First, there is no doubt that the NSA is an exemption statute encompassed by FOIA Exemption 3. *Sims*, 471 U.S. at 181; *see also Wolf*, 473 F.3d at 378. Moreover, unlike the requirements of Exemption 1, the Government is not required to make a showing of actual harm to national security from disclosure to justify nondisclosure under Exemption 3[7]: all an agency need do, as the CIA has done here, is show that the withheld information falls within the protected scope of the exempting statute. *See Larson*, 565 F.3d at 868.

[6] The NSA provides that the Director of National Intelligence ("DNI") "shall protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 3024(i)(1) (enacted as part of the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 1011. Courts have recognized that not just the DNI, but also the CIA and other members of the intelligence community, may rely upon the amended NSA to withhold records under FOIA. *See, e.g.*, *Larson*, 565 F.3d at 862-63, 865. Section 1.6(d) of Executive Order 12333, as amended by Executive Order 13470, 73 Fed. Reg. 45,325 (July 30, 2008), requires the Director of the CIA to "[p]rotect intelligence and intelligence sources, methods, and activities from unauthorized disclosure in accordance with guidance from the [DNI.]"

[7] The requirement of showing harm to national security derives from the substantive requirement for classification pursuant to section 1.1(a)(1) of E.O. 13,526.

Consequently, the only remaining issue is whether compelling the CIA to either confirm or deny the existence of responsive documents can "reasonably be expected to lead to unauthorized disclosure of intelligence sources and methods." *Gardels v. CIA*, 689 F.2d 1100, 1103 (D.C. Cir. 1982). In this regard, the CIA has wide-ranging latitude to determine what could constitute or lead to an unauthorized disclosure of intelligence sources and methods. *See Sims*, 471 U.S. at 168-70. The Supreme Court has held that "[t]he plain meaning of the statutory language, as well as the legislative history of the National Security Act, . . . indicates that Congress vested in the Director of Central Intelligence very broad authority to protect all sources of intelligence information from disclosure." *Id.* at 168-69 (rejecting "any limiting definition that goes beyond the requirement that the information fall within the Agency's mandate to conduct foreign intelligence"). As the Court also observed, Congress "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. Indeed, courts have characterized the CIA's discretion to withhold information under the NSA and Exemption 3 as "a near-blanket FOIA exemption." *Hunt v. CIA*, 981 F.2d 1116, 1120 (9th Cir. 1992).

As discussed above, the Blaine Declaration details how a Glomar response is required in this case to protect intelligence methods and sources. Courts routinely uphold such explanations as a valid basis to provide an Exemption 3-tethered Glomar response under the NSA and closely-related FOIA exempting statutes. *See, e.g.*, *Wilner*, 592 F.3d at 74; *Amnesty Int'l USA v. CIA*, 728 F. Supp. 2d 479, 510-11 (S.D.N.Y. 2010); *Earth Pledge Found. v. CIA*, 988 F. Supp. 623, 627-28 (S.D.N.Y. 1996), *aff'd*, 128 F.3d 788 (2d Cir. 1997). Accordingly, the CIA's response to the Request should be upheld on this separate and independent basis.

C. Neither the Public Domain Nor Official Acknowledgment Doctrines Preclude the CIA's Glomar Response

Finally, to the extent that OSJI contends that the CIA's Glomar response is precluded because "information about the CIA's role in the coronavirus is already in the public domain," or has been the subject of "official government statements acknowledging" such a role, Letter to Agency Release Panel at 2, those assertions are unavailing.

"Exemptions to FOIA do not apply 'if identical information is otherwise in the public domain.'" *Robbins Geller Rudman & Dowd LLP v. Sec. and Exch. Comm'n*, 419 F. Supp. 3d 523, 535 (E.D.N.Y. 2019) (quoting *Inner City Press/Cmty. On the Move v. Bd. of Governors of Fed. Reserve Sys.*, 463 F.3d 239, 244 (2d Cir. 2006)). But in order to invoke the public-domain doctrine, the plaintiff bears the burden of "point[ing] to specific information in the public domain that appears to duplicate that being withheld." *Inner City Press*, 463 F.3d at 249 (quoting *Afshar v. Dep't of State*, 702 F.2d 1125, 1130 (D.C. Cir. 1983)). "To hold otherwise would require the opponent of disclosure to prove a negative." *Id*.; *see also Occidental Petroleum Corp. v. Sec. and Exch. Comm'n*, 873 F.2d 325, 342 (D.C. Cir. 1989).

Under the related official-acknowledgment doctrine, "[w]hen an agency has officially acknowledged otherwise exempt information through prior disclosure, the agency has waived its right to claim an exemption with respect to that information." *New York Times*, 965 F.3d at 115–16 (quoting *ACLU v. CIA*, 710 F.3d 422, 426 (D.C. Cir. 2013)). In the Second Circuit, "a precise and strict test for claims of official disclosure" applies: "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." *Id*. at 116 (quoting *Wilson*, 586 F.3d at 186 (alterations and internal quotation marks omitted)).

Neither of these doctrines precludes the CIA from asserting a Glomar response in this case. OSJI can point to nothing in the public domain that confirms the precise information that it seeks to ascertain through a compelled response, namely, the fact of the CIA's involvement in the specific, wide-ranging COVID-19-related communications, meetings, and other activities identified in the Request. Nor is OSJI able to identify any statement by the CIA or authorized individual that specifically matches such purported information by acknowledging any role of the agency in those activities. OSJI's reliance on news reporting discussing the intelligence community's general interest in COVID-19 and a short press statement issued by the Office of the Director of National Intelligence affirming the same, *see* Letter to Agency Release Panel at 2 n.5, does not suffice to satisfy the relevant "precise and strict" test. As the Second Circuit recently explained, "widespread public discussion of a classified matter" or even the "existence of classified activity [that] may be inferred from publicly available information or from official statements" does not constitute official disclosure of specific records or information related to "specific aspects of [a] program that have not been subject to [] disclosure." *New York Times*, 965 F.3d at 116 ("a general acknowledgement of the existence of a program alone does not wholesale waive an agency's ability to invoke Glomar") (citations omitted). Because no authorized individual has acknowledged the existence of the specific records and information OSJI requests from the CIA, and because that information does not otherwise exist in the public domain, the CIA properly issued a Glomar response.

CONCLUSION

For the reasons stated above, the CIA's motion for summary judgment should be granted.

Dated: New York, New York
November 20, 2020

Respectfully submitted,

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