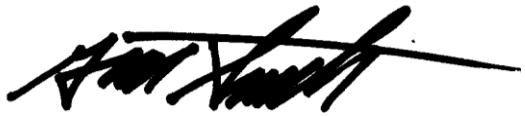
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GRANT F. SMITH, *PRO SE*	)	
Plaintiff,	)	
vs.	)	
U.S. NATIONAL ARCHIVES AND RECORDS ADMINISTRATION	)	
	)	
	)	Case: 18-02048
Defendant.	)	**Oral Argument Requested**
	)	
	)	

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGEMENT AND IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGEMENT



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PRELIMINARY STATEMENT

This case arises out of Plaintiff's June 29, 2018 Freedom of Information Act (FOIA) request for George W. Bush Presidential Library and the Clinton Presidential Library letters that Defendants refused to properly process. Plaintiff's central argument is that because all U.S. assistance to Israel is unlawful, none of the usual FOIA and other commonly applied means for denying release apply to narrow requests for release of the instruments that facilitate the fraud—including in this case presidential letters promising Israel the U.S. will thwart the Treaty on the Non-Proliferation of Nuclear Weapons and undermine the Arms Export Control Act. Also, the policy under which Defendants withheld responsive documents under Glomar, so-called policy "ambiguity" about Israel's nuclear weapons, is now entering its 50th year of existence. Such an abundance of formerly classified information about "ambiguity" has been properly released that this Glomar response is untenable. Plaintiff therefore challenges the Defendant's Glomar response and motion for summary judgement which claim the National Archives and Records Administration need not even conduct a bona fide search for responsive materials.

The explosion in the misuse of the Glomar response, "we can neither confirm nor deny the existence or nonexistence of records responsive to your request" is a tactic not only dominating responses to FOIA requests in federal courts, it is now

beginning to infest even state and local courthouses. Casual, reflexive application of Glomar—with no effort invested in researching its appropriateness—can properly be seen as a way to control discourse and foreclose recourse. The Department of Justice and the Office of Information Policy regularly create guides for federal agency reference in managing the FOIA. Beginning in 1986, the section detailing use of the Glomar response has called such a reply extraordinary and cautioned against utilization.[1] Nevertheless agencies are flooding courts with Glomar responses, confident that if their conclusory affidavits asserting their "right" to Glomar are denied (an increasingly rare occurrence), at very least the essentially cost-free invocation of Glomar will add many years and thousands of dollars to the cost of plaintiff efforts to obtain information about the function of government. See A. Jay Wagner, "*Controlling Discourse, Foreclosing Recourse: The Creep Of The Glomar Response*," Slane College of Communications and Fine Arts, Bradley University.

The Glomar doctrine is in large measure a judicial construct, an interpretation of FOIA exemptions that flows from their purpose rather than their express language. One of the most abusive aspects of Glomar is that it allows FOIA officials to preemptively deny records without even bothering to conduct a bona fide search—under ever expanding, ever more dubious, post-9/11 claims of "national security."

[1] https://www.justice.gov/archive/oip/courtdecisions/glomar.html

A second is that classification authorities are allowed to weigh in and speculate—without troubling themselves to examine original classification markings (or whether there are any)—that if hypothetical documents did exist, they would certainly (once again, in the opinion of non-original classifiers) be withheld on national security grounds. Affidavits brimming with such speculation are then given great weight in FOIA court. NARA takes this to a new low by having its preemptive Glomar response certified by a former NARA employee now working at the National Security Council.

The Glomar response provides a growing loophole in the otherwise solid edifice of the FOIA appeals structure, undermining the very purpose of the law and its well-honed judicial review process. Expansion of the Glomar response threatens to unravel the fabric of access to government records through FOIA.

Challenging a Glomar response is an arduous task, and defeating a claim only places the requester back at the beginning of the labyrinth, appealing the exemption itself. Nevertheless, Plaintiff indeed challenges this Glomar response by providing overwhelming evidence of bad faith present in the National Security Council affidavit submitted in the interest of having this case dismissed.

Plaintiff believes it would be prejudicial for this court to accept such a misleading, counter-factual and error-laden affidavit written by a former NARA official now working at the National Security Council filed in support of dismissal. The affidavit makes an incredibly large number of false claims and hypothetical assertions about a 50-year old policy that has been officially acknowledged by the U.S. government. It is contemptuous of the record. Plaintiff also challenges Defendant claims about the applicability of FOIA exemptions and E.O. 13526, which expressly forbid using government secrecy to conceal unlawful acts.

The Court should deny the Defendant's motion for summary judgement and order NARA to conduct—as it should have done more than half a year ago—stop the sock puppetry and search for and release responsive documents. If necessary, the court should also review the letters *in camera* to determine whether the letters were ever classified by an original classification authority as defendants speculate, they indeed must have been, or whether they fall within 6 enumerated categories of presidential materials that may be withheld from the Bush administration records. Plaintiff believes they are probably not classified since their contents—for all intents and purposes—were drafted by the Israeli government, which also maintains copies of them to circulate and extort concessions from various U.S. administrations and possibly government agencies. This bona fide FOIA process for records would help

Americans better understand the functions of government and is entirely warranted for three reasons.

First, the specific content of the letters has already been officially acknowledged and previously released through official disclosures. The public domain exception to Glomar has irrefutably been triggered. Second, because U.S. aid to Israel became unlawful under the Symington and Glenn Amendments to the Arms Export Control Act (formerly they were part of the US Foreign Assistance Act) in 1976, FOIA exemptions and classification under E.O. 13526 do not allow continued secrecy through claims that such information is properly classified. That is because the primary function of the letters is to compel the U.S. to unlawfully provide the majority of its foreign aid budget to Israel by violating the Treaty on the Non-Proliferation of Nuclear Weapons. That is done because of elected officials' fear of Israel's U.S. lobby, not national security concerns. This fact is well-documented in official documents developed in the run-up to "ambiguity" policy in the Nixon administration. Third, George W. Bush administration records are not exempt from a FOIA or PRA search and release process. Records requests have already been properly processed, proving the records are now generally open to the public. There is also no evidence that the letters fall within six enumerated exempt categories or that they have been exempted from release by the Archivist, as required under PRA.

BACKGROUND

Plaintiff Grant F. Smith is a public interest researcher and founder of the Institute for Research: Middle Eastern Policy, Inc. (Compl. 2). On June 29, 2018, he filed a FOIA request to the George W. Bush Presidential Library and the Clinton Presidential Library, both operated and maintained by Defendant, NARA, requesting release of presidential letters to Israel, which pledge not to pressure the Israeli government into signing the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) or discuss Israel's nuclear weapons program. (Compl., Exhibit A and B).

On July 5, 2018 the Clinton Presidential Library denied Plaintiff's FOIA request, which it numbered 2018-0887-F by issuing a "Glomar" response citing Section 3.3(b)(1) of E.O. 13526.On July 6, 2018 the George W. Bush Presidential Library denied Plaintiff's FOIA request, which it numbered 2018-0219-F issuing a "Glomar" response citing Section 3.3(b)(1) of E.O. 13526. (Compl., Exhibit C and D).

Both denial letters offered expert consultation at the administrative level, stating "If you would like to discuss our response before filing an appeal to attempt to resolve your dispute without going through the appeals process, you may contact our FOIA Public Liaison John Laster for assistance at: Presidential Materials Division, National Archives and Records Administration, 700 Pennsylvania Avenue, NW,

Room G-7, Washington, DC 20408-0001; email at libraries.foia.liaison@nara.gov; telephone at 202-357-5200; or facsimile at 202-357-5941."

Plaintiff contacted John Laster on July 6 in an attempt to resolve his dispute, stating, "1. The FOIA denial neither confirms nor denies the existence of the letter in question, reported in *The New Yorker* , claiming " The fact of the existence or nonexistence of records containing such information, unless of course the subject has been officially acknowledged, would be classified for reasons of national security under Section 3.3(b)(1) of E.O. 13526." We do not believe that is so, because President Clinton would not have classified a letter demanded by, and then given to, the leader of a foreign government. Also, many presidential materials, whether acknowledged or not, are unclassified. Do you believe such a blanket response complies with FOIA and is proper? 2. The speed of the FOIA denial seems to indicate no search or examination of the requested letter was even attempted.

Do you believe such an assumption-laden administrative process complies with FOIA and is proper? 3. The purpose of the letters (Clinton's was only the first of four) is to ensure that U.S. Presidents do not comply with longstanding Arms Export Control Act provisions conditioning U.S. foreign assistance to foreign nuclear weapons states that are not signatories to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT). Section 1.7 (2) of E.O. 13526 prohibits classification of

information to "conceal violations of the law." Do you concur that classifying the Clinton letter in order to foster non-compliance with the AECA by continuing to provide foreign aid to a non-signatory nuclear state would be a violation of E.O. 13526? Do you agree that public release of such a letter to foster public debate would only improve governance?" (Compl., pages 4-5).

After waiting one week for a response from NARA's Presidential Materials Division, and not receiving one during that timeframe, Plaintiff appealed both FOIA denials. (Compl., Exhibit F and G). Defendants failed to respond to the appeals within the statutory time frame allowed by FOIA, and on August 31, 2018 Plaintiff filed this present action.

On October 10, 2018 Defendant responded to the complaint stating, "Plaintiff is not entitled to compelled production of any records exempt from disclosure by one or more exemptions enumerated in the FOIA, 5 U.S.C. § 552." (ECF 8, p5) On December 20, Defendants filed a motion for summary judgement to dismiss the case.

ARGUMENT

The Freedom of Information Act, 5 U.S.C. § 552, was enacted "to facilitate public access to Government documents" and "was designed to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny."

Citizens for Responsibility and Ethics in Washington v. DOJ, 746 F.3d 1082, 1088 (D.C. Cir. 2014) The underlying purpose of the FOIA is "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *EPIC v. DHS*, 999 F. Supp. 2d 24, 29 (D.D.C. 2013) (quoting John Doe Agency v. John Doe Corp., 493 U.S. 146, 152 (1989)). "In enacting FOIA, Congress struck the balance it thought right—generally favoring disclosure, subject only to a handful of specified exemptions—and did so across the length and breadth of the Federal Government." *Milner v. Dep't of the Navy*, 562 U.S. 562, 571 n.5 (2011). As a result, the FOIA "mandates a strong presumption in favor of disclosure." *EPIC v. DOJ*, 511 F. Supp. 2d 56, 64 (D.D.C. 2007) (internal citations omitted).

The FOIA specifies that certain categories of information may be exempt from disclosure, "[b]ut these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Pub. Citizen, Inc. v. Rubber Mfrs. Ass'n*, 533 F.3d 810, 813 (D.C. Cir. 2008). Therefore FOIA exemptions "must be narrowly construed." Id. "The statute's goal is broad disclosure, and the exemptions must be given a narrow compass." *Milner*, 562 U.S. at 563 (internal citations omitted). Furthermore, "the burden is on the agency to sustain its action." 5 U.S.C. § 552(a)(4)(B); see also *EPIC v. DHS*, 384 F. Supp. 2d 100, 106 (D.D.C. 2005).

Where the government has not carried this burden, summary judgment in favor of the Plaintiff is appropriate. *DOJ v. Tax Analysts*, 492 U.S. 136, 142 (1989); *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980).

I. Standard of Review

Summary judgment may be granted if "the movant shows that 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). "A genuine issue of material fact is one that would change the outcome of the litigation." *EPIC v. DHS*, 999 F. Supp. 2d 24, 28 (D.D.C. 2013). FOIA cases are typically decided on motions for summary judgment. Id.; see *Defenders of Wildlife v. U.S. Border Patrol*, 623 F. Supp. 2d 83, 87 (D.D.C. 2009). A district court reviewing a motion for summary judgment in a FOIA case "conducts a de novo review of the record, and the responding federal agency bears the burden of proving that it has complied with its obligations under the FOIA." *Neuman v. United States*, 70 F. Supp. 3d 416, 421 (D.D.C. 2014); CREW, 746 F.3d at 1088; see also 5 U.S.C. § 552(a)(4)(B). The court must "analyze all underlying facts and inferences in the light most favorable to the FOIA requester," and therefore "summary judgment for an agency is only appropriate after the agency proves that it has 'fully discharged its [FOIA] obligations.'" Neuman, 70 F. Supp. 3d at 421.)In some cases, the agency may carry its burden by submitting affidavits that "describe 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 evidence of agency bad faith." *ACLU v. DOJ*, ___ Fed App'x ___, 2016 WL 1657953, at *1 (D.C. Cir. Apr. 21, 2016).

"In Glomar cases, courts may grant summary judgment on the basis of agency affidavits that contain 'reasonable specificity of detail rather than merely conclusory statements, and if they are not called into question by contradictory evidence in the record or by evidence of agency bad faith.'" *Elec. Privacy Info. Ctr.*, 678 F.3d at 931 (quoting *Gardels*, 689 F.2d at 1105). However, "in the context of a Glomar response, the public domain exception is triggered when `the prior disclosure establishes the existence (or not) of records responsive to the FOIA request,' regardless whether the contents of the records have been disclosed." *Marino v. Drug Enforcement Admin.*, 685 F.3d at 1081 (quoting Wolf, 473 F.3d at 379).

II. Plaintiff is entitled to summary judgement

The FOIA provides that every government agency shall "upon any request which (i) reasonably describes such records and (ii) is made in accordance with published rules . . . make the records promptly available to any person." 5 U.S.C. § 552(a)(3)(A). Despite the general "pro disclosure purpose" of the statute, *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004), the FOIA provides for nine exemptions.

These exemptions outline "specified circumstances under which disclosure is not required." *Gosen v. Citizen and Immigration Serv.*, 75 F. Supp. 3d 279, 286 (D.D.C. 2014); see 5 U.S.C. § 552(b). In a FOIA case, the "agency bears the burden of establishing that an exemption applies." *PETA v. NIH*, 745 F.3d 535 (D.C. Cir. 2014). The agency may "meet this burden by filing affidavits describing the material withheld and the manner in which it falls within the exemption claimed." *King v. DOJ*, 830 F.2d 210, 217 (D.C. Cir. 1987). However, it is not sufficient for the agency to provide "vague, conclusory affidavits, or those that merely paraphrase the words of a statute." *Church of Scientology of Cal., Inc. v. Turner*, 662 F.2d 784, 787 (D.C. Cir. 1980) (per curiam). When an agency invokes an exemption, "it must submit affidavits that provide the kind of detailed, scrupulous description [of the withheld documents] that enables a District Court judge to perform a de novo review." *Brown v. FBI*, 873 F. Supp. 2d 388, 401 (D.D.C. 2012) (internal quotation marks omitted). Again, "In Glomar cases, courts may grant summary judgment on the basis of agency affidavits…if they are not called into question by contradictory evidence in the record or by *evidence of agency bad faith*.'" Elec. Privacy Info. Ctr., 678 F.3d at 931 (quoting Gardels, 689 F.2d at 1105).

Finally, a document filed *pro se* is "to be liberally construed," *Estelle v. Gamble*, 429 U.S., at 106, 97 S.Ct. 285, and "a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers," ibid.

(internal quotation marks omitted). Cf. Fed. Rule Civ. Proc. 8(f) ("All pleadings shall be so construed as to do substantial justice"). However, "in the context of a Glomar response, the public domain exception is triggered when `the prior disclosure establishes the existence (or not) of records responsive to the FOIA request,' regardless whether the contents of the records have been disclosed." *Marino v. Drug Enforcement Admin.*, 685 F.3d at 1081 (quoting Wolf, 473 F.3d at 379).

A. NARA'S Exemption 1 Glomar Response is Unlawful

Bad faith exists when a party "seeks to shield itself from liability by denying, in bad faith and without probable cause…" *Freeman & Mills, Inc. v. Belcher Oil Co.*, 900 P. 2d 669 - Cal: Supreme Court 1995. Bad faith can be established when a party shows the other's "intent to deceive…" *Union Bankers Ins. Co. v. Shelton*, 889 S.W.2d at 281-82 and can demonstrate (1) the making of a representation. (2) the falsity of that representation, (3) reliance…on that representation, (4) …intent to deceive…with the misrepresentation, and (5) the materiality of the representation. *Darby v. Jefferson Life Ins. Co.*, No. 01-91-00255-CV, ___ S.W.2d ___, 1995 WL 258120 (Tex. App.—Houston [1st Dist.] 1995, n.w.h.

In the context of a *Glomar* response, the public domain exception is triggered when `the prior disclosure establishes the *existence* (or not) of records responsive to

the FOIA request,' regardless whether the contents of the records have been disclosed." *Marino,* 685 F.3d at 1081 (quoting *Wolf,* 473 F.3d at 379).

Classified U.S. government documents about the longstanding, coerced U.S. policy of "ambiguity" towards Israel's nuclear weapons program—a policy enacted at the behest of the Israeli government and under pressure of retaliation on U.S. elected officials from Israel's powerful U.S. lobby for non-compliance—has been officially released and resides in the public domain. The policy has been in effect since 1969—fully half a century. Israel's demands for presidential letters from Clinton, Bush, Obama and Trump are merely the continuation of this shrill foreign demand first made in 1969—and the grudging, written acquiescence of U.S. presidents after thorough consideration, and rejection of options advanced by multiple agencies far more in line with U.S. national interests.

"[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." *Am. Civil Liberties Union v. CIA* ("ACLU"), 710 F.3d 422, 426 (D.C. Cir. 2013). This "official acknowledgement" principle applies in the Glomar context, and "the plaintiff can overcome a Glomar response by showing that the agency has already disclosed the fact of the existence (or nonexistence) of responsive records, since that is the purportedly exempt information that a Glomar response is

designed to protect." Id. at 427. The plaintiff "must bear the initial burden of pointing to specific information in the public domain that appears to duplicate that being withheld." Id. (quoting Wolf, 473 F.3d at 378). The D.C. Circuit has narrowly construed the official acknowledgement principle, however, and the plaintiff must satisfy three stringent criteria. See *Associated Press v. FBI*, No. 16-cv-1850 (TSC), 2017 WL 4341532, at *7 (D.D.C. Sept. 30, 2017) (a claim that information has been officially acknowledged must meet a "strict test").

"First, the information requested must be as specific as the information previously released." Wolf, 473 F.3d at 378 (quoting Fitzgibbon, 911 F.2d at 765). "Prior 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. 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) (additional citations omitted); see also Competitive Enter. Inst. v. NSA, 78 F. Supp. 3d 45, 54 (D.D.C. 2015) ("Plaintiffs in this case must therefore point to specific information in the public domain establishing that the NSA has [the claimed information.]"). "Second, the information requested must match the information previously disclosed." Wolf, 473 F.3d at 378 (quoting Fitzgibbon, 911 F.2d at 765). If there are "substantive

differences" between the two, an official acknowledgment claim must fail. Am. Civil Liberties Union v. DoD ("ACLU"), 628 F.3d 612, 621 (D.C. Cir. 2011). "Third, . . . the information requested must already have been made public through an official and documented disclosure." Wolf, 473 F.3d at 378 (quoting Fitzgibbon, 911 F.2d at 765) (additional citations omitted). Key to this element is that the source must be official; non-governmental releases, or even anonymous leaks by government officials, do not qualify. See, e.g., ACLU, 628 F.3d at 621-22; Competitive Enter. Inst., 78 F. Supp. 3d at 55. "[M]ere speculation, no matter how widespread," is not enough. Wolf, 473 F.3d at 378.

Elements in the "Israel Nuclear Letters" match information already released in 1969 parameters surrounding "nuclear ambiguity" and the policy adopted by the Nixon administration. The essential three Israeli demands to be met in all four letters mentioned in the Adam Entous "New Yorker" article are first, that the U.S. would not pressure Israel to sign the Treaty on the Non-Proliferation of Nuclear Weapons. Second, that the U.S. administration would not force Israel to give up its nuclear weapons. Third, that the U.S. administration would not publicly discuss the fact of Israel's nuclear weapons. See Adam Entous, "How Trump and Three Other US Presidents Protected Israel's Worst kept Secret: Its Nuclear Arsenal" *The New Yorker*, June 18, 2018.

These Israeli government demands had already all been met by president Richard Nixon administration policy. Though followed by the Ford, Carter, Reagan and H.W. Bush administrations, according to Entous, the Israeli government wanted assurances that their demands would continue to be met. The foreign government could not count on continuity because, according to Entous, "The documents had been sent to the [National] archives," necessitating new letters with every incoming administration. The Israelis desired the letters to ensure that U.S. laws and treaties that condition aid to Israel would not be enforced, as discussed later. This overriding Israeli objective, also discussed later, has nothing whatsoever to do with U.S. national security.

B. The information requested is as specific as and matches information previously released through official, documented disclosures.

The Nixon Presidential Library released volumes of formerly classified information outlining the foreign pressures and defeat of bona fide U.S. national security interests that led the only president ever to resign from office in humiliation, to foreshadow that disgrace by acquiescing to Israel's demands and succumbing to the policy of "ambiguity."

In 1969 the government of Israel, backed by its U.S. lobby (which was ordered to register as a foreign agent by the U.S. Department of Justice in 1962, but never

complied)[2] was demanding advanced Phantom F-4 fighter jets from the United States. The U.S. was attempting to stop Israel's clandestine nuclear weapons program and compel Israel to sign the Treaty on the Non-Proliferation of Nuclear Weapons (NPT). The U.S. was also reeling from the Israeli theft of a stockpile of U.S. government owned highly enriched uranium from the NUMEC facility in Apollo, PA sufficient to build a dozen atomic bombs. NUMEC was a plant established and run by Zionist Organization of America (ZOA) connected Israeli smugglers and political operatives.

A NARA-declassified July 19, 1969 memo to President Nixon by Henry Kissinger titled "Israeli Nuclear Program" outlined the policy of nuclear "ambiguity" ultimately adopted by Nixon under intense Israeli pressure. See "Memorandum from Henry Kissinger to President Nixon, 'Israeli Nuclear Program'," July 19, 1969, Richard Nixon Presidential Library, National Security Council Files, box 612, Israeli Nuclear Program. (Exhibit A)

In the memo, Kissinger outlines the views of a cross-agency study group encompassing State, Defense and intelligence community recommendations about the danger of the Israeli nuclear weapons program and their overriding concerns about

[2] See "DOJ orders AZC to Register as a Foreign Agent" https://israellobby.org/azcdoj/

how it would "not be in our interest" (Exhibit A, p 1) and "we do not desire complicity in it." (Exhibit A, p 2) In particular, Kissinger correctly noted Israel's possession of nuclear weapons "would sharply reduce the chances for any peace settlement in the near future." (Exhibit A, p 10)

Kissinger thought that, given Israel's huge lobby in the U.S., the U.S. would not be able to withhold nuclear-delivery capable Phantom F-4 fighter jets from Israel. "If we withhold the Phantoms and they [the Israelis] make this fact public in the United States, enormous political pressure will be mounted on us." (Exhibit A, p 10) This was based on the Nixon administration's knowledge of what happened when President Lyndon Johnson attempted to condition weapons sales on Israel signing the NPT. "President Johnson and Secretary Rusk told Foreign Minister Eban we felt strongly about Israel's signature on the NPT and stated that political discussions on this issue would precede negotiation. Later, after strong pressure from the Israeli government and approaches from American Jewish leaders, the President instructed Secretary Clifford to sell the planes without conditions." (Exhibit A, p 8)

Outflanked by a foreign country and its U.S. lobby determined to supplant American national interests with those of Israel, the Nixon administration ultimately acquiesced to Israel's misleading interpretation of what constituted the "introduction"

of nuclear weapons in the Middle East. In the Israeli formulation "introduction would not occur until a weapon had been tested and its existence had become publicly known." (Exhibit A, p 15) The U.S. interpretation, informed by the NPT, was that a state is a nuclear weapons state if it possesses nuclear weapons. Nevertheless, with its own tortured "introduction" definition entered into the record, the Israeli government reaffirmed in writing its commitment "not to be the first to introduce nuclear weapons into the Mid-East." (Exhibit A, p 15)

With those policy options at hand, Nixon met with Israeli Prime Minister Golda Meir on September 26, 1969. The president entered into "ambiguity" policy when he chose not to withhold U.S. weapons sales from Israel or to publicly pressure Israel to join the NPT or demand a halt to its nuclear weapons program, outlined in the Kissinger policy papers summarized from key agencies consulted to outline the American interest. For its part, Israel maintained a policy of never confirming or denying its nuclear weapons program.

Further evidence of the ongoing nature of "ambiguity" policy is President Obama, against his better judgement and upon acquiescing to Israel's demands to sign an "ambiguity" renewal letter, also publicly verified their contents in a pointed public statement, "We discussed issues that arose out of the nuclear-nonproliferation

conference," Obama said, after meeting with Netanyahu on July 6, 2010. "And I reiterated to the Prime Minister that there is no change in U.S. policy when it comes to these issues." See Adam Entous, "How Trump and Three Other US Presidents Protected Israel's Worst kept Secret: Its Nuclear Arsenal" *The New Yorker*, June 18, 2018.

A "plaintiff can overcome a Glomar response by showing that the agency has already disclosed the fact of the existence (or nonexistence) of responsive records" within the public domain. *ACLU v. CIA*, 710 F.3d 422, 427 (D.C. Cir. 2013). If an agency has "officially acknowledged the existence of the record, the agency can no longer use a Glomar response." *Moore v. CIA*, 666 F.3d 1330, 1333 (D.C. Cir. 2011). This Circuit has clarified that in the Glomar context, it is the "existence vel non of any records responsive to a FOIA request," rather than the content of the records, that is the focus of the inquiry. ACLU, 710 F.3d at 427.

In order to rebut a Glomar response, the requester must point to an official prior disclosure that "establishes the existence (or not) of records responsive to the FOIA request." *Wolf*, 473 F.3d at 379. The law concerning how to overcome an agency Glomar response arose out of the "official acknowledgment" exception to FOIA's exemptions, which required the requester to meet three stringent criteria: (1) "the information requested must be as specific as the information previously

released," (2) "the information requested must match the information previously disclosed," and (3) "the information requested must already have been made public through an official and documented disclosure." Id. at 378 (quoting *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990)). However, the inquiry for subsequent records need not be for identical records. The Wolf court, which addressed the official acknowledgment standard in the Glomar context for the first time, explained that where the official acknowledgment or prior disclosure demonstrates the existence of the records the requester seeks, "the prior disclosure necessarily matches both the information at issue—the existence of records—and the specific request for that information." *Id.* at 379. That is the case in here, buttressed by Obama's public restatement of agreement with maintaining "ambiguity" policy after signing his letter. See Adam Entous, "How Trump and Three Other US Presidents Protected Israel's Worst kept Secret: Its Nuclear Arsenal" *The New Yorker*, June 18, 2018.

Fitzgibbon's matching and specificity criteria, then, are not applicable in the Glomar context; in such cases, the court must analyze only whether the prior disclosure acknowledges the existence of the records sought. It is therefore important to consider the broader context within which Nixon administration's lengthy, detailed records confirming the consideration and final U.S. acquiescence to the Israel lobby and its foreign principal's demands about "ambiguity" were made a half-century ago.

Subsequent records are merely the written continuations of that publicly-known—and extremely harmful—acquiescence.

C. NSC Affidavit "National Security Threat" assertions are made in bad faith

John P. Fitzpatrick, Senior Director of the Record Access and Information Security Management Directorate at the National Security Council, advances a number of misleading and dubious assertions in support of dismissing this public-accountability information release effort. Plaintiff notes that until January 2016, Fitzpatrick was an employee at the National Archives and Records Administration Information Security Oversight Office. See Steven Aftergood, "ISOO Director Fitzpatrick Moves to NSC" *Secrecy News*, Federation of American Scientists, January 11, 2016. ISOO is a component of the National Archives and Records Administration.[3]

Plaintiff notes that NARA did not claim any consultation with NSC was sought before issuing its Glomar response. Plaintiff questions whether the assertions of a former NARA employee more experienced in withholding information at NARA (four years) than studying NSC policy (three years) is really any sort of credible arms-

[3] https://www.archives.gov/isoo

length "independent" executive branch source that should be allowed to file an affidavit. Fitzgerald's statements suggest he is not. Neither Fitzpatrick nor NARA properly disclosed that Fitzpatrick is a former NARA employee. This suggests that NARA is attempting to engage in sophisticated sock puppetry by calling in favors to former employees to provide a rubber stamp to its predetermined course of action in asserting Glomar. It also appears that Fitzgerald is engaged in omitting material biographic facts from his own sworn affidavit. This court should take this to be an indication of bad faith, but unfortunately it is far from the only one.

Fitzpatrick dubiously asserts that "The existence or nonexistence of Presidential letters is information owned by and under the control of the United States Government." (ECF 10-3, p 3). That is doubtful. Like the original concept of "ambiguity" presented to the Nixon administration in 1969, the content of the letters was proposed and drafted by the government of Israel. The government of Israel furthermore retains copies of the letters in order to continue making demands on incoming administrations—because NARA takes possession of such records at the end of each administration. Since the purpose of the letters is to ensure continuity of policy, their existence is continually presented to subsequent administrations by Israel, according to *The New Yorker*. See Adam Entous, "How Trump and Three Other US Presidents Protected Israel's Worst kept Secret: Its Nuclear Arsenal" *The New Yorker*,

June 18, 2018. If the existence or non-existence was "information owned by and under control of the United States," it would surely defeat their main purpose. This court should therefore presume the obvious, that "The existence or nonexistence of Presidential letters is information neither drafted by, owned by, under the control of, or to the benefit of the United States Government."

Fitzgerald incorrectly asserts that "Responding substantively to Plaintiffs requests would require the NSC to reveal a classified fact-i.e., whether the U.S. Government is or is not engaged in particular foreign relations or foreign activities." This is incorrect. National Security Advisor Henry Kissinger (January 20, 1969-November 3, 1975) revealed the precise parameters of engagement on ambiguity in a series of NSC studies and memos drawn from cross-agency input and Israeli demands. The facts surrounding the foreign relations and activities in question, "ambiguity" towards Israel's nuclear weapons program and arsenal, have already been officially released. (See Exhibit A) The letters may or may not be originally classified as "secret," this fact has not yet been settled, through either a NARA review, *in camera* review or release. Plaintiff believes, since they are essentially Israeli bargaining leverage, they are probably not classified since that would undermine their utility as discussed later.

Fitzgerald looks to the *New Yorker*, which is not a classification authority, for substantiation. "This conclusion is underscored by Plaintiffs reference in his requests to a June 18, 2018 article in the *New Yorker*, which portrays certain information as a government secret and refers to purported letters from several U.S. Presidents regarding such secrets to a foreign head state." Plaintiff suggests the obvious: the *New Yorker* is not a classification authority, original or derivative. Therefore the National Security Council should not defer to the *New Yorker* for authorities or expertise in that domain.

Fitzgerald continues, "Given the contents of that article, responding affirmatively could confirm or refute the substance of information exchanged between the United States and one or more foreign governments." Plaintiff insists that the letters are probably not actually secret. If disclosed, they would merely reveal the continuance of exchanges under a well-known, fifty-year old policy of subordination of U.S. national interests. Also, as discussed later, other foreign governments have long been aware of U.S. adoption of "ambiguity."

Fitzgerald advances, via the preamble "The specific nature of the harm to national security that is reasonably likely to occur if the existence or nonexistence of the letters is confirmed could include:" a string of misleading statements revealing either bad faith or extreme ignorance. [ECF 10-3, p 4]

"…sowing doubt about the U.S. commitment to the [Nuclear] Non-Proliferation Treaty." On the issue at hand, doubts about the U.S. commitment to the NPT could simply not go any lower than they are currently. Because of the longstanding, known policy of U.S. acquiesce to non-signatory Israel having a nuclear weapons program, the U.S. has already lost its credibility in the realm of the NPT in the Middle East, and elsewhere.

A 2011 public opinion survey of 16,000 residents of 12 Arab countries in the Middle East with a margin of error of 3.5 percent is unambiguous. Between 50 percent and 68 percent of respondents in 10 out of the 12 surveyed countries supported the idea of a Middle East free of nuclear weapons. More than half of all respondents (55 percent) believe that Israel's possession of nuclear weapons justifies other states in the region seeking to acquire such weapons. Approximately 70 percent of those who support a nuclear-free Middle East claim it is the right of other states in the region to pursue nuclear weapons in light of Israel's possession of them. See the Arab Center For Research And Policy Studies. (2012). Measurement of Arab Public, Opinion Project. Arab Opinion Index 2011. These opinion holders are skeptical of vaunted claims of U.S. commitment to the NPT because nearly every time Arab member states seek to implement a nuclear free zone in the Middle East, under NPT

review conferences, the U.S. blocks it at Israel's behest. See "Netanyahu thanks US for blocking push for Middle East nuclear arms ban" *The Guardian*, May 23, 2016

The U.S. has violated the NPT by providing nuclear materials to Israel despite knowing of its nuclear weapons program since at least 1974. Article 3, Section 2 of the NPT requires safeguarding materials against weapons-related use by non-nuclear or non-signatory states. Nevertheless, Israel has used a U.S. supplied nuclear reactor at Soreq and other materials provided for humanitarian purposes by the U.S. under "Atoms for Peace" to build nuclear weapons production facilities that mirror American national laboratories. According to an unclassified 1987 report produced for the U.S. Department of Defense, "The SOREQ and the Dimona/Beer Shiva facilities are the equivalent of our Los Alamos, Lawrence Livermore and Oak Ridge National Laboratories. The SOREQ center runs the full nuclear gamut of activities from engineering, administration and non-destructive testing to electro-optics, pulsed power, process engineering and chemistry and nuclear research and safety. This is the technology base required for nuclear weapons design and fabrication…. The capability of SOREQ to support SDIO and nuclear technologies is almost an exact parallel of the capability currently existing at our National Laboratories…" The Pentagon report asserted that the Israelis were "developing the kind of codes which will enable them to make hydrogen bombs. That is, codes which detail fission and

fusion processes on a microscopic and macroscopic level." Despite this misuse of U.S. aid, no NPT compliance actions were ever taken. See Edwin S. Townsley and Clarence A. Robinson *Critical Technology Assessment in Israel and NATO Nations* April, 1987, Office of the Under Secretary of Defense

The very first U.S. official government confirmation that Israel has a nuclear weapons program, highlights in its report title that Israel represents the *commencement* of nuclear proliferation in the Middle East. See U.S. Central Intelligence Agency 1974 *Special National Intelligence Estimate, Prospects for Further Proliferation of Nuclear Weapons*.

For this and many other known U.S. actions, no foreign state or serious observer believes the U.S. is a champion of upholding the NPT with regards to Israel or the Middle East.

Fitzgerald continues, "Undermining the foreign policy objectives of the United States by eliminating strategic ambiguity." The foreign policy objectives of the United States in 1969 at the launch of "ambiguity" were keeping Israel from going nuclear, making Israel sign the NPT and using U.S. conventional weapons deliveries to ensure Israeli compliance. These U.S. foreign policy objectives were thwarted by the replacement of U.S. policy objectives with the Israeli policy objective of "ambiguity." It is therefore misleading to assert that eliminating "strategic ambiguity" would

subvert U.S. foreign policy objectives. Strategic ambiguity in 1969 and its continuance today *is* the subversion of U.S. foreign policy objectives.

Fitzgerald: "Undermining relations with an important ally by revealing information shared with an expectation of confidentiality." Once again, the core nature of the letters is misrepresented. The overriding purpose of the letters, an extension of "ambiguity," is for Israel to continually remind U.S. presidents in succeeding administrations that they must comply with the Israeli policy of ambiguity by promising to violate the NPT and the AECA.

Fitzgerald: "Undermining U.S. government policy limiting the potential to an arms race in a particular region." Acquiescing to "ambiguity" (again, fundamentally an Israeli, rather than U.S. policy) touched off an arms race in the Middle East. There is no government in the region that believes Israel does not possess nuclear weapons. By failing to uphold its treaty obligations under the NPT, the U.S. has forced neighboring countries to try to develop their own deterrents at various times. These proliferation attempts have included Iran (until 2003), Libya (until 2003), Iraq (until 1991) and Syria (until 2007). Arguably, if the U.S. had achieved its true policy preferences, none of these countries would have sought their own deterrent capabilities. It is more accurate to say that "ambiguity" undermined limiting the

potential for an arms race far more than revealing the latest developments in the "ambiguity" arena would.

Fitzgerald: "Serving as confirmation to our adversaries that there is no such information." Again, the region assumes the U.S. is abiding, if not actively supporting, Israeli nuclear proliferation through ambiguity. A handful of confirmation letters is unlikely to have any major impact on a policy visibly in effect since 1969.

"Undermining relations with other nations by suggesting differential treatment." Other nations can readily observe that the U.S. has used its UN veto on Israel's behalf more than for any other reason. (43 times in one estimation) See "The 43 times US has used veto power against UN resolutions on Israel" Middle East Eye, December 18, 2017. They can also observe that the U.S. has delivered over $250 billion in publicly known foreign aid to Israel, more than any nation or to rebuild post-war Europe under the Marshall Plan. Any affirmation that the U.S., again at the insistence of Israel and its U.S. lobby, engages in favoritism would be so incremental as to offer no meaningful addition to the popular worldwide perception of monumental bias the U.S. has long exhibited.

Fitzgerald: "Revealing the relationship (or absence of such a relationship) with foreign intelligence agencies." This statement must surely be left over NSC (or NARA) boilerplate from another FOIA request involving the 16-member intelligence

community. In reality, the main body of Israel's nuclear weapons program, though clandestinely assisted by Israeli intelligence units such as Lakam, which stole the weapons-grade uranium from the United States to build Israel's first bombs by 1967, is not actually run by Israeli intelligence agencies. Rather, tax-exempt fundraising in the United States is performed by the Weizmann Institute for Science and Technology and then is diverted to fund Israel's nuclear weapons and missile development (which does not meet IRS social welfare parameters governing the use of such donations). Policy, production and delivery is spread across Ministry of Defense and other non-intelligence agencies.

Fitzgerald: "Further, confirming the existence of the subject letters, if they exist, could reveal the United States' regional interests, and relationships." Again, based on an understanding of how "ambiguity" replaced declared, multi-agency expressions of U.S. national interests, it is inaccurate to speculate the letters would reveal the absence or existence of relationships. The letters would merely incrementally add to the understanding of the subversion of bona fide U.S. interests. To the contrary, exposing the corruption that is called "ambiguity" by releasing the letters could go a long way toward repairing, as opposed to impairing, the President's foreign policy by returning policy back into the service of U.S. rather than Israeli, national interests.

Fitzgerald concludes by declaring "The determination to classify the information described above was made to protect the national security of the United States. The information was not classified to conceal violations of law, inefficiency, or administrative error, to prevent embarrassment to a person, organization, or agency; to restrain competition; or to prevent or delay the release of information that does not require protection in the interests of national security." However, this self-certification requires either ignorance or fundamental misrepresentation of the deliberations that finally led to "ambiguity" policy in 1969, and which have afflicted America ever since. Fortunately, it is for the judiciary branch to determine whether this NSC statement—against the available body of facts—is compelling.

D. FOIA exemptions do not provide blanket cover for "breaking the law"

Having disposed of the NSC "affidavit" we turn to the inadmissibility of the use of FOIA exemptions and the existing classification authority to conceal lawbreaking.

Defendants initially cherry-pick Executive Order 13526 by claiming there are only four conditions for proper classification. "That order sets forth four conditions for proper classification: First, the information must be classified by an 'original classification authority.' Second, the classified information must be 'owned by,

produced by or for, or [be] under the control of the United States Government.' Third, the information must pertain to one or more of eight enumerated categories. Fourth and finally, the original classification authority must 'determine that the unauthorized disclosure of the information reasonably could be expected to result in damage to national security" and be able to "identify or describe the damage."' (ECF 10-1, p 4)

Again, whether the letters have any original classification markings is undetermined, as well as the exclusivity of U.S. ownership, production and control by the U.S. government. Its pertinence to any enumerated category has not been established, and as discussed, whether the disclosure of the letters could harm U.S. national security in the face of a mountain of officially released "ambiguity" records and official statements is extremely doubtful.

What is not doubtful is that executive order 13526 expressly forbids classifying information in order to "conceal violations of law, inefficiency, administrative error or to prevent embarrassment." NARA may not conceal the requested letters because their primary purpose is to compel the U.S. to violate the NPT and AECA. Worse, this taxpayer fraud is ongoing and there is no sign of relief on the horizon, absent building a public record about what is happening by blowing away the noxious cloud of government secrecy.

As NSC Chief Henry Kissinger documented in the deliberations before the U.S. entered into "ambiguity," not only had Israel gone nuclear in the mid-1960's, but it had probably stolen highly enriched uranium from the U.S. to accomplish that breakout. "There is circumstantial evidence that some fissionable material available for Israel's weapons development was illegally obtained from the United States about 1965," Mr. Kissinger noted in his long declassified memorandum. [Exhibit A, page 7] "This is one program on which the Israelis have persistently deceived us," Mr. Kissinger said, "and may even have stolen from us." [Exhibit A, page 13] See also the following article for a summary of key points from the declassified Nixon administration "ambiguity" files. David Stout "Israel's Nuclear Arsenal Vexed Nixon." *New York Times*, November 29, 2007.

Kissinger's oblique references were to the diversion of weapons grade uranium from the Pennsylvania-based Nuclear Materials and Equipment Corporation. NUMEC was launched and managed by Zalman Shapiro, a nuclear chemist credited with solving engineering issues for naval nuclear propulsion in the 1950s. His partner, David Luzer Lowenthal was an international smuggler with murky ties to Israeli intelligence and industrialist. Lowenthal organized the emergence of NUMEC from a complicated merger and acquired facilities for NUMEC in a defunct steel mill in the middle of Apollo, Pennsylvania. The Zionist Organization of America, originally

chartered to "do any and all things that may be necessary" to support Israel, supplied three of NUMEC's executives. Zalman Shapiro, Pittsburgh region president of ZOA, Morton Chatkin and Ivan J. Novick who became ZOA's national president.

Officially NUMEC was a startup supplier of highly-enriched fuel for the US Navy. But two Central Intelligence Agency officials verified Kissinger's fears were true when they officially stated NUMEC's true purpose was to amass and divert US government-owned highly enriched uranium into Israel's nuclear weapons program. 300 kilograms of highly enriched uranium disappeared from NUMEC between 1957-1978, with most of it gone by 1966. Material stolen from NUMEC would have been the most likely source for Israel's ability to ready nuclear weapons for use during the 1967 Six-Day War.

CIA Tel Aviv Station Chief John Hadden, who performed field operations to sample the environment around Dimona for highly enriched uranium – material Israel was incapable of producing on its own – publicly stated that NUMEC was "an Israeli operation from the beginning." CIA Directorate of Science and Technology Deputy Director Carl Duckett testified that "NUMEC material had been diverted by the Israelis and used in fabricating weapons." There were telltale signs.

Inside NUMEC's underfunded, ramshackle facilities an Israeli scientist, Baruch Cinai, learned to handle samples of plutonium, a skill subsequently useful to plutonium production at Israel's Dimona facility. Israeli covert operatives Raphael Eitan, Avraham Bendor and Ephraim Beigun all visited the NUMEC facility at Shapiro's invitation in 1968 undercover as various Israeli energy specialists, in the company of Avraham Hermoni, chief of Israel's nuclear weapons development program. The FBI's investigation of NUMEC-related activities ultimately shook loose eyewitness testimony that Shapiro was collaborating in the illicit diversion of highly enriched uranium from NUMEC's U.S.-government owned stockpile to Israel. Under increasing pressure, NUMEC's regulator, the Atomic Energy Commission, subsequently engineered NUMEC's corporate buyout and the exit of its management team to save face, after many years of denial and providing easily refuted excuses for NUMECs extreme and inexplicable material "losses."

That NUMEC was a front operation, following in the footsteps of Israel's 1940s-era conventional weapons smuggling operations from the US such as Martech, Service Airways, and the Sonneborn Institute, is well-known by the FBI and CIA. Both have released extensive archives of intelligence reports and surveillance photographs of Israeli conventional weapons smuggling from the United States through overseas networks. See the document archive The Nuclear Materials and

Equipment Corporation (NUMEC) and the diversion of US government weapons-grade uranium to Israel, Institute for Research: Middle Eastern Policy, Inc.

The Arms Export Control Act restricts and conditions U.S. foreign aid to countries that have not signed the Nuclear Non-Proliferation Treaty, yet—like Israel—are known to have nuclear weapons programs under 22 USC §2799aa-1*: Nuclear reprocessing transfers, illegal exports for nuclear explosive devices, transfers of nuclear explosive devices, and nuclear detonations.* The amendments were authored by Senator Stuart Symington, a close confidant of NPT champion President John F. Kennedy, and Senator John Glenn, who was extremely concerned about the lack of due process and criminal prosecutions over the illegal NUMEC diversion detected by the CIA and FBI. Glenn visited the CIA and the National Security Council seeking accountability over the incident. *NUMEC Material Unaccounted For*, National Security Council, November 27, 1979.[4] However, the CIA never provided clandestine overseas evidence to the FBI sufficient to prosecute the U.S. and Israeli operatives involved in the diversion.

In the present day, U.S. Army Corps of Engineers estimate of the cleanup costs of the sites of the smuggling front in Pennsylvania reach half a billion. See Grant

[4] https://israellobby.org/numec/11271979_brezinski_denial.pdf

Smith, "CIA Cover-Up Thwarted FBI's Nuclear Diversion Investigations, Evidence that missing uranium went to Israel withheld since 1968*," Antiwar.com*, September 7, 2015

Israel's nuclear weapons program is undeniable and unambiguous. However mandatory waiver conditions under the AECA have never been met. Therefor all "assistance" to Israel is unlawful under the AECA. The waiver provision is presidential notification of Congress. Congresswoman Eleanor Holmes Norton confirms no presidential Arms Export Control Act waiver has ever been filed with Congress, "No president has exercised his authority to waive the nuclear enrichment transfer prohibition for Israel." Congresswoman Eleanor Holmes Norton letter, March 30, 2018 [Exhibit B] Because all forms of aid to Israel are in violation of the Arms Export Control Act, invoking 13526 through FOIA exemptions to conceal additional aspects of "ambiguity" in order to continue shipping tax dollars to Israel clearly "conceals violations of the law."

The letters represent Israel's realization that U.S. presidents—no matter how beholden to Israel lobby campaign contributions—could someday begin to comply with the NPT and AECA. Political parties might also begin to take constituent demands into consideration, over the demands of Israel and its lobby. When asked in an August 2018 poll, "Arms Export Control Act law limits foreign aid to countries

with nuclear weapons that haven't signed the NPT. CIA says Israel has nuclear weapons." 54.8% of Americans said, "Aid to Israel should be limited by law." See poll, "Americans would limit aid to nuclear Israel." IRmep, 8/14/2018. Conducted through Google Consumer Surveys. Sample size 1,005. RMSE score 5.0%.

To preempt that kind of governance and democratic process, presidents are pressured by Israel to sign letters so that Israel continues to receive the lion's share of U.S. foreign aid. This acquiescence is an extension of Nixon era "ambiguity," the original core purpose of which was to coerce the U.S. to violate the NPT in Israel's favor to the detriment of American national security.

Since the Symington and Glenn Amendments became law in 1976, the U.S. has unlawfully delivered an inflation-adjusted publicly known sum of $222.8 billion to Israel. Since Bill Clinton signed the first "ambiguity" extension letter, inflation adjusted unlawful aid to Israel has been $99.9 billion.

In short, the letters have nothing to do with U.S. national security, but rather the ongoing maintenance of a fraud that dwarfs Teapot Dome and all previously uncovered corruption scandals. See Grant F. Smith, "Four Presidents Conspired To Give $100 Billion to Israel: Secret White House Letters Buttress Ongoing US Arms Export Control Act Violations," Antiwar.com, June 25, 2018

Defendants blithely assert it is perfectly acceptable to use secrecy to cover up wrongdoing. (ECF 10-1, p. 13-14 "That is because, as the D.C. Circuit has explained, 'there is no legal support for the conclusion that illegal activities cannot produce classified documents,' and "history teaches the opposite." *ACLU vs Department of Defense*, 628 F.3d at 622. To evaluate this extraordinary claim, we must carefully examine the precedent."

The cited precedent was not ACLU but rather the withholding of illegal FBI surveillance tapes of Dr. Martin Luther King from assassination researchers in 1980. In that case the DOJ managed to win a court order sealing the records for an additional fifty years since they might "compromise legitimate secrecy needs." See *Lesar v. Dep't of Justice,* 636 F.2d 472, 483 (D.C.Cir.1980) The judge held that the precedent was applicable to ACLU because, "We conclude that the President's prohibition of the future use of certain interrogation techniques and conditions of confinement does not diminish the government's otherwise valid authority to classify information about those techniques and conditions and to withhold it from disclosure under exemptions 1 and 3."

It might be argued that withholding "no-warrant" FBI surveillance has ended and that sealing the MLK records had more to do with protecting his privacy. It might be argued that that CIA torture is now clearly known to have occurred and that it has

been outlawed may mitigate not releasing tapes of such torture (which the CIA burned even after a court ordered their release, with no consequences.)

However, this case is different. Flouting the NPT and AECA is an ongoing abuse with no mitigation or reform on the horizon. Ambiguity and secret legislative rules and letters have been the instruments of massive a fraud against U.S. taxpayers for decades amounting to billions of dollars. It is precisely this category of endemic ongoing abuse that led to the E.O. 13526 ban on using secrecy to cover up wrongdoing.

D. George W. Bush presidential records are releasable

Defendants claim President Bush's records still reside within a 12-year restricted access period. In an affidavit, B. John Laster, Director of the Presidential Materials Division speculates—without providing any evidence—the Bush letter may reside within one of six categories which may be held up to 12 years, even if the record is the subject of a FOIA request. The PRA provides that the Archivist's decision to withhold a record within the 12-year period under one of the six enumerated restrictions of the PRA 'shall not be subject to judicial review.'" (ECF 10-2, pp 3-4)

Plaintiff contacted B. John Laster—as advised by NARA—during the FOIA administrative phase, questioning the applicability of such restrictions. Though given a week to respond, Laster never replied.

Plaintiff still challenges the assertion that the Bush presidential letter lies within any of the six enumerated PRA categories. Highly sensitive U.S. government owned information about Israel's nuclear weapons program is not always classified. For example, Edwin S. Townsley and Clarence A. Robinson *Critical Technology Assessment in Israel and NATO Nations* April, 1987, Office of the Under Secretary of Defense reveals highly sensitive information about Israel's nuclear program, including hydrogen bomb development. One reason it was never classified is that it represented an Israeli bid for contracts under the Reagan administration's "Star Wars" or Strategic Missile Defense initiative. The Israelis wanted their advanced technical capabilities to be circulated to the right parties, and secrecy classification would have thwarted bids for SDI contracts.

Similarly, the letters drafted and demanded by the Israelis from four U.S. presidents are designed to be held by the Israelis and circulated for coercion purposes. This function is not amenable to national security classification, since, if American members of the Israel lobby, unregistered agents such as AIPAC, were caught using the letters on Capitol Hill in efforts to coerce sitting U.S. members of Congress to

increase U.S. aid to Israel, the AIPAC lobbyists could be charged with espionage for holding sensitive classified documents. This is not a purely hypothetical example.

AIPAC was investigated for espionage in 1976 over its possession of classified Hawk missile data it was using in congress to thwart a U.S. sale to Jordan[5], possession of a classified 300-plus page International Trade Organization document of classified U.S. industry information in AIPAC and the Israeli Ministry of Economics bid to pass America's worst performing bilateral trade deal,[6] and in 2005 over AIPAC's attempting to use classified NDI provided by convicted spy for Israel Col. Lawrence Franklin to precipitate U.S. military attacks on Iran.[7] History suggests, given Israel's intended use of the presidential letters, that they would not be classified so that Israel's U.S. lobbyists and Israeli officials could handle them freely, without fear of additional 1917 Espionage Act indictments. (Two AIPAC officials were indicted for espionage in 2005, and their accomplice was convicted).

Original classification and NOFORN stamps would complicate their use by Israeli officials as well, and endanger their transport of such documents through the

[5] http://www.israellobby.org/amitay/default.asp
[6] http://www.israellobby.org/economy/default.asp
[7] http://www.israellobby.org/espionage/default.asp

United States where they are used to coerce concessions with incoming presidential administrations, and likely many other parties.

Plaintiff asserts that since the Glomar response is impermissible, given official acknowledgement of "ambiguity," only an examination for the presence of original classification markings on the letters and their actual contents could satisfactorily determine into which—if any—of the six enumerated PRA categories the letters may fall.

Plaintiff also notes that while, upon proper processing an Archivist may decide to withhold a record within the 12-year period under one of the six enumerated restrictions, so far that has not been done for lack of any FOIA administrative process. Plaintiff calls the court's attention to the fact that the only NARA official that can make such a determination is Archivist David Ferriero—who has not filed any affidavits in this case.

Lest this court conclude that no George W. Bush records have been released by NARA, Plaintiff calls the court's attention to John Laster's release of 1,127 assets in whole and 632 assets in part from George W. Bush presidential records on August 31, 2018, pertaining to Judge Brett Kavanaugh. [Exhibit C.] In that request, NARA actually performed a bona fide, somewhat timely, responsive record search to examine

whether 12,773 assets from the Bush presidential records fell into any of the six PRA Presidential restrictive categories and any applicable FOIA exemptions. Plaintiff asserts that his request for presidential nuclear letters should receive the same due diligence as the Kavanaugh materials. [Exhibit C, p 1]

III. Defendant's motion for summary judgement should be denied.

Defendants have not met their burden of proving they have complied with their obligations under FOIA. The FOIA requires that "each agency, upon any request for records which (I) reasonably describes such records and (ii) is made in accordance with published rules . . .shall make the records promptly available to any person." 5 U.S.C. § 552(a)(3)(A). Rather, Defendants have sought the implementation of a judicial construct—Glomar—to preempt a bona fide records search and FOIA release.

A district court reviewing a motion for summary judgment in a FOIA case "conducts a de novo review of the record, and the responding federal agency bears the burden of proving that it has complied with its obligations under the FOIA." *Neuman v. United States*, 70 F. Supp. 3d 416, 421 (D.D.C. 2014); *CREW*, 746 F.3d at 1088; see also 5 U.S.C. § 552(a)(4)(B). NARA has not yet even attempted to meet its burden.

A. NARA has yet to conduct a search for responsive records

The mandate of NARA is to "make such records available to the public as rapidly and completely as possible consistent with the provisions of [the PRA]." Id.; see generally *Am. Historical Ass'n v. NARA*, 516 F. Supp. 2d 90, 93-95 (D.D.C. 2007). NARA does so by processing FOIA requests and must properly apply and justify any withholdings under FOIA exemptions. "To meet its FOIA obligations, an agency must show that it 'conducted a search reasonably calculated to uncover all relevant documents.'" *Freedom Watch, Inc. v. NSA*, 49 F. Supp. 3d 1, 5 (D.D.C. 2014) *aff'd and remanded*, 783 F.3d 1340 (D.C. Cir. 2015)

An agency may only withhold information if it fits within nine narrowly construed exemptions. *See* 5 U.S.C. § 552(b). But the FOIA 5 U.S.C. § 552(a) also requires that the agency release any "reasonably segregable portion" of the records requested. *Id.* The agency in a FOIA case bears the burden of establishing that at least one exemption applies for each record withheld. See *Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973). The agency also bears the burden of proving that it has complied with the segregability requirement. *Johnson*, 310 F.3d at 776.

An agency seeking to justify its withholding of responsive records under the FOIA 5 U.S.C. § 552(a) must satisfy five overarching requirements in addition to the particular standards of each FOIA 5 U.S.C. § 552(a) exemption claimed. The

government must "(1) [I]dentify the document, by type and location in the body of documents requested; (2) note that [a particular exemption] is claimed; (3) describe the document withheld or any redacted portion thereof, disclosing as much information as possible without thwarting the exemption's purpose; (4) explain how this material falls within one or more of the categories . . .; and [if the exemption requires a showing of harm] (5) explain how disclosure of the material in question would cause the requisite degree of harm." *Am. Immigration Council v. DHS*, 950 F. Supp. 2d 221, 235 (D.D.C. 2013). In order to be granted summary judgment, the agency must establish that it has satisfied all of the statutory requirements of the FOIA. *Harrison v. Fed. Bureau of Prisons*, 681 F. Supp. 2d 76, 85 (D.D.C. 2010).

In this case, NARA has failed to search for *any* responsive records in whole or part. Plaintiff challenges NARA's *Glomar* invocation and affidavit for the reasons described above as utterly failing to justify its refusal to even search for responsive records.

NARA may not properly invoke Glomar when the fact of the existence of records has been officially acknowledged. Nor may NARA withhold records under FOIA Exemptions or authorities such as E.O. 13526 when overarching reason behind withholding the records is to violate the law.

B. NARA has not released responsive documents it possesses

NARA has not yet processed under FOIA which have been officially acknowledged—U.S. acquiescence to the Israeli policy of ambiguity in the interest of violating the NPT and flow of foreign aid that became unlawful under the Symington and Glenn Amendments in 1976. More than fifty years have passed since a U.S. president first acquiesced to "ambiguity." A decade has passed since the formerly secret Nixon administration policy options leading to ambiguity were declassified and released. Half a year has elapsed since NARA received Plaintiff's narrow FOIA request, for additional "ambiguity" policy documents. NARA is improperly withholding the material requested by the Plaintiff—under unlawful pretenses to assert Glomar to delay and increase the cost of this public accountability effort.

C. Supplemental U.S. State Department input would not meaningfully contribute to this proceeding.

Defendant suggests, "Should the Court determine that it must assess the scope of the Arms Export Control Act or the United States' treaty obligations and whether the alleged letter amounts to a violation of those obligations, the Defendant respectfully requests the opportunity to submit supplemental briefing on that point, after consultation with other agencies, including the Department of State." (ECF 10-1, p 13 footnote)

This would not be a useful exercise. In furtherance of adhering to the Israeli policy of "ambiguity" in 2012 the Obama administration Department of Energy, under Department of State classification guidelines, passed a legislative rule in the form of a classification guideline. This guideline bans the release of information held by the U.S. government about Israel's nuclear weapons program or authoritative official comments about Israel's nuclear weapons. During the course of litigation to publicly release the secret legislative rule, the U.S. Department of State has provided no meaningful comments on the self-classifying WNP-136 and has actively sought to extricate itself from the litigation in order to avoid providing any. See *Smith v United States of America*, case 18-00777, District Court of the District of Columbia. Since it is unable to mount any defense of questions about U.S. ambiguity with regards to WPN-136. FOIA inquiries about why the State Department is harboring through the extension of Green Cards Israeli nuclear weapons component traffickers identified by DHS and the FBI as unlawfully smuggling nuclear triggers from the U.S., State would likely decline to mount a defense in this instance.

D. In camera review would meaningfully contribute to this proceeding.

The court should exercise its discretion to review the presidential letters *in camera.* See *Mobley v. CIA*, 806 F.3d 568, 588 (D.C. Cir. 2015) ("At its discretion, a district court 'may examine the contents of . . . agency records in camera[.]'") (quoting

5 U.S.C. § 552(a)(4)(B)); see also Am. Civil Liberties Union v. U.S. Dep't of Defense, 628 F.3d 612, 626 (D.C. Cir. 2011)

The NARA advancement of Glomar coupled with false and misleading statements in the NSC affidavit firmly establish bad faith on the part of the government. The proper use of the Glomar and the classification of executive agency information related to this topic depends on three binary questions. The first is whether Israel has a nuclear weapons program. The answer to that question is "yes." The second question is whether the U.S. is adhering to the NPT and AECA. The answer to that question is "no". The third binary question is whether the U.S. is using secrecy and false assertions of national security to violate the law and cover up wrongdoing. The answer is "yes." Such bad faith *demands in camera* review. *Am. Civil Liberties Union v. U.S. Dep't of Defense*, 628 F.3d 612, 626 (D.C. Cir. 2011) ("This court reviews a district court's decision whether to conduct in camera review of FOIA documents for abuse of discretion.").

In camera review would be their first and only *de novo* review outside the domain of NARA's clutches, and begin the fulfill FOIA's mandate of outside, independent judicial review.

CONCLUSION

For the foregoing reasons, the Court should deny Defendant request for summary judgement and order NARA to process the FOIA. Plaintiff encourages this court to examine the presidential letters held by NARA *in camera* for the presence of original classification markings and to make an independent review of the applicability of claimed Glomar, FOIA and PRA exemptions.