UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GRANT F. SMITH

Plaintiff,

v. Civil No. 1:15-cv-01431

CENTRAL INTELLIGENCE AGENCY

Defendant.

MEMORANDUM IN OPPOSITION TO DEFENDANT MOTION FOR SUMMARY JUDGEMENT

The Plaintiff in his Freedom of Information Act (FOIA) case states that under the Symington and Glenn Amendments to the Foreign Assistance Act of 1961, because Israel is a nuclear weapons state, that U.S. aid to Israel is illegal. This court, indeed this very judge, recently oversaw a FOIA case[1] which resulted in the release of secret DoD files about Israel's clandestine nuclear weapons program. As part of his broader transparency and accountability work, the Plaintiff now seeks judicial review of his request to obtain records on how much secret illegal U.S. intelligence aid is now being funneled through the Central Intelligence Agency to Israel. Rather than properly acknowledging the release request, the Defendant claims that a blanket denial (appropriately nicknamed *Glomar,* after an expensive CIA maritime boondoggle) properly authorizes it under FOIA Exemptions 1 and 3 to cloak the program under a dank tarp of secrecy and keep the American people guessing about precisely how "unprecedented" the current level secret illegal intelligence aid, the existence

[1] Smith v. Department of Defense, 1:14-cv-01611

of which the President has repeatedly publicly confirmed, is in dollar terms while thwarting their quest to better understand how such illegal secret aid—like many, many past CIA programs— may in fact be endangering U.S. national security even as it undermines rule of law, as well as the perception of rule of law and good governance in America.

The Defendant, in his opposition brief, does not challenge the inherently illegal nature such intelligence aid must represent. Instead he argues that the Court, and Plaintiff, cannot possibly fathom the implications of the president's plain language in his repeat confirmations of "American military and intelligence assistance to Israel" and then draw the most logical conclusions about which agency delivers—or at very least in its central coordinating role—accounts for the aid. In reality, the Defendant cannot issue a Glomar response when the nation's top government official officially acknowledges that such records undeniably exist while dodging the conclusion that as the nation's *central* intelligence agency, it certainly possesses top line numbers for the aid.

The Plaintiff—contrary to the Defendant declarations—indeed challenges the CIA's application of Exemptions 1 and 3 and the adequacy of the CIA's supporting declarations. *Glomar* is normally invoked to protect legitimate government interests, not to conceal illegal activity. The fatal defect in the CIA's arguments and attempts to focus attention on trivialities is that there is no legitimate government interest to protect here. Secret or public, U.S. foreign aid to Israel is illegal because that country possesses an active nuclear weapons program—a fact that in addition to within this very court, has already been publicly disclosed in many, many declassified CIA files, and is undisputed by the Defendant, and properly revealed in the original complaint. Regardless of the merits of the CIA's and

President's trumpeting and defense of its intelligence support to Israel, neither may lawfully provide such aid. Because the CIA is—as confirmed by any logical interpretation of the President's two remarks and a high-school level understanding of how federal government functions—providing illegal intelligence support to Israel. Nothing in Glomar, FOIA, or any statute authorizes it to shield that information from disclosure. Based on the President's statements, intelligence aid it is probably in the range of $1.9-$13.2 billion. If the CIA, as during the Iran-Contra scandal when it was involved in delivering illegal aid to the Nicaraguan *contras* in violation of the Boland Amendments, is finally properly compelled to release information about how much the Israel intelligence aid costs taxpayers, U.S. national security will no doubt be *improved*, rather than *jeopardized*, This is because disclosure will shore up the foundations of this country as being a nation under rule of law. Similarly, if the CIA properly and convincingly demonstrates to the Plaintiff it possesses no records responsive to his request because it is not—as so many times in the past—again involved in illegal activity, FOIA and rule of law would also be served. However, the defendant wishes to dash down a third, darker path, after splitting hairs over the clear implications of what the U.S. President officially stated about intelligence aid. It wants the cost figures to remain in the shadows—unconvincingly given its history and institutional undermining of FOIA, again which the Defendant does not dispute—by stamping it in red letters as a "national security" matter. U.S. intelligence aid to Israel has been officially acknowledged in 2015 not "in a single clause in a single sentence in a single speech by President Obama" as the Defendant incorrectly claims. The president mentioned it at American University in August of 2015. He *also* officially acknowledged the existence of the program earlier, in March of 2015, claiming

"defense and intelligence aid to Israel would continue uninterrupted."[2] The Defendant's claims that there is no official acknowledgement of the intelligence program therefore cannot stand. The Defendant claims that, "In his speech, President Obama was silent about whether that intelligence assistance involved financial or budgetary support, as opposed to, for example, intelligence sharing or other non-monetary assistance." In reality, there is no such thing as "non-monetary assistance." Assistance costs money, particularly from the perspective of the taxpayers who fund it.

Even at the CIA, aid to foreign countries—in all forms—is carefully tracked and budgeted. If the Defense does not understand or believe that, the Plaintiff would be happy to invite a retired CIA case officer who had budgetary responsibilities into court to provide enlightenment. The President's repeated references to the intelligence support program and the Plaintiff's FOIA requests are entirely congruent, and release would be of immense aid to the function of government—if only the CIA responded to FOIA as required by law. The defendant's litmus test about "granularlity" issues are inappropriate. The Plaintiff is not seeking "granular data" but rather the most aggregated possible information—top line country numbers of a program of immense and growing concern to Americans. Repeated claims of "intelligence aid" are indisputable proof of the existence of a program the Defendant cannot dismiss through diversionary recitations of inapplicable case precedents—or inflated claims about the sanctity of its own FOIA processing credibility—because CIA has no such credibility.

[2] Barak Ravid "Obama says 'real policy difference' between Israel, U.S." *Haaretz*, March 24, 2015 http://www.haaretz.com/israel-news/.premium-1.648641

If this Court denies CIA summary judgement in favor of the Plaintiff's request for an *in-camera* review of the requested budget line items, it will help restore one brick in the foundation of accountability and sunlight that the CIA has—undeniably—chipped away through unwarranted secrecy, illegal programs and institutionalized contempt for FOIA.

ARGUMENT

The Defendant claims that statements from its low-level agency functionaries trump the President and that extreme detail and parsing are required to meet various precedents in order to overcome CIA's bald assertions of the "Glomar" privilege. Untrue. A Glomar response is permitted only where admitting or denying the existence of records would implicate legitimate national security interests protected by FOIA. *See Phillippi v. CIA*, 546 F.2d 1009, 1014-1015 (D.C. Cir. 1976); see also Executive Order 12958 § 3.6(a), as amended, 68 Fed. Reg. 15315, 15324 (March 28, 2003). When the government responds to a FOIA request, "every effort should be made to segregate for ultimate disclosure aspects of the record that would not implicate legitimate intelligence operations." *Founding Church of Scientology v. NSA*, 610 F.2d 824, 830 n.49 (D.C. Cir. 1979). The Defendant has not shown how admitting or denying possession of records of illegal intelligence support to Israel would implicate legitimate intelligence operations. Indeed, the CIA cannot show this, and has instead filed declarations and hypothetical cases of dubious and unconvincing applicability to this request for simple financial data. Plaintiff does indeed challenge the applicability of these exemptions and the adequacy or specificity of the Agency's declaration—as well as the agency's very own record of processing FOIA requests.

FOIA exemptions were never intended to enable concealment of unlawful activity—

indeed enhancements to FOIA such as the CIA Information Act of 1984 were enacted to uncover and allow public knowledge of illegal CIA programs and abuses—particularly those targeting or causing harm to Americans. "FOIA was enacted in order to 'promote honest and open government and to assure the existence of an informed citizenry [in order] to hold the governors accountable to the governed." *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 355 (2d Cir. 2005) (alteration in original) (quoting *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 478 (2d Cir. 1999)); *see also NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). The interests behind FOIA Exemptions 1 and 3 are not served by hiding illegal activities. This is a grave—indeed cynical—misuse of such exemptions.

Statutes not only do not support the CIA's use of such exemptions or the declarations of its classification officials in order to cover up illegal activity—they forbid it. Exemption 1 shields from disclosure only those documents that are "(A) 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) (emphasis added). The relevant Executive order, Executive Order 12958, explicitly provides that "*[i]n no case shall information be classified in order to . . . conceal violations of law. . . .*" Executive Order 12958 § 1.7(a)(1), as amended, 68 Fed. Reg. at 15318 (emphasis added). As the Plaintiff has repeatedly demonstrated—and which the Defendant concedes through non-opposition—because the government could not lawfully deliver secret foreign intelligence aid to *any* foreign nuclear weapons state outside the Nuclear Non-Proliferation Treaty, records of such activity could not be properly classified, and the CIA cannot therefore rely on FOIA Exemption 1. The court's role here is clear.

FOIA places a heavy responsibility on the judge to determine '*de novo*' if documents withheld by an agency are *properly* withheld . . . ." *ACLU v. Dep't of Defense* ("*ACLU v. DoD*"), 389 F. Supp. 2d 547, 552 (S.D.N.Y. 2005).

The CIA—giving Chicken Little himself a run for his money—unconvincingly asserts the sky will fall if American taxpayers are allowed the see mundane topline budget figures. However, in evaluating a *Glomar* claim under Exemption 1, a court must determine *de novo* whether the documents are improperly classified to "conceal violations of law." *Id.* at 564 (punctuation omitted). Where the government has not provided sufficient information for a court to make this *de novo* determination, the court should deny the government summary judgment. *Id.* at 564, 565; *see Wiener v. FBI*, 943 F.2d 972, 988 (9th Cir. 1991). In *Wiener*, the Ninth Circuit reversed a district court's award of summary judgment to the government and remanded for consideration of, *inter alia*, plaintiff's allegation that the requested information was improperly withheld under Exemption 1 to conceal unlawful government operations. 943 F.2d at 988. The Defendant has yet to provide convincing evidence for how an illegal intelligence aid program to Israel could benefit from Glomar and Exemption 1, and must therefore now be seen as conceding this point.

Rather, in his brief, the Defendant unleashes a number of attacks on transparency, and lauding undue concealment as being entirely justified under Exemption 3 — denigrating the possibility of public interest in the numbers sought. But he cannot prove that aid to Israel is uncontroversial or of growing public concern—in March of 2016, 62 percent of Americans now vigorously disfavor it, according to a statistically significant Google

Consumer research poll.[3] That fact makes this court's review important. Where a FOIA request seeks records on a controversial topic and that topic has already been addressed in the media, the invocation of *Glomar* can "raise concern" that "the purpose of the [agency's *Glomar* defense] is less to protect intelligence activities, sources or methods than to conceal possible violations of law . . . ." *ACLU v. DoD*, 389 F. Supp. 2d at 564-65 (punctuation altered).

Contrary to the Defendant's assertions of blanket, almost fawning judicial deference to the CIA's proclamations, Courts have not routinely approved the invocation of FOIA Exemption 3 and the National Security Act to conceal unconstitutional, illegal activities. *See Founding Church of Scientology*, 610 F.2d at 830 n.49; *Hayden v. NSA / Cent. Sec. Serv.*, 608 F.2d 1381, 1389 (D.C. Cir. 1979); *Terkel v. AT & T Corp.*, 441 F. Supp. 2d 899, 905 (N.D. Ill. 2006); *ACLU v. DoD*, 389 F. Supp. 2d at 564-65; *cf. People for the American Way Found. v. NSA* ("*PFAWF*"), 462 F. Supp. 2d 21 (D.D.C. 2006); *Navasky v. CIA*, 499 F. Supp. 269 (S.D.N.Y. 1980). This lack of court deference has been revealed in cases involving another intelligence agency, the National Security Agency, or NSA.

Exemption 3 shields documents "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3). "[W]here [an NSA] function or activity is authorized by statute *and not otherwise unlawful*, NSA materials integrally related to that function or activity fall within . . . Exemption 3." *Hayden*, 608 F.2d at 1389 (emphasis added). However, "NSA would have no protectable interest in suppressing information [under Exemption 3] simply because its

[3] Grant F. Smith "US Aid to Israel Is 'Too Much' Say 61.9% of Americans, Yet additional secret U.S. aid may have ballooned to $1.9-$13.2 billion annually" *Antiwar.com*, April 6, 2016 - http://original.antiwar.com/smith-grant/2016/04/05/us-aid-israel-much-say-61-9-americans/

release might uncloak an illegal operation . . . ." *Founding Church of Scientology*, 610 F. 2d at 830 n.49.

As courts have observed, allowing the government to invoke a blanket *Glomar* response in the face of a FOIA request for records of unlawful government conduct—as the CIA clearly desires in this case— would give the government license "to conceal information regarding blatantly illegal or unconstitutional activities simply by assigning these activities to the NSA or claiming they implicated information about the NSA's functions." *Terkel*, 441 F. Supp. 2d at 905.

Finally, the narrowness of the question before the Court bears particular emphasis. As the Plaintiff has already demonstrated, the president has twice publicly disclosed the existence of U.S. intelligence aid to Israel. The *only* additional information sought by the plaintiffs is a top line accounting—which the CIA certainly possesses given its central role in the intelligence ecosystem—over the last decade. Admitting or denying this dataset would not reveal the identities of intelligence case officers, their agents, sources and methods, or covert program operational details. U.S. intelligence aid to Israel is not a covert program when the president talks about it openly. The Plaintiff —and the public he serves—simply want to know how many taxpayer dollars are *secretly* being channeled to a country that is also America's top recipient *unclassified* foreign aid (which news reports suggest is about to undergo a massive increase). Nothing applicable under *Glomar*, or the policies behind it, authorizes the government to arbitrarily conceal that information.

The Defendant claims, "Obama has not disclosed the fact of the existence or non-existence of line-items in the intelligence budget supporting Israel." In fact, he clearly has,

through public confirmation that there is such intelligence support flowing from the US to Israel, it is clear that such accounting information exists at CIA. And behind the well-settled "official acknowledgement" rule is that there is no national security interest in refusing to disclose information the government itself has already placed in the public domain. *Founding Church of Scientology*, 610 F.2d at 831-32; *Lamont v. Dep't of Justice*, 475 President Obama placed the existence of intelligence aid to Israel—unprecedented no less—into the realm of "no plausible deniability."

Official acknowledgement occurs when there is just such "direct acknowledgement by an authoritative government source," *Schlesinger v. CIA*, 591 F. Supp. 60, 66 (D.D.C. 1984) That includes not just testimony before a Congressional subcommittee, or official statements, but even "off-the-record" press briefings. All are examples of disclosures found to constitute official acknowledgements. *Wolf v. CIA*, 473 F.3d 370, 379 (D.C. Cir. 2007); *Lawyers Comm. for Human Rights v. INS*, 721 F. Supp. 552, 569 (S.D.N.Y. 1989). President Obama's two known declarations in 2015 blow away the CIA's invocation that such things are secret and cannot now possibly be disclosed. The Defendant's assault against the most logical conclusions about the agency through which such aid flows or at least—coordinated accounts lie—must fail.

The Plaintiff has demonstrated—and the Defendant now concedes through failure to refute—that the CIA would rather burn some records than release them to the public it claims to serve. It was therefore not in passing or mere afterthought that the Plaintiff requested *in camera* review of the records sought. This is not only proper here. It is proper in any case in which an American citizen seeks records from a federal agency with the history and level of

intuitional bias against FOIA repeatedly demonstrated by the CIA. Or, put another way, the Plaintiff will always request *in camera* review because the CIA's affidavits, declarations and assertions simply cannot be trusted. Some Courts may have, in the past as the Defendant asserts, given great deference to the CIA and treated *in camera* review as a last resort. But that was before a direct court order to the CIA demanding that it turn over for *in camera* review the evidence of an illegal program, the so-called "torture tapes," under FOIA. The CIA, rather than comply, simply burned the tapes because they were, in the words of agency officials, "bad news." The CIA remains both unreformed and unrepentant, because it was never held to account for this or other acts in contempt of FOIA. Citing "before torture tapes" court precedents in this new era of "after torture tapes" is therefore not compelling, and should never again be taken seriously by any court.

Similarly, the case of *Aftergood v CIA* still stands as a clear, shining precedent. Stripping away the Defendant's attempt to cloud up the case, the facts are clear. The CIA director admitted that release of top-line budget agency information presents no national security threat, particularly given low American public opinion of the Central Intelligence Agency and widespread distrust over its past conduct. Aftergood sued the CIA for top line budget data, and it was released. Americans were informed and could respond. The sky—as predicted—did not fall.

The existence of an "unprecedented" US Israel intelligence aid program has now been officially acknowledged. It is time for Americans squeezed by pressing economic issues, with record levels of distrust about the functions of government and elected officials—who overwhelmingly disfavor such aid to Israel— to review precisely how much is being denied

important domestic programs such as rebuilding infrastructure, education and items of true social welfare benefit, and instead being quietly funneled through the CIA to Israel as "intelligence aid."

CONCLUSION

For the foregoing reasons, this court should deny the Defendant's motion for summary judgement and review *in camera* the CIA's top line Israel intelligence aid budget numbers for overdue release to the Plaintiff.