IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GRANT F. SMITH,

Plaintiff,

v.

CENTRAL INTELLIGENCE AGENCY,

Defendant.

Case No.: 1:15-cv-01431 (TSC)

Electronically Filed

MEMORANDUM IN SUPPORT OF DEFENDANT'S
SECOND MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The plaintiff in this Freedom of Information Act ("FOIA") case, Grant F. Smith, requested that the defendant, the Central Intelligence Agency ("CIA" or "the Agency"), provide him with a copy of intelligence budget line items supporting Israel. The CIA, following five decades of D.C. Circuit precedent, properly issued a *Glomar* response to Plaintiff's request, *i.e.*, it refused to confirm or deny the existence of such records, because the existence (or non-existence) of such records was a fact that Congress protected from release by FOIA Exemptions 1 and 3.

As has been made clear in multiple rounds of briefing and opinions, the key issue in this case is whether then-President Obama officially acknowledged the existence of the records Plaintiff seeks. In 2015, President Obama, in a speech about the Iran nuclear deal, mentioned that his Administration has provided unprecedented "American military and intelligence assistance" that has, in part, allowed Israel to defend itself. Because the CIA is not the only intelligence agency to provide intelligence support abroad, and because there is no single intelligence budget, much less one controlled by or in the custody of the CIA, President Obama's statement did not officially acknowledge that the *CIA* has or does not have line items in its intelligence budget (or access to line items in an intelligence budget in its custody or control) that relate to Israel. Furthermore, while this Court denied Defendant's first motion for summary judgment on the basis that it lacked information to determine "whether the CIA either creates or obtains and retains under its control the budget line items of other intelligence agencies," Order (Aug. 23, 2017), at 6, ECF No. 24, Defendant now clarifies that "the CIA does not create, obtain, access, or retain under its control the budget line items of other intelligence agencies." Second Decl. of Antoinette B. Shiner, Info. Review Officer For The Litig. Review Office, Central Intelligence Agency ¶ 5 ("Second Shiner Decl.") [attached hereto].

As the CIA previously demonstrated, the CIA's *Glomar* response was appropriate and in keeping with well-established case law from this Circuit holding that specific information about intelligence budgets is protected from disclosure under FOIA. That is so under two FOIA exemptions. First, the existence or non-existence of intelligence budget line items is properly classified, and therefore protected by FOIA Exemption 1. Intelligence budget entries reflect important information on intelligence sources, methods, and priorities. Moreover, revealing information about intelligence expenditures could reasonably be expected to damage relationships between the U.S. Government and foreign governments, harming the CIA's ability to work collaboratively with those countries – and hindering the national security of the United States. Both of these reasons independently justify classification. Second, the National Security Act of 1947 requires that information relating to intelligence sources and methods be protected from disclosure by FOIA Exemption 3. That information, as courts in the D.C. Circuit have repeatedly held, includes intelligence expenditures.

Accordingly, the CIA's response to Plaintiff's FOIA request was proper, and Defendant respectfully asks this Court to enter summary judgment in its favor.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff submitted a FOIA request to the CIA for "a copy of the intelligence budget that pertains to line items supporting Israel [from 1990 through 2015]." Compl. at Ex. 1, ECF No. 1. The CIA denied the request, asserting what is known as a *Glomar* response: that the agency can neither confirm nor deny the existence of records responsive to the request:

> In accordance with section 3.6(a) of Executive Order 13526, the CIA can neither confirm nor deny the existence of records responsive to your request. The fact of the existence or nonexistence of requested records is currently and properly classified and is intelligence sources and methods information that is protected from disclosure by section 6 of the CIA Act of 1949, as amended, and section

> 102A(i)(1) of the National Security Act of 1947, as amended. Therefore, your request is denied pursuant to FOIA exemptions (b)(1) and (b)(3).

Id. at Ex. 2. Plaintiff filed an administrative appeal, but before the administrative appeal process was completed, Plaintiff filed this lawsuit. *See* Compl.

The CIA moved for summary judgment. *See* Def.'s Mot. Summ. J., ECF No. 12. In his opposition, Plaintiff claimed that a statement made by former President Obama in 2015 was an official acknowledgement that the CIA has intelligence budget line items supporting Israel, thus defeating the CIA's Glomar response. In a speech about the Iran nuclear deal, President Obama stated that "partly due to American military and intelligence assistance, which my administration has provided at unprecedented levels, Israel can defend itself against any conventional danger." THE WHITE HOUSE, *Remarks by the President on the Iran Nuclear Deal*, (Aug. 5, 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/08/05/remarks-president-iran-nuclear-deal (last accessed Oct. 31, 2017) [hereinafter "President's Remarks"]; *see also* Compl. ¶ 26.

The Court denied the CIA's motion, holding that President Obama's statement constituted an official acknowledgment of the fact "(1) that the CIA provides intelligence support to Israel, and (2) that it therefore must have some means of appropriating funds to do so, meaning that the budget line items must exist." Mem. Op. 5-6, ECF No. 16. In reaching that conclusion, the Court ruled that "it was not aware of, nor has the CIA pointed to, other agencies that might provide intelligence support abroad," and that "[t]he CIA's reference to 'the intelligence budget' refutes its suggestion that some entity other than the CIA might be responsible for the noted 'intelligence assistance,' as it implicitly acknowledges that there is a definitive 'intelligence budget' and it is the CIA's." *Id.* at 6.

The CIA moved for reconsideration. Def.'s Mot. Recons., ECF No. 18. Addressing the Court's factual conclusions, the CIA first asserted that there are multiple intelligence agencies that provide intelligence support abroad, and that President Obama's statement about American intelligence support generally cannot be read to confirm (or deny) that he was referring to the CIA specifically. Mem. Supp. Def's Mot. Reconsideration, at 4, ECF No. 18-1 (citing 50 U.S.C. § 3003(4); Decl. Mark W. Ewing, Chief Management Office, Office of the Dir. Of Nat'l Intelligence ("Ewing Decl.") ¶¶ 5-6, 10, ECF No. 18-2). The CIA further informed the Court that there was not a single intelligence budget, and to the extent there were consolidated U.S. intelligence budgets, those budgets were not controlled by the CIA. *Id.* at 6-7. Plaintiff acknowledged both of these facts in his opposition to the motion for reconsideration. *See* Mem. in Opp'n to Def.'s Mot. Recons. at 2, 4, ECF No. 22.

The Court denied the CIA's motion for reconsideration but provided it a second opportunity to move for summary judgment. The Court concluded that while it "cannot infer from the President's statement that the CIA has budget line items that support intelligence assistance for Israel," President Obama's "statement implies that some intelligence agency or government entity does have budget line items related to such intelligence assistance, and the court must determine whether the CIA has a relationship with that agency that would require production of the budget information under FOIA." Order (Aug. 23, 2017) at 6. In particular, the Court noted that "the CIA has not addressed whether it routinely creates or has records of other intelligence agencies' budget line items," and therefore, "[b]ased on the current record, the court cannot grant CIA's motion for summary judgment because the court does not have sufficient information to decide whether President Obama's statement constitutes an official acknowledgement of records that the CIA keeps or regularly accesses." *Id.* at 6-7. The Court noted the example of the National

Intelligence Program ("NIP") budget, which funds all intelligence community agencies' activities and is developed by the Director of National Intelligence based on proposals submitted by individual agencies. If the CIA retains its own copy of the NIP budget, or regularly accesses it, the Court reasoned, it would have records of other intelligence agencies' budget line items and its *Glomar* response would be precluded by President Obama's statement. *Id*. at 7.

The Court thus denied the CIA's original motion for summary judgment "on modified grounds," and stated that the CIA "may supplement the record with additional information and move again for summary judgment." *Id.* at 8.

ARGUMENT

The Court denied the CIA's previous motion for summary judgment on the basis that it lacked information to determine whether the CIA "either creates or obtains and retains under its control the budget line items of other intelligence agencies," Order (Aug. 23, 2017), at 6. The CIA now moves again for summary judgment on the specific basis that it "does not create, obtain, access, or retain under its control the budget line items of other intelligence agencies," Second Shiner Decl. ¶ 5, and that there has not, therefore, been any official acknowledgement of the classified information that Plaintiff seeks. Accordingly, the CIA's *Glomar* response, which Plaintiff otherwise fails to meaningfully challenge, was proper, and the CIA is entitled to summary judgment.

I. PRESIDENT OBAMA HAS NOT OFFICIALLY ACKNOWLEDGED WHETHER THE CIA POSSESSES THE RECORDS PLAINTIFF SEEKS.

President Obama's general reference to his administration's provision of military and intelligence assistance that has allowed Israel to defend itself cannot be understood to officially acknowledge that the CIA has records showing its own, or other agencies', budget line items related to intelligence assistance for Israel. There are multiple intelligence agencies, and therefore

references to "intelligence assistance" cannot necessarily be read to refer to the CIA. Nor is there a single intelligence budget, much less one controlled by the CIA. Moreover, in response to the Court's earlier question, the CIA now clarifies that it does not "create, obtain, access, or retain under its control the budget line items of other intelligence agencies." Second Shiner Decl. ¶ 5. Accordingly, there has been no official acknowledgment of whether or not the CIA possesses the records that Plaintiff seeks.

A. The D.C. Circuit Narrowly Applies The Official Acknowledgment Principle With An "Insistence On Exactitude."

"[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.

B. President Obama's Statement Is Neither As Specific As Nor Does It Match Plaintiff's Request For Information About Line-Items In The Intelligence Budget Supporting Israel.

President Obama's statement does not "match[]" the "specific information" that Plaintiff requested, *i.e.*, line-items in an intelligence budget in the custody or control of the CIA that support Israel from 1990 to 2015. The President did not, therefore, officially acknowledge the existence of the specific information Plaintiff seeks.

As an initial matter, President Obama only referenced "American . . . intelligence assistance" which "my Administration" has provided. President's Remarks. As this Court has already correctly determined:

> President Obama's statement referred only to the intelligence community during his administration, which lasted from January 2009 until January 2017. . . . The only records at issue here are those that existed during President Obama's tenure, because his statement did not acknowledge the existence of any records pertaining to U.S. intelligence support for Israel created before or after his administration.

Order (Aug. 23, 2017), at 8 n.3. Accordingly, to the extent that Plaintiff continues to apply President Obama's statement to events that predate the President's Administration, this Court has already rejected such an argument. *Id*. ("Defendant's *Glomar* response is appropriate concerning any records in the CIA's possession pertaining to intelligence assistance for Israel before January 2009 or after January 2017.").

Nor did President Obama officially acknowledge the existence of line-items in an intelligence budget under the custody or control of the CIA during his Administration. To begin with, as the CIA has previously argued, President Obama's statement about American intelligence support generally cannot be read to confirm (or deny) that the CIA is the specific intelligence agency to which he was referring. President Obama did not explicitly mention the CIA. The President also did not discuss whether that general American intelligence assistance to Israel involved financial or budgetary support that would have been reflected in a budgetary line-item (much less that of the CIA), as opposed to, for example, intelligence sharing or other non-monetary assistance that might not been part of a line-item. In short, President Obama's speech and Plaintiff's request are not congruent; the former is at a different (and much higher) level of generality than the latter. *See Wolf,* 473 F.3d at 379-80 (holding that an official acknowledgement must confirm or deny "the existence *vel non*" of the sought records, and limited disclosure only to records whose existence "have been previously disclosed (but not any others).").

There is also no basis to infer that President Obama was referring to information in the CIA's custody or control, even assuming such inference is compatible with this Circuit's

insistence that official acknowledgements be construed "strictly." *See, e.g.*, *Competitive Enter. Inst*, 78 F. Supp. 3d at 58 (rejecting analysis that "was based on inferences and assumptions – not an *official* and actual acknowledgement by someone in a position to know whether this is true"). As stated in Defendant's motion for reconsideration, the United States Intelligence Community consists of 17 separate intelligence agencies.[1] 50 U.S.C. § 3003(4); *see also* Ewing Decl. ¶¶ 5-6. These "entities at times provide intelligence assistance abroad." Ewing Decl. ¶ 10. For example, the various intelligence agencies conduct intelligence collaboration and sharing with multinational allies and partners. *See, e.g.*, Joint & National Intelligence Support to Military Operations, Joint Pub. 2-01 (Jan. 05, 2012), at II-26, http://www.dtic.mil/doctrine/new_pubs/jp2_01.pdf (discussing multinational intelligence collaboration between U.S. intelligence agencies and foreign intelligence agencies); Office of the Director of National Intelligence: Members of the IC, https://www.dni.gov/index.php/what-we-do/members-of-the-ic (last visited October 31, 2017) ("The [National Security] Agency supports military customers, national policymakers, and the counterterrorism and counterintelligence communities, as well as *key international allies*.") (emphasis added). Accordingly, references to "intelligence assistance" to Israel cannot be read to *a priori* refer to the CIA, as many different intelligence agencies provide foreign intelligence assistance. President Obama's statement therefore does not confirm

[1] These include (1) the Office of the Director of National Intelligence; (2) the Central Intelligence Agency; (3) the National Security Agency; (4) the Defense Intelligence Agency; (5) The National Geospatial Intelligence Agency; (6) The National Reconnaissance Office; (7) other offices within the Department of Defense for the collection of specialized national intelligence through reconnaissance programs; (8) the intelligence elements of the Army, the Navy, the Air Force, the Marine Corps, the Coast Guard, the Federal Bureau of Investigation, the Drug Enforcement Administration, and the Department of Energy; (9) the Bureau of Intelligence and Research of the Department of State; (10) the Office of Intelligence and Analysis of the Department of Treasury; (11) The Office of Intelligence and Analysis of the Department of Homeland Security. 50 U.S.C. § 3003(4).

the existence of records with regard to the CIA *specifically*. *See Wolf*, 473 F.3d at 380; *see also* Order (Aug. 23, 2017) at 5 ("The court recognizes that President Obama did not explicitly confirm or deny that the CIA itself provides intelligence assistance to Israel."); *id.* at 6 ("the court cannot infer from the President's statement that the CIA has budget line items that support intelligence assistance for Israel").

Nor is there a basis for concluding that President Obama officially acknowledged the existence of line items in an intelligence budget that the CIA "creates, or obtains, [or is] under its control." *Lewis v. DOJ*, 867 F. Supp. 2d 1, 12-13 (D.D.C. 2011). There is not a single intelligence budget, and certainly not a single intelligence budget controlled by the CIA – and so there is not a basis for concluding that a reference to "American intelligence assistance" to Israel must therefore be reflected in a CIA-controlled budget. Rather, as previously explained, the consolidated U.S. intelligence budget has two major components – the National Intelligence Program ("NIP") and the Military Intelligence Program ("MIP"). Ewing Decl. ¶ 7. The "annual consolidated National Intelligence Program budget" is developed by the Director of National Intelligence based on proposals submitted by the Intelligence Community. 50 U.S.C. § 3024(c)(1). It includes "all programs, projects, and activities of the intelligence community," excluding those activities conducted by the military departments and Department of Defense that support tactical military operations. *Id.* § 3003(6); *see also* Ewing Decl. ¶ 6. Tactical military intelligence operations are separately budgeted through the MIP. Ewing Decl. ¶ 7. The topline budgets for both the NIP and MIP are publically released, but all other budget figures and

program details are classified, including line-items that relate to particular intelligence agencies or programs. *See, e.g.*, 50 U.S.C. § 3306(b); Ewing Decl. ¶ 9.[2]

This Court denied Defendant's earlier motion for reconsideration on the basis that it "has no information as to whether the CIA obtains the records of those NIP budget line items. For example, if the CIA retains its own copy of the NIP budget [or regularly accesses the NIP budget as part of its typical responsibilities], the budget line items that [Plaintiff] seeks could constitute CIA agency records." Order (Aug. 23, 2017) at 7. The CIA now confirms that it "does not create, obtain, access, or retain under its control the budget line items of other intelligence agencies." Second Shiner Decl. ¶ 5. As specifically regards the NIP, the Director of National Intelligence develops the NIP budget based on proposals by agencies and organizations within the intelligence community, including the CIA. *Id.* "Once the full NIP budget is completed, the CIA receives from the DNI the broad overview of the NIP, which has only the top line budget numbers, and the portion of the NIP that pertains to the CIA budget. The portions of the NIP that CIA receives from DNI does not include the line items budgets of other intelligence agencies." *Id.* Accordingly, the CIA does not have access to the line-items of other intelligence agencies. President Obama's statement does not therefore acknowledge, or imply, that the CIA has control or custody of line-

[2] The following releases are typical: DNI Releases Budget Figure for the 2015 National Intelligence Program (Oct. 30, 2015), https://www.dni.gov/index.php/newsroom/press-releases/210-press-releases-2015/1279-dni-releases-budget-figure-for-2015-national-intelligence-program; Department of Defense Releases Budget Figure for 2015 Military Intelligence Program (Oct. 30, 2015), https://www.defense.gov/News/News-Releases/News-Release-View/Article/626734/department-of-defense-releases-budget-figure-for-2015-military-intelligence-pro/.

items in an intelligence budget related to Israel. *See also* Order (Aug. 23, 2017) at 6 (distinguishing *ACLU* as not applicable).[3]

II. THE CIA'S *GLOMAR* RESPONSE WAS PROPER UNDER FOIA EXEMPTIONS 1 AND 3.

Having disposed of the official acknowledgement question, the CIA turns to the justifications for its Glomar response under FOIA Exemptions 1 and 3 (arguments made in the CIA's first motion for summary judgement and repeated here for completeness and the Court's convenience).

A. The Freedom Of Information Act and *Glomar* Responses.

FOIA's "basic purpose" reflects a "general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (citation and internal quotation marks omitted). "Congress recognized, however, that public disclosure is not always in the public interest." *CIA v. Sims*, 471 U.S. 159, 166–67 (1985). Accordingly, "FOIA represents a balance struck by Congress between the public's right to know and the government's legitimate interest in keeping certain information confidential." *Ctr. for Nat'l Sec. Studies v. DOJ*, 331 F.3d 918, 925 (D.C. Cir. 2003) (citing *John Doe Agency*, 493 U.S. at 152).

As a manifestation of that balance, FOIA mandates disclosure of agency records unless the requested information falls within one of nine enumerated exemptions. *See* 5 U.S.C. § 552(b). Two such exemptions are relevant to this case. Exemption 1 exempts from disclosure materials properly classified as "secret in the interest of national defense or foreign policy," *id.* § 552(b)(1),

[3] The CIA agrees with the Court that the issue of whether President Obama's statement would preclude a *Glomar* response by the CIA to a request for "any and all records" pertaining to intelligence assistance to Israel is not before the Court. *See* Order (Aug. 23, 2017) at 5-6.

and Exemption 3 shields from release materials that are "specially exempted from disclosure by statute," *id.* § 552(b)(3).

Normally, "agencies must acknowledge the existence of information responsive to a FOIA request and provide specific, non-conclusory justifications for withholding that information." *Roth v. DOJ*, 642 F.3d 1161, 1178 (D.C. Cir. 2011) (citation omitted). But that general rule admits a key exception, *see id.*, which applies in this case. It is well-established that "the CIA 'may refuse to confirm or deny the existence of records where to answer . . . would cause harm cognizable under an FOIA exception.'" *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007) (quoting *Gardels v. CIA*, 689 F.2d 1100, 1103 (D.C. Cir. 1982)). "Such an agency response is known as a *Glomar* response and is proper if the fact of the existence or nonexistence of agency records falls within a FOIA exemption."[4] *Id.* "The agency must demonstrate that acknowledging the mere existence of responsive records would disclose exempt information." *Elec. Privacy Info. Ctr.. v. NSA*, 678 F.3d 926, 931 (D.C. Cir. 2012) (citation omitted). In doing so, the agency's explanatory burden is not demanding. "Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible." *Id.* (quoting *Larson v. Dep't of State*, 565 F.3d 857, 862 (D.C. Cir. 2009)).

"In reviewing an agency's *Glomar* response, th[e] Court exercises caution when the information requested 'implicates national security, a uniquely executive purview.'" *Elec. Privacy Info. Ctr.*, 678 F.3d at 931 (quoting *Ctr. for Nat'l Sec. Studies* 331 F.3d at 926-27 (bracket omitted)). While courts review de novo an agency's withholding of information pursuant to a

[4] The term "Glomar" came from the case *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976), where the CIA upheld the CIA's use of the "neither confirm nor deny" response to a FOIA request for records concerning the CIA's reported contacts with the media regarding a ship called the "Hughes Glomar Explorer."

FOIA request, "de novo review in FOIA cases is not everywhere alike." *Ass'n of Retired R.R. Workers, Inc. v. U.S. R.R. Ret. Bd.*, 830 F.2d 331, 336 (D.C. Cir. 1987). Although de novo review calls for "an objective, independent judicial determination," courts nonetheless must defer to an agency's determination in the national security context, acknowledging that "the executive ha[s] unique insights into what adverse [e]ffects might occur as a result of public disclosure of a particular classified record." *Ray v. Turner*, 587 F.2d 1187, 1194 (D.C. Cir. 1978).

Accordingly, courts have "consistently deferred to executive affidavits predicting harm to the national security, and have found it unwise to undertake searching judicial review." *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 927 (citation omitted); *see also Larson*, 565 F.3d at 865 ("Today we reaffirm our deferential posture in FOIA cases regarding the 'uniquely executive purview' of national security."). "[I]n the national security context," therefore, "the reviewing court must give 'substantial weight'" to agency declarations. *Am. Civil Liberties Union v. DOJ*, 265 F. Supp. 2d 20, 27 (D.D.C. 2003) (quoting *King v. DOJ*, 830 F.2d 210, 217 (D.C. Cir. 1987)); *see also Frugone v. CIA*, 169 F.3d 772, 775 (D.C. Cir. 1999) (stating that because "courts have little expertise in either international diplomacy or counterintelligence operations, we are in no position to dismiss the CIA's facially reasonable concerns" about the harm that disclosure could cause to national security); *Fitzgibbon v. CIA*, 911 F.2d 755, 766 (D.C. Cir. 1990) (holding that the district court erred in "perform[ing] its own calculus as to whether or not harm to the national security or to intelligence sources and methods would result from disclosure"). In according such deference, "a reviewing court must take into account . . . that any affidavit or other agency statement of threatened harm to national security will always be speculative to some extent, in the sense that it describes a potential future harm." *Wolf*, 473 F.3d at 374 (citation omitted).

"FOIA cases typically and appropriately are decided on motions for summary judgment." *Leopold v. CIA*, 106 F. Supp. 3d 51, 55 (D.D.C. 2015) (citation omitted). Summary judgment is proper "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). "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). If a *Glomar* response is appropriate, "the agency need not conduct any search for responsive documents or perform any analysis to identify segregable portions of such documents." *People for the Ethical Treatment of Animals v. Nat'l Institutes of Health, Dep't of Health & Human Servs.*, 745 F.3d 535, 540 (D.C. Cir. 2014) (citation omitted).

B. The CIA Cannot Confirm Or Deny The Existence Of Responsive Records Without Causing Harm To National Security.

The existence or non-existence of line-items entries in the CIA's intelligence budget pertaining to support for Israel is itself properly classified. Accordingly the CIA's *Glomar* response was appropriate under Exemption 1.

Exemption 1 protects from disclosure records 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). An agency establishes that it has properly withheld information under Exemption 1 if it demonstrates that it has met the classification requirements of E.O. 13,526, the current Executive Order governing the classification of national security information. Exec. Order No. 13,526, 75 Fed. Reg. 707 (2009). "Agencies may establish the applicability of Exemption 1 by

affidavit (or declaration)." *Judicial Watch v. DOD*, 715 F.3d 937, 940 (D.C. Cir. 2013). Section 1.1 of the Executive Order sets forth four requirements for the classification of national security information: (1) an original classification authority classifies the information; (2) the U.S. Government owns, produces, or controls the information; (3) the information is within one of eight protected categories listed in section 1.4 of the Order;[5] and (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in a specified level of damage to the national security, and the original classification authority is able to identify or describe the damages. Exec. Order No. 13,526 § 1.1(a). As noted, the Court must accord "substantial weight" to agency affidavits concerning classified information, *King*, 830 F.2d at 217, and must defer to the expertise of agencies involved in national security and foreign policy, particularly to those agencies' articulations and predictive judgments of potential harm to national security, *see, e.g.*, *Larson*, 565 F.3d at 865; *Frugone*, 169 F.3d at 775; *Fitzgibbon*, 911 F.2d at 766.

As supported in a declaration by Antoinette B. Shiner, the Information Review Officer for the Litigation Information Review Office at the CIA, the CIA has determined that the existence or nonexistence of intelligence budget line-item entries supporting Israel is currently and properly classified. Decl. of Antoinette B. Shiner, Info. Review Officer For The Litig. Review Office,

[5] Those categories are: "(a) military plans, weapons systems, or operations; (b) foreign government information; (c) intelligence activities (including covert action), intelligence sources or methods; or cryptology; (d) foreign relations or foreign activities of the United States, including confidential sources; (e) scientific, technological, or economic matters relating to the national security; (f) United States Government programs for safeguarding nuclear materials or facilities; (g) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to national security; or (h) the development, production, or use of weapons of mass destruction." Exec. Order No. 13,526 § 1.4(a)-(h).

Central Intelligence Agency ("First Shiner Decl."), ECF No. 12-2.[6] The First Shiner declaration satisfies the four criteria set out in Executive Order 13,526.

First, Ms. Shiner "hold[s] original classification authority at the TOP SECRET level under written delegation of authority pursuant to section 1.3(c) of Executive Order 13526." First Shiner Decl. ¶ 3; *see also id.* ¶ 22; Exec. Order No. 13,526 § 1.1(a)(1). Second, the sought "information is owned by, produced by or for, or is under the control of the United States Government." Exec. Order No. 13,526 § 1.1(a)(2). Plaintiff seeks information about the budget of an agency of the United States, and that data is plainly within the control of the United States Government, a point to which the Declarant attests. *See* First Shiner Decl. ¶ 23. Third, while the information must fall into at least one of eight categories of information set out in the Executive Order, Exec. Order No. 13,526 § 1.1(3), Ms. Shiner avers that it falls into two: section 1.4(c), which covers "intelligence activities" and "intelligence sources and methods," and section 1.4(d), which encompasses the "foreign relations or foreign activities of the United States," First Shiner Decl. ¶ 23

Fourth, and most importantly, Ms. Shiner has determined that the "disclosure of the existence or nonexistence of [line item intelligence budget entries supporting Israel] could be expected to result in damage to national security." First Shiner Decl. ¶ 23; *see also* Exec. Order No. 13,526 § 1.1(4). The danger manifests in several ways. First, "[d]isclosure of information about intelligence expenditures could reasonably be expected to harm national security because it would reveal capabilities, activities, and intelligence priorities of the U.S. Government, which in turn could inhibit intelligence gathering." First Shiner Decl. ¶ 27. Plaintiff seeks information on

[6] The First Shiner Declaration was submitted with the CIA's first motion for summary judgment, on February 5, 2016. In her second declaration, filed concurrently with this motion, Ms. Shiner has "incorporated by reference" her first declaration, along with the declaration of Mark Ewing, Chief Management Officer, Office of the Director of National Intelligence, which was filed alongside the CIA's motion for reconsideration. Second Shiner Decl. ¶ 3.

specific intelligence budget line items supporting Israel, or, in other words, specific funded programs and activities by the CIA supporting Israel, in whatever form. The simple fact is that budgets reflect priorities, and if the CIA was forced to identify the specific areas it spent money on (or did not spend money on), it "would reveal the resources available to the intelligence community and the intelligence priorities of the U.S. Government." *Id.* As Ms. Shiner explained:

> Information about intelligence budgets has been and continues to be of great interest to foreign nations and hostile groups wishing to calculate the strengths and weakness of the United States. Foreign governments and groups also have been and continue to be keenly interested in U.S. intelligence priorities. Nowhere have these priorities been better reflected than in spending on particular intelligence activities. Combined with other information already available to foreign intelligence services and the public, the release of intelligence budget information would tend to reveal intelligence activities, priorities, vulnerabilities, and strengths.

Id. ¶ 28. Here, Plaintiff seeks specific intelligence budgetary information – the CIA's intelligence budget line item entries supporting Israel – that would be revealing of the CIA's interests and priorities related to Israel, *id.* ¶¶ 27, 28, and therefore useful to adversaries interested in such information.

Moreover, confirming that the CIA had or did not have line-items in its intelligence budget related to Israel would also reveal information about the nature of any intelligence support provided by the United States to Israel. As Mark W. Ewing, Chief Management Officer of the Office of the Director of National Intelligence, noted in his earlier declaration: "The 17 agencies that comprise the Intelligence Community each have distinct functions and missions related to foreign intelligence and counterintelligence activities. Of the 17 Intelligence Community members, some of the agencies tend to specialize in one of the six particular intelligence collection disciplines." Ewing Decl. ¶ 8. The CIA, for example, specializes in human source intelligence, while other agencies, like the National Security Agency, specialize in signals intelligence. *Id.*; *see also* Second Shiner Decl. ¶ 6. Revealing whether an intelligence agency had line-items in their

budget reflecting support for a particular country would therefore provide information about the substantive nature of that support.

The CIA's reasoning accords with that of the Supreme Court, which has explained that disclosing "[t]he inquiries pursued by the [CIA] can often tell our adversaries something that is of value to them." *Sims*, 471 U.S. at 177 (citation omitted); *see also id.* at 178 ("In this context, the very nature of the intelligence apparatus of any country is to try to find out the concerns of others; bits and pieces of data 'may aid in piecing together bits of other information even when the individual piece is not of obvious importance in itself.'" (citation omitted)). Indeed, in *Sims*, the Supreme Court was concerned that "disclosure of the fact that the Agency subscribes to an obscure but publicly available Eastern European technical journal" would unacceptably hinder intelligence activities, because adversaries could determine the "general nature" of Agency interests in developing new intelligence techniques. *Id.* at 177. Judged against that undemanding standard, it is certainly "logical or plausible" to conclude that disclosing classified information about which countries the CIA does or does not provide budgetary support to would reveal information about the intelligence priorities, capabilities, and interests of the Agency. *See Judicial Watch*, 715 F.3d at 941 (citation omitted). Such a finding also accords with the conclusions reached in similar cases by other courts in this district. *Compare, e.g.*, *Leopold*, 106 F. Supp. 3d at 58 (finding as adequate a declaration that explained that disclosing intelligence expenditures "would reveal the resources available to the Intelligence Community and the intelligence priorities of the U.S. Government"), *with* First Shiner Decl. ¶ 28 ("Combined with other information already available to foreign intelligence services and the public, the release of intelligence budget information would tend to reveal intelligence activities, priorities, vulnerabilities, and strengths").

Next, as an independent justification, the CIA explained that the "disclosure of information about intelligence expenditures could reasonably be expected to damage relationships between the U.S. Government and foreign governments and could negatively impact the CIA's ability to work collaboratively with these countries on other areas of concern." First Shiner Decl. ¶ 29. These foreign cooperative intelligence relationships, which "constitute both an intelligence source and an intelligence method," *id.*, are important to national security, and as the CIA explained, depend on secrecy.

> The CIA relies on foreign intelligence liaison relationships for intelligence-gathering and assistance critical to U.S. national security. One of the major functions of the CIA is to gather intelligence from around the world that can be used by the President and other government officials in making important decisions. Disclosure of the Agency's relationship with or assistance to a specific country would suggest to other foreign liaison services and foreign government officials that have relationships with the Agency that the U.S. Government is unable or unwilling to protect the secrecy of such relationships and assistance. Such a perception could cause foreign liaison services and foreign governments to curtail their provision or information or other assistance to the Agency, or to end the relationship altogether, which would impair the Agency's ability to collect intelligence and conduct intelligence activities of importance to U.S. national security.

Id. As the Supreme Court has recognized, "[s]ecrecy is inherently a key to successful intelligence operations." *Sims*, 471 U.S. at 172 n.16. "If potentially valuable intelligence sources come to think that the Agency will be unable to maintain the confidentiality of its relationship to them, many could well refuse to supply information to the Agency in the first place." *Id.* at 175; *see also Fitzgibbon*, 911 F.2d at 763-64 ("[T]he Government has a compelling interest in protecting both the secrecy of information important to our national security and *the appearance of confidentiality* so essential to the effective operation of our foreign intelligence service."). That reasoning applies to the information at issue here: if countries could not ensure that their intelligence relationships, including the existence or nonexistence of budgetary "assistance," with the CIA remained secret, they would be less likely to enter into such relationships – and that as Ms. Shiner stated, would

harm the national security of the United States. *See* First Shiner Decl. ¶ 29; *compare also* First Shiner Decl. ¶ 29, *with, e.g.*, *Canning v. Dep't of State,* No. 13-cv-831 (RDM), 2015 WL 5776005, at *9 (D.D.C. Sept. 30, 2015) (affirming as exempt under Exemption 1 a declaration averring that "[t]he disclosure of the information in this document at this time could have the potential to inject friction into, or cause damage to, a number of our bilateral relationships with countries whose cooperation is important to U.S. national security").

Finally, as Ms. Shiner explains, a judicial ruling that the CIA must confirm or deny the existence of intelligence budget line-items would have enormous consequences on national security. "The potential damage to national security would be magnified many times over if the CIA were to respond to all FOIA requests for information on intelligence budget line items, thereby revealing – piece by piece – intelligence community resources, activities, and priorities." First Shiner Decl. ¶ 30. Allowing a foreign adversary to get detailed information on the existence or non-existence of specific line-items would largely nullify the well-established *Sims* principle that intelligence priorities cannot be disclosed, as requestors could determine whether specific, suspected classified programs existed and were funded simply by making a FOIA request. Other courts have also recognized the harmful impact on source protection that could be caused by forcing an agency to confirm or deny the existence of a relationship. *See Love v. DOJ*, No. 13-cv-1303 (TSC) 2015 WL 5063166, at *4 (D.D.C. Aug. 26, 2015) ("Denying the status of an individual as a confidential source would allow the requestor, through the process of elimination, to uncover the identity of any confidential source"), *appeal dismissed sub nom. Love v. DOJ*, No. 16-5033, 2017 WL 3895177 (D.C. Cir. May 5, 2017).

To conclude, Ms. Shiner has explained how revealing information on whether the CIA has or does not have line-items in its budget supporting Israel would harm national security. As the

D.C. Circuit has held, the key issue in an Exemption 1 *Glomar* claim is whether the affidavit "plausibly explains the danger" to national security if the agency confirms or denies the existence of the materials in question. *Wolf*, 473 F.3d at 375. If it does, "the existence of records *vel non* is properly classified under [the Executive Order] and justifies the Agency's invocation of Exemption 1." *Id.* at 375-76; *see also Ctr.. for Nat'l Sec. Studies*, 331 F.3d at 927 ("Moreover, in the FOIA context, we have consistently deferred to executive affidavits predicting harm to the national security, and have found it unwise to undertake searching judicial review."). Here, it is plausible to believe that revealing detailed, classified data about the CIA's budget would allow its adversaries to infer information about the Agency's priorities and capabilities. It is also plausible to believe that foreign countries would be less likely to cooperate with the CIA if their relationships with the Agency became public knowledge. And so long as the CIA's assertions are logical or plausible – as they are here – under D.C. Circuit case law, the Agency's *Glomar* response must be upheld.

C. The CIA Cannot Confirm Or Deny The Existence Of Responsive Records Without Disclosing Information Protected By Another Statute.

The CIA has also properly asserted FOIA Exemption 3 in support of its *Glomar* response. *See Larson*, 565 F.3d at 862-63 (Exemption 3 is sufficient to justify an agency's *Glomar* response). This exemption bars from disclosure information that Congress has required by statute to be "withheld from the public." 5 U.S.C. § 552(b)(3). Here, the National Security Act of 1947 prohibits the Agency from confirming of denying the existence of the information Plaintiff seeks.

Exemption 3 protects from disclosure information that is protected by a separate statute, "provided that such statute . . . (i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld." *Id.* § 552(b)(3)(A). The "purpose of

Exemption 3 [is] to assure that Congress, not the agency, makes the basic nondisclosure decision." *Ass'n of Retired R.R. Workers*, 830 F.2d at 336; *see also id.* ("[T]he policing role assigned to the courts in a[n Exemption 3] case is reduced.").

Following the Supreme Court's decision in *Sims*, courts apply a two-pronged inquiry when evaluating an agency's invocation of Exemption 3. *See Sims*, 471 U.S. at 167-68. First, the court must determine whether the statute qualifies as an exempting statute under Exemption 3. Second, the court decides whether the withheld material falls within the scope of that exempting statute. *See id.* Here, the CIA relies on section 102A(i)(1) of the National Security Act of 1947 (the "Act"), which requires that "[t]he Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 3024(i)(1); *see also* First Shiner Decl. ¶ 32. The Act is an exempting statute for the purposes of Exemption 3, so the CIA has satisfied the first of *Sims*' two requirements. *See, e.g.*, *ACLU*, 628 F.3d at 619; *Larson*, 565 F.3d 857, 865 (D.C. Cir. 2009); *see also Leopold*, 106 F. Supp. 3d at 57 (applying section 102(A)(i)(1) to the CIA).

The CIA's *Glomar* response also satisfies *Sims*' second requirement as it falls comfortably within the expansive scope of section 102A(i)(1)'s protection of "intelligence sources and methods." The Supreme Court has recognized the "broad sweep of [section 102A(i)(1)'s] statutory language," as well as the lack of any "limiting language." *Sims*, 471 U.S. at 169; *see also id.* at 169-70 ("Congress simply and pointedly protected all sources of intelligence that provide, or are engaged to provide, information the Agency needs to perform its statutory duties with respect to foreign intelligence. The plain statutory language is not to be ignored."). And this Circuit has gone even further in reading section 102(A)(i)(1) expansively. As Judge Boasberg recently summarized:

> The D.C. Circuit has interpreted this provision broadly, holding that material is properly withheld under the Act if it "*relates* to intelligence sources and methods,"

> or "can reasonably be expected to lead to unauthorized disclosure of intelligence sources and methods." Courts have also recognized that the Act's protection of sources and methods is a "near-blanket FOIA exemption," which includes the "power to withhold superficially innocuous information on the ground that it might enable an observer to discover the identity of an intelligence source [or method]." This is so because in the intelligence context "bits and pieces of data may aid in piecing together bits of other information even when the individual piece is not of obvious importance in itself." The Supreme Court has also warned that "it is the responsibility of the [intelligence community], not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the . . . intelligence-gathering process."

Leopold, 106 F. Supp. 3d at 57-58 (internal citations omitted). Indeed, the mandate to withhold information pursuant to the National Security Act is broader than the authority to withhold information pursuant to FOIA Exemption 1 and Executive Order No. 13,526. *Cf. Gardels*, 689 F.2d at 1107. This is because unlike section 1.1(a)(4) of Exec. Order No. 13,526, the National Security Act does not require the CIA to determine that the disclosure of the information would be expected to result in damage to national security. *Compare* 50 U.S.C. § 3024(i)(1), *with* Exec. Order No. 13,526 § 1.1(a)(4); *see also Associated Press*, 2017 WL 4341532, at *8 ("[Section 102(A)(i)(1)] presents an easier hurdle for the agency under Exemption 3 than does Executive Order 13,526 under Exemption 1, in that it does not require the [agency] to determine that release of the information could reasonably be expected to result in damage to national security.").

Revealing intelligence budgets – including the existence or non-existence of intelligence budget line items – reveals information on "intelligence sources and methods" that Congress has exempted from disclosure. As Ms. Shiner states "acknowledging the existence or nonexistence of records reflecting a classified connection to the CIA would reveal information that concerns intelligence sources and methods, which the National Security Act is designed to protect." First Shiner Decl. ¶ 32; *see also id.* ¶¶ 26-30, 33-34. Indeed, as explained in more depth in the Exemption 1 section, intelligence budget line items "can reveal the CIA's specific intelligence

capabilities, authorities, interests, and resources." *Id.* ¶ 26; *see also id.* ¶ 25 (to acknowledge that the CIA does or does not have intelligence budget line items supporting Israel "would implicate intelligence sources and methods in a manner harmful to U.S. national security"); *Int'l Counsel Bureau v. CIA*, 774 F. Supp. 2d 262, 274 (D.D.C. 2011) (concluding that the same discussion of harms to intelligence sources used to support an Exemption 1 claim also support an Exemption 3 claim); *Associated Press*, 2017 WL 4341532, at *9 (same).

The CIA's declaration is supported by this Circuit's case law, which has concluded that information about intelligence budgets goes directly to intelligence sources and methods. In *Leopold*, for example, the court concluded that releasing information on CIA line item budgets "could shed light on the funds that were available for particular activities, which could, in turn, divulge the agency's capabilities and priorities." 106 F. Supp. 3d at 58. So too here: knowing whether or not the CIA's intelligence budget includes line-items "supporting Israel" necessarily indicates the Agency's priorities (or lack thereof) – and the sources and methods necessary to support those priorities. The D.C. Circuit has embraced this reasoning. In *Halperin v. CIA*, 629 F.2d 144 (D.C. Cir. 1980), the CIA refused to disclose information on the fees paid to its attorneys, arguing that "such information could give leads to information about covert activities that constitute intelligence methods." *Id.* at 150. The D.C. Circuit agreed, concluding "that each individual piece of intelligence information, much like a piece of jigsaw puzzle, may aid in piecing together other bits of information even when the individual piece is not of obvious importance in itself." *Id.*; *see also Sims*, 471 U.S. at 178 ("[W]hat may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context." (citation omitted)); *Military Audit Project v. Casey*, 656 F.2d 724, 750 (D.C. Cir. 1981) (revealing information about costs can reveal information about

"intelligence capabilities and purposes."). In this case, knowing that the CIA has (or does not have) line item entries in its budget supporting Israel would provide information about the activities of the Agency, as funding (or not funding) supportive intelligence activities is itself an intelligence method. *See, e.g.*, Ewing Decl. ¶ 8; Second Shiner Decl. ¶ 6.

Indeed, courts within this Circuit have held that the *aggregate* "intelligence budget information relates to intelligence methods, namely the allocation, transfer, and funding of intelligence programs." *Aftergood v. CIA*, 355 F. Supp. 2d 557, 562 (D.D.C. 2005). Disclosing the existence or non-existence of *line-item* budget information would sweep far beyond disclosing total budget information, and would allow for individuals and foreign entities to draw conclusions on methods of gathering intelligence by the existence or non-presence of budgetary support. It also would provide information on the relative connections between foreign intelligence entities and the CIA, which necessarily implicates intelligence sources and methods. *See Elec. Privacy Info. Ctr. v. Office of the Dir. of Nat'l Intelligence*, 982 F. Supp. 2d 21, 30 (D.D.C. 2013) ("There is little doubt that the names of particular datasets and the agencies from which they originate would allow interested onlookers to gain important insight *into the way ODNI and its partners operate*." (emphasis added) (citation omitted)). The CIA has asserted harm to intelligence sources and methods, First Shiner Decl. ¶ 25, and "the CIA's assertions of harm to intelligence sources and methods under the National Security Act are accorded great deference." *Int'l Counsel Bureau*, 774 F. Supp. 2d. at 27 (citation omitted); *see also Whitaker v. CIA*, 64 F. Supp. 3d 55, 63-64 (D.D.C. 2014).

CONCLUSION

For the foregoing reasons, this Court should grant Defendant's motion for summary judgment.

November 3, 2017

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