UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GRANT F. SMITH

Plaintiff,

v. Civil No. 1:15-cv-01431 (TSC)

CENTRAL INTELLIGENCE AGENCY

Defendant.

MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR RECONSIDERATION

Plaintiff Grant F. Smith respectfully submits the following information pertaining to assertions made by the Defendant and affiant.

The Court did not err in determining the "CIA's *Glomar* response unwarranted because of President Obama's statement, which constituted an official acknowledgement of the existence of the records sought." (Dkt 17, p8) President Obama's reference to "intelligence assistance" indisputably referred to data in possession of the CIA, which it must acknowledge. Because the FOIA for "intelligence assistance" covered the period from 1990-2016 it referred to budgetary information that was held by the CIA. In fact, most the Plaintiff's FOIA request (58%) encompassed data for the years between 1990 and 2004 when the CIA was the central coordinator of the entire U.S. intelligence community (IC) and indisputably had some form of releasable Israel intelligence support line item budget data within its documents covering its own and the activities conducted by the IC.

Before the DNI was formally established in 2004, the head of the Intelligence

Community *was* the Director of Central Intelligence (DCI), who concurrently served as the Director of the Central Intelligence Agency (CIA). Plaintiff's FOIA request, directed at the entire CIA, included those CIA/DCI records. The US Congress then passed the *Intelligence Reform and Terrorism Prevention Act of 2004, S.2845 — 108th Congress*,[1] which President George W. Bush signed into law on December 17, 2004. It was only after that date that the CIA might have, through mandated separations of functions into the Directorate of National Intelligence, lost an overall budgetary view of the IC, including intelligence assistance to Israel, though that is extremely unlikely.

> *Sec. 102. <<NOTE: President. Congress. 50 USC 403.>> (a) Director of National Intelligence.--(1) There is a Director of National Intelligence who shall be appointed by the President, by and with the advice and consent of the Senate. Any individual nominated for appointment as Director of National Intelligence shall have extensive national security expertise.*
>
> *(2) The Director of National Intelligence shall not be located within the Executive Office of the President.*
> *(b) Principal Responsibility.--Subject to the authority, direction, and control of the President, the Director of National Intelligence shall--*
> *(1) serve as head of the intelligence community;*
> *(2) act as the principal adviser to the President, to the National Security Council, and the Homeland Security Council for*

[1] https://www.congress.gov/bill/108th-congress/senate-bill/2845

> *intelligence matters related to the national security; and*
>
> *(3) consistent with section 1018 of the National Security Intelligence Reform Act of 2004, oversee and direct the implementation of the National Intelligence Program.*
>
> *(c) Prohibition on Dual Service.--The individual serving in the position of Director of National Intelligence shall not, while so serving, also serve as the Director of the Central Intelligence Agency or as the head of any other element of the intelligence community.*

Defendant alleges inadequacies of interpreting the applicability of *American Civil Liberties Union v. CIA, 710 F.3d 422 (D.C. Cir. 2013)*. Defendant attempts to portray President Obama's August 2015 American University statement that intelligence support to Israel was "unprecedented" as insufficient to conclude a CIA role in that support. Defendant fails on both counts. It is true that ACLU "relied on statements by the CIA Director and other high-level government officials that it concluded strongly implied that the Director (and therefore the agency) possessed the records at issue in that case." However, very little was publicly known about CIA's role in the drone program when the D.C. circuit ruled in the ACLU's favor.

A much lower bar is present here. Much more is known about CIA's central position in the intelligence community, and responsibilities overseas, before 2004. This matters. The commander-in-chief's assertion that "unprecedented intelligence support" had been flowing from the U.S. was a *de facto* admission that the CIA would certainly have budgetary information, at least through 2004, but most likely through the present day if it continues to be concerned about duplication of efforts or conflicting programs. The Defendant and affiant's apparent lack of

institutional knowledge about CIA's central IC role before the 2004 agency reshuffling are therefore understandable, but certainly no cause for sudden summary judgement in their favor. Plaintiff notes that affiant Mark W. Ewing transferred to ODNI in 2005, after a stint at DIA (and not the pre-or post-2004 CIA). Though Ewing footnotes the *Intelligence Reform and Terrorism Prevention Act of 2004* on page 2 of his affidavit, (Dkt 17, Declaration of Mark W. Ewing) he does not appear to be aware that the Plaintiff's FOIA covered a substantial period prior to its passage. He uses it mainly to present a snapshot of how DNI theoretically functions from 2004 to the present.

ARGUMENT

I. Reconsideration is unwarranted because, at least through 2004 and probably through today, CIA was the head of the intelligence community and certainly possessed/possesses the budgetary data necessary to both fulfill its mandate and respond to a FOIA covering 1990-2015

Defendants point to the existence of "17 separate intelligence agencies" including several they cannot precisely name, that "at times provide intelligence assistance abroad." (Dkt 18, Attachment 2, page 5) Defendants then assert "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." The Plaintiff understands that there are other intelligence agencies. Some, such as the Defense Intelligence Agency, are even known to provide ongoing intelligence support to Israel. That other IC entities provide intelligence support to Israel does not refute the fact that CIA has topline budgetary data on intelligence support to Israel through 2004, and probably from 2005 through 2015. As a budget-restricted public interest researcher, it made sense to for Plaintiff to FOIA the agency that was central, largest, most intensively dedicated to overseas intelligence support, undoubtedly highly coordinated with other IC

members that certainly had the data requested, rather than every IC member, most with tiny budgets unlikely to play a significant role as conduits for what the commander-in-chief referred to as "unprecedented" support. The Plaintiff frequently uses this "most likely holder" approach in his FOIA work. Recently, a records request solely to the FBI yielded Justice Department, Treasury, and Customs data from ICE/DHS about the Netanyahu-Milchan-Smyth US-to-Israel nuclear weapons trigger smuggling ring.[2] That is how FOIA is supposed to work.

It is necessary to return to the original Plaintiff FOIA. Plaintiff, on March 19, 2015 requested "a copy of the intelligence budget that pertains to line items supporting Israel." Through the year 2004, CIA *a priori* possessed cumulative budgets of any/all budget line items supporting Israel. If intelligence support to Israel was being given by the US, the CIA had information about it, probably in many formats.

Defendants, rather than acknowledge this pre-2004 reality, engage in a shell game, claiming, in so many words that "There are so many [intelligence agency] walnut shells being shuffled on the table, and any could contain a pea [responsive FOIA information]." This shell game does not wash, given public information and institutional facts about the structure of the CIA, an agency subject to laws passed by Congress such as the *Intelligence Reform and Terrorism Prevention Act of 2004*, *S.2845*, that any citizen can read and interpret.

The court similarly has no need to rely on Defendant interpretations about what President Obama may have meant by "intelligence assistance." History and detailed facts about the CIA are already ensconced in the public domain. The CIA website offers a public definition of

[2] Grant F. Smith, "How to Smuggle US Nuclear Triggers to Israel, New DHS files raise questions about Arnon Milchans's US Visa" Antiwar.com, May 11, 2017 http://original.antiwar.com/smith-grant/2017/05/10/how-to-smuggle-us-nuclear-triggers-to-israel/

"intelligence."

> *"Intelligence is the official, secret collection and processing of information on foreign countries to aid in formulating and implementing foreign policy, and the conduct of covert activities abroad to facilitate the implementation of foreign policy."* [3]

Covert operations, gifts of spy equipment, data, satellite photos, help with offensive cyber-attacks all fit the CIA's definition of intelligence, and all would leave a budgetary trail. Other intelligence programs specific to the CIA have been reported in the news media include secret prisons, lethal drones, torture programs, and a large new counterterrorism center.[4] As the largest recipient of IC appropriations, the CIA is the most logical place for the Plaintiff to seek precise numbers when the commander-in- chief describes lower parameters of intelligence support. Because President Obama acknowledged unprecedented levels of intelligence support to Israel, no matter what the nature of that assistance, or which agency was providing it, at least through 2004, the CIA would certainly have had the data. It is implausible, that as the largest recipient of IC appropriations, CIA does not have continued insights into the entire budget for reasons of efficiency alone.

Defendant issues a cautionary warning that "If CIA were to confirm that a portion of its individual Agency intelligence budget relates to Israel, it would tend to show whether or not the intelligence assistance provided was related to [human intelligence] (a CIA area of expertise)."

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[3] A Definition of Intelligence — Central Intelligence Agency - CIA https://www.cia.gov/library/center-for-the-study-of-intelligence/kent-csi/vol2no4/html/v02i4a08p_0001.htm

[4] Barton Gellman and Greg Miller, "CIA is largest spy agency" Washington Post, August 30, 2013 https://www.washingtonpost.com/world/national-security/cia-is-largest-us-spy-agency-according-to-black-budget-leaked-by-edward-snowden/2013/08/29/d8d6d5de-10ec-11e3-bdf6-e4fc677d94a1_story.html?utm_term=.7e80a747db19

(Dkt 18, Attachment 2, p 5). This conclusion does not follow. It is publicly known that CIA allocates only $4.8 billion to HUMINT, out of an annual budget of $14.7 billion, or around 33% of the total. [5] Therefore, no such conclusions could be drawn from release of the top line "unprecedented" amount of intelligence support to Israel. In fact, many observers would likely conclude otherwise. Since one of the CIA's largest divisions today is the Information and Operations Center (IOC) which conducts offensive cyber operations, some informed observers would probably conclude that HUMINT could not be a major expenditure within a massive flood of "unprecedented" intelligence support to Israel.[6] With an officially released top-line number, and access to public domain information, people still would not know the breakdown.

The affiant also claims, "confirming the existence of a relationship between a particular foreign government and a specific member of the intelligence community could damage intelligence sharing and cooperation on areas of importance to national security." This is unconvincing. So much information has been placed in the public domain about US IC member-Israeli joint programs, that it is unlikely the confirmation of top line budget numbers could cause damage. Public interest reassessment perhaps, damage no.

There is no national security threat here. Disclosure of topline intelligence support for Israel would likely improve national security, as informed citizens became even more engaged and empowered to question and challenge its legality and important factors such as government waste, fraud and abuse.

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[5] Barton Gellman and Greg Miller, "CIA is largest spy agency" Washington Post, August 30, 2013 https://www.washingtonpost.com/world/national-security/cia-is-largest-us-spy-agency-according-to-black-budget-leaked-by-edward-snowden/2013/08/29/d8d6d5de-10ec-11e3-bdf6-e4fc677d94a1_story.html?utm_term=.7e80a747db19

[6] *Washington Post*, "US spy agencies mounted 231 offensive cyber-operations in 2011, documents show" august 30, 2013. https://www.washingtonpost.com/world/national-security/us-spy-agencies-mounted-231-offensive-cyber-operations-in-2011-documents-show/2013/08/30/d090a6ae-119e-11e3-b4cb-fd7ce041d814_story.html?utm_term=.2377b7c49a43

II. The Court correctly concluded that there was, for the purposes of this FOIA action, a Single Intelligence Budget, in possession of the CIA at least through 2004.

Speaking yet again in the present tense, Defendants state "There is no single intelligence budget, and certainly no single intelligence budget controlled by the CIA. The 'annual consolidated National Intelligence Program budget' is developed by the Director of National Intelligence based on proposals submitted by the intelligence community." (Dkt 18, p 6) While this may be true today, it does not address what was originally sought in the Plaintiff's FOIA. Most the years of data requested by the Plaintiff (58%, or years 1990-2004) pertain to numbers that indisputably were in CIA possession, probably in many, many cross-tabulated formats and reports. How many is unknown, because more than two years have passed, and the CIA has not engaged in a records search. Also, contrary to the Defendant's above-referenced assertion, the Plaintiff did not narrow the FOIA to budgets "controlled by the CIA." The original FOIA was broad, "US Intelligence Support to Israel Budget 1990-2015." (Dkt 1, Attachment 1, Exhibit 1) Given the Defendant misdirection and seeming temporal errors of omission, it is necessary to explore why the CIA may wish to avoid admitting the obvious, that it has such data, and whether these obstacles have any relevance in FOIA.

Known US foreign aid to Israel, a prosperous country, between the years 1949-2016 adjusted for inflation, was $254 billion, far more than any other single country.[7] The president's American University speech set the lower quantitative parameters for how much additional intelligence support the US must also be providing. All the Plaintiff's FOIA request does is ask for precise numbers. Given that year-by-year foreign aid to Israel is very precisely known to the public (see *Jeremy M. Sharp, "U.S. Foreign Aid to Israel" Congressional Research Service,*

[7] "254 billion in uncondition US aid to Israel is unique" Antiwar.com February 23, 2018 http://original.antiwar.com/smith-grant/2017/02/22/254-billion-in-unconditional-us-aid-to-israel-is-unique/

December 22, 2016) Plaintiff anticipates that, when properly released under FOIA, the intelligence aid may amount to another $2 billion per year, at the lower end of the scale of what it would have to be for the total in 2015 to have reached "unprecedented" levels when added to known foreign aid. It would probably be as embarrassingly inflated and lopsided as US foreign aid to Israel already is, compared with other recipient countries and much poorer nations that do not have a large, foreign-interest lobby directing campaign contributions to members of the U.S. Congress. However, from a FOIA/classification perspective, embarrassing information may not be withheld on that basis alone. *Executive Order 13526, Section 1.7 (a)* "in no case shall information be classified…to prevent embarrassment…"

This is probably why the CIA does not want to release such information, not to protect HUMINT, but rather because the American public does not support aid to Israel.[8] It also appears to be illegal under Arms Export Control Act prohibitions on aid to clandestine nuclear powers. From a FOIA/classification perspective, this is also not allowed. "*Executive Order 13526, Section 1.7* "(a) in no case shall information be classified…to conceal violations of law…" An official verification of the precise amount of total US aid to Israel (known plus intelligence support), while uncomfortable for the CIA to disclose, is releasable under FOIA because the commander-in-chief has already verified it exists and even roughly quantified it.

III. Reconsideration is Unwarranted Because *ACLU v. CIA* Clearly Apply.

President Obama's reference to "intelligence assistance" going to Israel at "unprecedented" levels was made against a backdrop of information long in the public domain about how the CIA functions. It is known that CIA has facilities in Israel (a CIA station, with a station chief and many official cover employees). It is known that the Israelis were so close to

[8] "American attitudes about Israel/lobby programs – 3/26/2017." Surveys fielded through Google Analytics Solutions. ISBN 978-0-9827757-9-0 http://irmep.org/03262017_American_Attitudes.asp

some CIA past officials, such as James Angleton, that monuments are erected in their names.[9] It is known that CIA was, at very least, until 2004 in possession of full spectrum information about the conduct of the US intelligence community abroad. It is even publicly known that CIA's operations in Israel are routinely monitored, penetrated and subverted by Israel.[10] This is why there is no need for additional assertions by CIA directors, as was in the case for armed drones in *ACLU*. A newspaper subscription and the legislative history of *Intelligence Reform and Terrorism Prevention Act of 2004* alone are enough in this instance.

CONCLUSION

The Defendant's *Glomar* response is unsustainable and was already properly rejected once by this Court. As the court already noted, (Dkt 16, p 8) the Defendant cannot simultaneously invoke *Glomar* and Exemptions 1 and 3 of FOIA (as is done in this "second bite of the apple" on Dkt 18, page 9) since CIA has not yet confirmed their possession of responsive information. CIA has the information Plaintiff requests, and must emit a bona fide response under FOIA, as this court has already properly ordered, which can then be challenged, including through requests for *in camera* review and Vaughn index production.

[9] "…after Angleton's death, Jerusalem Mayor Teddy Kollek and then-Defense Minister Yitzhak Rabin dedicated a "memorial corner" of a park not far from the King David Hotel where there's an inscription in English, Hebrew and Arabic: "IN MEMORY OF A DEAR FRIEND, JAMES (JIM) ANGLETON." From Christopher Dickey, "My Lunch with 'the spider' who nearly wrecked the CIA" – *The Daily Beast*, February 27, 2016

[10] "Former US Officials Say CIA Considers Israel to be Mideast's Biggest Spy Threat" *Haaretz*, July 28, 2012 http://www.haaretz.com/israel-news/former-u-s-officials-say-cia-considers-israel-to-be-mideast-s-biggest-spy-threat-1.454189

Dated May 15, 2017

Respectfully submitted,

Grant F. Smith, Pro Se
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