IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GRANT F. SMITH, *Plaintiff*, v. U.S. NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, *Defendant*.	Civil Action No. 1:18-cv-02048-TSC

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT AND REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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Plaintiff's requests under the Freedom of Information Act (FOIA) sought records the existence or nonexistence of which is itself a classified fact. Consistent with decades of precedent, the National Archives and Records Administration (NARA) refused to confirm or deny the existence of any responsive records. The declarations offered in support of Defendant's Motion for Summary Judgment clearly establish that NARA has fully discharged its obligations, and nothing in Plaintiff's filing undermines this conclusion. The Court should enter summary judgment in Defendant's favor.

I. The Court lacks jurisdiction to review the Bush Library response.

As previously explained, the Presidential Records Act (PRA) authorizes a president to restrict access to classified records for up to 12 years beyond the end of the president's tenure. 44 U.S.C. § 2204(a). President Bush did so. *See* Laster Decl. ¶ 13, ECF No. 10-2 at 6; *see also* Ex. A (July 31, 2002 letter from President George W. Bush to Archivist John W. Carlin). The PRA further provides that the determination whether to deny access to information within a restricted category of information "shall not be subject to judicial review" during that period. 44 U.S.C. § 2204(b)(3); *see* Def.'s Mem. in Supp. of Def.'s Mot. for Summ. J. (Def.'s Mem.) at 6-7, ECF No. 10-1 at 6-7. The Court is without jurisdiction to review the determination that the existence or nonexistence of the requested records was classified and therefore that access to such information was restricted under the PRA. *See, e.g.*, *Judicial Watch v. NARA*, 845 F. Supp. 2d 288, 298 n.3 (D.D.C. 2012).

Plaintiff suggests that NARA may not rely on this jurisdictional provision because only the Archivist himself is permitted to make such a determination. Pl.'s Mem. of Law in Opp'n to Def.'s Mot. for Summ. J. and in Supp. of Pl.'s Mot. for Summ. J. (Pl.'s Mem.) at 51, ECF No. 11-1 at 52.

But Congress has explicitly provided that "the Archivist may delegate any of the functions of the Archivist to such officers and employees of the Administration as the Archivist may designate, and may authorize such successive redelegations of such functions as the Archivist may deem to be necessary or appropriate." 44 U.S.C. § 2104(b). Pursuant to that statute, the Archivist has in fact delegated his authority to make determinations under the PRA. *See* NARA Policy Directive, Part 9, § 13(c) (Oct. 2, 2016), Ex. B at 14-15. Moreover, the fact that NARA has released some records from the George W. Bush Administration has no bearing on the unreviewable determination to withhold other records subject to the restricted access period. Indeed, as that release makes clear, NARA withheld the bulk of the documents because they remained restricted. *See* Pl.'s Mem. Ex. C at 3, ECF No. 11-7 at 3.

Because the Presidential records of the George W. Bush Administration are still within the PRA's 12-year restricted access period invoked by President Bush before he left office, "the determination whether access to a Presidential record or reasonably segregable portion thereof shall be restricted . . . shall not be subject to judicial review." 44 U.S.C. § 2204(b)(3). The Court simply lacks jurisdiction to review the PRA restriction determinations made regarding the Bush Library records and should dismiss for lack of jurisdiction Plaintiff's claims as they relate to the Bush Library request.[1]

II. The Clinton Library's *Glomar* response was proper under Exemption 1.

For more than four decades, courts of this circuit have recognized that an agency may respond to a FOIA request by refusing to confirm or deny the existence of responsive records if

[1] Again, if the Court determines that the PRA does not preclude judicial review of the Bush Library response, that response is also justified under FOIA for the same reasons as is the

doing so would itself reveal information falling within a FOIA exemption. *See, e.g.*, *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976); *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007). When a plaintiff challenges such a response, the responding agency is entitled to summary judgment if it demonstrates, through affidavit or declaration, "that acknowledging the mere existence of the responsive records would disclose exempt information." *Elec. Privacy Info. Ctr. v. NSA* (*EPIC*), 678 F.3d 926, 931 (D.C. Cir. 2012) (quoting *Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982)). The declarations offered in support of Defendant's motion do so, and Plaintiff's filing does nothing to suggest otherwise.[2]

A. The Fitzpatrick Declaration establishes that the information is properly classified.

NARA's *Glomar* response is justified under FOIA Exemption 1, which permits withholding of information that is properly classified pursuant to Executive Order. *See* 5 U.S.C. § 552(b)(1). The operative Executive Order establishes four substantive criteria for proper classification: (1) that the classification be made by an original classification authority; (2) that the information classified is owned by, produced by or for, or is under the control of the United States; (3) that the information pertains to one or more of eight enumerated categories; and (4) that the original classification authority determines that unauthorized disclosure of the information reasonably could be expected to result in describable damage to the national security. Exec. Order No. 13,526 § 1.1(a), 75 Fed. Reg. 707 (Dec. 29, 2009).

Clinton Library response, set out in Defendant's Motion for Summary Judgment, ECF No. 10-1, and again below.

[2] Plaintiff's suggestion that the omission of some biographical information demonstrates that Mr. Fitzpatrick's declaration is offered in bad faith is wholly without merit. *Cf. Leopold v. Dep't of Justice*, 130 F. Supp. 3d 32, 42 (D.D.C. 2015) (mistakes in an affidavit do not demonstrate bad faith); *Voinche v. FBI*, 412 F. Supp. 2d 60, 72 (D.D.C. 2006) (no bad faith where plaintiff had "presented no actual evidence refuting any statements" made by the declarant).

Plaintiff does not contest that Mr. Fitzpatrick is an original classification authority. Nor does Plaintiff meaningfully contest that the information "pertains to . . . foreign government information . . . [or] foreign relations or foreign activities of the United States," Exec. Order No. 13,526 § 1.4. *See* Pl.'s Mem. at 40, ECF No. 11-1 at 41 (asserting without elaboration that "pertinence to any enumerated category has not been established"). Plaintiff suggests that the information cannot be "under the control of the United States" because Israeli officials presumably know whether or not the letters exist. *See* Pl.'s Mem. at 30, ECF No. 11-1 at 31. But information need not be within the exclusive control of the United States government to be properly classified. Indeed, the Executive Order explicitly recognizes "foreign government information" as potentially classified, *see* Exec. Order No. 13,526 § 1.4(b), and *presumes* that unauthorized disclosure of foreign government information causes damage to the national security, *id.* § 1.1(d); *see also id.* § 1.6(e) (discussing classification of information furnished by foreign governments). In such cases, a foreign government also has the information.

Nor does Plaintiff's filing undermine Mr. Fitzpatrick's conclusion that unauthorized disclosure of the information (that is, whether the letters do or do not exist) reasonably could be expected to result in damage to the national security. "[T]he text of Exemption 1 itself suggests that little proof or explanation is required beyond a plausible assertion that information is properly classified." *Morley v. CIA*, 508 F.3d 1108, 1124 (D.C. Cir. 2007). Mr. Smith's view of how disclosure of the fact of the existence or nonexistence of the letters might or might not sow doubt about the U.S. commitment to the Nuclear Non-Proliferation Treaty is simply irrelevant. Mr. Smith undoubtedly holds strong views on U.S. foreign policy, but the Executive Order assigns responsibility to determine the risk of harm to the original classification authority, not to

FOIA requesters. *See id.* (emphasizing that courts must give "*substantial weight* . . . to an agency's affidavit concerning the details of the classified status of the disputed record" (quoting *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981))).

It is both "logical" and "plausible" to conclude that confirming the existence or nonexistence of letters acquiescing in Israel's alleged possession of nuclear weapons could undermine confidence in the U.S. commitment to the Nuclear Non-Proliferation Treaty; could undermine what Mr. Smith recognizes is a longstanding policy of ambiguity; and could have second- and third-order effects for U.S. foreign policy goals in the Middle East. *Cf. Larson v. Dep't of State*, 565 F.3d 857, 862 (D.C. Cir. 2009) ("Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible." (quoting *Wolf*, 473 F.3d at 374-75)). And, as Mr. Fitzpatrick explains, and courts of this circuit have recognized, it is essential to maintain a *Glomar* response even when the requested records do not exist in order to maintain the efficacy of the response. *See* Fitzpatrick Decl. ¶ 11; *People for the Ethical Treatment of Animals v. Nat'l Insts. of Health, Dep't of Health & Human Servs.* (*PETA*), 745 F.3d 535, 544 (D.C. Cir. 2014); *Mobley v. CIA*, 924 F. Supp. 2d 24, 51 (D.D.C. 2013). Mr. Fitzpatrick's declaration "plausibly explains the danger" from disclosure of the classified fact, and that is all that is required to sustain the *Glomar* response, even if Mr. Smith would make a different assessment of that danger. *See Wolf*, 473 F.3d at 375-76.

B. The classification determination was not made to conceal unlawful conduct.

Executive Order 13,526 prohibits classifying information "in order to . . . conceal violations of law." Exec. Order No. 13,526 § 1.7. Mr. Fitzpatrick's declaration sets out the reasons for the classification determination and avers that the information was "not classified to

conceal violations of law." Fitzpatrick Decl. ¶ 12. Mr. Smith suggests that the alleged letters contain evidence of unlawful conduct. *See* Pl.'s Mem. at 40-46, ECF No. 11-1 at 41-47. The government disputes Plaintiff's characterization of the interplay between the Arms Export Control Act, the Nuclear Non-Proliferation Treaty, and U.S. foreign aid.[3] But the precedent is clear: the Court need not even inquire into the legality of the alleged conduct because even illegal conduct "may still produce information that may be properly withheld under exemption 1." *ACLU v. U.S. Dep't of Defense*, 628 F.3d 612, 622 (D.C. Cir. 2011); *see also Wilner v. NSA*, 592 F.3d 60, 77 (2d Cir. 2009) (declining to decide the legality of the program about which records were sought because that question was "beyond the scope" of a FOIA action). Whatever the requirements of the Nuclear Non-Proliferation Treaty or the Arms Export Control Act, the determination that the information at issue is classified is valid so long as it was not made for an improper purpose. *See, e.g.*, *Am. Ctr. for Law and Justice v. U.S. Dep't of State*, 2018 WL 6329454 at *8 (D.D.C. Dec. 4, 2018) ("Even if certain portions *could* be considered embarrassing to State, 'it would nonetheless be covered by Exemption 1 if, independent of any desire to avoid embarrassment, the information withheld [was] properly classified.'" (quoting *Wilson v. Dep't of Justice*, 1991 WL 111457 at *2 (D.D.C. June 13, 1991)) (emphasis and alteration in original)). Mr. Fitzpatrick's explanation of the possible harm that could reasonably arise from the information's unauthorized disclosure belies any claim that the information was classified to conceal violations of law.

[3] For example, the National Defense Authorization Act of 2019 expressly authorizes certain defense aid to Israel. John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 1688.

C. There is no search, Vaughn *index, or* in camera *review in a* Glomar *case.*

As the D.C. Circuit has explained, *in camera* review is "neither necessary nor appropriate" when the agency meets its burden through declarations, and it is "particularly a last resort in national security situations" like this case. *Larson*, 565 F.3d at 869-70 (citations omitted). NARA has met its burden to justify its response through the declarations of Mr. Laster and Mr. Fitzpatrick. Moreover, and as Plaintiff correctly points out, NARA did not perform a search for responsive documents. Laster Decl. ¶¶ 12-13; *see* Pl.'s Mem. at 53-54, ECF No. 11-1 at 54-55. The D.C. Circuit has explicitly rejected the argument that an agency must perform a search, or produce a *Vaughn* index, when it gives a *Glomar* response. *See PETA*, 745 F.3d at 540; *EPIC*, 678 F.3d at 934 (citing *Wolf*, 473 F.3d at 374 n.4). Because the agency does not perform a search for responsive documents, "there are no relevant documents for the court to examine other than the affidavits which explain the Agency's refusal." *Phillippi*, 546 F.2d at 1013. "[O]rdering an [*in camera*] inspection would essentially require [the agency] to admit or deny whether the requested records exist," which "would be inconsistent with" the *Glomar* response. *Wonders v. McHugh*, 2012 WL 3962750 at *9 (D.D.C. Sept. 11, 2012) (Wilkins, J.); *see also Wilner*, 592 F.3d at 75-76 (citing *Phillippi*, 546 F.2d at 1013).

Relatedly, the Court should reject Plaintiff's suggestion that the classification is improper because the declarations do not aver to the existence of classification markings. Pl.'s Mem. at 40, 51, ECF No. 11-1 at 41, 52. When an agency gives a *Glomar* response, the classified information is the fact of the existence or nonexistence of the requested records. There is no document to be marked. This court rejected an identical argument in *Mobley v. CIA*, noting that the Executive Order's marking requirement presupposes the existence of a tangible record to

apply a classification marking to. 924 F. Supp. 2d at 48. As that court explained, a *Glomar* response is "intangible" and an agency is not required to create a record in response to a FOIA request. *Id.* Accordingly, and as that court held, an agency is not required to demonstrate that it has applied classification markings to the *Glomar* information in order to justify its invocation of Exemption 1.

III. Plaintiff has not identified a prior disclosure sufficient to rebut the *Glomar* response.

NARA has sufficiently justified its *Glomar* response with the declarations of John Laster and John Fitzpatrick. A FOIA requester may nonetheless overcome an otherwise valid *Glomar* response if he can show a prior, official disclosure of the existence (or nonexistence) of the requested records. *ACLU*, 628 F.3d at 620. Plaintiff has not met his burden to do so.

Plaintiff conflates the information at issue. In a *Glomar* case, the issue is the existence or nonexistence of the records themselves. Thus, "in the context of a *Glomar* response, the public domain exception is triggered when 'the prior disclosure establishes the existence (or not) of records responsive to the FOIA request.'" *Marino v. DEA*, 685 F.3d 1076, 1081 (D.C. Cir. 2012) (quoting *Wolf*, 473 F.3d at 379). Plaintiff tries to skirt this requirement by pointing to prior disclosures that he contends reveal an ongoing policy of "ambiguity." *E.g.*, Pl.'s Mem. at 20, ECF No. 11-1 at 21. But neither of the two prior disclosures Plaintiff identifies refer, in any way, to the alleged presidential letters Plaintiff requested, and so Plaintiff's invocation of this exception fails.

Plaintiff first points to a declassified memorandum from then-Secretary of State Henry Kissinger to President Nixon. Pl.'s Mem. at 24-26, ECF No. 11-1 at 25-27. But this document sheds no light on whether the alleged letters exist. Indeed, it cannot: the Kissinger memorandum

was drafted decades before the alleged letters were supposedly drafted. *Compare* Pl.'s Mem. Ex. A at 7, ECF No. 11-5 at 7 (date of July 19, 1969), *with* Laster Decl. Ex. A at 1, ECF No. 10-2 at 10 (requesting letter "written in September or October (or possibly a few months earlier) of 1998).

Plaintiff next identifies a speech made by President Barack Obama in July 2010. In that speech, President Obama stated that he and Israeli Prime Minister Netanyahu had "discussed issues that arose out of the nuclear-nonproliferation conference" and that President Obama had "reiterated to the Prime Minister that there is no change in U.S. policy when it comes to these issues." *See* Pl.'s Mem. at 26-27, ECF No. 11-1 at 27-28. But, again, these comments say nothing about the existence or nonexistence of the alleged letters. Nor do they implicitly demonstrate or acknowledge the existence of any such letters.

Simply put, the alleged prior disclosures Plaintiff relies upon do not pertain to the existence or nonexistence of the requested records. That is the information the agency is withholding, and that is the information Plaintiff must show has been previously disclosed. Accordingly, the Court should reject Plaintiff's invocation of the "official acknowledgement" exception. *See ACLU*, 628 F.3d at 621 (rejecting prior disclosure argument when "there are substantive differences between the disclosed documents and the information that has been withheld").

* * *

For the foregoing reasons, Defendant U.S. National Archives and Records Administration respectfully requests that the Court grant summary judgment in its favor.

Dated: February 6, 2019

Respectfully submitted,

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