**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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

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

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Neither the Presidential Records Act nor the Freedom of Information Act requires disclosure of classified information. 44 U.S.C. § 2204(a)(1); 5 U.S.C. § 552(b)(1). In this case, Plaintiff's requests sought Presidential records the existence or nonexistence of which is itself a classified fact. Accordingly, and consistent with both its statutory obligations and decades of precedent, the agency processing the requests refused to confirm or deny the existence of responsive records. As the attached declarations demonstrate, this response was entirely proper. Defendant respectfully requests the Court enter summary judgment in Defendant's favor.

## BACKGROUND

### I. The Presidential Records Act

For most of U.S. history, Presidential records were considered the personal property of the president associated with them. *See Nixon v. United States*, 978 F.2d 1269, 1284 (D.C. Cir. 1992). The Presidential Records Act (PRA) now provides otherwise, *see* 44 U.S.C. § 2202, and also sets forth procedures promoting public access to Presidential records, *see, e.g.*, *id.* § 2204(g)(1). As part of that process, the PRA directs the Archivist of the United States to "assume responsibility for the custody, control, and preservation of, and access to, the Presidential records" of a president whose tenure has ended, and then to "make such records available to the public as rapidly and completely as possible consistent with the provisions of [the PRA]." *Id.*; *see generally Am. Historical Ass'n v. NARA*, 516 F. Supp. 2d 90, 93-95 (D.D.C. 2007).

But recognizing that unfettered access to Presidential records would not always be in the public interest, Congress put important restrictions on access to such records. *Id.* § 2204. As relevant to this case, the PRA permits a president to "specify durations, not to exceed 12 years, for which access shall be restricted with respect to information, in a Presidential record," for six

categories of information, including information that is both "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" and also "in fact properly classified pursuant to such Executive order." *Id.* § 2204(a). President George W. Bush specified that access to records from his administration shall be subject to the PRA restrictions for 12 years following the end of his term. Laster Decl. ¶ 13. Access to such records is restricted until either "the expiration of the duration" specified by the President for that category or the former President waives the restriction. *Id.* § 2204(b)(1)(A). Further, "the determination whether access to a presidential record . . . shall be restricted shall be made by the Archivist," and "such determinations shall not be subject to judicial review."[1] *Id.* § 2204(b)(3).

## II. The Freedom of Information Act as Incorporated by the PRA

The PRA imposes certain restrictions on access to Presidential records, but "[s]ubject to" those limitations, "Presidential records shall be administered in accordance with" the Freedom of Information Act (FOIA), 5 U.S.C. § 552.[2] *See* 44 U.S.C. § 2204(c)(1). FOIA provides a mechanism for the public to request disclosure of government records. 5 U.S.C. § 552(a). But "Congress has recognized that 'public disclosure is not always in the public interest.'" *Am. Civil Liberties Union v. U.S. Dep't of Def.* (*ACLU*), 628 F.3d 612, 618 (D.C. Cir. 2011) (quoting *CIA v. Sims*, 471 U.S. 159, 166 (1985)). To balance the need in some cases for secrecy against the general interest in public disclosure, Congress included several exemptions to FOIA's otherwise broad

[1] The PRA creates a single exception to the bar on judicial review not relevant here: "The United States District Court for the District of Columbia shall have jurisdiction over any action initiated by the former President asserting that a determination made by the Archivist violates the former President's rights or privileges." 44 U.S.C. § 2204(e).

[2] For example, FOIA exemption (b)(5), which applies to inter- and intra-agency correspondence, may not be asserted with regard to Presidential records. 44 U.S.C. § 2204(c)(1).

disclosure requirements. *See* 5 U.S.C. § 552(b); *see also Ctr. for Nat'l Sec. Studies v. Dep't of Justice*, 331 F.3d 918, 925 (D.C. Cir. 2003). Particularly relevant to this case, the first exemption applies to information that is "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" and is "in fact properly classified pursuant to such an Executive order." *Id.* § 552(b)(1). This FOIA exemption is identical to the 12-year PRA restriction noted above.

Executive Order 13,526 currently governs the classification of national security information subject to the first FOIA exemption (and the first PRA restriction). *See* 75 Fed. Reg. 707 (Dec. 29, 2009). That order sets forth four conditions for proper classification: First, the information must be classified by an "original classification authority."[3] Second, the classified information must be "owned by, produced by or for, or [be] under the control of the United States Government." Third, the information must pertain to one or more of eight enumerated categories.[4] Fourth and finally, the original classification authority must "determine that the unauthorized disclosure of the information reasonably could be expected to result in damage to national security" and be able to "identify or describe the damage." Exec. Order No. 13,526 § 1.1.

## III. *Glomar* Responses

In most FOIA cases, the responding agency "must acknowledge the existence of information responsive to a FOIA request and provide specific, non-conclusory justifications for withholding that information." *Roth v. Dep't of Justice*, 642 F.3d 1161, 1178 (D.C. Cir. 2011).

[3] An "original classification authority" includes government "officials delegated this authority [to make original classification determinations] pursuant to" the procedures set out in the Executive Order. *See* Exec. Order No. 13,526 § 1.3.

[4] The categories include, for example, "military plans," "intelligence sources or methods," and "programs for safeguarding nuclear materials or facilities." *See* Exec. Order No. 13,526 § 1.4.

But this general requirement yields when even acknowledging or denying the existence of requested records "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)). In such a case, the agency "may issue a *Glomar* response," in which it "refuse[s] to confirm or deny the existence or nonexistence of responsive records." *Elec. Privacy Info. Ctr. v. NSA* (*EPIC*), 678 F.3d 926, 931 (D.C. Cir. 2012). An agency's *Glomar* response[5] "narrows the FOIA issue to the existence of records *vel non*," *Wolf*, 473 F.3d at 374 n.4, and therefore "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 Insts. of Health, Dep't of Health & Human Servs.* (*PETA*), 745 F.3d 535, 540 (D.C. Cir. 2014).

## IV. Plaintiff's Requests

In this case, Plaintiff filed two FOIA requests. The first, directed to the William J. Clinton Presidential Library, requested "an unredacted copy of a President Clinton letter . . . likely addressed to the Prime Minister of Israel" and "promising not to pressure the Israeli government into signing the Treaty on the Proliferation of Nuclear Weapons (NPT) or discuss Israel's nuclear weapons program." Laster Decl. Ex. A at 1. The second request, sent to the George W. Bush Presidential Library, similarly sought "an unredacted copy of a President George W. Bush letter . . . likely addressed to the Prime Minister of Israel" and "promising not to pressure the Israeli government into signing the Treaty on the Proliferation of Nuclear Weapons (NPT) or discuss Israel's nuclear weapons program." Laster Decl. Ex. B at 1. Without performing a search, the

[5] The term "*Glomar* response" derives from the CIA's refusal to confirm or deny the existence of records pertaining to the ship the *Hughes Glomar Explorer*. *See Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976).

libraries denied Plaintiff's requests, explaining that they "can neither confirm nor deny the existence or nonexistence of any records that may be responsive" because the "fact of the existence or nonexistence of records" would itself "be classified for reasons of national security." Laster Decl. ¶¶ 12-13; *see also* Laster Decl. Ex. C at 1 (Clinton Library Response Letter); Laster Decl. Ex. D at 1 (Bush Library Response Letter). Plaintiff appealed these denials of his requests, and before the appeals had been processed filed this lawsuit. *See* Compl.

## ARGUMENT

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

President Bush's records are still within the PRA's 12-year restricted access period invoked by President Bush before he left office. *See* Laster Decl. ¶ 13. Under the PRA, then, access to "[a]ny Presidential record . . . containing information within a category restricted by the President" shall be "restricted" until the President waives the restriction or the 12-year period expires. 44 U.S.C. § 2204(b)(1); *see also id.* § 2204(a). During this period of restricted access, "the determination whether access to a Presidential record or reasonably segregable portion thereof shall be restricted shall be made by the Archivist, in the Archivist's discretion." *Id.* § 2204(b)(3). And also during this period of restricted access, the Archivist's "determinations shall not be subject to judicial review," *id.*, except in one circumstance not applicable here, *see id.* § 2204(e).

Plaintiff's request of the Bush Library sought Presidential records. *See id.* § 2201(2) (defining "Presidential records"). In response, the Bush Library explained that it could "neither confirm nor deny the existence or nonexistence of any records that may be responsive" because the fact of their existence or nonexistence "would be classified for reasons of national security." Laster Decl. Ex. D. This response reflects NARA's determination that the existence or

nonexistence of Presidential records was subject to the 12-year restriction applicable to President Bush records that are properly classified, *see* 44 U.S.C. § 2204(a)(1). That determination is unreviewable in this or any court, and, once made, that determination required the Bush Library to restrict access to the fact of the existence or nonexistence of the requested records. *See id.* § 2204(b)(1) (mandating that "access thereto *shall be* restricted" until the restriction period expires or is waived).

Federal courts are courts of limited jurisdiction, and Congress can both expand and limit that jurisdiction. Here, Congress has withdrawn courts' jurisdiction over claims seeking review of the Archivist's determination to withhold restricted records during the restricted period. *See, e.g.*, *Judicial Watch v. NARA*, 845 F. Supp. 2d 288, 298 n.3 (D.D.C. 2012). Accordingly, the Court should dismiss for lack of jurisdiction Plaintiff's claims as they relate to the Bush Library request.[6]

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

Presidential records from President Clinton are beyond the 12-year restricted period set out in the PRA. *See* 44 U.S.C. § 2204(a), (b)(1). Such records are now generally "administered in accordance with" FOIA.[7] *Id.* § 2204(c)(1). FOIA cases are typically decided at summary judgment. *See, e.g.*, *Leopold v. CIA*, 106 F. Supp. 3d 51, 55 (D.D.C. 2015). The burden is on the agency to demonstrate that a FOIA exemption applies, and it "[t]ypically does so by affidavit." *ACLU*, 628 F.3d at 619.

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[6] 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 the Clinton Library response, set out below.

[7] Other provisions of the PRA, such as the requirement to consult with and notify the current and former president before releasing records, generally still apply. Here, of course, there was no consultation or notification because the response did not confirm or deny the existence of any records which would require consultation.

In the *Glomar* context, the agency "must demonstrate that acknowledging the mere existence of the responsive records would disclose exempt information"; it does so through "affidavits that contain 'reasonable specificity of detail rather than merely conclusory statements [and that] are not called into question by contradictory evidence in the record or by evidence of agency bad faith.'" *EPIC*, 678 F.3d at 931 (quoting *Gardels*, 689 F.2d at 1105). And although a court assesses the agency's justification *de novo*, "an agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible." *Larson v. Dep't of State*, 565 F.3d 857, 862 (D.C. Cir. 2009). Moreover, when the withholding is justified by reference to the "'uniquely executive purview' of national security," the reviewing court takes a "deferential posture" because the "judiciary 'is in an extremely poor position to second-guess' the predictive judgments" made by government experts charged with protecting the national security. *Id.* at 865 (quoting *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 926-27, 928); *see also 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"). The court's deferential review also "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 (quoting *Halperin v. CIA*, 629 F.2d 144, 149 (D.C. Cir. 1980)) (omission in original).

**A. The existence or nonexistence of the requested records is a properly classified fact.**

Because the agency's response "narrows the FOIA issue to the existence of records *vel non*," *Wolf*, 473 F.3d at 374 n.4, the agency "must demonstrate that acknowledging the mere existence of the responsive records would disclose exempt information," *EPIC*, 678 F.3d at 931.

Here, the *Glomar* response is justified under FOIA Exemption 1. That exemption permits withholding of information properly classified pursuant to Executive Order. *See* 5 U.S.C. § 552(b)(1); *Judicial Watch, Inc. v. U.S. Dep't of Def.*, 715 F.3d 937, 940-41 (D.C. Cir. 2013). The declaration of John Fitzpatrick, who is the Senior Director of the Records, Access and Information Security Management Directorate of the National Security Council (NSC), demonstrates that the fact of the existence or nonexistence of the requested Presidential letter is itself properly classified.[8]

An agency establishes that it has properly withheld information under Exemption 1 if it demonstrates that it has met the requirements of Executive Order 13,526. *Judicial Watch*, 715 F.3d at 941 (citing *Lesar v. U.S. Dep't of Justice*, 636 F.2d 472, 481 (D.C. Cir. 1980)). As explained above, Executive Order 13,526 sets out four requirements for the classification of national security information. Mr. Fitzpatrick's declaration demonstrates that each is met.

First, Mr. Fitzpatrick is himself an original classification authority. Fitzpatrick Decl. ¶ 2; *see* Exec. Order No. 13,526 § 1.1(a). Second, the information—whether the United States Government possesses certain records—is of course "information [that] is owned by, produced by or for, or is under the control of the United States Government." Exec. Order No. 13,526 § 1.1(b); *see* Fitzpatrick Decl. ¶ 8. The requested letter, if it exists, would be official correspondence between a U.S. President and the Israeli government, and whether such a record exists plainly "pertains to . . . foreign relations or foreign activities of the United States." Exec. Order No. 13,526 § 1.4(d); *see id.* § 1.1(c). As Mr. Fitzpatrick's declaration explains, confirming the existence or

[8] As John Laster explains in his declaration, NARA does not have original classification authority and so consults with the entity holding equity in the information—here, the NSC. Laster Decl. ¶¶ 19-20.

nonexistence of the letter would reveal "whether the U.S. government is or is not engaged in particular foreign relations or foreign activities." Fitzpatrick Decl. ¶ 9. As Mr. Fitzpatrick further explains, given the nature of Plaintiff's request and his description of the letter he is requesting, confirming the letter's existence (if it exists) would tend to reveal the substance of information provided to the United States by a foreign government. *Id.*; *see* Exec. Order No. 13,526 § 1.4(b).

Fourth, and most importantly, Mr. Fitzpatrick states that he has "determined that the unauthorized disclosure of the information could reasonably be expected to result in damage to the national security." *Id.* ¶ 8; *see* Exec. Order No. 13,526 § 1.1(d). As Mr. Fitzpatrick explains, confirming the existence or nonexistence of the letter Plaintiff has requested could cause harm to national security by "sowing doubts about the U.S. commitment to the Non-Proliferation Treaty," by "eliminating strategic ambiguity (i.e., whether or not an allied foreign state maintains certain capabilities)," and by "undermining U.S. government policy limiting the potential for an arms race in a particular region." Fitzpatrick Decl. ¶ 10.

The Court must defer to the Executive Branch's assessment of the possible harm to national security. It is the original classification authority that is charged with deciding whether unauthorized disclosure of given information "reasonably could be expected to result in damage to the national security." Exec. Order No. 13,526 § 1.1(a)(d). The Court's role in assessing the propriety of an agency's invocation of FOIA Exemption 1 is properly limited to determining whether the information is "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy," and whether the information is "in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). This exemption does not require or authorize the Court to make its own independent judgment about

the potential harm to national security, but instead requires only that the Court verify that "an original classification authority" has made that judgment about government information that falls into a relevant category.[9] *See Fitzgibbon*, 911 F.2d at 766 ("The assessment of harm to intelligence sources, methods and operations is entrusted to the Director of Central Intelligence, not to the courts."). Mr. Fitzpatrick makes clear that that requirement has been met as to the information at issue here, and the details he provides confirm that he has made that judgment in good faith.

That should be the end of the matter: the Fitzpatrick declaration establishes that the fact of the existence or nonexistence of the requested record is itself a properly classified fact, and thus the government's reliance on Exemption 1 (which authorizes withholding of a classified fact) is both "logical" and "plausible." *Larson*, 565 F.3d at 862. But the declaration also demonstrates that the assessment of the risk of damage to national security (while properly beyond the Court's purview) is itself both "logical" and "plausible." *See Wolf*, 473 F.3d at 375-76 ("[I]f the [agency's] Affidavit plausibly explains the danger, the existence of records *vel non* is properly classified . . . and justifies the Agency's invocation of Exemption 1.").

Plaintiff's request seeks a purported letter from a U.S. President to a foreign government "promising not to pressure the Israeli government into signing the Treaty on the Proliferation of Nuclear Weapons (NPT) or [to] discuss Israel's nuclear weapons program." Laster Decl. Ex. A at 1; *see also* Laster Decl. Ex B at 1. It is both "plausible" and "logical" for Mr. Fitzpatrick to conclude that confirming the existence or nonexistence of such an alleged letter could both "sow[] doubts about the U.S. commitment to the Non-Proliferation Treaty" and could "eliminat[e]

[9] As explained below, the Court does retain the authority to order disclosure if the government has already officially disclosed the exact same information.

strategic ambiguity"—potentially "undermining U.S government policy limiting the potential for an arms race in a particular region." Fitzpatrick Decl. ¶ 10.

The Fitzpatrick declaration also describes a peculiarity of the *Glomar* response that the courts of this circuit have recognized: the government must assert a *Glomar* response even when harm would not result if the government confirmed the *absence* of the requested records. *See PETA*, 745 F.3d at 544; *Mobley v. CIA*, 924 F. Supp. 2d 24, 51 (D.D.C. 2013). As Mr. Fitzpatrick explains, a *Glomar* response is effective only if it is consistently asserted without regard to whether the requested records exist: if it is asserted only when the documents exist, then use of the *Glomar* response will become a de facto confirmation of the existence of records. Fitzpatrick Decl. ¶ 11; *see PETA*, 745 F.3d at 544 ("If NIH were required to acknowledge responsive documents in instances where there was no investigation but were permitted to give a *Glomar* response in cases where there had been one, it would become apparent that a *Glomar* response really meant that an investigation had occurred.").

Nonetheless, Mr. Fitzpatrick also identifies harms that could result from confirming the absence of such a letter. Acknowledging the nonexistence of the letter's guarantees could "serv[e] as confirmation for adversaries" that the United States has not made the promises the alleged letter purportedly makes—a fact which itself could undermine U.S. policy "limiting the potential for an arms race." Acknowledging the nonexistence of the letter would also reveal the absence of a specific relationship with a foreign state, and "[a]dversaries can exploit this information to gain a more accurate picture of the U.S. Government's activities and interests." Plainly, Mr. Fitzpatrick's declaration demonstrates that the information at issue—the existence or nonexistence of the letter—is a properly classified fact and therefore exempt from disclosure under FOIA. *See* 5

U.S.C. § 552(b)(1). Because his affidavit "plausibly explains the danger" from disclosure of the classified fact, "the existence of records *vel non* is properly classified" and "justifies the Agency's invocation of Exemption 1." *Wolf*, 473 F.3d at 375-76 (citing *Gardels*, 689 F.2d at 1105; *Hayden*, 608 F.2d at 1388).

**B. The existence or nonexistence of the requested records was not classified for an impermissible purpose.**

Executive Order 13,526 prohibits classifying information for certain purposes. *See* Exec. Order No. 13,526 § 1.7. Plaintiff's Complaint suggests that he may challenge the validity of the classification decision on the ground that the decision was made to "conceal violations of law." Compl. ¶ 11 (noting that Executive Order 13,526 "prohibits classification of information to 'conceal violations of law'" and referencing the NPT and Arms Export Control Act). Mr. Fitzpatrick's declaration sets out the reasons that the fact of the existence or nonexistence of the records is a classified fact. And Mr. Fitzpatrick also avers that the information was classified "to protect the national security of the United States" and that it was "not classified to conceal violations of law . . . ." Fitzpatrick Decl. ¶ 12. To be absolutely clear, the Court does not have to decide, or even contemplate, whether the alleged letter Plaintiff describes would amount to a violation of U.S. law or its treaty obligations.[10] That is because, as the D.C. Circuit has explained, "there is no legal support for the conclusion that illegal activities cannot produce classified

[10] Should the Court determine that it must assess the scope of the Arms Export Control Act or the United States' treaty obligations and whether the alleged letter amounts to a violation of those obligations, the Defendant respectfully requests the opportunity to submit supplemental briefing on that point, after consultation with other agencies, including the Department of State. *See Medellin v. Texas*, 552 U.S. 491, 513 (2008) ("It is, moreover, well settled that the United States' interpretation of a treaty 'is entitled to great weight.'" (quoting *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982))).

documents," and "history teaches the opposite." *ACLU*, 628 F.3d at 622. So long as an original classification authority has determined that the disclosure of the information is reasonably likely to harm national security, and has classified the information for that reason (and not an impermissible reason), it is simply irrelevant what the treaty or statute required.

**C. The United States government has never officially disclosed the existence or nonexistence of the requested letter.**

An agency's "otherwise valid exemption claim" is ineffective "if the government has officially acknowledged" the very same information it claims it cannot disclose. *ACLU*, 628 F.3d at 620 (citing *Wolf*, 473 F.3d at 278; *Fitzgibbon*, 911 F.2d at 765). To overcome the otherwise applicable exemption, the FOIA plaintiff bears the burden of identifying a specific official disclosure; this disclosure "must satisfy three criteria: (1) the information requested must be as specific as the information previously released; (2) the information requested must match the information previously released; and (3) the information requested must already have been made public through an official and documented disclosure." *Id.* at 620-21 (citing *Wolf*, 473 F.3d at 278; *Fitzgibbon*, 911 F.2d at 765).

The Defendant is unaware of any official disclosure of the existence or nonexistence of the requested letter. NARA is aware, of course, of the *New Yorker* article cited in Plaintiff's requests and in his complaint. *See* Compl. at ¶ 11; Compl. Ex. A at 1; Compl. Ex. B at 1. That article alleges the existence of certain letters, but it is not an "official and documented disclosure." As the D.C. Circuit has explained, "[t]he distinction between an official government disclosure and references in an unofficial document from a nonofficial source is essential" and the unofficial nature of a purported disclosure is "fatal" to an "official acknowledgement" argument. *ACLU*,

628 F.3d at 621; *see also Fitzgibbon*, 911 F.2d at 765 ("[I]n the arena of intelligence and foreign relations there can be a critical difference between official and unofficial disclosures."). Because the *New Yorker* article is not an "official" disclosure, it cannot overcome the valid invocation of Exemption 1.

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

Dated: December 20, 2018

Respectfully submitted,

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