JAMES G. CONNELL, III,

Plaintiff-Appellant,

v.

CENTRAL INTELLIGENCE AGENCY,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia

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GLOSSARY

CIA	Central Intelligence Agency
DoD	Department of Defense
FBI	Federal Bureau of Investigation
FOIA	Freedom of Information Act

In a report on the detention and interrogation program formerly carried out by the Central Intelligence Agency (CIA), the Senate Select Committee on Intelligence stated that 14 detainees transferred from CIA custody to the Department of Defense (DoD) "remained under the operational control of the CIA." JA160.

Plaintiff James Connell, an attorney representing a detainee before a military commission at Guantanamo Bay, wants to know what this phrase means and filed a FOIA request for documents relating to CIA's "operational control" over the facility where these detainees were held. After Connell added, in response to a request for clarification, a list of "possible topics" that interested him, CIA searched for responsive documents reflecting an unclassified or otherwise openly acknowledged relationship between the agency and the subject of the FOIA request. It released two documents with redactions and withheld one in full. But confirming or denying the existence of any other responsive documents—*i.e.*, documents that might reflect a classified or unacknowledged relationship between the agency and the subject matter of Connell's request—would disclose classified and statutorily

Connell invoked the district court's jurisdiction under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331. JA5. The district court granted summary judgment to CIA on March 29, 2023. JA481. A timely notice of appeal was filed on May 25, 2023. JA497. This Court has jurisdiction under 28 U.S.C. § 1291.

Connell sued CIA to compel the disclosure of documents relating to the agency's "operational control" over detainees at the U.S. military base at Guantanamo Bay. The question presented on appeal is whether CIA properly refused to confirm or deny the existence of any such records beyond those that had been declassified or otherwise officially acknowledged.

Pertinent statutes and regulations are reproduced in the addendum to this brief.

FOIA generally mandates disclosure of federal agency records upon request, but the statute's disclosure requirement "does not apply"

to documents that fall within one of its enumerated exemptions. 5 U.S.C. § 552(a)(3)(A), (b). These statutory exemptions reflect Congress's judgment that "public disclosure is not always in the public interest," *CIA v. Sims*, 471 U.S. 159, 166-67 (1985), because "legitimate governmental and private interests" may be damaged by releasing certain types of information, *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989). Courts must afford FOIA's exemptions "meaningful reach and application" to preserve the statute's "workable balance between the interests of the public in greater access to information and the needs of the Government to protect certain kinds of information from disclosure." *Id.* at 152, 157; *see also Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019) (explaining that the exemptions are "as much a part of FOIA's purposes and policies as the statute's disclosure requirement" (alterations omitted)).

Under Exemption 1, FOIA's disclosure provisions do not apply to classified matters—that is, matters that are "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" and "are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1).

426 (D.C. Cir. 2013). In certain circumstances, however, confirming or denying whether the agency has any responsive records may itself reveal information that is protected from public disclosure under one or more applicable FOIA exemptions. In those circumstances, an agency may properly refuse to confirm or deny whether it has any records responsive to the FOIA request. *Id.*

Neither confirming nor denying the existence or nonexistence of responsive records is generally referred to as a *Glomar* response. This term originates from a seminal FOIA case in which this Court upheld

acknowledged the records' existence." *Leopold v. CIA*, 987 F.3d 163, 167 (D.C. Cir. 2021). "[W]hen an agency has officially acknowledged" information that is "otherwise exempt" from disclosure under FOIA, "the agency has waived its right to claim an exemption with respect to that information." *American Civil Liberties Union*, 710 F.3d at 426. In order for a prior disclosure to constitute an "official acknowledgment," three criteria must be met: (i) "the information requested must be as specific as the information previously released," (ii) the "information requested must match the informatio

other words, "to overcome an agency's *Glomar* response based on an official acknowledgment, the requesting plaintiff must pinpoint an agency record that both matches the plaintiff's request and has been publicly and officially acknowledged by the agency." *Moore v. CIA*, 666 F.3d 1330, 1333 (D.C. Cir. 2011). "This test is 'strict.'" *Leopold*, 987 F.3d at 170.

As part of its oversight of the intelligence community, the Senate Select Committee on Intelligence conducted a review of the detention and interrogation program formerly carried out by CIA. *See generally American Civil Liberties Union v. CIA*, 823 F.3d 655, 659-61 (D.C. Cir. 2016). At the end of that review, the Committee produced a voluminous report, running nearly 7,000 pages long, and an Executive Summary that itself was over 500 pages. *Id.* at 660-61. The Committee released a minimally redacted version of the Executive Summary that had been declassified by the Director of National Intelligence, but the full report remains classified and has never been publicly released. *Id.*

One portion of the Executive Summary discusses the transfer in September 2006 of 14 detainees from CIA custody to the DoD. The

Committee stated that "[a]fter the 14 CIA detainees arrived at the U.S. military base at Guantanamo Bay, they were housed in a separate building from other U.S. military detainees and remained under the operational control of the CIA." JA114. This sentence is followed by a footnote citing "CIA Background Memo for CIA Director visit to Guantanamo, December [redacted], 2006, entitled Guantanamo Bay High-Value Detainee Detention Facility." JA114 n.977. The facility where these 14 detainees were held is known as Camp VII. JA482.

Plaintiff James Connell is a defense attorney for Guantanamo detainee Ammar Al Baluchi in his trial before a U.S. military commission. JA295. Seeking information that could be of use in that proceeding, Connell submitted a FOIA request to CIA on May 23, 2017. JA5-6. The request began with the sentence quoted above from the Senate Committee's report. Connell then asked for "any and all information that relates to such 'operational control' of the CIA over Guantanamo Bay detainees including but not limited to the document cited in the footnote 977." JA58.

specific . . . period of time you would like us to search." JA62. Connell replied that he was "seeking to determine what 'operational control'

partially redacted three-page document, which it noted had been previously released, and stated that it could neither confirm nor deny the existence of any other records responsive to the request. JA6822. Connell filed an administrative appeal. JA70.

CIA provided a final response to Connell's request in July 2021. The agency explained that it had searched "for records that would reveal an unclassified or openly acknowledged association between the Agency and the subject of [the] request" and that it had located three documents. JA73. Two were released with redactions and one was withheld in full. JA73. The two released documents were (1) a proposed itinerary and memorandum relating to a visit by the CIA Director to Guantanamo Bay in December 2006; and (2) a memorandum of agreement between the DoD and CIA concerning the "detention by DoD of certain terrorists at a facility at Guantanamo Bay Naval Station." JA307-43 (altered formatting); *see also* JA485.[1] With respect to any records that may reveal a classified connection between the

[1] The first document was an expanded version of the three-page document that had previously been released to Connell. JA296.

agency and the subject of Connell's request, CIA again issued a *Glomar* response. JA74.

The basis for the *Glomar* response was laid out in a sworn declaration by Vanna Blaine, a senior CIA official and original classification authority. The declaration explained that the "confirming or denying the existence or nonexistence" of records reflecting a classified or otherwise publicly unacknowledged connection between the agency and the subject of Connell's FOIA request would reveal "intelligence sources and methods information that is protected from disclosure" by Exemptions 1 and 3. JA43.

With respect to Exemption 1, the declaration stated that "the existence or nonexistence" of such records "is a properly classified fact" relating to "intelligence activities" and "intelligence sources and methods." JA45. For example, either a confirmation or a denial that such records exist (or do not exist) "would reveal sensitive information about the CIA's intelligence interests, personnel, capabilities, authorities, and resources" that is protected by Executive Order 13,526. JA47. Adversaries such as "[t]errorist organizations, foreign intelligence services, and other hostile groups use such information to

thwart CIA activities and attack the United States and its interests." JA46. Moreover, "[t]hese groups search continuall

Exemption 3, which applies "independently and co-extensively to protect CIA's intelligence sources and methods from disclosure." JA49.

CIA moved for summary judgment. Connell "accept[ed] the redactions within the two documents released in part by the CIA," Dkt. No. 7, at 2, and conceded in his opposition that the agency had properly withheld the third document in whole, Dkt. No. 23, at 6 n.4. The only remaining dispute for decision was the propriety of the *Glomar* response. JA485.

The district court granted CIA's motion for summary judgment. The court observed that Connell's opposition relied solely on his assertion that "the agency has declassified the intelligence connection between [the] CIA and Guantanamo Bay's Camp VII and [officially acknowledged] the existence of responsive documents about that connection." JA489 (quotation marks omitted) (alteration in original). The court was skeptical of Connell's argument that declassification could undermine a *Glomar* response without application of the official acknowledgment test. JA489 n.2. And the Court "reject[ed] th[e] argument" that, in light of the declassification, the CIA's rationale for

invoking Exemptions 1 and 3 was no longer logical or plausible. JA489 n.2 (quotation marks omitted); *see also* JA495 (concluding that "the Blaine Declaration 'logically' and 'plausibly' supports the response under FOIA Exemptions 1 and 3"). In doing so, the court explained that "[t]he fact that information resides in the public domain does not eliminate the possibility that further disclosures can cause harm to intelligence sources, methods and operations." JA489 n.2 (quoting *Fitzgibbon v. CIA*, 911 F.2d 755, 766 (D.C. Cir. 1990)).

The district court then applied the official acknowledgment test to the various documents Connell relied on and concluded that "none of the materials referenced constitute a public acknowledgment by the CIA of the existence of documents concerning the agency's purported operational control of Camp 7." JA494. As a result, the agency had not "waived its ability to assert a *Glomar*

370, this Court held that CIA had partly waived a *Glomar* response through a former Director's testimony that included direct quotations from responsive records. JA495 (citing *Wolf*, 473 F.3d at 378-79). But this Court "went on to find . . . that the 'official acknowledgment waiver relate[d] only to the existence or nonexistence of the records . . . disclosed by [the former Director's] testimony.'" JA495 (alterations in original) (quoting *Wolf*, 473 F.3d at 379). "Applying *Wolf* here," the district court reasoned, if any of the documents Connell relies on "triggered a public acknowledgement waiver, then he would be entitled to an acknowledgement of the existence of those specific documents 'but not any others." JA495 (quoting *Wolf*, 473 F.3d at 379). Because all of those documents "have been produced to Connell or are otherwise publicly available," the agency's *Glomar* response was valid.

Connell submitted a FOIA request for documents relating to what a Senate Committee characterized as CIA's "operational control" of a particular detention facility (Camp VII) at Guantanamo Bay over a five-month period. The agency searched for and processed officially acknowledged records and issued a *Glomar* response with respect to any

other documents that could reveal a classified or otherwise unacknowledged connection between CIA and the "operational control" of the facility during that time. This Court has previously approved the use of a *Glomar* response in this kind of situation. *See Wolf v. CIA*, 473 F.3d 370 (D.C. Cir. 2007).

The existence or nonexistence of any additional, unacknowledged records is a classified, statutorily protected fact exempt from compelled disclosure. The request sought documents that revealed not only whether CIA exerted "operational control" over Camp VII, but also details about the agency's role there, including how broadly it reached, who carried it out, when and how it might have ended, and which other organizations were involved. CIA's declaration explained that confirming or denying the existence (or nonexistence) of such documents would reveal information related to the agency's intelligence sources and methods. This information falls within the scope of the National Security Act, 50 U.S.C. § 3024(i)(1), and is therefore protected by Exemption 3.

The agency's *Glomar* response is also independently supported by Exemption 1. A senior CIA official with original classification authority

explained that the information protected by the *Glomar* response is properly classified because it pertains to intelligence activities, sources, and methods, and its disclosure coul

rejected similar attempts to evade the requirements for official acknowledgment, and the outcome Connell advocates for would be inconsistent with every case in which this Court has strictly applied those requirements. Regardless, CIA's *Glomar* response here remains logical and plausible even if Connell were correct that other documents established that the agency had "some measure of operational control" over detainees during the relevant time period. Br. 19. None of these documents undermine the agency's assessment that revealing a

GLOMAR

A *Glomar* response allows the Government to "refuse to confirm or deny the existence of records where to answer the FOIA inquiry would cause harm cognizable under [a] FOIA exception." *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007). In reviewing a *Glomar* response, courts apply "the general exemption review standards established in non-*Glomar* cases." *Id.* This means that "[a]gencies may carry their burden of proof through declarations explaining why a FOIA exemption applies," *Knight First Amendment Inst. at Columbia Univ. v. CIA*, 11 F.4th 810, 818 (D.C. Cir. 2021), and that courts must give "substantial weight to an agency's affidavit" and "not second-guess its conclusions even when they are speculative to some extent." *Schaerr v. U.S. Dep't of Justice*, 69 F.4th 924, 930-31 (D.C. Cir. 2023) (quotation marks omitted). Summary judgment is warranted if an agency declaration justifies the nondisclosure with "reasonably specific detail" and is not "substantially called into question by contrary record evidence or evidence of agency bad faith." *Id.* at 929. Ultimately, the Government's justification is sufficient if it "appears logical or plausible, taking into

account the deference due to the Executive Branch in this area." *Knight First Amendment Inst.*, 11 F.4th at 819-20.

"A defining characteristic of the CIA's intelligence activities is that they are carried out through clandestine means, and therefore they must remain secret in order to be effective." JA41-42. Thus, while it is widely known that the agency "is responsible for conducting intelligence collection and analysis for the United States, the CIA generally does not confirm or deny the existence, or disclose the target, of specific intelligence collection activities of the operations it conducts or supports." JA51-52. This Court has repeatedly sustained *Glomar* responses to requests for such specific information under FOIA. *See, e.g.*, *Schaerr*, 69 F.4th at 926 ("records about the unmasking of members of President Trump's campaign and transition team"); *Knight First Amendment Inst.*, 11 F.4th at 813 (records about whether CIA "knew, before the murder, of an impending threat to [Jamal] Khashoggi"); *Leopold v. CIA*, 987 F.3d 163, 168 (D.C. Cir. 2021) ("records about [CIA] 'payments to Syrian rebels fighting [Bashar al-] Assad'").

In this case, however, the agency possessed a small number of "officially acknowledged records" that were responsive to Connell's request. JA46. Because "acknowledging the existence" of these particular records would not "fall within a FOIA exemption," *Schaerr*, 69 F.4th at 928, a *Glomar* response would not be proper as to this category of records. CIA therefore conducted a search reasonably calculated to locate all such records, released two documents with redactions, and withheld a third in full. Connell does not challenge any aspect of the agency's response with respect to these documents.

But apart from these three documents, any other records responsive to Connell's request "would reveal a classified or otherwise unacknowledged connection" between CIA and the "operational control" of detainees at Camp VII during the time period at issue. JA57. The "fact of the existence or nonexistence of such records" is itself "classified and protected by statute," and therefore falls within the scope of Exemptions 1 and 3. JA57. For this category of records, CIA issued a *Glomar* response.

As the district court recognized, this Court has expressly approved the use of the *Glomar* response in such a situation. JA495. In *Wolf*, the

FOIA requester sought CIA records about a former Colombian politician. 473 F.3d at 372. The Court held that the agency could not invoke *Glomar* with respect to records that had been officially acknowledged through congressional testimony of a former CIA Director. *Id.* at 479-80. But it sustained the *Glomar* response with respect to all other responsive records because the agency had demonstrated that "the existence or nonexistence" of those records was protected from disclosure by Exemptions 1 and 3. *Id.* at 380; *see also Moore v. CIA*, 666 F.3d 1330, 1334 (D.C. Cir. 2011) (describing *Wolf*).

FOIA Exemption 3 applies to "matters" that are "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3). Coverage under this exemption does not depend on "the detailed factual contents of specific documents." *Morley v. CIA*, 508 F.3d 1108, 1126 (D.C. Cir. 2007). Rather, an agency carries its burden of invoking Exemption 3 by establishing "the existence of a relevant statute and the inclusion of withheld material within the statute's coverage." *Id.*

Here, CIA invoked the National Security Act of 1947, as amended, which directs the Director of National Intelligence to "protect . . . intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 3024(i)(1). "By delegation, the Director of the Central Intelligence Agency must do the same." *Leopold*, 987 F.3d at 167; *see also DiBacco v. U.S. Army*, 795 F.3d 178, 196-99 (D.C. Cir. 2015). This statute authorizes CIA to "do more than simply withhold the names of intelligence sources." *CIA v. Sims*, 471 U.S. 159, 178 (1985). "[B]its 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." *Id.* (quotation marks omitted). "[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." *Id.* Accordingly, CIA has the power under the National Security Act "to withhold superficially innocuous information on the ground that it might enable an observer to discover the identity of an intelligence source" or uncover an intelligence method. *Id.*

Because the National Security Act "qualifies as a withholding statute under Exemption 3," *Sims*, 471 U.S. at 167, the "only remaining

inquiry is whether the withheld material relates to intelligence sources and methods," *Larson v. Department of State*, 565 F.3d 857, 865 (D.C. Cir. 2009). Because intelligence officials are "familiar with 'the whole picture,' as judges are not," their determinations in this regard "are worthy of great deference given the magnitude of the national security interests and potential risks at stake." *Sims*, 417 U.S. at 179.

CIA's declaration explains that "[i]ntelligence methods are the techniques and means by which an intelligence agency accomplishes [its] mission, and the classified internal regulations, approvals, and authorities that govern the conduct of CIA personnel." JA51. Here, Connell asked for "any and all information that relates to" CIA's "operational control" over a particular set of detainees held in a particular location on Guantanamo Bay Naval Station. JA58. He sought documents revealing not only whether CIA exerted such "operational control" over those individuals in that location but also "*details* about the CIA's purported operational control," JA490 (emphasis added), including how broadly it reached, who carried it out (personnel or contractors), when and how it might have ended, which other organizations were involved, and how those other organizations

could access detainees, JA63. As the declaration notes, no matter which way it responded, CIA would be revealing information about its "intelligence interests, personnel, capabilities, authorities, and resources," not to mention its "relationships with other agencies." JA47.

Under any standard of review, there can be no serious doubt that revealing whether CIA has responsive, unacknowledged documents would reveal information that "relates to intelligence sources and methods." *Larson*, 565 F.3d at 865. But here the agency need only establish that its arguments are logical and plausible because the protection of "intelligence sources, methods and operations is entrusted to the Director of Central Intelligence, not to the courts." *Fitzgibbon v. CIA*, 911 F.2d 755, 766 (D.C. Cir. 1990); *see Sims*, 471 U.S. at 174-75.

The information protected by CIA's *Glomar* response is also independently protected by FOIA Exemption 1. Exemption 1 shields information that is properly classified "under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy." 5 U.S.C. § 552(b)(1)(A). Under Executive Order 13,526, information within the government's control is properly classified by an original classification authority if (1) the information "pertains to . . .

Second, the declaration identifies the potential damage to national security that could reasonably be expected to result from confirming or denying the existence or nonexistence of unacknowledged records. For example, "terrorist organizations, foreign intelligence services, and other hostile groups" gather information regarding the activities of CIA, "analyze this information," and use it "to undermine CIA intelligence activities and attack the United States and its interests." JA46-47. Disclosing information about CIA activities can also "jeopardize the safety of the CIA employees and the employees of other agencies" who might be involved. JA47. Hostile groups "are able to gather information from a myriad of sources" and use "seemingly disparate pieces of information" to accomplish their aims. JA46. "FOIA does not require [CIA] to lighten the task of our adversaries around the world by providing them with documentary assistance from which to piece together the truth." *Gardels*, 689 F.2d at 1105.

This declaration establishes that the *Glomar* response was supported by Exemption 1. *See Morley*, 508 F.3d at 1124 ("[T]he text of Exemption 1 itself suggests that little proof or explanation is required beyond a plausible assertion that information is properly classified.").

Whether the "existence of records *vel non* is properly classified" is a determination made in the first instance by an original classification authority, and that determination is given "substantial weight" by a reviewing court. *Wolf*, 473 F.3d at 375-76. This Court has credited similar concerns in other cases where agencies have declined to confirm or deny the existence or nonexistence of intelligence records. *See*, *e.g.*, *Knight First Amendment Inst.*, 11 F.4th at 820 (noting agency assertions that disclosing areas of intelligence interest "would be useful information for foreign adversaries"); *Wolf*, 473 F.3d at 376-77 (finding it "plausible that either confirming or denying an Agency interest in a foreign national reasonably could damage sources and methods by revealing CIA priorities, thereby providing foreign intelligence sources with a starting point for applying countermeasures").

Glomar

Under this Court's case law, the disclosure of information "may be compelled even over an agency's otherwise valid exemption claim" if the information has been "officially acknowledged." *Wolf*, 473 F.3d at 378. The theory behind this doctrine is that "[i]f an agency has officially acknowledged otherwise exempt information through prior disclosure, it

has waived its right to claim an exemption with respect to that information." *Knight First Amendment Inst.*, 11 F.4th at 813 (quotation marks omitted). Waiver by "official acknowledgment" is analyzed under a three-part test: the protected material (i) "must be as specific as the information previously released"; (ii) "must match the information previously disclosed"; and (iii) "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).

This specific-match test is "strict." *Moore*, 666 F.3d at 1330. It is, by design, "a high hurdle for a FOIA plaintiff to clear." *Public Citizen v. Department of State*, 11 F.3d 198, 203 (D.C. Cir. 1993). "[A] plaintiff asserting a claim of prior disclosure must bear the initial burden of

order to protect "the Government's vital interest in information relating to national security and foreign affairs." *Id.*

An agency's *Glomar* response "narrows the FOIA issue to the existence of records *vel non*." *Wolf*

original). For example, the Federal Bureau of Investigation (FBI) cannot make an official acknowle

This argument misunderstands the scope of CIA's *Glomar* response in this case. The agency did not refuse to confirm or deny the existence of *any records* responsive to Connell's request. Rather, it asserted a *Glomar* response with respect to "records that would reveal a *classified or otherwise unacknowledged* connection" between CIA and "operational control" over detainees held at Camp VII during a specified period of time. JA57 (emphasis added). Connell does not point to anything in the documents that CIA produced to him that acknowledges the existence or nonexistence of such records. Thus, those records do not officially acknowledge the specific information at issue.

To the extent that Connell suggests that the agency's acknowledgment of some documents prevents it from invoking *Glomar* with respect to others, that contention is squarely foreclosed by this Court's decision in *Wolf*. As in that case, "[t]he CIA's official acknowledgment waiver relates only to the existence or nonexistence of the records" that have been officially "disclosed by" the agency. *Wolf*, 473 F.3d at 379. Connell "is entitled to disclosure of that information, namely the existence of CIA records . . . that have been previously disclosed (but not any others)." *Id.*

Second, Connell invites (Br. 54) the Court to "consider relying on the public disclosures found in the [Senate Committee] Report to conclude that the CIA has waived its ability to assert a Glomar response." This attempt to establish official acknowledgment is also foreclosed by precedent. On more than one occasion, this Court has "rejected attempts to establish an agency's official acknowledgment based on disclosures by Congress." *Knight First Amendment Inst.*, 11 F.4th at 816 (citing *Fitzgibbon*, 911 F.2d at 766; *Salisbury v. United States*, 690 F.2d 966, 971 (D.C. Cir. 1982)).

Connell tries to avoid this conclusion by citing to opinions declaring that statements made by federal contractors in a deposition or by the government's lawyers in federal court would—in contexts other than FOIA—be "tantamount" to official acknowledgments by their principals. Br. 55 (quoting *United States. v. Zubaydah*, 595 U.S. 195, 211 (2022); *Ameziane v. Obama*, 699 F.3d 488, 493 (D.C. Cir. 2012)). But Congress is not an agent of CIA; it is an entirely separate branch of government.

Nor would it matter if there were "good reason" (Br. 56) to credit the Senate Committee's characterization of CIA's role at Camp VII.

This court has consistently held that "a disclosure made by someone other than the agency from which the information is being sought" is not "official." *Knight First Amendment Inst.*, 11 F.4th at 816 (quoting *Frugone*, 169 F.3d at 774). If this rule could be overcome by a showing that the third party is credible, *Frugone* would have come out the other way. There is good reason to think that Office of Personnel Management could credibly identify the personnel of the Executive Branch. But this Court held that a statement from that office that a person's employment records were held by CIA did not count as an official acknowledgment of the employment relationship. *Frugone*, 169 F.3d at 774.

Even if, contrary to decades of this Court's precedent, the Senate Committee report could be attributed to CIA, Connell fails to identify (Br. 54-57) any portion of the report he claims is an exact match to the information protected by *Glomar* (the existence of documents revealing a previously unacknowledged connection to CIA "operational control" over certain detainees at a particular location in a specific time frame). He points (Br. 35) to a part of the report that cites a CIA document to support the Committee's characterization of the agency's relationship to

Camp VII as one of "operational control," JA114, but that document has been acknowledged and provided to Connell. He also points (Br. 38) to a part of the report that discusses CIA activities at Guantanamo "prior to the time period in question." Connell believes (Br. 38) that the document cited at that portion of the report—the DoD-CIA memorandum of agreement—"suggests some kind of ongoing CIA role" at the facility, but that document has also been acknowledged and provided to him. Finally, Connell points (Br. 38) to the report's citation of "a site daily report and cable" regarding the government's treatment of a particular detainee "after his arrival at Camp VII." But as the district court observed, this passage of the report "says nothing about CIA 'operational control,'" JA493, so it also does not match his request.

This court's decision in *Moore* demonstrates just how exacting the official acknowledgment inquiry is. In that case, a FOIA requester asked CIA and FBI for "all information or records" relating to Svienn B. Valfells, an Icelandic national. *Moore*, 666 F.3d at 1331. CIA issued a *Glomar* response based on Exemptions 1 and 3. FBI produced a redacted report entitled "Svienn B. Valfells." *Id*. The report suggested, and a CIA declarant confirmed, that the FBI report contained "CIA-

Glomar response with "reasonable specificity of detail."

words, the Court held that the agency had officially acknowledged the underlying information that the *Glomar* response was intended to protect. But here there has been no similar official acknowledgment of the underlying intelligence sources and methods information identified in CIA's declaration—whether or not there is a classified or otherwise unacknowledged relationship between CIA and the detention of certain individuals at Camp VII during the five months at issue. *See* JA46-50. Because confirming or denying the existence or nonexistence of documents reflecting such a relationship would reveal classified and statutorily protected information, the *Glomar* response here remains proper.

More fundamentally, however, Connell's argument is inconsistent with the strict limits this Court has imposed on the official acknowledgment doctrine. He invokes a report by a Senate Committee (Br. 35-39), documents released by CIA and the Office of the Director of National Intelligence (Br. 39-42) in response to FOIA requests (including this one), and various materials related to military commission proceedings conducted by DoD (Br. 42-49) to argue that it is no longer "a secret whether the CIA has records" that are responsive to

Personnel Management did not "trea[t] the 'existence or nonexistence' of records related to [Eduardo Frugone's claimed employment with CIA] to be a secret." Br. 49. Rather, that office informed Frugone that "because his records were in the custody of the CIA, his inquiries should be directed there." 169 F.3d at 773. CIA then responded to those inquiries with a *Glomar* response, refusing to confirm or deny Frugone's employment. "To be sure, the plaintiff in [*Frugone*] did not present the exact theory pressed here" by Connell. *Knight First Amendment Inst.*, 11 F.4th at 817. But the Court in *Frugone* sustained the agency's *Glomar* response, and "the same issue presented in a later case in the same court should lead to the same result." *Id.* at 817-18.

Connell instead invokes a decision of the Second Circuit in *Florez v. CIA*, 829 F.3d 178 (2d Cir. 2016). In that case, CIA issued a

investigating, monitoring, and had an intelligence interest in" the subject of the request. *Id.* at 185. Starting from the premise that a *Glomar* response is "justified only in unusual circumstances, and only by a particularly persuasive affidavit," the Second Circuit held that, "a third party agency's disclosures" could provide "relevant and contradictory record evidence" that "bear[s] upon whether the CIA is able to carry its burden" of establishing that the *Glomar* response protects a fact exempt from disclosure. *Id.* at 182, 185-87 (quotation marks omitted).

Florez is inconsistent with the law of this Circuit. To start, this Court has repeatedly held that *Glomar* responses are subject to the same "general exemption review standards established in non-*Glomar* cases." *Knight First Amend. Inst.*, 11 F.4th at 819 (quoting *American Civil Liberties Union*, 710 F.3d at 426 (quoting *Wolf*, 473 F.3d at 374)); *see also id.* (describing a legal analysis based in part on *Florez* as "flawed"). This Court has also, as noted above, held that reliance on third-party agency disclosures to defeat a *Glomar* response is "foreclosed" by this Court's official acknowledgment cases. *American Civil Liberties Union*, 628 F.3d at 625. Indeed, in one of the cases about

records related to the Glomar Explorer, this court explained that a FOIA requester "show[s] neither 'contrary evidence' nor 'bad faith'" sufficient to undermine and agency declaration by relying on disclosures that fall short of official acknowledgments.

implausible" for an intelligence agency to issue a *Glomar* response even if another government entity has disclosed related information. *Id.* at 821.[3] "[T]he fact that information exists in some form in the public domain does not necessarily mean that official disclosure will not cause

that the information protected by the *Glomar* response is not owned or under the control of the United States. Exec. Order No. 13,526 § 1.1(a)(1), (2). Nor does he claim that the documents suggest that the information does not pertain to "intelligence activities" or "intelligence

Salisbury, 690 F.2d at 971 ("The fact of disclosure of a similar type of information in a different case does not mean that the agency must make its disclosure in every case."). As the Supreme Court has explained, "[t]he national interest sometimes makes it advisable, or even imperative, to disclose" national security information, including "information that may lead to the identity of intelligence sources." *Sims*, 471 U.S. at 180. For example, the "Government may choose to release information deliberately to 'send a message' to allies or adversaries." *Id.* The executive order governing classification likewise recognizes that "the need to protect such information may be outweighed by the public interest in disclosure." Exec Order No. 13,526, § 3.1(d).

But it is "the responsibility of the Director of Central Intelligence, 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 Agency's intelligence-gathering process." *Sims*, 471 U.S. at 180. Thus, for any potential disclosure of classified or statutorily protected information, it is up to the agency responsible for the information to "determine, as an exercise of

discretion, whether the public interest in disclosure outweighs the

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 9,230 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Word for Microsoft 365 in Century Schoolbook 14-point font, a proportionally spaced typeface.

I hereby certify that on January 12, 2024, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

/s/ Thomas Pulham
Thomas Pulham

Each agency shall make available to the public information as follows:

. . .

(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

. . .

(4)(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

. . .

This section does not apply to matters that are—

(1)(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;

(2) related solely to the internal personnel rules and practices of an agency;

> security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;
>
> (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
>
> (9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

. . . .