UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES G. CONNELL, III, Plaintiff, v. **UNITED STATES CENTRAL INTELLIGENCE AGENCY**, Defendant.	Case No. 21-cv-627 (CRC)

MEMORANDUM OPINION

In 2006, the Central Intelligence Agency transferred a number of -

to a detention facility at the U.S. military base in Guantanamo Bay, Cuba known as Camp 7.

The intelligence community

withholding Glomar [1] response, neither confirming nor denying that any responsive information exists. The agency based its Glomar response on FOIA Exemptions 1 and 3, which protect from release, respectively, classified records and records prohibited from disclosure by statute.

Glomar response. Specifically, he contends the agency waived its ability to assert the response because it has purportedly declassified and publicly

the Court will grant summary judgment for the CIA.

I. Background

Mr. Connell lodged the request at issue with the CIA in May 2017. Blaine Decl. Ex. 1 at 1. The request begins:

> **Description of Request:**
> Intelligence:

Decl. Ex. 6 at 1 2. [t]he fact of the existence or nonexistence of such records is itself currently and properly classified and is intelligence sources and methods information protected from disclosure by Section 6 of the CIA Act of 1949, as amended, and

II. Legal Standards

_____, 581 F. Supp. 3d 218, 225 (D.D.C. 2022). Under FOIA, federal

subject to several

exemptions. Knight First Amend. Inst. at Columbia Univ. v. CIA, 11 F.4th 810, 813 (D.C. Cir. 2021) (citing 5 U.S.C. § 552(a)(3)(A)). A

of records where to answer the FOIA inquiry would cause harm cognizable under an FOIA

Wolf v. CIA, 473 F.3d 370, 374 (D.C. Cir. 2007) (cleaned up). This practice, known as a Glomar response, is proper if the fact of the existence or nonexistence of agency records falls within a FOIA exemption. Id. (cleaned up). In considering a Glomar

general exemption review standards established in non-Glomar

Knight First Amend. Inst., 11 F.4th at 813 (cleaned up). The burden falls on the agency

Mobley v. CIA, 806 F.3d 568, 580 (D.C. Cir. 2015).

An otherwise valid Glomar officially and

Leopold v. CIA, 987 F.3d 163, 167 (D.C. Cir. 2021) (citing Am. C.L. Union v. CIA, 710 F.3d 422, 426 27 (D.C. Cir. 2013)). An official acknowledgement must satisfy a three-part test the information requested

specific as the information previously released;

disclosed; must already have been made public through an official and documented disclosure. Wolf, 473 F.3d at 378 (quoting Fitzgibbon v. CIA, 911 F.2d 755, 765 (D.C. Cir. 1990)). Plaintiffs relying on this strict test

Schaerr v. U.S.

_____, 435 F. Supp. 3d 99, 116 (D.D.C. 2020) (quoting _____, 702 F.2d 1125, 1130 (D.C. Cir. 1983)). When applied to Glomar responses, the first two prongs of the inquiry merge

concern intelligence activities and intelligence sources and methods within the meaning of . . . the Executive Order; the records are owned by and under the control of the U.S. Government; and . . . the disclosure of the existence or nonexistence of [the] requested records reasonably could be expected to result in damage Id. ¶ 30. Blaine continues, stating

g a classified or

Am. C.L. Union, 710 F.3d at 427 (cleaned up). An

even for Glomar responses

Id. (quoting Wolf, 473 F.3d at 374 75).

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Nor does he contest that E.O. 13526 and the National Security Act are recognized grounds upon which to assert FOIA Exemptions 1 and 3, respectively. Rather, he argues that the CIA has waived its ability to invoke Exemptions 1 and 3 to support its Glomar response because the

intelligence connection between [the] CIA and

Camp VII and [officially acknowledged] the existence of responsive documents about that connection. [2] 5 7. DNI] declassified CIA

until now [s] connection to Camp VII and the existence of documents providing specifics as unclassified, even if the specifics themselves are

Id. at 8. As a result, he argues, further confirming or denying the existence of

[2] While Connell presents declassification as a standalone basis for a Glomar response waiver separate from the public acknowledgement test he cites no authority supporting that approach and the Court has not independently found any. While an agency can publicly acknowledge the existence of records by declassifying documents discussing that information, waiver still requires satisfying the three criteria of the public acknowledgment test. To the extent that Connell relies on declassification to contend that the rationale for invoking exemptions 1 and 3 is not , the Court rejects this argument. The Court

plausible, _____, 78 F. Supp. 3d 45, 60 (D.D.C. 2015), and that the declassified documents referenced do not defin operational control over Camp 7.
does not eliminate the possibility that further disclosures can cause harm to intelligence sources, Fitzgibbon, 911 F.2d at 766 (cleaned up).

responsive records will not result in a harm cognizable under Exemption 1 or 3 because the DNI has alre Id.

is based,

informa antanamo Bay

Blaine Decl. Ex. 1 at 1. He later clarified that he was interested in materials

operational control

examples. Id. Ex. 4 at 1. He further refined the request to cover the five-month period from September 1, 2006 through January 31, 2007. Id.

officially acknowledged, Connell points to information contained in several publicly released documents.

He focuses primarily on the passage from the redacted SSCI Executive Summary quoted in his FOIA request, which states:

at Guantanamo Bay, they were housed in a separate building from other U.S. military detainees and remained under the 12 (citing Zittritsch Decl. Ex. B at 160). The parties spar over whether the quoted sentence in the executive summary is attributable to the CIA for purposes of the public acknowledgement doctrine. 19. But the Court need not decide that question. Instead, assuming arguendo that DNI declassification suffices, that DNexecut

enough to establish public acknowledgement. Knight First Amend. Inst., 11 F.4th at 816 (

quoting Frugone v. CIA, 169 F.3d 772, 774 75 (D.C. Cir. 1999))).

The declassified sect operational control over Camp 7, either. See Connell Decl. Ex. C. To the contrary. The -value detainees to the high-value Id. at 4. . . . all detainees are subject to the same general in-processing utilized by DoD for other detainees arriving at Id. T -site DoD physician, as well

Connell also points to the following snippet from page 80 of the redacted unclassified Executive Summary: h was transferred to U.S. military custody at Guantanamo Bay, Cuba. After his arrival, bin al Shibh was placed on anti- n at 13 (citing Zittritsch Decl. Ex. B at 80). Connell contends that the DNI declassified references to two CIA documents supporting these

the CIA Background Memo indicates that psychiatric screening was a standard part of DoD intake procedures for all detainees who arrived at Guantanamo.

Next, Connell points to a redacted version of a 2006 MOA between the DoD and the CIA Connell Decl. Ex. D at 1 role or activ Camp 7.

Connell also relies on two facsimiles from the Office of the Director of National Intelligence to a lawyer at the State Department regarding the agenda for an upcomin - Connell Decl. Exs. E, F. An attached agenda for a discussion of includes questions on [w]hat level of security clearance is required to adequately protect the [w]ho should be permitted to have Id. Ex. E at 1 3. These questions may well encompass some of

participation in an interagency meeting on those subjects falls far short of an acknowledgement

or that documents concerning such

.

Finally, Connell cites excerpts from transcripts of military commission proceedings where defense lawyers, prosecutors, and the First Camp 7 Commander all of whom are either employed or retained by DoD

Summary. See 18; Reply at 13; see alsp 612 7 0 612 Tf1 0 0 1 285.05 1 792 reW*nBT/F2 12 Tf1 0

Accordingl Glomar response was valid and the agency is entitled to summary judgment. A separate order will follow.

CHRISTOPHER R. COOPER
United States District Judge

Date: March 29, 2023