IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY, *et al.*,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 1:18-cv-2709 (TNM)
CENTRAL INTELLIGENCE AGENCY, *et al.*,	)	
Defendants.	)	

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

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INTRODUCTION

There is no dispute that the death of Jamal Khashoggi was a tragedy, which remains the subject of substantial and legitimate public interest. Neither the fact of that public interest, however, nor any of the voluminous media reporting on this subject or statements by various American politicians (or, for that matter, the European Parliament or United Nations), are of any arguable legal relevance to the issues before this Court for adjudication—which are, simply, whether Defendants have properly asserted *Glomar* responses in order to protect classified information and related statutory prerogatives. As set forth in Defendants' opening memorandum and again below, because Defendants cannot reveal whether or not they have any records responsive to Plaintiff's Freedom of Information Act ("FOIA") requests without also revealing protected intelligence information, their *Glomar* responses are amply justified under both Exemptions 1 and 3.

Plaintiff attempts to evade this result by invoking the "official acknowledgement" doctrine, pursuant to which "when an agency has officially acknowledged otherwise exempt information through prior disclosure, the agency …waive[s] its right to claim an exemption with respect to that information." *Am. Civil Liberties Union v. CIA* ("*ACLU v. CIA*"), 710 F.3d 422, 426 (D.C. Cir. 2013). This rule is strictly and narrowly construed, however, and is satisfied only when each of three criteria are met: (1) the information requested must be as specific as the information previously released; (2) the information requested must match the information previously disclosed; and (3) the information requested must already have been made public through an official and documented disclosure. *Id.* Because Plaintiff itself expressly concedes that its requests seek an "increment" of information that goes beyond any official, attributed disclosures by any of

the remaining Defendants, Pl. Mem., Dkt. No. 38-1, at 2—and for the additional specific reasons set forth in detail below—Plaintiff's attempt to invoke this doctrine must necessarily fail. The Court should properly enter summary judgment in Defendants' favor, and deny Plaintiff's motion for the same.

ARGUMENT

Plaintiff no longer pursues any challenges to the CIA redactions and withholdings to the documents it produced in response to the first of Plaintiff's four FOIA requests. Pl. Mem. at 19 n. 54. Accordingly, the only contested issue in this case is the *Glomar* responses made by all four Defendants in response to Parts 2, 3—and, in the case of the Office of the Director of National Intelligence ("ODNI") only, Part 4—of Plaintiff's requests (referred to herein simply as Plaintiff's FOIA requests). Those responses were entirely appropriate, as the agencies cannot reveal whether they have records about the duty to warn related to Mr. Khashoggi without revealing information protected by FOIA Exemptions 1 and 3, nor has Plaintiff demonstrated that the agencies waived their ability to make these responses through official acknowledgement of the existence or nonexistence of such records.

I. Defendants' *Glomar* Responses to Plaintiff's Requests Are Amply Supported under Exemptions 1 and 3.

A. The Existence or Non-Existence of Responsive Records Is a Currently and Properly Classified Fact.

In their opening memorandum, Defendants explained in detail why their *Glomar* responses are necessary in order to safeguard a currently and properly classified fact—"namely, whether the duty to warn was implicated in connection with Jamal Khashoggi." Decl. of Antoinette B. Shiner ("Shiner Decl.") ¶ 43; Defs.' Mem., Dkt. No. 34-1, at 23-

27. As Defendants explained, under the plain terms of the "duty to warn" policy, ICD-191, no duty to warn procedures are taken—and thus, pursuant to ICD-191 § F.13, documented, such that there would be records responsive to Plaintiff's FOIA requests—unless an Intelligence Community ("IC") element has "collect[ed] or acquire[d] credible and specific information indicating an impending threat of intentional killing, serious bodily injury, or kidnapping[.]" ICD-191 § E. Thus, acknowledging the existence of records concerning the duty to warn under Directive 191 as it relates to a particular person, would necessarily acknowledge the existence of intelligence information of this particular nature, about the particular person, at a particular time. The disclosure of such information would, of necessity, be detrimental to national security, because it would "tend to reveal sources and methods that [the responding agency] or another IC element used to gather such information—thus threatening or undermining the future effectiveness or viability of th[ose] sources and methods." Decl. of Linda M. Kiyosaki ("Kiyosaki Decl.") ¶ 19; *see also id.* ¶ 20; Decl. of Patricia Gaviria ("Gaviria Decl.") ¶ 22 (similar); Shiner Decl. ¶ 44 (similar); Decl. of David M. Hardy ("Hardy Decl.") ¶ 35 (similar).

Conversely, acknowledging that no responsive records exist could reveal a lack of relevant intelligence information, tending to reveal, for example, either a lack of intelligence interest in particular individuals or collection gaps against certain targets—information that adversaries may also seek to exploit, to the determinant of U.S. national security. *See* Defs. Mem. at 26. Consistent with these harms, each agency Defendant has submitted a declaration from a qualified Original Classification Authority, explaining that the existence or-nonexistence of documents responsive to Plaintiff's requests is a

currently and properly classified fact. Kiyosaki Decl. ¶¶ 17-24; Gaviria Decl. ¶ 14-26; Shiner Decl. ¶¶ 41-45; Hardy Decl. ¶¶ 25-38. As noted in Defendants' opening brief, given the national security interests at takes, these declarations are entitled to deference from the Court, and must be afforded substantial weight. Defs.' Mem. at 26-27.

In response, Plaintiff nonetheless claims that Defendants have not explained why merely acknowledging the existence or nonexistence of responsive records would tend to reveal specific targets of surveillance or sources. Pl. Mem. at 24-25. This argument fails to engage with Defendants' actual explanations and relies on arguments regarding what is already in the public domain that are more properly understood as official acknowledgement arguments, *id*. at 25-29 (*see* section II, *infra*, for a response to those arguments).

Moreover, Plaintiff concedes elsewhere in its brief that confirming the existence or nonexistence of "documents concerning any decision to warn or not warn Mr. Khashoggi" "necessarily" reveals whether the government had "advance knowledge of Mr. Khashoggi's disappearance." *Id*. at 22. Defendants explained why revealing this could reasonably be expected to harm national security, and those explanations are logical and plausible. *ACLU v. CIA*, 710 F.3d at 427. In short, the individuals who harmed Mr. Khashoggi know who they are. If Defendants were to confirm the existence of "duty to warn" records related to Mr. Khashoggi—and thus, as Plaintiff itself acknowledges, their possession of before-the-fact intelligence regarding the plot to harm him—these individuals could be "alert[ed] … that certain intelligence sources or methods are [or were] being employed by specific elements of the IC to collect information on them." Gaviria Decl. ¶ 22. "For example, if a particular individual who is a target of IC

surveillance mentioned Mr. Khashoggi and very specific information about him (e.g., an intent to harm Mr. Khashoggi) when that individual was using a particular method of communication, that individual would learn that they were being surveilled during a specific period of time and what method the IC was using to surveil them." *Id. See also* Shiner Decl. ¶ 44 (similar); Hardy Decl. ¶ 35 (similar); Kiyosaki Decl. ¶¶ 19-20 (similar). Redactions to any responsive records would not obviate or avoid such harms, and Plaintiff has not demonstrated otherwise.

As Defendants have demonstrated, they cannot confirm or deny the existence of records responsive to Plaintiff's requests without revealing classified information. Although Plaintiff invites the Court to overrule the reasoned judgments of the Defendants, this Circuit's precedent makes clear that the purported intelligence expertise of the FOIA requestor does not substitute for that of the responsible federal agency. *See Afshar v. U.S. Dep't of State*, 702 F.2d 1125, 1130-31 (D.C. Cir. 1983). Accordingly, this Court should uphold Defendants' *Glomar* assertions under Exemption 1.

B. Defendants' *Glomar* Responses Are Independently Justified under Exemption 3.

For substantially the same reasons, the Court should independently uphold Defendants' *Glomar* responses under Exemption 3. Defendants demonstrated in their opening brief that they properly relied on Section 102A(i)(1) of the National Security Act of 1947, which provides that the Director of National Intelligence "shall protect intelligence sources and methods from unauthorized disclosure," as an independent basis for their respective *Glomar* responses. 50 U.S.C. § 3024(i)(1); Defs. Mem. at 28 and *supra* Section I.A. The brief also showed that NSA's Exemption 3 *Glomar* response is

additionally supported by Section 6 of the National Security Agency Act of 1959, 50 U.S.C. § 3605(a), and 18 U.S.C. § 798. Defs. Mem. at 28-30.

In opposition, Plaintiff largely repeats its arguments that merely acknowledging the existence or nonexistence of responsive records would not tend to reveal intelligence sources or methods, ignoring the government's rationale, just as it did in its Exemption 1 argument. *See, e.g.*, Pl. Mem. at 32 ("Parts 2, 3, and 4 of CPJ's requests do not ask that the agencies provide any information on intelligence sources or methods information."). The Court should uphold Defendants' *Glomar* assertions under Exemption 3 for the reasons stated in their opening brief and above.

II. The Remaining Defendants Have Not Officially Acknowledged the Existence or Nonexistence of Documents Responsive to Plaintiff's Requests.

Plaintiff's primary attack on Defendants' well-supported *Glomar* assertions is through the "official acknowledgement" doctrine, which provides that "when an agency has officially acknowledged otherwise exempt information through prior disclosure, the agency has waived its right to claim an exemption with respect to that information." *ACLU v. CIA*, 710 F.3d at 426. This "official acknowledgement" principal applies in the *Glomar* context, and "the plaintiff can overcome a *Glomar* response by showing that the agency has already disclosed the fact of the existence (or nonexistence) of responsive records, since that is the purportedly exempt information that a *Glomar* response is designed to protect." *Id.* at 427. The plaintiff "must bear the initial burden of pointing to specific information in the public domain that appears to duplicate that being withheld." *Id.* (quoting *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007)). The D.C. Circuit has narrowly constrained the official acknowledgement principle, however, and the plaintiff

must satisfy three stringent criteria. *See Associated Press v. FBI*, 265 F. Supp. 3d 82, 96 (D.D.C. 2017) (a claim that information has been officially acknowledged must meet a "strict test").

"First, the information requested must be as specific as the information previously released." *Wolf*, 473 F.3d at 378 (quoting *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990)). "Prior disclosure of similar information does not suffice; instead, the *specific* information sought by the plaintiff must already be in the public domain by official disclosure. The insistence on exactitude recognizes "'the Government's vital interest in information relating to national security and foreign affairs.'" *Id.* (quoting *Public Citizen v. Dep't of State*, 11 F.3d 198, 203 (D.C. Cir. 1993) (additional citations omitted); *see also Competitive Enter. Inst. v. NSA*, 78 F. Supp. 3d 45, 54 (D.D.C. 2015) ("Plaintiffs in this case must therefore point to specific information in the public domain establishing that the NSA has [the claimed information]"). Second, the information requested must match the information previously disclosed." *Wolf*, 473 F.3d at 378 (quoting *Fitzgibbon*, 911 F.2d at 765). If there are "substantive differences" between the two, an official acknowledgement claim must fail. *Am. Civil Liberties Union v. DoD* ("*ACLU v. DoD*"), 628 F.3d 612, 621 (D.C. Cir. 2011). In the *Glomar* context, for an official acknowledgement to negate a *Glomar* response, the official statement must … "'necessarily match[] both the information at issue—the existence of records—and the specific request for that information.'" *Smith v. CIA*, 246 F. Supp. 3d 28, 32 (D.D.C. 2017) (quoting *Wolf*, 473 F.3d at 379).

"Third, … the information requested 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) (additional citations omitted). Of particular relevance to this case is the well-established corollary to this third prong of the official acknowledgement test, which is the rule that the source must be *official*: non-governmental releases, including anonymous and unauthorized leaks by government official, do not qualify. *See*, *ACLU v. DoD*, 628 F.3d at 621-22. Moreover, as also particularly relevant here, "the prior disclosure must originate from the agency itself, as opposed to 'another, unrelated agency.'" *BuzzFeed, Inc. v. DOJ*, 344 F. Supp. 3d 396, 408 (D.D.C. 2018) (quoting *ACLU v. CIA*, 710 F.3d at 429 n.7)). "These criteria are important because they acknowledge the fact that in the arena of intelligence and foreign relations there can be a critical difference between official and unofficial disclosures." *Fitzgibbon*, 911 F.2d at 765.

Plaintiff purports to identify three "official acknowledgments," each of which, on its theory, effectuates a waiver of Defendants' *Glomar* responses: (1) a statement by a State Department spokesperson; (2) various federal agencies' responses to separate FOIA requests—pursued by a different entity, but also related to Mr. Khashoggi—which are the subject of pending litigation in the Southern District of New York; and (3) news reports relying on anonymous sources. For the reasons set forth in detail below, each of these theories is demonstrably meritless.

A. The State Department's Statement Waived Only Its Own *Glomar* Response.

As Plaintiff note, on October 10, 2019, a spokesman for the State Department stated at a press briefing, and in response to questioning from journalists, that "the United States had no advanced knowledge of Jamal Khashoggi's disappearance."[1] The State

[1] https://www.state.gov/briefings/department-press-briefing-october-10-2018/ (last visited October 17, 2019).

Department recognized that this statement waived its ability to provide a *Glomar* response to Parts 2 and 3 of Plaintiff's FOIA request and conducted searches for records responsive to those parts. These searches returned no responsive records, however, Defendants' Exhibit ("DEX") 2—a result that Plaintiff does not challenge.

Plaintiff seeks to extrapolate this waiver to the other defendant agencies in this case on the basis that the State Department spokesperson "spoke on behalf of 'the United States'—that is, on behalf of all agencies and not just itself." Pl. Mem. at 20. However, Plaintiff fails to cite a single case supporting the proposition that a statement or disclosure by one agency can effectuate a waiver on behalf of another agency. Indeed, no such authority exists: to the contrary, it is long-settled law in this Circuit that "[d]isclosure by one federal agency does not waive another agency's right to assert a FOIA exemption." *BuzzFeed, Inc.*, 344 F. Supp. 3d at 408 (quoting *Mobley v. CIA*, 806 F.3d 568, 583 (D.C. Cir. 2015)); *see also*, *e.g.*, *Burwell v. Exec. Office for United States Attorneys*, 210 F. Supp. 3d 33, 38 (D.D.C. 2016), *aff'd*, No. 16-5306, 2017 WL 4231142 (D.C. Cir. June 12, 2017) ("'We do not deem 'official' a disclosure made by someone other than the agency from which the information is being sought.'") (quoting *Frugone v. CIA*, 169 F.3d 772, 774-75 (D.C. Cir. 1999)); *Marino v. DEA*, 685 F.3d 1076, 1082 (D.C. Cir. 2012) (courts will not "forc[e] one agency to adopt another's official disclosure of information common to both").

Plaintiff's arguments regarding the State Department's press briefing ask this Court to directly contravene this authority, by relying on a statement by *one* agency to constitute an "official acknowledgment" of the existence or non-existence of a fact that four *other* agencies have determined to be properly classified and subject to related

statutory protections. The fact that the State Department spokesperson used the term "United States" does not change this analysis. If the State Department cannot waive another agency's FOIA exemption, then surely it cannot waive *all* the other agencies' exemptions, including the remaining defendants, by purporting to speak on behalf of the United States. *Frugone*, 169 F.3d 774-75. And while a disclosure made by an authorized representative of an agency's parent, such as the President, can waive the agency's Glomar response, *see ACLU*, 710 F.3d at 429 n.7, the State Department spokesperson is the remaining defendant agencies' brother or sister, not their parent, and Plaintiff points to no statements of the President waiving the agencies' Glomar responses. *See* Pl. Mem. at 15. Nor are the State Department and the remaining defendant agencies separate components of the same agency. *See Ctr. for Pub. Integrity v. U.S. Dep't of Energy*, 287 F. Supp. 3d 50, 68 (D.D.C. 2018).

Likewise, Plaintiff's argument also fails for the independent (if related) reason that the "official acknowledgement" doctrine looks at whether the information that purportedly acknowledges the fact in question has "*already … been made public* through an official disclosure," such that the court is "'confident that … the requester [will] receive no more than what is publicly available before [it] find[s] a waiver.'" *Klayman v. CIA*, 170 F. Supp. 3d 114, 123 (D.D.C. 2016) (quoting *Students Against Genocide v. Dep't of State*, 257 F.3d 828, 836 (D.C. Cir. 2001)) (emphasis added). Here, Plaintiff insists that a (hypothetical) confirmation from the remaining Defendants that, like the State Department, they too lacked any "duty to warn" records related to Mr. Khashoggi "would add nothing of substance to the Department of State's denial." Pl. Mem. at 22. But this contention is belied by *the entirety of Plaintiff's memorandum*, which certainly

takes the view that such a disclosure would be of very significant import. And the same is true of the (hypothetical) converse as well: to the extent that one or more of the remaining Defendants does possess responsive records, no such disclosure has been made, and were one to be ordered here, Plaintiff would—in contravention of binding law—receive substantially more information than what is currently publically known. *Klayman*, 170 F. Supp. 3d at 123; *see* Pl. Mem. at 2 (admitting that the information sought is an "increment" beyond what is currently publically known). In short, it is clear that what the "United States" knew about a threat to Mr. Khashoggi is not tantamount to what individual agencies knew about a threat to him—otherwise, Plaintiff wouldn't be pursuing this lawsuit.

Accordingly, the State Department's statement, while accurate as to itself, does not constitute an official acknowledgement on the part of any other Defendant agency.

B. CIA and ODNI's Reponses in the Related SDNY Litigation Are Not Official Acknowledgements.

Plaintiff additionally attempts to establish an official acknowledgement by pointing to the CIA and ODNI's responses to separate FOIA requests—pursued by a different entity, but also related to Mr. Khashoggi—which are the subject of pending litigation in the Southern District of New York. *See* Pl. Mem. at 3, 23 (citing *Open Soc'y Justice Initiative v. CIA*, 19-cv-234-PAE (S.D.N.Y.)). According to Plaintiff, "[i]n [this] separate litigation, both the CIA and the ODNI have acknowledged that they have 'records relating to the killing of U.S. resident Jamal Khashoggi, including but not limited to the CIA's findings on and/or assessment of the circumstances under which he was killed and/or the identities of those responsible.'" *Id.* (citing the Complaint in *Open Soc'y*, attached hereto as DEX 3). On the basis of CIA and ODNI's responses in the other

litigation, Plaintiff argues that "[t]o the extent that the CIA and ODNI might try to distinguish the records whose existence it has admitted from records related to the duty to warn, any such distinction is surely too fine to withstand this Court's scrutiny." Pl. Mem. at 23.

As explained above, however, the official acknowledgement test is "strict," *Associated Press*, 265 F. Supp. 3d at 96, and "insist[s] on exactitude." *Morley v. CIA*, 508 F.3d 370, 378 (D.C. Cir. 2007)). Moreover, Plaintiff omits a crucial aspect of the *Open Soc'y* litigation, which is that the plaintiff there agreed to "limit[] the request to records created on or after October 1, 2018"—and thus to any non-exempt records from the relevant agencies' *after-the-fact* investigative efforts. DEX 4 (April 27, 2019 joint status letter, also available at 19-cv-234-PAE, Dkt. No. 27). In contrast, the information that Plaintiff seeks here has to do, in its own words, with whether "U.S government agencies kn[ew] *in advance* of the threat to Mr. Khashoggi's life and liberty." Pl. Mem. at 1 (emphasis added). And as the filing that Plaintiff relies on explains, the documents that CIA and ODNI have produced in the other litigation are the "result of searches of each agency's press office." Pl. Exhibit 20 at 1. Any remaining responsive records "have been withheld in full pursuant to FOIA [E]xemptions (b)(1) and (b)(3), and portions are also subject to [E]xemptions (b)(5) and (b)(6)." *Id.* CIA and ODNI take the position in the S.D.N.Y. litigation that neither "can provide additional information to Plaintiff about the number or type(s) of document(s) withheld because to do so would itself reveal a classified fact and information relating to sources or methods protected by FOIA [E]xemptions 1 and 3." *Id.* at 2. Thus, Plaintiff here can point to no responses in the S.D.N.Y. case that even arguably "officially acknowledge" the existence of any

information that it here seeks—precisely because of the fundamental differences in the categories of information at issue in the respective cases.[2]

Accordingly, far from being "surely too fine to withstand this Court's scrutiny," the distinctions between the instant case and the *Open Society* litigation are fundamental, and dispositive of any effort by Plaintiff to establish an official acknowledgement.

C. News Reports Relying on Anonymous Sources Are Not Official Acknowledgments.

Finally, to the extent that Plaintiff relies on various media reports as an "official acknowledgement" by Defendants, *see* Pl. Mem. at 25-29, this position is directly contrary to well-established and binding authority in this Circuit establishing beyond cavil that the press and other non-official sources cannot waive the government's right to invoke a *Glomar* response. *ACLU v. DoD*, 628 F.3d at 621- 22 ("'It is one thing for a reporter or author to speculate or guess that a thing may be so or even, quoting undisclosed sources, to say that it is so; it is quite another thing for one in a position to know of it officially to say that it is so.'") (quoting *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1370 (4th Cir. 1975)); *Afshar*, 702 F.2d at 1130-31 (distinguishing between "official acknowledgement" of information and "[u]nofficial leaks and public surmise"); *Agility Pub. Warehousing Co. K.S.C. v. NSA*, 113 F. Supp. 3d 313, 330 (D.D.C. 2015) ("[A] statement by an anonymous agency insider" may not "be deemed an 'official

[2] The plaintiff in that other litigation has posted the responsive records it has received on its website *See* link to "Accessing Released Documents," at https://www.justiceinitiative.org/litigation/open-society-justice-initiative-v-central-intelligence-agency-cia-et-al (last visited Oct. 17, 2019). For the reasons given above, none are of any aid to Plaintiff here.

acknowledgement' because an anonymous leak is presumptively an unofficial and unsanctioned act.").

Notwithstanding this binding authority, Plaintiff posits that various media reports— all of which are exclusively anonymously sourced as to the assertions that Plaintiff posits are relevant to this case—somehow effectuate a waiver of Defendants' *Glomar* responses. Specifically, in support of this argument, Plaintiff points to the following media reporting:

- Reporting from the *Washington Post* that "information" about Mr. Khashoggi had "been disseminated throughout the U.S. government and was contained in reports that are routinely available to people working on U.S. policy towards Saudi Arabia or related issues," according to an anonymous "official." Philip Bump, *What We Know About What the Government Knows About Jamal Khashoggi's Disappearance*, Wash. Post (Oct. 17, 2018), attached hereto as DEX 5 (cited in Pl. Mem. at 25).[3]

- Additional reporting from the *Washington Post* that "[b]efore Khashoggi's disappearance, U.S. intelligence intercepted communications of Saudi officials discussing a plan to capture him, *according to a person familiar with the information*." Loveday Morris et al, *Saudis Are Said to Have Lain in Wait for Jamal Khashoggi*, Wash. Post (Oct. 9, 2018) (emphasis added), attached hereto as DEX 6 (cited in Pl. Mem. at 25-26).

- Reporting from the *New York Times* that "Crown Prince Mohammed bin Salman of Saudi Arabia told a top aide in a conversation in 2017 that he would use 'a bullet' on

[3] Puzzlingly—or perhaps tellingly—while Plaintiff filed as exhibits numerous articles containing reporting that is wholly irrelevant to the issues presented by the instant cross-motions, it did not include among these exhibits the majority of the articles which it cites in support of its official acknowledgement argument. For the Court's ease of reference, Defendants attach the omitted articles here.

Jamal Khashoggi … if [he] did not return to the kingdom and end his criticism of the Saudi government, *according to current and former American and foreign officials with direct knowledge of intelligence reports*." Mark Mazzetti, *Year Before Killing, Saudi Prince Told Aide He Would Use 'a Bullet' on Jamal Khashoggi*, N.Y. Times (Feb. 7, 2019) (emphasis added), attached hereto as DEX 7 (cited in Pl. Mem. at 26).[4] *See also id.* (further reporting that this conversation was "intercepted by American intelligence agencies," and "appears to have been recently transcribed").[5]

- Reporting from the *Wall Street Journal* that "Saudi Crown Prince Mohammed bin Salman sent at least 11 messages to his closest advisor, who oversaw the team that killed journalist Jamal Khashoggi, in the hours before and after the journalist's death in October, *according to a highly classified CIA assessment*." Pl. Exhibit 8, Warren P. Strobel, *CIA Intercepts Underpin Assessment Saudi Crown Prince Targeted Khashoggi*, Wall St. Journal (Dec. 1, 2018) (emphasis added); *see id.* (indicating that this purported assessment was made "last month") (cited in Pl. Mem. at 26).[6]

[4] For the reasons discussed both *supra* and *infra*, the anonymous sources cited by this article cannot effectuate any official acknowledgement. Further, insofar as the article purports to rely on "foreign officials," DEX 7, it is equally well-established that "a foreign government also cannot waive a federal agency's right to assert a FOIA exemption." *Mobley*, 806 F.3d at 583.

[5] In addition to the fact that this article, like all of the others cited by Plaintiff, relies on anonymous sources, its subject is also *after-the-fact* investigative efforts by the U.S. Government. To be clear, Defendants neither confirm nor deny the reporting in this or any other article cited by Plaintiff. But even assuming, *arguendo*, that its assertions were true, for the reasons set forth in Section II.B, *supra*, the fact that elements of the U.S. Government conducted an investigation *after* Mr. Khashoggi's death has no bearing on the information protected by Defendants' *Glomar* responses, which is whether any of the Defendant agencies possessed relevant intelligence prior to this occurrence.

[6] *See supra* fn. 5.

- An assertion by reporter John Schindler that "I can confirm that the National Security Agency, America's big ear, indeed intercepted Saudi communications that indicated Riyadh had something unpleasant in store for Khashoggi … At least a day before Khashoggi appeared at the Saudi consulate in Istanbul, *an NSA official told me*, the agency had Top Secret information that Riyadh was planning something nefarious—though exactly what was not clear from the intercepts." John Schindler, *NSA: White House Knew Jamal Khashoggi Was in Danger. Why Didn't They Protect Him?*, Observer (Oct. 10, 2018) (emphasis added), attached hereto as DEX 8 (cited in Pl. Mem. at 25).

None of the above-discussed media reporting—and none of the other news articles cited throughout Plaintiff's filing—constitutes an official acknowledgement of *anything*, much less what Plaintiff characterizes as the "narrowly targeted" information sought, Pl. Mem. at 1, for the straightforward reason that none even arguably constitutes an "official and documented disclosure," *i.e.*, one made by any authorized governmental representative. *Wolf*, 473 F.3d at 378. To the contrary, each of these media reports relies, in all respects that Plaintiff deems relevant, exclusively on unsourced and anonymous attribution. This fact—which cannot be disputed—is fatal to Plaintiff's claim. *ACLU v. DoD*, 628 F.3d at 621- 22; *see also, e.g.*, *Edmonds v. FBI*, 272 F. Supp. 2d 35, 49 (D.D.C. 2003) (where "statements in the press [ar]e made by anonymous sources, even documents containing identical information may properly be withheld because 'release would amount to official confirmation or acknowledgment of their accuracy'") (quoting *Washington Post v. DoD*, 766 F. Supp. 1, 9 (D.D.C. 1991)); *Afshar*, 702 F.2d at 1130-31 ("Unofficial leaks and public surmise can often be ignored by foreign governments that might perceive themselves to be harmed by disclosure of their cooperation with the

[American Intelligence Community], but official acknowledgement may force a government to retaliate.").[7]

Finally, it again bears emphasizing that the fact of the substantial public interest in Mr. Khashoggi—as reflected by the copious news reporting cited in Plaintiff's memorandum—is wholly irrelevant to the official acknowledgement test. That test consists solely of the three prongs discussed at length above, none of which even arguably take into account the level of public interest, however legitimate, as to the information sought. Indeed, where a Plaintiff cannot satisfy each of the three "strict" criteria of an official acknowledgement, *Associated Press*, 265 F. Supp. 3d at 96, courts routinely uphold—as they must—properly substantiated *Glomar* assertions as to even the most "high profile" of subjects. *See, e.g.*, *Poulsen v. DoD*, 373 F. Supp. 3d 1249, 1271 (N.D. Cal. 2019) (upholding *Glomar* response to requests for information regarding electronic surveillance of President Donald Trump and his advisors during presidential election campaign); *Leopold v. CIA*, 380 F. Supp. 3d 14, 27 (D.D.C. 2019) (upholding

[7] In addition to the news reports discussed above, Plaintiff also attempts to rely on reporting from *Time*, to the effect that "[s]ince Mr. Khashoggi's assassination, the CIA has warned multiple people that their pro-democracy work efforts have made them targets of potential retaliation from Saudi Arabia." Pl. Mem. at 26 (citing Josh Meyer, *CIA Sent Warnings to at Least 3 Khashoggi Associates about New Threats from Saudi Arabia*, Time (May 9, 2019), attached hereto as DEX 9).

Like the media reporting discussed above, the *Time* article does not contain any "official and documented disclosure" made by any authorized governmental actor. *Wolf*, 473 F.3d at 378. Independently, the topic of this article—warnings that were purportedly issued by the CIA to "friends and colleagues of Jamal Khashoggi" in the Spring of 2019, DEX 9—comes nowhere close to "match[ing]" the information sought by Plaintiff, which relates to Mr. Khashoggi himself, *Wolf*, 473 F.3d at 378; *see also*, *e.g.*, *ACLU v. DoD*, 628 F.3d at 621 (if there are any "substantive differences" between the alleged prior disclosure and the information sought, an official acknowledgment claim must fail).

Glomar response to requests for information related to an alleged covert CIA program to arm Syrian rebels).

Similarly, Plaintiff's speculative assertion that Defendants have asserted *Glomar* responses in order to "avoid embarrassment" is both wholly unfounded, and wholly irrelevant to the issues before the Court. In support of this contention, Plaintiff again relies on various media reports as to various aspects of Mr. Khashoggi's disappearance and death. *See* Pl. Mem. at 36-40. But again, the *sole* question before the Court is whether Plaintiff has met its " burden of pointing to specific information in the public domain" that "duplicate[s] that being withheld," *ACLU v. CIA*, 710 F.3d at 426, and that satisfies each of the three stringent criteria under the official acknowledgement test. *See Wolf*, 473 F.3d at 378 ("mere public speculation, no matter how widespread[,]" does not suffice). For all of the reasons given above, Plaintiff has not come close to doing so here.

Accordingly, Plaintiff's attempted reliance on unsourced media reporting to establish a purported "official acknowledgement" must necessarily fail.

III. ***In Camera*** **Review of Responsive Records, If Any Exist, Is Inappropriate.**

Finally, in a last-ditch effort, Plaintiff also calls upon the Court to order *in camera* review. Pl. Mem. at 41. Plaintiff provides no valid basis for why such review is appropriate, and its request should be denied.

At its discretion, a district court "may examine the contents of ... agency records in camera...." 5 U.S.C. § 552(a)(4)(B). But "[i]f the agency's affidavits provide specific information sufficient to place the documents within the exemption category, if this information is not contradicted in the record, and if there is no evidence in the record of agency bad faith," then it is well-established that "summary judgment is appropriate

without *in camera* review of the documents." *ACLU v. DoD*, 628 F.3d at 626; *Wilner v. NSA*, 592 F.3d 60, 76 (2d Cir. 2009) (holding that *in camera* review is unnecessary where an agency's "public affidavits sufficiently allege the necessity of a *Glomar* response").

For all the reasons set forth above, and in Defendants' opening brief, Defendants' declarations describe the rationale for their *Glomar* responses, making summary judgment based on those declarations appropriate. Moreover, *in camera* review is simply inapposite to a *Glomar* response, which as explained above "is proper if the fact of the existence or nonexistence of agency records falls within a FOIA exemption." *Wolf*, 473 F.3d at 374. "'When the Agency's position is that it can neither confirm nor deny the existence of the requested records, there are no relevant documents for the court to examine other than the affidavits which explain the Agency's refusal.'" *Wheeler v. CIA*, 271 F. Supp. 2d 132, 141-42 (D.D.C. 2003) (quoting *Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976)). Thus, to acknowledge the existence of responsive documents, if any do exist, by providing such documents to the Court would obviously defeat the very purpose of Defendants' *Glomar* responses. *See, e.g.*, *Mount v. Nielsen*, No. 16-CV-2532 (CRC), 2018 WL 707485, at *2 n. 3 (D.D.C. Feb. 5, 2018) ("[T]he relevant question here is not whether the *contents* of any records, if they exist, would be protected [from disclosure], but rather whether the very *existence* of the records is a [protected] fact … Whether the [agency] has adequately justified any assertion that the underlying documents [if any exist] are protected [from disclosure] is thus irrelevant to the Court's inquiry here.") (emphasis in original).

In short, Plaintiff's reflexive request for *in camera* review is a poor fit for the instant *Glomar* dispute, and the public interest in the subject of Plaintiff's FOIA request

does not change that. *See* Pl. Mem. at 41-42. As set forth above, Defendants' *Glomar* responses are amply supported by the record. Because Plaintiff has failed to advance any meritorious argument as to why these responses are inappropriate, the Court should grant Defendants summary judgment.

CONCLUSION

For the reasons stated above, and in Defendants' opening brief, Defendants' motion for summary judgment should be granted and Plaintiff's motion for summary judgment should be denied.

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

MARCIA BERMAN
Assistant Branch Director

/s/
Antonia Konkoly
Trial Attorney
U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L St. NW, Room 11110
Washington, DC 20005
(202) 514-2395 (direct)
(202) 616-8470
antonia.konkoly@usdoj.gov

Counsel for the Defendants

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