UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

REPLY OF PLAINTIFF COMMITTEE TO PROTECT JOURNALISTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

The two key grounds for summary judgment in this FOIA case were set forth in the moving papers of Plaintiff, the Committee to Protect Journalists ("CPJ"), and remain undisturbed by the Government's opposition. First, the Government's *Glomar* responses are entirely rote. The Central Intelligence Agency ("CIA"), the Federal Bureau of Investigation ("FBI"), the National Security Agency ("NSA"), and the Office of the Director of National Intelligence ("ODNI") (collectively "Defendants") have failed to establish with any specificity that intelligence activities, sources, or methods, or other national security interests, would actually be compromised by a fuller response to CPJ's FOIA requests. Second, the Government has already publicly asserted that the executive branch, as a whole, lacked prior knowledge of the threat to Jamal Khashoggi. This means the Government cannot now, consistent with FOIA, refuse to even confirm or deny the existence of responsive documents. Each of these is a separate and independent ground for summary judgment in favor of CPJ, and for compelling each of the defendant agencies to respond in substance to CPJ's FOIA requests.

The Government's responses on both points are simply unavailing. As for the affidavits, this Court's objective review will confirm that they are in fact rote and nonspecific. No amount of after-the-fact argument can change that. The detail that FOIA requires to support *Glomar* responses in the name of national security simply is not present. *See Larson v. Dep't of State*, 565 F.3d 857, 865 (D.C. Cir. 2009) (agency's statement supporting a FOIA exemption must "contain reasonable specificity of detail as to demonstrate that the withheld information logically falls within the claimed exemption"). Defendants have not explained and cannot explain how acknowledging the mere existence or nonexistence of documents would by itself necessarily

reveal any intelligence sources, the identity of individuals under surveillance, or methods used to surveil those individuals, or would create risks to national security that cannot be cured by withholding or redaction. *See ACLU v. CIA*, 710 F.3d 422, 429 (D.C. Cir. 2013) (finding that an agency's justification for invoking a FOIA exemption is only "sufficient if it appears 'logical' or 'plausible.'"). To take a simple example: Assume that an employee at one of the Defendant agencies wrote an email that referenced the duty to warn Mr. Khashoggi, or mentioned in general terms a prior awareness of the threat to his life. Any purported harm to national security interests from disclosure of such emails would easily be addressed through redaction of sensitive details.

As for the Government's prior public statement that it lacked advance knowledge of the mortal threat to Mr. Khashoggi, Defendants cannot avoid the impact of that statement, as they try to do, by professing that the Department of State spoke only for itself. In its traditional role in matters of international affairs, the Department of State expressly spoke on behalf of the entire executive branch: "the *United States* had no advance knowledge of Jamal Khashoggi's disappearance." Office of the Spokesperson, Department Press Briefing, U.S. Dep't of State (Oct. 10, 2018), https://www.state.gov/briefings/department-press-briefing-october-10-2018/ (emphasis added) [hereinafter Department of State Briefing]; *see Niagara Mohawk Power Corp. v. U.S. Dep't of Energy*, 169 F.3d 16, 21 (D.C. Cir. 1999) (explaining that once information has become public, any damage the agency fears from disclosure has already been done). This is unsurprising, given that the Department of State is both the preeminent federal agency and a member of the Intelligence Community ("IC") that is the focus of this case.

If the Department of State's statement was true, then Defendants should be able to simply acknowledge in this FOIA proceeding that they have no responsive documents. The public

position of the Government would remain unchanged, and the lack of impact to national security interests would seem obvious. If the Department of State Briefing was factually incorrect, then the Government has misstated the facts to the American people on a matter of grave importance to human rights. In neither scenario can the *Glomar* responses be justified. In both scenarios, the case for additional transparency under FOIA is compelling.

Summary judgment for CPJ therefore is in order. Defendants should be ordered to acknowledge the existence or nonexistence of responsive records and to produce responsive records, should they exist. In the alternative, we ask that this Court order the Defendants to submit more detailed affidavits and/or responsive documents, to the extent they exist, for review *in camera*. *See e.g.*, *Dickstein Shapiro LLP v. Dep't of Defense*, 730 F. Supp. 2d 6, 9 (D.D.C. 2010) ("[*I*]*n camera* review is appropriate . . . where 'the agency affidavits merely parrot the language of the statute and are drawn in conclusory terms, [and] the Court's responsibility to conduct *de novo* review is frustrated.'") (quoting *Allen v. CIA*, 636 F.2d 1287, 1298 (D.C. Cir. 1980)).

ARGUMENT

I. The Government Has Not Met Its Burden In Justifying Its *Glomar* Responses Under Exemption 1 Or Exemption 3

A. The Government's Conclusory Submissions Do Not In Fact Show How Acknowledging Whether Responsive Records Exist Would Damage National Security

The Government's argument that acknowledgment of the existence of responsive records would "tend to reveal sources and methods," while nonexistence would tend to reveal "either a lack of intelligence interest in particular individuals or collection gaps against certain targets,"

does not hold up to simple scrutiny. Defs.' Mem. Opp'n Summ. J. 3, ECF No. 39 [hereinafter Defs.' Opp'n Mem.] (quoting Decl. of Linda M. Kiyosaki ¶ 19). Read objectively and with care, these generic statements do not demonstrate that acknowledgment could reasonably result in damage to national security.

First, the Government fails to actually explain—with *sufficient particularity*—how acknowledging the mere existence or nonexistence of responsive records could lead to any compromise of intelligence sources and methods. The Government's opposition provides only vague explanations as to why revealing whether responsive records do or do not exist would "necessarily" harm national security. Generic explanations do not satisfy the Government's burden. Acknowledging the existence of responsive records would indicate that the Government was in possession of intelligence that somehow related to Mr. Khashoggi, but would not necessarily reveal that the information was of a "particular nature . . . at a particular time," as the Government argues. *Id.*

Similarly, the Government has not explained and cannot explain, in any nonconclusory fashion, why the nonexistence of responsive records would necessarily reveal "a lack of intelligence interest in particular individuals or collection gaps." *Id.* There are alternative reasons why responsive records might not exist, if that is in fact the case. For example, Defendants might have had a strong interest and robust intelligence collection procedures, but those factors might have not yielded any responsive documents prior to the killing. The fact that the Government did not have information that triggered the creation of documents related to the duty to warn does not itself reveal intelligence activities, sources, or methods.

Second, the Government's vague examples of how particular persons may be alerted to certain intelligence sources or methods do not explain why redactions or withholdings would not protect that information. There is no merit to the Government's argument that there is a reasonable expectation of harm because the individuals responsible for the murder of Mr. Khashoggi "know who they are" and therefore "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.'" *Id.* 4 (quoting Decl. of Patricia Gaviria ¶ 22, ECF No. 34-2 [hereinafter Gaviria Decl.]). *See ACLU v. CIA*, 710 F.3d at 429 (finding that an agency's justification for invoking a FOIA exemption is only "sufficient if it appears 'logical' or 'plausible.'"). The fact that responsive records do or do not exist does not provide information about *what is contained in those responsive records*, should they exist. Nor does disclosure of that fact equal disclosure of what triggered (or did not trigger) the documents' creation.

The Government has not credibly explained, nor could it, why acknowledging the mere existence or nonexistence of documents would itself reveal any intelligence sources, individuals under surveillance, or methods used to surveil those individuals. Surely the mere fact that the United States was or was not in possession of information related to the threat to Mr. Khashoggi's life would not necessarily, or even potentially, provide his killers with information specific enough to know how intelligence was gathered about their plan. The Government's statement that "the individuals who harmed Mr. Khashoggi know who they are" and, as such, could be alerted is simply a conclusory make-weight. Defs.' Opp'n Mem. 4. Responsive records, should they exist, could have been developed from numerous sources, and could be

disclosed or described in a manner that does not compromise any legitimate national security interests.

Third, though the Government does not name the individuals responsible, it is clear that by saying "they know who they are" it is referring to the persons associated with the Saudi government. Seeking to avoid FOIA disclosure on this basis calls to mind The Emperor's New Clothes. The entire world, including the Saudi leadership, already publicly acknowledges and discusses the undisputed fact of Saudi government responsibility for Mr. Khashoggi's horrific death. *See* Decl. of Alexandra P. Swain Ex. 10, ECF No. 35-1, 53-55 (Ben Hubbard & Nick Cumming-Bruce, *On Khashoggi Killing and Yemen, Saudis Cannot Avoid Fresh Scrutiny*, N.Y. Times (Sept. 26, 2019), https://www.nytimes.com/2019/09/26/world/middleeast/mbs-khashoggi-killing-responsibility.html) (reporting that the Saudi Crown Prince accepted "all the responsibility" for the murder of Mr. Khashoggi); Decl. of Alexandra P. Swain Ex. 14, ECF No. 35-2, 14-17 (Julie Hirschfeld Davis & Eric Schmitt, *Senate Votes to End Aid for Yemen Fight Over Khashoggi Killing and Saudis' War Aims*, N.Y. Times (Dec. 13, 2018), https://www.nytimes.com/2018/12/13/us/politics/yemen-saudi-war-pompeo-mattis.html) (reporting that the U.S. Senate voted unanimously to pass a resolution holding the Saudi Crown Prince responsible for the murder of Mr. Khashoggi). Nor is it a secret that the United States gathers intelligence on Saudi Arabia, and the Government has not shown how admitting the existence or nonexistence of responsive records would divulge information about U.S. intelligence-gathering activities, sources, and methods that is not already public knowledge. *See* Max Fisher, *Why America Spies on Its Allies (and Probably Should)*, Wash. Post (Oct. 29, 2013), https://www.washingtonpost.com/news/worldviews/wp/2013/10/29/why-america-spies-on-its-

allies-and-probably-should/ ("Spying on friendly foreign nations does not actually violate the standard practices of international relations and in many ways is consistent with those norms.") (CPJ Mem. Supp. Summ. J. 39-40, ECF No. 37 [hereinafter CPJ Mem.]); Jonathan Marcus, *NSA Spying Allegations: Are U.S. Allies Really Shocked?*, BBC News (Oct. 26, 2013), https://www.bbc.com/news/world-europe-24676392 ("Almost all governments conduct surveillance or espionage operations against other countries whose activities matter to them.") (CPJ Mem. 40). In these circumstances, the argument that *Glomar* responses are required in this context to avoid alerting the Saudis can generously be called implausible.

Further, the Government does not and cannot say why, to the extent that the requested records would reveal intelligence activities, sources, and methods, Defendants could not simply redact the documents or acknowledge but withhold them. The Government asserts that

> 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.

Defs.' Opp'n Mem. 4-5 (quoting Gaviria Decl. ¶ 22). That is at best an argument for withholding or redaction; it does not logically support the *Glomar* approach. It is far from inevitable, indeed not even likely, that an individual would learn from the mere fact that responsive records do or do not exist that those records were created because of information gathered from, or are even about, that individual.

B. The Government Has Not Carried Its Burden To Demonstrate That Acknowledging The Existence Or Nonexistence Of Responsive Records Would Cause Cognizable Harm Under The Claimed Statutes

The Government's reliance on "substantially the same reasons" in justifying its *Glomar* responses under Exemption 3 is unavailing. Defs.' Opp'n Mem. 5. This rationale does not demonstrate why Exemption 3 properly applies to these facts.

The National Security Act cannot justify a *Glomar* response here because the acknowledgment of the existence or nonexistence of responsive records need not result in the "unauthorized disclosure" of "intelligence sources and methods." 50 U.S.C. § 3024(i)(1). As discussed above, the Government has not demonstrated how acknowledging the existence of responsive records in this case would in itself provide sufficient information for any particular person to know that particular information was surveilled at a particular time or by a particular method. While persons aware of the threat to Mr. Khashoggi's life prior to his murder, as the Government asserts, "know who they are," the Government has not explained why knowledge that responsive records exist would provide confirmation as to what information is contained in those records or what sources were relied upon in the creation of those records. Conversely, if no responsive records exist, that fact is not itself informative enough to allow any person to conclude that the United States does not conduct surveillance in a particular place or of a particular type.

The NSA further fails in its defense of its *Glomar* responses on the bases of Section 6 of the National Security Agency Act of 1959 (the "NSA Act"), 50 U.S.C. § 3605(a), as well as 18 U.S.C. § 798. The NSA Act may only serve as a basis for justifying a *Glomar* response if the acknowledgment of the existence or nonexistence of responsive records would "require the

disclosure of the organization or any function of the National Security Agency, or any information with respect to the activities thereof, or the names, titles, salaries, or number of the persons employed by such agency." 50 U.S.C. § 3605. The Government does not even try to counter CPJ's showing that acknowledging the fact that responsive records do or do not exist would not itself require the NSA to disclose information about the specific activities in which the NSA engages or about its personnel. CPJ Mem. 34-35. To the extent such information exists in the responsive records, should they exist, it could be redacted pursuant to the NSA Act.

Section 798 of Title XVIII of the United States Code may only serve as a basis for justifying a *Glomar* response if the acknowledgment of the existence or nonexistence of responsive records would "make[] available to an unauthorized person any classified information . . . concerning the communication intelligence activities of the United States or any foreign government." 18 U.S.C. § 798(a)(3). As with the NSA Act, the Government offers no elaboration on how section 798 supports the NSA's *Glomar* response. As CPJ has argued previously, though, acknowledging the existence or nonexistence of responsive records would not itself involve making classified information available. CPJ Mem. 35-36. The fact of the information's existence or nonexistence is not itself a classified fact. The NSA's *Glomar* response may not be justified on this basis.

The Government's arguments do not demonstrate a cognizable harm under either Exemption 1 or 3. As such, its *Glomar* responses are unjustified and the Government should be directed to produce the responsive records, should they exist, or acknowledge that such records do not exist.

II. The Government's Past Public Position Waives Its Ability To Invoke *Glomar*

A. When The Department Of State Denied The Entire United States Government's Advance Knowledge Of The Killing of Mr. Khashoggi, It Waived The Government's Reliance On *Glomar*

The Department of State's statement on October 10, 2018 that "*the United States* had no advanced knowledge of Jamal Khashoggi's disappearance," Department of State Briefing (emphasis added), represented an "official acknowledgment" that waived the Defendants' ability to invoke *Glomar*. *See ACLU v. CIA*, 710 F.3d 422 at 429 n. 7 (holding that when an agency or a representative authorized to speak on behalf of an agency discloses "otherwise exempt information through prior disclosure," the affected agency "has waived its right to claim an exemption with respect to that information"); *see also Marino v. Drug Enf't Admin.*, 685 F.3d 1076, 1080 (D.C. Cir. 2012) ("[A]n agency may not rely on an otherwise valid [FOIA] exemption to justify withholding information that is already in the public domain.") (internal quotation marks omitted); *Niagara Mohawk Power Corp.*, 169 F.3d at19 (explaining that "if identical information is truly public, then enforcement of an exemption cannot fulfill its purposes").

Here, the Department of State Briefing clearly was a denial that the Government as a whole had records that the Defendants' *Glomar* responses were purportedly "designed to protect." Defs.' Opp'n Mem. 11 (citing *ACLU v. CIA*, 710 F.3d at 427). Such disclosure clearly meets the *Fitzgibbons* three-part test. *See BuzzFeed, Inc. v. DOJ,* 344 F. Supp. 3d 396, 407 (D.D.C. 2018) ("Information is officially acknowledged by an agency where: (1) 'the information requested [is] as specific as the information previously released,' (2) the requested information 'match[es] the information previously disclosed,' and (3) the requested information

was already 'made public through an official and documented disclosure.'") (quoting *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990)). The Department of State's public statement necessarily encompassed CPJ's "duty to warn" FOIA request and therefore, under the official acknowledgment doctrine, the Government cannot assert a *Glomar* response here.

First, the Department of State's on-the-record statement easily meets the first two prongs of the waiver test, which collapse into one in the *Glomar* context. *See Wolf v. CIA*, 473 F.3d 370, 379 (D.C. Cir. 2007) ("[I]f the prior disclosure establishes the *existence* (or not) of records responsive to the FOIA request, the prior disclosure necessarily matches both the information at issue—the existence of records—and the specific request for that information.") (emphasis in original). The Department of State's statement necessarily speaks with specificity to the information being sought by and matches the information requested by Plaintiff because there can be no "duty to warn" records if the United States had no prior knowledge of threats to Mr. Khashoggi's life. *See* Defs.' Opp'n Mem. 3 ("[N]o duty to warn procedures are . . . 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[.]'") (quoting Office of the Dir. of Nat'l Intelligence, Intelligence Community Directive 191, § E.1 (July 21, 2015), https://fas.org/irp/dni/icd/icd-191.pdf [hereinafter ICD-191]).

Second, the Department of State Briefing was an "official and documented disclosure," *Fitzgibbon*, 911 F.2d at 765, made on behalf of the entire U.S. government, satisfying the third prong of the *Fitzgibbon* test. Deputy Spokesperson Robert Palladino, an official spokesperson of

the U.S. government, spoke through an "official and documented" channel, *id.*, at an official Department of State press conference.

Contrary to Defendants' suggestion, the Department of State can, and did here, speak on behalf of the *entire* United States government. It bears emphasis that State is not just any agency. It is the oldest federal agency and the most prestigious, exemplified by the Secretary of State's place near the top of the presidential line of succession. *See* 3 U.S.C. § 19. Its statutory mandate is to lead the government's business in all areas of foreign affairs. *See* 22 U.S.C. §§ 2651, 2656 (establishing the Department of State and defining its role to include "correspondences, commissions or instructions to or with public ministers or consuls, from the United States, or to negotiate with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers or other foreigners, or to such other matters respecting foreign affairs as the President of the United States shall assign to the department"); *see also About the U.S. Department of State*, U.S. Dep't of State, https://www.state.gov/about/about-the-u-s-department-of-state/ ("The U.S. Department of State leads America's foreign policy through diplomacy, advocacy, and assistance by advancing the interests of the American people."). Its formal press briefings exist to communicate timely and accurate information with the goal of furthering U.S. foreign policy and national security interests as well as broadening understanding of American values, not simply to speak for itself. *Id.*; *see also Office of the Spokesperson*, U.S. Dep't of State, https://www.state.gov/bureaus-offices/under-secretary-for-public-diplomacy-and-public-affairs/bureau-of-global-public-affairs/office-of-the-spokesperson/ (stating that the Department's mission is "[t]o communicate U.S. foreign policy objectives to the American public.").

Additionally, the Department of State was hardly speaking out of turn by addressing an intelligence issue. As a member of the intelligence community, the Department of State is positioned to speak on behalf of the entire Intelligence Community on issues related to foreign intelligence. *See* 50 U.S.C. § 3003(4)(I) (defining "intelligence community" to include "[t]he Bureau of Intelligence and Research of the Department of State"). It is undisputed that the agencies in the Intelligence Community share intelligence, support national security, and must adhere to the Intelligence Community Directives, including the ICD-191 duty to warn. ICD-191; *see also* 50 U.S.C. § 3024(i)(2)(B) ("[T]he Director of National Intelligence shall establish and implement guidelines for the intelligence community for . . . [a]ccess to and dissemination of intelligence, both in final form and in the form when initially gathered"). It strains credulity to refer to the State Department as merely "another, unrelated agency," as the Defendants would like to contend. Defs.' Opp'n Mem. 8 (quoting *Buzzfeed, Inc.*, 344 F. Supp. 3d at 408). *See ACLU v. CIA*, 710 F.3d at 431 ("There comes a point where . . . Court[s] should not be ignorant as judges of what [they] know as men and women.") (citation and internal quotation marks omitted).

The Government cites no case from this District or Circuit, nor is CPJ aware of such a case, where a court denied a waiver argument based on an agency's statement on behalf of the entire U.S. government about the existence or nonexistence of the responsive records.[1] For the

[1] *See Marino*, 685 F.3d 1076 (holding that a prior disclosure by a federal prosecutor in court waived the DEA's *Glomar* response because the federal prosecutor and the DEA are *both* part of the DOJ); *Frugone v. CIA*, 169 F.3d 772 (D.C. Cir. 1999) (holding that a statement by the Office of Personal Management (OPM) did not waive the CIA's ability to issue a *Glomar* response to Plaintiff's request); *Public Citizen v. Dep't of State*, 11 F.3d 198 (D.C. Cir. 1993) (finding that Department of State did not waive its right to assert FOIA exemptions by permitting a former Ambassador to testify publicly before two congressional

foregoing reasons, the Government's argument that "what the 'United States' knew about the threat to Mr. Khashoggi is not tantamount to what individual agencies knew about a threat to him," Defs.' Opp'n Mem. 11, simply does not hold up to objective review.

The cases upon which Defendants attempt to rely are inapposite. Unlike here, where the Department of State spoke on behalf of the entire United States, the plaintiff in *Klayman v. CIA*, tried to argue that disclosure to third parties—but *not* the general public—represented an official acknowledgment. 170 F. Supp. 3d 114 (D.D.C. 2016). Furthermore, CPJ's request for documents related to the duty to warn is equal in scope to the Department of State Briefing. If the Department of State's statement was true, then Defendants can simply say here that they have no responsive documents, because no responsive documents would exist if there was no advance knowledge. Yet if the Department of State Briefing was not correct, then the Government has

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committees because the official only discussed the *general* subject matter of the sought-after information); *Poulsen v. Dep't of Defense*, 373 F. Supp. 3d 1249 (N.D. Cal. 2019) (noting that the presidential tweets and comments and congressional statements relied upon by the plaintiffs lacked specificity to constitute official acknowledgment on the part of NSA, ODNI, FBI, the Office of Legal Counsel, or the National Security Division and thus failed the waiver test); *Ctr. for Pub. Integrity v. U.S. Dep't of Energy*, 287 F. Supp. 3d 50 (D.D.C. 2018) (finding that while the National Nuclear Security Administration's disclosures triggered official acknowledgment waiver on behalf of other Department of Energy subcomponents, the disclosure was document specific and thus did not preclude redactions in other records); *Associated Press v. FBI*, 265 F. Supp. 3d 82 (D.D.C. 2017) (holding that then-FBI director's statements to Congress lacked specificity and thus did not constitute a waiver on behalf of the FBI); *Burwell v. Exec. Office for U.S. Attorneys*, 210 F. Supp. 3d 33 (D.D.C. 2016), aff'd, No. 16-5306, 2017 WL 4231142 (D.C. Cir. 2017) (holding that an unredacted criminal indictment obtained from a private investigator or the district court did not constitute official acknowledgment on the part of the Executive Office for United States Attorneys); *Students Against Genocide v. Dep't of State*, 257 F.3d 828 (D.C. Cir. 2001) (holding that a news article's mention of a closed United Nations Security Council session and sharing of that meeting's information *exclusively* with third parties by the Secretary of State did not constitute an official acknowledgment on the part of the Department of State, Department of Defense, and CIA).

misstated the facts to the American people, and FOIA provides the appropriate path to additional scrutiny of the nature of the misstatement. *See Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976) ("To make crystal clear the congressional objective [of FOIA] . . . 'to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.'" (quoting *Rose v. Dep't of Air Force*, 495 F.2d 261, 263 (2d Cir. 1974)).

Defendants also err in seeking to rely on *Frugone*, which dealt with an alleged former CIA employee requesting records in order to obtain retirement benefits. 169 F.3d 772. The alleged disclosure at issue in *Frugone* was not so broad as to apply to the *entire* United States Government as the Department of State's disclosure did here. Moreover, the alleged disclosure concerned the Office of Personnel Management ("OPM") making an acknowledgment on behalf of the CIA, a truly unrelated agency in both purpose and function; in this case, as explained above, all Defendants are members of the Intelligence Community, including the Department of State.

B. The Statements Made In The Course Of The OSJI Litigation Further Weaken The Government's *Glomar* Invocation

The Government's posture in the related *OSJI* litigation further weakens Defendants' *Glomar* justifications here. *Open Soc'y Justice Initiative v. CIA*, No. 19-cv-234-PAE (S.D.N.Y. 2019); CPJ Mem. 3, 23. In the OSJI litigation, the CIA and ODNI did not issue *Glomar* responses as they have done here. *See* Decl. of Alexandra P. Swain Ex. 20, ECF No. 35-2, 111-14 (*Open Soc'y Justice Initiative v. CIA*, No. 19-cv-234-PAE, ECF No. 99 "Joint Status Letter" (Sept. 24, 2019)). Instead they acknowledged the existence of records responsive to OSJI's requests, yet withheld those records. *Id.* The categories of information sought by CPJ and OSJI

in the two litigations overlap in both time and in substance. We note that Mr. Khashoggi was murdered on October 2, 2018, and the letter that the Government cites states that OSJI requested documents created on or after October 1, 2018. *See* Defs.' Opp'n Mem. Ex. 4, ECF No. 39-4, 2. It is possible that intelligence about threats to Mr. Khashoggi's life could have been collected the day before his murder or on the day of his murder, therefore triggering the duty to warn. In any event, it is certainly possible that the Defendants conducted after-the-fact evaluations of the application of the duty to warn policy with respect to Mr. Khashoggi and that there are documents responsive to CPJ's requests that reflect such earlier evaluations and discussions.

III. *In Camera* Review Of More Detailed Affidavits And/Or Responsive Records, Should They Exist, Is An Appropriate Remedy

The Government fails to demonstrate why *in camera* review is not a valid remedy in this case as an alternative to an immediate grant of summary judgment in CPJ's favor. *See* CPJ Mem. 23-36. The implausibility of the Government's *Glomar* arguments leaves the Court with no basis to rule in Defendants' favor. *See Elec. Frontier Found. v. Dep't of Justice*, 384 F. Supp. 3d 1, 11 (D.D.C. 2019) ("The D.C. Circuit has cautioned that courts should not 'stretch th[e] [*Glomar*] doctrine too far' and 'give their imprimatur to a fiction of deniability that no reasonable person would regard as plausible.'") (quoting *ACLU v. CIA*, 710 F.3d at 431); *see also ACLU v. CIA*, 710 F.3d at 429 (finding that an agency's justification for invoking a FOIA exemption is only "sufficient if it appears 'logical' or 'plausible.'").

In camera review is particularly appropriate here because of the strong indications that avoiding embarrassment, rather than protecting national security, is actually driving the *Glomar* responses. *See Jones v. FBI*, 41 F.3d 238, 243 (6th Cir. 1994) (finding that if "it becomes

apparent that the subject matter of a request involves activities which, if disclosed, would publicly embarrass the agency . . . government affidavits lose credibility."); *Elec. Frontier Found.*, 384 F. Supp. 3d at 9 (holding that while "[a]gency affidavits are entitled to a presumption of good faith," that presumption may be "called into question"—as it is here—"by contradictory record evidence or evidence of bad faith.") (citing *SafeCard Servs. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991)); CPJ Mem. 36-40. There are credible indications in the public record that the Government may have abused the use of classified systems in order to conceal the contents of communications with the Saudi regime. *See* Julian E. Barnes et al., *White House Classified Computer System Is Used to Hold Transcripts of Sensitive Calls*, N.Y. Times (Sept. 27, 2019) https://www.nytimes.com/2019/09/27/us/politics/nsc-ukraine-call.html. These indicia of bad faith provide additional grounds here for overcoming the Government's invocation of *Glomar*. *See* CPJ Mem. 36-40.

At a minimum, this Court also can and should use its authority to order Defendants to submit more detailed affidavits. The Court has the discretion to order the agencies to submit more detailed affidavits, either publicly or confidentially. The Court may also order the review of responsive records, should they exist, *in camera*. *See* 5 U.S.C. § 552(a)(4)(B) (The court "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 [§ 5 U.S.C. § 552(b)]."). The affidavits submitted by the Government are insufficient to sustain the agencies' burden to demonstrate that its *Glomar* responses are justified. Particularly in the *Glomar* context, where the Government's affidavits are all the evidence the Court has to rely on, *in camera* review of more detailed affidavits may be appropriate. *See Phillippi v. CIA*, 546 F.2d

1009, 1013 (D.C. Cir. 1976) ("When the Agency's position is that it can neither confirm nor deny the existence of the requested records . . . the District Court may have to examine classified affidavits in camera."); *see, e.g.*, *Dickstein Shapiro LLP*, 730 F. Supp. 2d at 9 ("[*I*]*n camera* review is appropriate where 'the agency affidavits merely parrot the language of the statute and are drawn in conclusory terms, [and] the court's responsibility to conduct *de novo* review is frustrated.'") (quoting *Allen*, 636 F.2d at 1298).

FOIA provides the Court with the authority to order such review. Submitting more detailed affidavits and/or responsive documents for review by the Court would allow a further check on the Government's justifications without piercing its *Glomar* response. *See Dep't of Air Force v. Rose*, 425 U.S. at 361 ("To make crystal clear the congressional objective [of FOIA] . . . 'to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.'") (quoting *Rose v. Dep't of Air Force*, 495 F.2d at 263 (2d Cir. 1974)).

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CONCLUSION

CPJ respectfully requests that the Court grant its cross-motion for summary judgment, or in the alternative, order the Defendants to submit more detailed affidavits justifying their *Glomar* responses, to be reviewed *in camera* with responsive documents, if they exist, if necessary; deny the Defendants' motion for summary judgment; and grant CPJ such other and further relief as the Court deems just and proper.

Respectfully submitted,

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