THE SECRECY OF CHAMBERS: AN ARGUMENT FOR GREATER IN CAMERA REVIEW OF THE GOVERNMENT'S *GLOMAR* RESPONSE IN FOIA LITIGATION

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The Freedom of Information Act (FOIA) empowers the public with a formal process to request access to records about government operations and activities.[1] Promulgated after an 11-year investigation into government secrecy by the House Special Subcommittee on Government Information, the statute amended the Administrative Procedure Act by granting the public the "right to know" about government processes and operations.[2] The FOIA replaced the government's post-World War II public information policy, which limited access to those with a "need to know" and recognized that an informed citizenry is the cornerstone of public discourse and democratic governance.[3] However, certain records may be protected from disclosure if they fall within one of the discrete categories of exemptions under the FOIA. More controversially, the government may refuse to acknowledge the very existence of those records if the fact of their existence is itself exempt from disclosure.

In January 2018, the U.S. District Court for the District of Columbia held in *James Madison Project* that an agency cannot refuse to confirm or deny the existence of records, a reply known as the

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1. Freedom of Information Act, 5 U.S.C. § 552 (1967).

2. Sam Archibald, *The Early Years of the Freedom of Information Act – 1955 to 1974*, 26 POL. SCI. & POL. 726, 728 (1993).

3. Harold C. Relyea, *Extending the Freedom of Information Concept*, 8 PRESIDENTIAL STUD. Q. 96, 97 (1978) ("The 'need to know' tradition was, at base, an outgrowth of the mistaken supposition that government is an organic entity, existing apart from the citizenry who, in fact, created it . . . . [G]overnment information, like the state itself, belongs to the people.").

Glomar response, if that agency has previously made an official acknowledgement through statements or actions that: (1) are as specific as, (2) descriptively match, and (3) publicly disclose the records sought.[4] Just one year before in *Smith*, the court held that the official acknowledgement doctrine in the context of the *Glomar* response, as opposed to the government's withholding of specific information contained within the records, requires a less formalized approach than the three-prong test faithfully applied in *James Madison Project*. [5] The lower standard of *Smith*, in which the three-prong test is not so rigidly applied, recognizes that disclosure of the existence of records is a more generalized request for information than the content of those records.

When research for this paper began, the singular purpose was to explain the disagreement within the jurisdiction about the proper application of the official acknowledgement doctrine to the *Glomar* response and to advance an argument in support of a lower standard. Research included a comprehensive review of litigation resulting from the government's use of the *Glomar* response to information requests, as well as the court's application of the official acknowledgement doctrine to the *Glomar* context. Approximately sixty cases were reviewed from the past forty years, starting with the first few *Glomar* cases that arose in the mid-1970s and continuing through to the present day. Through the course of this research, the judicial opinions also revealed that courts are reluctant to accept classified affidavits explaining an agency's justification for withholding government records. The courts' resistance to further inquiry into agency nondisclosure decisions raises questions about the judiciary's role to ensure that FOIA exemptions are not abused by agencies. This paper primarily discusses the court's disfavor of in camera review and argues against its application to the *Glomar* context.

Part I tells the origin story of the *Glomar* response and describes its first appearance in case law. Part II describes the procedures for judicial review of an agency's disclosure determination pursuant to the FOIA. Part III provides the procedures particular to judicial review of an agency's *Glomar* response, a discussion of the court's divergent applications of official acknowledgement doctrine in *Smith* and *James Madison Project*, and arguments for a lower standard of the official acknowledgement doctrine in the *Glomar* context. Justifications for judicial reluctance to perform in camera

4. *See* James Madison Project v. Dep't of Justice, 302 F. Supp. 3d 12, 20–22 (D.D.C. 2018) (discussing the applicable standards).

5. *See* Smith v. CIA, 246 F. Supp. 3d 28, 32 (D.D.C. 2017).

review of classified affidavits are explained in Part IV, and Part V lists potential harms to both the judicial and executive branches through minimal use of in camera review, especially in the *Glomar* context.

I.
BACKGROUND FOR THE GOVERNMENT'S *GLOMAR* RESPONSE

A. Glomar's Origin Story: The Glomar Explorer and the Sunken K-19

In the early hours of June 5, 1974, a lone security guard was forced at gunpoint to unlock the Hollywood office of the Summa Corporation, Howard Hughes's principal holding company for his various aviation and hospitality enterprises.[6] Carting two oxy-acetylene tanks and a welding torch, a small gang of thieves infiltrated the office safes and absconded with two footlockers of sensitive documents. Initially, Summa only reported a theft of $68,000. After an aborted negotiation involving a million-dollar ransom, the Federal Bureau of Investigation and Los Angeles County Police Department were informed of the safes' full contents. The thieves now possessed a contract between Summa and the Central Intelligence Agency to salvage a sunken Soviet Union submarine from the Pacific Ocean floor.

Six years earlier, in March 1968, the Soviet Navy had initiated a search-and-rescue effort for the missing Golf class submarine, the *K-129*, which earlier that month failed to make routine radio contact or respond to calls from headquarters.[7] The Soviet's exhaustive but ultimately unsuccessful search by air and sea drew the attention of the U.S. Navy. A review of acoustic records from its Sound Surveillance System revealed that an underwater explosion had occurred northwest of Hawaii. For two months, the Navy combed over a ten-mile-square area in a research ship equipped with sonar, electronic scanners, and magnetic sensors until the wreck was finally located.

The discovery was thought invaluable. The Navy suspected that the submarine carried nuclear missiles and torpedoes, as well as targeting and coding devices, which could provide greater insight into the Soviet's Cold War-era weaponry and aid the United States in disarmament talks. The only obstacle was constructing a vessel that could lift the 4,000-ton wreck from its 16,000-foot-deep grave undetected by the Soviets. With the blessing of the White House,

6. William Farr & Jerry Cohen, *CIA Reportedly Contracted with Hughes in Effort to Raise Sunken Soviet A-Sub*, L.A. Times, Feb. 8, 1975, at 18.

7. *The Great Submarine Snatch*, Time, Mar. 31, 1975, at 20.

the Navy appealed to the CIA to orchestrate the covert retrieval, known as Project Azorian. The CIA approached business magnate and famous recluse Howard Hughes to provide its cover story for the creation of the *Glomar Explorer*, a 36,000-ton, deep-sea mining vessel. Hughes agreed. The Summa PR team contacted the press and began promoting the *Glomar Explorer* as Hughes' latest venture to harvest manganese nodules from the ocean floor for iron and steel production. Through his company, Global Marine Development, Inc., the CIA was able to subcontract with Lockheed Corporation for the design of the *Glomar Explorer* and Sun Shipbuilding and Drydock Company for its construction.

The *Glomar Explorer* began operation in the summer of 1974, but faced instant setback. After the ship had seized the wreck in its grappling hooks and raised it halfway to the surface, the *Glomar Explorer* malfunctioned and the *K-129* split in two. The part containing the Soviet's weaponry and code room slipped from the ship's hooks and fell back to the seabed. Empty-handed, the *Glomar Explorer* returned to California for repairs.

On February 8, 1975, while the Los Angeles County District Attorney pursued an extortion charge in the Summa burglary investigation, the *Los Angeles Times* published a front-page article in its evening edition about the CIA's contract with Hughes to raise the sunken submarine.[8] Although the article was riddled with inaccuracies, CIA Director William Colby contacted the editor immediately and asked the newspaper to kill the story. The *Los Angeles Times* declined but moved the article to page 18 in later editions and did not pursue further reporting. The CIA launched a campaign to forestall additional coverage of the *Glomar Explorer* in the press. Director Colby and other CIA officials contacted the *New York Times*, the *Washington Post*, the *Washington Star*, *Time*, *Newsweek*, *Parade*, three television networks including CBS, and the National Broadcasting System to brief their editors on the true mission of the *Glomar Explorer* and to warn of the potential harm to national security that could result from premature disclosure to the public. In exchange for this classified information, the CIA requested silence until the remaining part of the submarine was salvaged.

8. Martin Arnold, *C.I.A. Tried to Get Press to Hold Up Salvage Story: Agency Officials Argued for Delay on Ground of National Security–Media Agreed, But Only Temporarily*, N.Y. TIMES, Mar. 20, 1975, at 31; James Phelan, *An Easy Burglary Led to the Disclosure of Hughes-C.I.A. Plan to Salvage Soviet Sub*, N.Y. TIMES, Mar. 27, 1975, at 18; George Lardner & William Claiborne, *CIA's Glomar "Game Plan": How the CIA Tried to Head Off the Glomar Explorer Story*, WASH. POST, Oct. 23, 1977, at 1.

The news organizations reluctantly agreed to the CIA's terms, with the understanding that as soon as one newspaper broke the pact of silence then others were free to follow suit. Self-censorship in the interest of national security quickly gave way to the competitive urge. On March 18, 1975, reporter Jack Anderson went public with the story on the Mutual Broadcasting System radio station in Washington, D.C., calling the Hughes manganese story a CIA cover up for a 350 million dollar failure.[9] The *New York Times*, the *Washington Post*, and the *Los Angeles Times* quickly printed articles that described not only the *Glomar Explorer*, but also the CIA's extensive efforts to delay coverage. [10] After the dust settled, members of the press wondered whether the CIA's contact with news organizations was actually an attempt to protect Project Azorian or if it was instead a controlled leak of misinformation. Stories circulated that the CIA's true motive was to drum up positive publicity for the agency through an engineering marvel, to conceal from the Soviets that the *Glomar Explorer* had successfully raised all of the *K-129*, or to provide cover for a third and as-yet-unknown covert mission.[11]

B. Military Audit Project and Phillippi I & II: Judicial Acceptance of the Glomar Response

A month after Anderson's scoop, Felice "Fritzi" Cohen, Executive Director of the Military Audit Project and wife of the *Washington Post* reporter Ed Cohen, sought records about the CIA-Hughes contract and other financial arrangements between the government and private parties concerning the *Glomar Explorer*.[12] The conspiracy theories also attracted the curiosity of *Rolling Stone* reporter, Harriet "Hank" Phillippi, who sought CIA records describing the agency's attempt to dissuade the press from reporting on the *Glomar Explorer*.[13]

Both submitted a request for records under the FOIA. The CIA, however, resisted the FOIA's mandate of greater government transparency. Both Cohen and Phillippi's initial requests and later administrative appeals were rejected by the agency.[14] The CIA responded that the records, if any existed at all, were classified and exempted by statute. This was the first instance in which a government agency refused to confirm or deny the existence of records on

9. *The Great Submarine Snatch*, *supra* note 7.
10. *See* sources cited *supra* note 8.
11. *The Great Submarine Snatch*, *supra* note 7.
12. Military Audit Project v. Casey, 656 F.2d 724, 729 (D.C. Cir. 1981).
13. Phillippi v. CIA, 546 F.2d 1009, 1010 (D.C. Cir. 1976).
14. *Military Audit Project*, 656 F.2d at 730; *Phillippi*, 546 F.2d at 1011–12.

the grounds that their existence was itself a fact exempt from disclosure—a posture subsequently termed the *Glomar* response. Cohen, on behalf of the Military Audit Project and joined by U.S. foreign policy expert Morton Halperin, and Phillippi each brought suit in the U.S. District Court for the District of Columbia to enjoin disclosure.

In *Military Audit Project*, the CIA moved for dismissal or alternatively summary judgement.[15] In support of its motion, the CIA provided a brief public affidavit by the Deputy Secretary of State Lawrence Eagleburger and requested leave to submit two classified affidavits in camera. The District Court rejected the request on the basis of the Eagleburger affidavit and required a fuller public record. The CIA responded with public affidavits from CIA Deputy Director Carl Duckett and U.S. National Security Advisor Brent Scowcroft, which stated that acknowledgement of existence or nonexistence of the records sought could compromise intelligence operations, reveal technological developments relating to national security, disrupt foreign relations, and endanger military and diplomatic personnel overseas.[16]

The District Court denied summary judgement and ordered an in camera proceeding that required the CIA to produce the requested records and provide an explanation of the national security harm for each document.[17] The CIA balked and sought relief, arguing that the purpose behind the refusal to confirm or deny would be thwarted by such an order. The CIA again moved for dismissal with a public affidavit by CIA Director George H. W. Bush. Narrowing the focus of potential harm to national security, Bush's affidavit argued that the annual CIA budget, historically protected by Congress, could be inferred from disclosure of CIA expenditures for specific intelligence projects. The Court of Appeals denied the CIA's petition for a writ of mandamus. [18]

As a last resort, eight classified affidavits and testimony of undisclosed witnesses were submitted in camera while on remand, and the District Court dismissed the complaint based, unhelpfully, "on reasons stated in camera."[19] The case returned to the Court of Appeals, where the District Court was admonished for not providing a more informative opinion. The Court disclosed to the Military Audit Project that the identity of agencies involved and the content of

15. *Military Audit Project*, 656 F.2d at 731.
16. *Id.* at 731-33.
17. *Id.* at 733.
18. *Id.* at 734.
19. *Id.*

records sought were exempt from disclosure under exemptions (b)(1) and (b)(2) of the FOIA, which respectively protect classified information and information pertaining to internal personnel rules and practices of an agency. The Military Audit Project was then given 40 days to submit their briefs on appeal with this slightly better understanding of the reason behind the district court's ruling.[20]

Although Phillippi's litigation was certainly less circuitous than *Military Audit Project*, it was by no means more enlightening. In *Phillippi I*, the District Court, after receiving Deputy Secretary Eagleburger's public affidavit and reviewing two classified affidavits in camera, held that the information was exempt from disclosure under exemption (b)(3) of the FOIA, which allows the government to withhold information protected by statute, and granted the CIA's motion for summary judgement.[21] The Court of Appeals reversed and remanded the case to the district court for the CIA to provide a public record justifying its refusal to confirm or deny the existence of the records sought.[22] Additionally, the Court of Appeals rejected the CIA's attempt to introduce National Security Advisor Scowcroft's public affidavit from *Military Audit Project*, holding in part that summary judgement cannot be sustained by documents filed in a separate case concerning different but related issues.[23]

While both cases were in the district court on remand, a change in CIA leadership under the new Carter Administration led the agency to abandon is former position. Responsive records were disclosed revealing the CIA's involvement with the *Glomar Explorer*. In *Military Audit Project*, the CIA released 2,000 pages of responsive documents, while withholding other records pursuant to exemptions (b)(1) and (b)(3).[24] The CIA supported its partial disclosure with public affidavits by Secretary of State Cyrus Vance, then CIA Director Stansfield Turner, CIA Finance Director Thomas Yale, and CIA Associate Deputy Director Ernest Zellmer.[25] During this time, President Carter also issued Executive Order 12065, which established new standards for classification of government records.[26] The CIA reviewed its withholdings and confirmed that the information remained properly classified. Based on the public record, the

20. *Id.*

21. *Phillippi*, 546 F.2d at 1012.

22. *Id.* at 1013.

23. *Id.* at 1014-15.

24. *Military Audit Project*, 656 F.2d at 735.

25. *Id.* at 736.

26. Exec. Order No. 12065, 43 Fed. Reg. 28949 (June 28, 1978).

District Court granted summary judgement for the CIA, and the Military Audit Project appealed.

In *Phillippi I*, the CIA acknowledged that 154 responsive documents existed, releasing 16 in their entirety and 134 with redactions, and withholding four in their entirety.[27] Unsatisfied with the partial release, Phillippi sought the disclosure of the withheld documents and redacted information. In *Phillippi II*, the District Court granted summary judgement for the CIA on the ground that the records were properly withheld under exemption (b)(3), which shields from disclosure information exempt by statute.[28] Specifically, the National Security Act of 1947 provided that the CIA protect "intelligence sources and methods from unauthorized disclosure."[29]

In both cases, the Court of Appeals affirmed summary judgement. Despite unconfirmed CIA leaks to news organizations and partial FOIA disclosures, a national security interest remained in the withheld records.[30] With the same penchant as the press for a good conspiracy theory, the Court reveled in the possibility of the *K-129* explanation as either a second fallback cover after the first was blown by the Summa burglary or as a double bluff to create public speculation about the *Glomar Explorer*'s true purpose. "There may be much left to hide," the Court explained in *Phillippi II*, "and if there is not, that itself may be worth hiding."[31]

II.
JUDICIAL REVIEW OF AN AGENCY'S DISCLOSURE DETERMINATION PURSUANT TO THE FOIA

A. An Agency's Response to a FOIA Request

The FOIA requires federal executive agencies to release government records upon request by any person.[32] The statute's presumption of the value of disclosure and government transparency, however, is balanced by nine categories of exemption that protect, among other things, personal privacy, ongoing criminal investigations, and matters of national security.[33] Exemption (b)(1) of the

27. Phillippi v. CIA, 655 F.2d 1325, 1328 (D.C. Cir. 1981).

28. *Id.* at 1329.

29. 50 U.S.C. § 3523(b)(1)(A) (2018) (originally enacted as The National Security Act of 1947, 50 U.S.C. § 403(d)(3)).

30. *Military Audit Project*, 656 F.2d at 752-54; *Phillippi*, 655 F.2d at 1329–31.

31. *Phillippi*, 655 F.2d at 1331.

32. *See* Freedom of Information Act, 5 U.S.C. § 552(a)(3)(A) (2011).

33. 5 U.S.C. § 552(b); Orrin G. Hatch, Commentary, *The Freedom of Information Act: A Collage*, 46 PUB. ADMIN. REV. 608, 609–10 (1986) ("A society with no

FOIA protects classified information, specifically, government records that are (1) "authorized under criteria established by an [e]xecutive order to be kept secret in the interest of national defense or foreign policy" and are (2) "properly classified pursuant to such [e]xecutive order."[34] Executive Order 13526 currently governs the classification of government records.[35]

Under Executive Order 13526, information may be properly classified only if: (1) an original classification authority classifies the information; (2) the government owns, produces, or controls the information; (3) the information falls within one of the enumerated categories of protected information; and (4) the original classification authority determines that unauthorized disclosure could reasonably be expected to damage national security and is able to identify or describe the damage. [36] Enumerated categories of protected information include matters related to national security and defense; foreign relations and governments; and intelligence activities, sources, and methods. [37] Thus, for an agency to properly invoke exemption (b)(1), it must first comply with classification procedures set forth in Executive Order 13526 and withhold only those records under the FOIA that fall within the executive order's enumerated categories.[38]

Following an agency's review of its records and response to a FOIA request, including a determination that some or all information must be withheld pursuant to exemption (b)(1), the requester may seek judicial review of the agency's disclosure determination.[39] The FOIA empowers a federal court with the authority to enjoin an agency from improperly withholding information and to compel

access to information about its Government would be susceptible to abuses of power, as the builders of our constitutional system were aware. Yet a society in which all information is open to view compromises its primary goal of protecting its citizens against criminal and foreign threats as well as jeopardizes the privacy rights of many unsuspecting citizens.").

34. 5 U.S.C. § 552(b)(1); *see also* Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362, 1367 (4th Cir. 1975).

35. Classified National Security Information, Exec. Order No. 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009) [hereinafter E.O. 13526].

36. E.O. 13526 § 1.1(a); *see also* ACLU v. Dep't of Justice, 808 F. Supp. 2d 280, 298 (D.D.C. 2011).

37. E.O. 13526 § 1.4.

38. *See* King v. Dep't of Justice, 830 F.2d 210, 214 (D.C. Cir. 1987) ("An agency may invoke this exemption only if it complies with classification procedures established by the relevant executive order and withholds only such material as conforms to the order's substantive criteria for classification.").

39. Vaughn v. Rosen, 484 F.2d 820, 826 (D.C. Cir. 1973).

production of government records to the requester.[40] Typically, there is no dispute of material facts in a FOIA case and the court may decide on motions for summary judgment.[41]

At summary judgment, the court conducts a de novo review of the agency's disclosure determination, including its classification decision where exemption (b)(1) is invoked.[42] The agency bears the burden of justifying its decision to withhold the requested information through public declaration or affidavit that proper procedures to review the records were followed and the information responsive to the request logically falls within the claimed exemption.[43] The court may choose to examine the contents of the agency records in camera.[44]

B. Judicial Review: The Agency's Burden at Summary Judgment

A court may grant summary judgment to the agency on the basis of public declarations or affidavits that describe both the withheld information and the justification for nondisclosure. It may do so if it is provided with reasonably specific detail sufficient to demonstrate that the information logically falls within the claimed exemption. [45] Further, the agency's decision must not be called into question by contradictory evidence, nor impugned by evidence of agency bad faith.[46] On appeal, the court in question reviews the public record to determine whether the agency's affidavits provide a complete and detailed explanation for nondisclosure, so as to afford the requester a meaningful opportunity to contest and the lower court an adequate foundation to review the agency withholding. [47]

Courts have held that public affidavits, without further requiring in camera inspection of the withheld records, are sufficient to

40. 5 U.S.C. § 552(a)(4)(B).

41. Fed. R. Civ. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."); *James Madison Project*, 302 F. Supp. 3d 12, 19 (D.D.C. 2018).

42. 5 U.S.C. § 552(a)(4)(B); *see also* Hayden v. NSA, 608 F.2d 1381, 1386 (D.C. Cir. 1979).

43. *Hayden*, 608 F.2d at 1387; *see also* Halperin v. CIA, 629 F.2d 144, 147 (D.C. Cir. 1980).

44. 5 U.S.C. § 552(a)(4)(B).

45. *Halperin*, 629 F.2d at 148; Military Audit Project v. Casey, 656 F.2d 724, 738 (D.C. Cir. 1981).

46. *Id.*

47. *King*, 830 F.2d at 218.

conduct a de novo review.[48] Additionally, Congress has determined that an agency's affidavit concerning the applicability of an exemption, based on its assessment of a cognizable harm resulting from public disclosure, must be accorded substantial weight by the court.[49] This "substantial weight" standard recognizes that an agency's description of a potential future harm, as opposed to an actual past harm, requires a certain amount of speculation, especially in the arena of national security. [50] However, conclusory and generalized statements that the information is exempt from disclosure are inadequate for a court's de novo review.[51] To keep Congress's grant of substantial weight to the agency from usurping the court's role through judicial review, the agency's invocation of an exemption must appear both "logical and plausible" to the court.[52]

To meet its burden, the agency must strike a balance in the public record between specificity and generality. It is not the intent of the courts to require public affidavits with factual descriptions that, if disclosed, would result in the very harm the agency sought to avoid by withholding the records.[53] Yet, the public record must lay an adequate foundation for the requester to contest the nondisclosure and for the court to make a de novo review. Specificity within the public record is necessary "to correct, however, imperfectly, the asymmetrical distribution of knowledge that characterizes FOIA litigation."[54]

Where classified information is concerned, a full public record may be impossible because the level of specific detail necessary to justify nondisclosure could compromise national security. In such cases, a classified affidavit for in camera review is appropriate. [55] Congress has left the decision of when classified affidavits should be

48. Weissman v. CIA, 565 F.2d 692, 697 (D.C. Cir. 1977) ("[W]here the public record is sufficient to permit a legal ruling, the inquiry need go no further."); *Hayden*, 608 F.2d at 1386 ("[T]he court is to afford this opportunity to the agency [to show proper classification through affidavit] before ordering any in camera inspection of documents.").

49. 5 U.S.C. § 552(a)(4)(B).

50. *Halperin*, 629 F.2d at 149.

51. *Vaughn*, 484 F.2d at 826; *see also Hayden*, 608 F.2d at 1387 ("The affidavits will not suffice if the agency's claims are conclusory, merely reciting statutory standards, or if they are too vague or sweeping.").

52. Gardels v. CIA, 689 F.2d 1100, 1105 (D.C. Cir. 1982).

53. *King*, 830 F.2d at 219.

54. *Id.* at 218.

55. *See Hayden*, 608 F.2d at 1385 (explaining that, given "[t]he unique signals intelligence mission of NSA[,] . . . secrecy concerns are greater here than is usual in FOIA cases" and thus receiving affidavits in camera was appropriate).

permitted to the discretion of the courts. [56] De novo determinations based on in camera review, "without full benefit of adversary comment on a complete public record," are fundamentally contrary to the adversarial system.[57] As a result, courts have habitually abstained from the practice unless relevant questions remain unanswered and in camera review is required to make a proper de novo determination.[58] Some judicial opinions have gone so far as to state that, where an agency has met its burden through public affidavit, in camera review is "neither necessary nor appropriate."[59] Courts have thus been discouraged from undertaking in camera review based on the assumption that "it can't hurt."[60]

C. Judicial Review: The Requester's Burden at Summary Judgment

If an agency can show that records have been properly withheld, then the burden shifts to the requester to show that summary judgment should not be granted to the agency.[61] The requester may accomplish this either by proof that the agency has acted in bad faith or has waived its otherwise valid exemption claim through prior disclosure of the protected information.[62]

For all intents and purposes, allegations of agency bad faith have proven unsuccessful in carrying the requester's burden at summary judgment. Bad faith arguments have arisen through two situations: (1) where an agency withholds records concerning government conduct later deemed unlawful and (2) where an agency, after previously withholding the requested information, releases the information after a later review of the records. In the first instance, courts maintain that records produced through illegal government activity may nonetheless contain classified information

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56. 5 U.S.C. § 552(a)(4)(B).

57. *Hayden*, 608 F.2d at 1385.

58. Wilner v. NSA, 592 F.3d 60, 75–76 (2d Cir. 2009) ("A court should only consider information *ex parte* and *in camera* that the agency is unable to make public if questions remain after the relevant issues have been identified by the agency's public affidavits and have been tested by plaintiffs.").

59. *Hayden*, 608 F.2d at 1387.

60. Ray v. Turner, 587 F.2d 1187, 1195 (D.C. Cir. 1978) (internal quotation marks omitted).

61. *See Halperin*, 629 F.2d at 148.

62. *See* Afshar v. Dep't of State, 702 F.2d 1125, 1131 (D.C. Cir. 1983) (discussing "bad faith or a general sloppiness in the declassification or review process"); *see also* Pub. Citizen v. Dep't of State, 11 F.3d 198, 201 (D.C. Cir. 1993) (discussing the criteria for waiver).

exempt from public disclosure. [63] In the second, courts characterize an agency's willingness to revisit its prior disclosure determination and to release more information to the requester as an act of good, not bad, faith. [64] Further, courts are concerned that penalizing an agency for its initial improper withholding, after self-correction, will deter agencies in the future from revisiting initial, overly cautious withholdings.

Alternatively, the requester may meet his or her burden by showing that the agency has waived its claim to an otherwise valid exemption through prior official acknowledgement of the protected information.[65] Unlike agency bad faith, plaintiffs have frequently asserted official acknowledgement arguments and the doctrine's parameters are well defined through FOIA litigation. Official acknowledgement requires that the information sought (1) be as specific as the information previously disclosed, (2) match the information previously disclosed, and (3) have been made public through a prior official and documented disclosure.[66]

The specificity prong requires that the information previously released be at least as specific as the information sought.[67] For example, in *ACLU*, the court held that the CIA had not waived its right to withhold information concerning individual high value detainees because the requester could only point to a general description in the public domain of the confinement conditions at Guantanamo Bay and the CIA's interrogation techniques.[68] The information previously released, a general description of the CIA program, was not as specific as the information sought, details of the capture, detainment, and interrogation of individual detainees.

The matching prong requires that the information previously released exactly match, rather than be similar to, the information sought. This part of official acknowledgement is implicated where the requester attempts to apply prior disclosure of certain information to related, but still protected, information. For example, the redacted information within a government document released in part cannot be said to match the segregated, unredacted information within that same document. Although related to the overarch-

63. ACLU v. Dep't of Def., 628 F.3d 612, 622 (D.C. Cir. 2011) ("Documents concerning surveillance activities later deemed illegal may still produce information that may be properly withheld under exemption 1.").

64. *Military Audit Project*, 656 F.2d at 752; *Wilner*, 592 F.3d at 75.

65. Fitzgibbon v. CIA, 911 F.2d 755, 765 (D.C. Cir. 1990).

66. *Fitzgibbon*, 911 F.2d at 765. *E.g.*, *Afshar*, 702 F.2d at 1133.

67. Wolf v. CIA, 473 F.3d 370, 378 (D.C. Cir. 2007).

68. *ACLU*, 628 F.3d at 625.

ing subject matter of the document, the redacted and unredacted portions convey different information. [69] This is why the court in *Military Audit Project* and *Phillippi II* upheld the CIA's partial release. Similarly, previously disclosed records that acknowledge a fact at one point in time or at a certain geographical location do not extend to records sought that prove the same fact at another time or location.[70]

Finally, the prior disclosure prong requires the information sought to have been made public through an official and documented disclosure by the agency or its authorized representative. [71] The parameters of prior disclosure have been drawn by courts through a litany of FOIA cases in which the circumstances did not give rise to a prior disclosure.[72]

Courts stringently apply the specificity, matching, and prior disclosure prongs because the records sought often relate to mat-

69. Ancient Coin Collectors Guild v. Dep't of State, 641 F.3d 504, 510 (D.C. Cir. 2011).

70. *Fitzgibbon*, 911 F.2d at 766.

71. *Wolf*, 473 F.3d at 378 (quoting *Fitzgibbon*, 911 F.2d at 765).

72. For example, official acknowledgement cannot be based on public speculation, logical deduction, or undisclosed sources. *Id.* at 378 (quoting *Fitzgibbon*, 911 F.2d at 765); *see also Afshar*, 702 F.2d at 1130; Moore v. CIA, 666 F.3d 1330, 1334 (D.C. Cir. 2011) (holding that the FBI's withholding of information originating with the CIA and at the request of the CIA did not officially acknowledge that CIA records existed on the same subject matter requested from the FBI); Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362, 1370 (4th Cir. 1975) ("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."). Official acknowledgement does not result from an agency official's unauthorized disclosure of identical or similar information. *See* E.O. 13526 § 1.1(c) ("Classified information shall not be declassified automatically as a result of any unauthorized disclosure of identical or similar information."). The court has reasoned that an agency official's leak of classified information cannot waive the agency's right to protect classified information. *See Alfred A. Knopf*, 509 F.2d at 1370. Similarly, official acknowledgement must occur during the course of employment. A former agency official is bound by confidentiality agreements and may not disclose classified information that is known to him or her as the result of employment, regardless of the existence of an independent source for that information. *Id.* at 1371. A disclosure made by another agency is also not considered an official acknowledgement by the agency from which the information is sought. *See* Frugone v. CIA, 169 F.3d 772, 774 (D.C. Cir. 1999). However, an inadvertent or limited disclosure does qualify as an official acknowledgement. *See* Memphis Pub. Co. v. FBI, 879 F. Supp. 2d 1, 12 (D.D.C. 2012) (holding that the FBI's inadvertent release of confidential human source information waived its right to protect that information from disclosure); Johnson v. CIA, 2018 U.S. Dist. LEXIS 17830, at *13–14 (S.D.N.Y. 2018) (holding that the CIA's limited disclosure of classified information to trusted reporters was a waiver of the right to keep the information private).

ters of national security.[73] The rationale behind official acknowledgement doctrine is that, while intelligence and counterintelligence activities may be an "open secret" among nation states, official confirmation of the fact would force a foreign power to "save face"[74] through retaliation:

> While it is known and accepted that nations engage in secret activities, designed to promote their foreign and national defense policy interests, traditionally, and for sound practical reasons in the conduct of foreign affairs, governments do not officially acknowledge that they engage in such activities. In this context all nations are aware that they may be the objects of such operations and may even unofficially acknowledge this fact. No government, however, could tolerate the official acknowledgment by another government that such an operation has been conducted against it. When such official acknowledgment occurs, the nation that has been the object of such an operation must take some action in response.[75]

Despite the willingness of executive agencies and the courts to tolerate spy games in the absence of official acknowledgement, the public is generally less accepting of unacknowledged open secrets. Jack Anderson, the Washington, D.C. reporter who broke the press pact of silence to cover the *Glomar Explorer* story, explained that "international etiquette" is not a matter of national security. [76]

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73. ACLU v. CIA, 109 F. Supp. 3d 220, 243 (D.D.C. 2015); *Pub. Citizen*, 11 F.3d at 203 ("We recognize that this is a high hurdle for a FOIA plaintiff to clear, but the Government's vital interest in information relating to national security and foreign affairs dictates that it must be.").

74. Phillippi v. CIA, 655 F.2d 1325, 1332–33 (D.C. Cir. 1981) ("In the world of international diplomacy, where face-saving may often be as important as substance, official confirmation . . . could have an adverse effect on our relations [with other nations]."); *see also Afshar*, 702 F.2d at 1130–31 ("Unofficial leaks and public surmise can often be ignored by foreign governments . . . but official acknowledgment may force a government to retaliate.") (citations omitted).

75. *Military Audit Project*, 656 F.2d at 732.

76. *Anderson Says Soviet Knew Submarine Story*, N.Y. TIMES, Mar. 26, 1975, at 13 ("Mr. Anderson said there had been numerous leaks on the expedition of Glomar Explorer. 'So the Russians knew. We knew they knew. They knew we knew they knew,' Mr. Anderson said. He said he had decided to ignore the appeal of the Director of Control Intelligence, William E. Colby, not to print the story when 'Colby told us it would be "rubbing [the Soviets'] noses in it" to let the American people know.'").

III.
JUDICIAL REVIEW OF AN AGENCY'S *GLOMAR* RESPONSE

Executive Order 13526 expressly authorizes an agency's refusal to confirm or deny the existence or nonexistence of records requested pursuant to the FOIA whenever their existence or nonexistence is itself a classified fact.[77] In a FOIA litigation where an agency has provided a *Glomar* response to the requester, there are no documents for the court to review other than the affidavits justifying the agency's refusal. [78] In addressing some of the earliest *Glomar* cases, the courts contemplated that there may be a greater need to examine classified affidavits in camera and without the benefit of adversarial process.

If an agency can show that the existence of the records is properly withheld, the burden shifts to the requester to demonstrate that the agency has waived its right to assert a *Glomar* response, because the existence or nonexistence of the requested records has been officially acknowledged.[79] In the context of a *Glomar* response, official acknowledgement concerns the existence, not the content, of the requested records. For example, in *Wolf*, where a former CIA director gave a prepared statement before a Congressional hearing that included dispatch excerpts, the court found that the CIA had waived its right to assert that records related to the subject of the prepared statement did not exist.[80] "[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."[81] Similarly, in *ACLU*, the President's acknowledgement that the U.S. government had participated in drone strikes made it neither logical nor plausible for the CIA to claim that it did not have an intelligence interest in the strikes.[82]

If the court determines that the agency has officially acknowledged the existence of records, then the agency may not rely on the *Glomar* response. In an apparent attempt to console agencies,

77. *See* E.O. 13526 § 3.6(a); ACLU v. Dep't of Justice, 808 F. Supp. 2d 280, 298 (D.D.C. 2011).

78. *Phillippi*, 546 F.2d at 1013 ("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.").

79. *Wilner*, 592 F.3d at 70.

80. *Wolf*, 473 F.3d at 370.

81. *Id.* at 379.

82. ACLU v. CIA, 710 F.3d 422, 430 (D.C. Cir. 2013).

courts have explained that defeat of the *Glomar* response does not necessarily result in the compelled disclosure of records. [83] The agency is simply required to review the records and determine what information is exempt and what information, if any, can be released. The FOIA, however, directs the agency to review the records with the objective of partial release of the information if full disclosure is impossible.[84] Foreclosing the use of the *Glomar* response forces an agency to engage with the information within its records, to actively segregate non-exempt from exempt information, and to release the segregable portion of records to the requester.

Although the subject matter that prompted the agency's *Glomar* response is protected from disclosure by exemption, the released information can prove equally valuable for informing the public about government operations. In fact, the process of segregation can create a new figure-ground perception; that is, by removing the particulars of the records, the reader can recognize larger patterns of information. For example, Josh Gerstein, co-plaintiff in the *James Madison Project*, submitted a FOIA request for records related to FBI investigations into leaks of classified information to the press.[85] The FBI released 300 pages of heavily redacted investigative files, removing the names of government employees, the agencies involved, and any information concerning the alleged leaks. By withholding the specific information of each leak's investigation, the FBI, whether inadvertently or not, revealed a systemic problem among agencies within the Intelligence Community. The *New York Sun* published the FOIA release along with a frontpage article by Gerstein describing how the lack of cooperation by victim agencies repeatedly thwarted FBI efforts to uncover the source of leaked information. Although agencies were obligated to report suspected leaks to the Department of Justice for referral to the FBI, agencies often cancelled meetings last minute without rescheduling or failed to provide necessary documents to special agents. In stark contrast

83. *Wolf*, 473 F.3d at 380; *see also ACLU*, 109 F. Supp. 3d at 225 (upholding CIA's release of one redacted memorandum and withholding of all remaining records following remand).

84. 5 U.S.C. § 552(a)(8)(A) ("An agency shall—(i) withhold information under this section only if—(I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b); or (II) disclosure is prohibited by law; and (ii)(I) consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible; and (II) take reasonable steps necessary to segregate and release nonexempt information. . . .").

85. Josh Gerstein, *Leak Probes Stymied, FBI Memos Show*, N.Y. SUN, Jan. 10, 2007, at 1.

with public statements by CIA officials, the FBI demonstrated agencies' preoccupation with preventing further dissemination of leaked information rather than cooperation to identify the source of the leak and prevent future unauthorized disclosures.

A. Afshar, Fitzgibbon, and Wolf: Development of the Official Acknowledgement Doctrine and First Application in the Glomar Context

In 1983, the elements of official acknowledgement were first developed in *Afshar*, but it was not until 1990 in *Fitzgibbon* that the court formalized the elements as a doctrine. Further, official acknowledgement doctrine was not applied to the *Glomar* context until 2007 in *Wolf*.

Alan Fitzgibbon, a historian studying the disappearance of Jesus de Galindez, a Spanish political writer and exile, submitted a FOIA request to the CIA and FBI.[86] The majority of the records identified as responsive to the request were withheld pursuant to, among others, exemption (b)(1).[87] In dispute was the CIA's withholding of CIA station locations, one of which had been made publicly available through a CIA document shared with Congress.[88] On appeal, the *Fitzgibbon* court formalized the three-prong test for official acknowledgement, which was derived from facts considered important for the court's analysis in a separate case, *Afshar*. [89]

Nassar Afshar sought information pertaining to himself and his activities while serving as an editor of an Iranian newspaper and as chairman of a committee for a free Iran.[90] The court rejected his reliance on books authored by former CIA agents and officials, which discussed the existence of CIA stations in foreign countries and relationships between the CIA and foreign intelligence services.[91] The court explained that Mr. Afshar failed to show an official acknowledgement of a relationship between the CIA and SAVAK, the secret police and intelligence service of the Iranian Pahlavi dynasty, because the books (1) did not specifically describe a relationship between the CIA and SAVAK, (2) did not show a continuing relationship between the two agencies matching the date range of the withheld records, and (3) was not an official and docu-

86. *Fitzgibbon*, 911 F.2d at 757.
87. *Id.*
88. *Id.* at 758.
89. *Id.* at 765 (citing *Afshar*, 702 F.2d at 1133).
90. *Afshar*, 702 F.2d at 1128.
91. *Id.* at 1133.

mented disclosure because the authors were no longer in government service.[92]

From the analysis of the facts in *Afshar*, the *Fitzgibbon* court distilled three factors for official acknowledgement: "First, the information requested must be as specific as the information previously released. Second, the information requested must match the information previously disclosed. . . . Third, we held that the information requested must already have been made public through an official and documented disclosure."[93] The *Fitzgibbon* court concluded that the matching factor of its three-prong test required the officially acknowledged information to temporally match the records sought. Accordingly, records relating to a CIA station at a time before the date of the congressional hearing, in which related information about the CIA station was disclosed, could remain protected.[94]

Almost two decades later, in *Wolf*, the court applied for the first time the official acknowledgement doctrine to an agency's *Glomar* response. After the CIA issued a *Glomar* response to Paul Wolf's FOIA request for records relating to Jorge Gaitan, an assassinated Colombian presidential candidate, Mr. Wolf pointed to congressional testimony by CIA Director R. K. Hillenkoetter.[95] In a prepared statement, Hillenkoetter testified to the CIA's awareness of political unrest following the assassination of Gaitain and preceding the 1948 riots in Bogota. The court found that the testimony, which included excerpts of dispatches from CIA sources in Colombia, was sufficient to draw an inference that the CIA maintained records on Gaitan.[96]

The *Wolf* court addressed the difference in the official acknowledgement standard in the *Glomar* context. Whereas the evaluation in other FOIA cases was for the match between the information requested and the content of the prior disclosure, the prior disclosure in the *Glomar* context must establish the existence or nonexistence of the records sought. "[T]he prior disclosure necessarily matches both the information at issue—the existence of records—and the specific request for that information."[97] Because the specific information at issue was the existence of records per-

92. *Id.*
93. *Fitzgibbon*, 911 F.2d at 765.
94. *Id.* at 766.
95. *Wolf,* 473 F.3d at 373.
96. *Id.* at 379.
97. *Id.* at 378.

taining to Gaitan, Hillenkoetter's testimony and its reliance on CIA dispatches confirmed the existence of those records.

B. Smith and James Madison Project: Application of Divergent Official Acknowledgement Standards

Although the official acknowledgement doctrine is an appropriate means for a requester to carry his or her burden at summary judgment, judges within the U.S. District Court for the District of Columbia disagree about how formalistically the official acknowledgement doctrine should be applied in the *Glomar* context.

Grant Smith, a researcher on Middle Eastern policy, filed a FOIA request with the CIA for its budget line items supporting Israel from 1990 through 2015.[98] The CIA issued a *Glomar* response. After the CIA failed to timely respond to Mr. Smith's administrative appeal, he sought judicial review. [99] To overcome the CIA's *Glomar* response, Mr. Smith provided a statement by President Obama that, due to U.S. military and intelligence assistance, Israel could defend itself against Iran or its proxies.[100] The *Smith* court found that President Obama had provided an official acknowledgement that the budget line items existed, because it could be inferred from his statement that the CIA provided intelligence assistance to Israel and must have means of appropriating funds to provide monetary or non-monetary support. [101] The court distinguished the official acknowledgement exception for FOIA exemptions from the *Glomar* response. Relying on *Fitzgibbon* and *Wolf*,[102] the court explained that, whereas FOIA exemptions required the factors of specificity, matching, and prior disclosure, the *Glomar* response required only prior disclosure because that factor alone settled the point at issue, that is, whether the information existed.[103] The additional factors of specificity and matching were inapplicable. The court concluded that the government's assertion that it did not maintain the records was neither logical nor plausible in light of the official acknowledgement.[104]

Following *Smith*, the court was faced with a similar *Glomar* case. The James Madison Project (JMP), a Washington, D.C. non-profit that educates the public on intelligence gathering and national se-

98. Smith v. CIA, 246 F. Supp. 3d 28 (D.D.C. 2017).
99. *Id.* at 30–31.
100. *Id.* at 32.
101. *Id.* at 33.
102. *Wolf,* 473 F.3d at 379.
103. *Smith*, 246 F. Supp. 3d at 32.
104. *Id.* at 33.

curity, submitted a FOIA request relating to the Trump Dossier by British intelligence operative Christopher Steele.[105] The dossier alleged that the Russian government possessed compromising personal and financial information about then-presidential candidate Donald Trump. The FOIA request, submitted to the Office of the Director of National Intelligence (ODNI), CIA, NSA, and FBI, specifically sought the two-page synopsis of the dossier presented to the President-elect, as well as the agencies' final determinations and investigative files regarding the factual accuracy of the dossier.[106] The ODNI, CIA, and NSA responded that they possessed the synopsis, but withheld the synopsis in full pursuant to exemptions (b)(1) and (b)(3).[107] As to the request for the agencies' analysis of the synopsis, the agencies issued a *Glomar* response.[108] The FBI, on the other hand, responded with a blanket *Glomar* to the entirety of the FOIA request pursuant to exemption (b)(7)(A), which protects information related to a pending law enforcement investigation. [109]

JMP argued that President Trump, former Director of National Intelligence James Clapper, and former FBI Director Jim Comey had all officially acknowledged the existence of the synopsis and related records. JMP pointed to Trump's numerous interviews, tweets, and Comey's termination letter;[110] Comey's testimony before the House Permanent Select Committee on Intelligence and statements made after his removal from office;[111] and Clapper's press release, stating that the dossier was not a product of the Intelligence Community and that no judgment had been made as to its veracity, as well as statements made following his resignation. [112]

105. *James Madison Project*, 302 F. Supp. 3d 16.

106. *Id.* at 17.

107. 5 U.S.C. § 552(b)(3) ("[Disclosure] does not apply to matters that are . . . specifically exempted from disclosure by statute (other than section 552b of this title), if that statute—requires that the matters be with- held from the public in such a manner as to leave no discretion on the issue; or establishes particular criteria for withholding or refers to particular types of matters to be withheld; and if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.").

108. *James Madison Project*, 302 F. Supp. 3d at 18.

109. *Id.*; 5 U.S.C. § 552(b)(7)(A) ("[Disclosure] does not apply to matters that are . . . records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information could reasonably be expected to interfere with enforcement proceedings. . . .").

110. *James Madison Project*, 302 F. Supp. 3d at 24–26.

111. *Id.* at 26–28.

112. *Id.* at 28.

The court declined to extend official acknowledgement to those statements made by former executive officials, even as supplemental material to other evidence, and held that the public official statements did not amount to an official acknowledgement for the information sought. Trump's tweets regarding Comey's possession of the dossier and testimony to Congress confirming the existence of an investigation into Russian interference in the 2016 presidential election did not acknowledge the FBI's possession of the synopsis.[113] While the court acknowledged that a presidential tweet could be an official acknowledgement, Trump's tweets discrediting the dossier appeared to come from media reporting or his own personal knowledge, not through information received from the Intelligence Community.[114]

Relying on *ACLU* and *Smith*, JMP urged the court to adopt a logical and plausible inference standard to overcome a *Glomar* response.[115] Under such a standard, the information previously disclosed would be sufficient to waive the agency's right to invoke a *Glomar* response if that position is neither logical nor plausible in light of the prior disclosure. The court rejected this recommendation and explained that, since *Wolf*, the *Fitzgibbon* three-prong test remains relevant for evaluating a claim of official acknowledgement in the *Glomar* context, if perhaps not as formalistically applied as when evaluating a withheld document's content.[116] Rather, the matching and specificity prongs merge into one, while prior disclosure remains a separate prong.[117] "In the *Glomar* context, the specificity requirement concerns the 'fit' [or match] between the particular records sought and the records that are the subject of the public official statements."[118] The logical and plausible language that appeared in *ACLU* was used to evaluate an agency's justification for applying a FOIA exemption to withhold records or issue a *Glomar* response, but that standard did not displace the specificity requirement within the *Fitzgibbon* three-prong test.[119]

The court explained further that there are two instances in which the burden of proof may be met to establish the existence of

113. *Id.* at 29–30.

114. *Id.* at 33–34.

115. *Id.* at 21.

116. *Id.* ("In the *Glomar* context . . . if 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.") (quoting *Wolf*, 473 F.3d at 378-79).

117. *Id.*

118. *Id.* at 22.

119. *Id.*

the records sought through official acknowledgement: "(1) where the existence of responsive records is plain on the face of the official statement, e.g., *Wolf*, 473 F.3d at 370, and (2) where the substance of an official statement and the context in which it is made permits the inescapable inference that the requested records in fact exist, e.g., *ACLU*, 710 F.3d at 422."[120]

C. The Right Standard

The disagreement that has arisen within the Fourth Circuit is whether the official acknowledgement doctrine should be revised in the *Glomar* context in light of the fact that the issue is the existence of the records rather than their content. The *Smith* court argues that the standard should be lowered; the *James Madison Project* court believes that it should not.

The lower standard contemplated does not necessarily remove the requirements of specificity, matching, and prior disclosure. What it does recommend is a less formal analysis that does not consider each prong individually, recognizing in the *Glomar* context that satisfaction of matching necessarily satisfies specificity. Although JMP relied on the plausible and logical language, perhaps to its detriment, a departure from the *Fitzgibbon* three-prong test was not unwarranted. The specificity and matching requirements were created to permit the compelled disclosure of agency records—line by line information—by the courts. They are inapplicable to the disclosure that records, without more, exist.

What is relevant in the *Glomar* context is that, through official government statements or actions, an agency has made a prior disclosure of the existence of the records. Prior disclosure can be held by a court on evidence that is circumstantial or direct, that is, an inescapable inference based on an agency's actions or agency statements that are a prima facie acknowledgement.

IV.
THE JUDICIARY'S RELUCTANT USE OF IN CAMERA REVIEW IN FOIA LITIGATION

Where an agency has met its burden at summary judgment through public affidavit, the courts have stated that it is neither necessary nor appropriate to undertake an in camera inspection of the records or, as may be the case with a *Glomar* response, to require in camera review of classified affidavits.[121] The requirement that pub-

120. *Id.* at 22.

121. *See Hayden*, 608 F.2d 1381, 1387 (D.C. Cir. 1979).

lic affidavits contain reasonably specific detail is as much for the purpose to demonstrate that the information logically and plausibly falls within the claimed exemption as it is to allow the court to forgo in camera review, which is treated as a last resort when an affidavit is insufficient to reach a de novo decision. The courts provide several justifications for their reluctance: (1) in camera inspection of the records places a significant administrative burden on the judiciary;[122] (2) in camera review undermines the adversarial process; [123] (3) in camera review does not provide the requisite deference to agency expertise;[124] and (4) the specificity standard for public affidavits ensures reliability of the agency's representations to the court.[125] The courts' justifications, however, are unpersuasive.

A. Administrative Burden

With the increasing number of FOIA litigations, as well as the voluminous amount of records concerned in each case, courts argue that they are ill-equipped to conduct an in camera inspection of all records.[126] In camera inspection of the records significantly taxes court resources, such that it should not be undertaken without a compelling need.[127] Congress did not contemplate that the courts would assume an administrative function by conducting a line by line review of the contested records; [128] instead, Congress placed that burden squarely with the agency.[129]

The courts' reluctance to undertake an in camera review due to the administrative burden of inspecting the withheld records is applicable only where the FOIA litigation concerns exemptions asserted on specific information. Where an agency has issued a *Glomar* response, there are no records for the court to inspect. The

122. See *infra* Section IV.A.

123. See *infra* Section IV.B.

124. See *infra* Section IV.C.

125. See *infra* Section IV.D.

126. *See* Vaughn v. Rosen, 484 F.2d 820, 823–26 (D.C. Cir. 1973) ("We could test the accuracy of the trial court's characterizations by committing sufficient resources to the project, but the cost in terms of judicial manpower would be immense.").

127. Ray v. Turner, 587 F.2d 1187, 1195 (D.C. Cir. 1978).

128. *See* Weissman v. CIA, 565 F.2d 692, 697–98 (D.C. Cir. 1977) (discussing congressional intent); *see also* Military Audit Project v. Bush, 418 F. Supp. 876, 878 (D.D.C. 1976) ("There is . . . justifiable concern that Federal Courts have undertaken responsibilities that were never intended by assuming policy and administrative functions that the Constitution contemplated should properly reside with the Executive or the Congress.").

129. 5 U.S.C. § 552(a)(4)(B) ("[T]he burden is on the agency to sustain its action."); *see also Weissman*, 565 F.2d at 698.

court's in camera review would be of classified affidavits, not withheld records. For this reason, there is little administrative burden in receiving a classified affidavit that provides a fuller description of the cognizable harm than the public record.

B. Adversarial Process

In *Military Audit Project*, the court provided the most complete explanation as to why in camera review of a classified affidavit is contrary to the adversarial process:

> Should the Court choose to proceed in camera in its discretion, the citizen is denied access to the papers and as a practical matter neither he nor his counsel have any opportunity to question the factual grounds on which exemption is sought . . . . Is it not alien to our entire jurisprudence that courts are to function ex parte in private without benefit of the adversary process? Will it not degrade the judiciary if it is used as a mechanism for resolving statutory rights on the basis of undisclosed representations made in chambers to judges by parties having a direct personal interest in the outcome? Surely our whole jurisprudence since the Magna Carta and the abolition of Star Chamber proceedings requires that the judiciary in both fact and appearance remain neutral, independent of Executive or legislative influence. The adversary system is a well-tested safeguard for preserving the integrity of the judicial process. [130]

Here the court was asked by the agency to review classified affidavits in camera without the requester receiving the benefit of a public record to contest the agency's nondisclosure decision. The court rightly rejected this request to review the record in the "secrecy of chambers" as contrary to judicial due process. A full public record was required for the requester to receive a meaningful opportunity to present evidence contradicting the agency's arguments, as well as for the judge to receive the benefit of both arguments in order to make a responsible de novo decision.[131] The court also raised the issue that, by forgoing the adversarial process and permitting in camera review, judges risked an appearance of partiality before the public eye.[132] While the court contemplated permitting the requester's counsel to review the records under a confidentiality agreement, this compromise was ultimately rejected because it could either undermine the attorney-client relationship

130. *Military Audit Project*, 418 F. Supp. at 878.
131. *Id.*
132. *See Weissman*, 565 F.2d at 697.

or disadvantage pro se litigants. The court concluded that in camera review was unnecessary in most instances, and this view has survived through subsequent FOIA litigation. [133]

Although the court's rationale in *Military Audit Project* is based on a valid concern for the legitimacy of the judicial process, the reactionary tone is based on facts unique to the case. The agency had sought to avoid any public record through submission of a classified affidavit to the court. No agency today would contemplate making such a request, as public affidavits are required for the agency to meet its burden at summary judgment.

Additionally, the assumption that the public record can provide specific details sufficient to support the adversarial process, without disclosing the information that the agency seeks to protect through exemption, is based in case law developed through regular FOIA litigation, not cases involving *Glomar* responses. The prevailing assumption that public affidavits provide sufficient specificity does not consider the *Glomar* situation in which the existence, rather than the content, of the record is itself a classified matter. The factual descriptions necessary to justify the *Glomar* position of the agency may also be classified information. Thus, no public record can provide the requester with a meaningful opportunity to contradict the agency's nondisclosure decision. In such a situation, the court should recognize the inevitable disadvantage under which the requester must operate and require the agency to provide a classified affidavit for in camera review. Although the court will not have the benefit of opposing arguments, it is better for the court to base its de novo decision on an imbalance of information provided in camera than on an inadequate public record.

C. Agency Expertise

Congress instructed the judiciary to accord substantial weight to an agency's affidavit describing its nondisclosure determination.[134] The courts have interpreted the substantial weight requirement as a prohibition against substituting the agency's judgment with that of the court, provided that the agency followed proper procedure in making its nondisclosure determination and that the exemption claimed was not pretextual or unreasonable. [135] The rationale underlying the substantial weight requirement is that judges lack the requisite skill or experience in national security matters,

133. *Id.* at 698.
134. 5 U.S.C. § 552(a)(4)(B).
135. *See Weissman*, 565 F.2d at 697.

including international diplomacy and counterintelligence operations, and must defer to agency expertise if the affidavit appears plausible and logical.[136] Congress entrusted national security assessments to executive agencies, not to the courts.[137] Included in the calculus is the type of information considered for disclosure, such as sources, methods, and operations,[138] and the cognizable harm resulting from its disclosure, such as retaliation or countermeasures.[139]

Judicial deference to agency expertise should discourage courts from testing an agency's assessment of harm, or truthfulness

136. *See id.* at 697; Halperin v. CIA, 629 F.2d 144, 148 (D.C. Cir. 1980); Frugone v. CIA, 169 F.3d 772, 775 (D.C. Cir. 1999). *See also Military Audit Project*, 418 F. Supp. at 878.

137. *Fitzgibbon*, 911 F.2d at 766; *see also* E.O. 13526 § 1.3(a) ("The authority to classify information originally may be exercised only by: (1) the President and the Vice President; (2) agency heads and officials designated by the President; and (3) United States Government officials delegated this authority pursuant to paragraph (c) of this section.").

138. E.O. 13526 § 1.4 ("Information shall not be considered for classification unless its unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security in accordance with section 1.2 of this order, and it pertains to one or more of the following: (a) military plans, weapons systems, or operations; (b) foreign government information; (c) intelligence activities (including covert action), intelligence sources or methods, or cryptology; (d) foreign relations or foreign activities of the United States, including confidential sources; (e) scientific, technological, or economic matters relating to the national security; (f) United States Government programs for safeguarding nuclear materials or facilities; (g) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security; or (h) the development, production, or use of weapons of mass destruction.").

139. ACLU v. Dep't of Def., 628 F.3d 612, 625 (D.C. Cir. 2011) ("The CIA asserts that the public disclosure of the withheld information may degrade the CIA's ability to interrogate detainees, improve al Qaeda's insight into the United States' intelligence activities, and hinder the CIA's ability to obtain assistance from foreign nations."); New York Times Co. v. Dep't of Justice, 2017 U.S. Dist. LEXIS 168276, *65–66 (S.D.N.Y. 2017) ("The unauthorized disclosure of information concerning foreign relations or foreign activities of the United States can reasonably be expected to lead to diplomatic or economic retaliation against the United States; identify the target, scope, or time frame of intelligence activities of the United States in or about a foreign country, which may result in the curtailment or cessation of these activities; enable hostile entities to assess United States intelligence gathering activities in or about a foreign country and devise countermeasures against these activities; or compromise cooperative foreign sources, which may jeopardize their safety and curtail the flow of information from these sources.").

absent evidence of bad faith.[140] However, deference does not necessarily proscribe a court's request for a classified affidavit to supplement the public record. Especially where an agency has issued a *Glomar* response, the public affidavit must toe a line between specificity and generality, so as to provide as much information as possible to the requester while still protecting the existence or nonexistence of the records. As a practical matter, the court should request a classified affidavit when the public record is simply inadequate for making a de novo decision about the nondisclosure determination, but in the *Glomar* context, the court should also consider whether the generality required to protect the existence of the agency's records may create misleading, though unintentional, representations within the public record. A classified affidavit, in this instance, does not contravene the substantial weight requirement. The purpose of requesting the classified affidavit is not to question the agency's risk assessment or reliability, but to ensure that the public record is an accurate generalization of the classified factual descriptions and that, through the process of sanitizing classified information, nothing material is lost in its translation for the requester.

D. Specificity and Reliability

Underlying the requirement that public affidavits provide specific detail is the assumption by the courts that specificity is an accurate measure of agency reliability:

> [T]he government's burden does not mean that all assertions in a government affidavit must routinely be verified by audit. Reasonable specificity in affidavits connotes a quality of reliability. When an affidavit or showing is reasonably specific and demonstrates, if accepted, that the documents are exempt, these exemptions are not to be undercut by mere assertion of claims of bad faith or misrepresentation.[141]

Unless the public affidavit is inadequate or there is evidence of bad faith, courts are discouraged from inquiring into the veracity of an agency's explanation for its nondisclosure determination. This is in accordance with a court giving substantial weight to an agency's expertise, so long as the agency provides specific details for its assessment of harm to national security.[142] Specificity, however, is no

140. *Weissman*, 565 F.2d at 697; *see also* Larson v. Dep't of State, 565 F.3d 857, 865 (D.C. Cir. 2009).

141. *Ray*, 587 F.2d at 1195.

142. *See Hayden*, 608 F.2d at 1387 (D.C. Cir. 1979) (explaining that, when affidavits contain information sufficient to place the documents within the exemp-

guarantee for veracity—there is such a thing as an elaborate lie. Given the generality of a public affidavit supporting a *Glomar* response, the requester is at a severe disadvantage to identify an inaccurate representation, whether intentionally or not.

Congress feared more than "bad faith" in the exercise of agency discretion to withhold government information. Even "good faith" interpretations by an agency are likely to suffer from the bias of the agency . . . . Being aware of the dangers of relying too much on agency "expertise," Congress required the courts to take a fresh look at decisions against disclosure as a check against both intentional misrepresentations and inherent biases.[143]

A classified affidavit would ensure that representations made in the public affidavit are supported by classified information provided to the court through in camera review.

V.
POTENTIAL HARMS TO THE JUDICIARY AND EXECUTIVE AGENCIES THROUGH MINIMAL USE OF IN CAMERA REVIEW

The judiciary's reluctance to undertake in camera review of classified affidavits relating to an agency's *Glomar* response is based on justifiable reasoning against in camera inspection of withheld records in a regular FOIA litigation. However, arguments concerning administrative burden, agency expertise, and reliability are less persuasive in the *Glomar* context because the disputed issue is the existence, not the content, of the records. The courts' reluctance to conduct an in camera review may also result in: (1) the failure to make a proper de novo decision as required by Congress; (2) an appearance of partiality that undermines public trust in the judicial process; and (3) the missed opportunity to legitimize an agency's nondisclosure determination.

A. Oversight

By accepting agency representations in public affidavits, there is a risk that the courts forgo making a de novo decision as required by Congress.[144] According substantial weight does not necessarily require the court to defer to agency expertise in making nondisclosure determinations. Congress trusted the courts to approach na-

tion category, it is "in accordance with congressional intent" to inquire no further) (citation omitted).

143. *Ray*, 587 F.2d at 1210 (Wright, C.J., concurring).

144. 5 U.S.C. § 552(a)(4)(B).

tional security matters with, if not expertise, common sense. [145] In *Ray*, the court noted that Senator Edmund Muskie stated that he could not imagine any federal judge "substitut[ing] their judgement for that of an agency head without carefully weighing all the evidence in the arguments presented on both sides" and that to discourage judicial review would "make the classifiers themselves privileged officials, immune from the accountability necessary for Government to function smoothly." [146]

Where the public record is insufficient because the underlying justifications are also a matter of national security, it is proper for the court to review classified affidavits in camera, and if the court finds that the classified affidavits do not in fact contain sensitive information, the court should order release of the information to the requester.[147]

B. Partiality

In FOIA litigation, there is an inherent asymmetry of information:

> [T]he party with the greatest interest in obtaining disclosure is at a loss to argue with desirable legal precision for the revelation of the concealed information. Obviously the party seeking disclosure cannot know the precise contents of the documents sought; secret information is, by definition, unknown to the party seeking disclosure. . . . [O]nly one side to the controversy (the side opposing disclosure) is in a position confidently to make statements categorizing information. . . . This lack of knowledge by the party seeking disclosure seriously distorts the traditional adversary nature of our legal system's form of dispute resolution. Ordinarily, the facts relevant to a dispute are more or less equally available to adverse parties. In a case arising under the FOIA this is not true, as we have noted, and hence the typical process of dispute resolution is impossible. In an effort to compensate, the trial court, as the trier of fact, may and often does examine the document in camera to determine whether the Government has properly characterized the information as exempt.[148]

The agency's representations in public affidavits are accepted by the courts as presumptively true and valid. Although the courts

145. *Ray*, 587 F.2d at 1194.
146. *Id.* at 1194 n.18.
147. *Hayden*, 608 F.2d at 1384–85.
148. *Vaughn*, 484 F.2d at 823–25.

cannot require an agency to disclose exempt information on the public record in order to correct this imbalance, the courts do have a responsibility to preserve the adversarial process by ensuring that the agency's advantageous position is not abused. If the judicial branch makes only infrequent inquiries into an agency's justifications through classified affidavit, it risks appearing as a rubber stamp for executive nondisclosure determinations.

Courts have claimed that in camera review deprives the requester of the opportunity to present opposing arguments, but where there is a public record consisting of conclusory or generalized statements, as is sometimes the nature of public affidavits supporting a *Glomar* response, a classified affidavit serves as a necessary backstop against misleading representations.[149] In light of this acknowledgement, the courts' reluctance to request classified affidavits demonstrates a passivity that appears, at best, as indifference to the information imbalance and, at worst, as partiality towards the government.

In *Phillippi II*, the court went to great lengths to explain the CIA's likely strategy to disseminate cover stories for the use of the *Glomar Explorer* and, despite official acknowledgement of one cover story to the press, the agency's justified withholding of records that would confirm or deny the cover stories as the *Glomar Explorer*'s actual or feigned use:

> Almost as important as the substance of the fallback cover would be the way in which the CIA protected it. Any appearance of carelessness would tend to undercut the credibility of the fallback story. The CIA would, therefore, be required to appear to devote as much zeal to protecting the fallback story from disclosure as it would devote to shielding the truth from revelation. Paradoxically, however, when the initial cover story was blown, it would be important for the CIA to arrange for the rapid and convincing dissemination of the fallback story in order to prevent inquisitive reporters from stumbling onto the truth before they could be sold on the authenticity of the fallback story. If there was a fallback cover story for the *Glomar Explorer* project that the vessel was designed to raise a sunken Russian submarine from the ocean floor Director Colby's apparently simultaneous efforts to cover up the fallback story while at the same time assuring its widespread dissemination begin to make sense . . . . [O]nce the fallback story was out, the Government suddenly had to reverse its position and begin re-

149. *Id.*

> fusing to confirm or to deny the stories it could have been planting in the press only days earlier; if the Government openly "admitted" the fallback story, it would thereby in effect declassify it, and as a result lose its ability to refuse to open its files on the subject.[150]

The CIA's controlled and calculated leaks of disinformation to the public are described by the court with an absorption that ignores the government transparency mandated by the FOIA and disserves the judge's role as a neutral arbiter.

C. Legitimacy

The FOIA was created to shift the government's information policy away from an individual's "need to know" to the public's "right to know" about government operations. An informed citizenry fosters public discourse about government policy that was deemed necessary to democratic governance. Functionally, the statute sought to replace the existing regime of information leaks, in which members of the press curried favor with officials to obtain exclusive access to government information. Initially, the FOIA received a cool reception among veteran reporters, who viewed a statute granting equal access to government records as the end to their competitive edge through established connections with government sources.[151] Today, the FOIA is regarded with much of the same disdain as the APA. Instead of shining a light on government operations, the FOIA seeks to delay and obstruct public access to government records through administrative obstacles. [152] The FOIA imposes regulations on both information that should be protected

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150. *Phillippi*, 655 F.2d at 1330; *see also Military Audit Project*, 656 F.2d at 745 ("[T]he record before us suggests either that the CIA still has something to hide or that it wishes to hide from our adversaries the fact that it has nothing to hide.").

151. Sam Archibald, *The Early Years of the Freedom of Information Act – 1955 to 1974*, 26 POL. SCI. & POL. 726, 728 (1993) ("Many Washington correspondents were little interested in opening up government information. After all, they had their sources, and a law breaking loose government records might open their sources to competitors.").

152. David T. Barstow, *The Freedom of Information Act and the Press: Obstruction or Transparency?*, 77 SOC. RES. 805, 805–06 (2010) ("Nothing in the world makes my blood boil faster than the Freedom of Information Act (FOIA). I have been pounding against this law for over 20 years and I cannot count the number of times government officials have looked me in the eye, given me a little smile, and said, 'Well, you could always file a Freedom of Information request.' They know when they say those words that they are condemning me to Siberia, that they have bought themselves months if not years of delay and obstruction.").

from unauthorized disclosure and information that should not be withheld from the public with undue delay.

In FOIA litigation involving a *Glomar* response, it is the court's responsibility to ensure that government action is legitimate. From the requester's perspective, in camera review provides independent verification of the agency's representations in its public affidavit.[153] From the agency's perspective, in camera inspection of its records bolsters the agency's credibility in its classification assessment, both in the present FOIA action and for future requests.[154] The information sought for which an agency issues a *Glomar* response often relates to matters of significant public interest, such as the military's use of drones,[155] or allegations of government misconduct, such as the detainment and interrogation program at Guantanamo Bay or the NSA's mass surveillance program.[156] The government's refusal to disclose records related to matters of national importance, much less to confirm or deny the existence of those records, undermines the legitimacy of the government by shrouding its operations in secrecy, depriving its citizens of information necessary to participate in public discourse and diminishing the public's trust in a democratic system of governance.

Although an agency's nondisclosure determination is often justified by legitimate national security interests, it may not be possible to describe those interests sufficiently on the public record to satisfy the requester. In such a case, the court should review in camera a fuller description of the agency's justifications to allay the requester's concerns and to lend legitimacy to the agency's nondisclosure determination. In camera review not only ensures the right outcome in the present case, but puts an agency on notice that judicial review of disclosure determinations is likely in the future. "[T]hreat of court review, like the threat of hanging, clears the

153. *Larson*, 565 F.3d at 869.

154. *Military Audit Project*, 418 F. Supp. at 877.

155. ACLU v. Dep't of Justice, 808 F. Supp. 2d 280, 299–300 (D.D.C. 2011) ("The fact that the public may already speak freely of the existence of drones, or speculate openly that such a program may be directed in part or in whole by the CIA, does not emasculate the CIA's warnings of harm were it forced to acknowledge officially the existence or nonexistence of requested records.").

156. Wilner v. NSA, 592 F.3d 60, 75 (2d Cir. 2009) ("We cannot base our judgment on mere speculation that the NSA was attempting to conceal the purported illegality of the [Terrorist Surveillance Program] by providing a *Glomar* response to plaintiffs' requests."); *ACLU*, 628 F.3d at 622 ("We conclude that the President's prohibition of the future use of certain interrogation techniques and conditions of confinement [for high value detainees] does not diminish the government's otherwise valid authority to classify information about those techniques and conditions and to withhold it from disclosure under exemptions 1 and 3.").

mind and leads to a much more . . . careful consideration of what needs to be kept secret than takes place when a document is first produced within the bureaucracy."[157]

CONCLUSION

The courts should recognize that in a FOIA litigation the public is acting from a place of distrust and disadvantage, and that it is in the interest of both the agency and the requester for the court to depart from the rigid formalism of official acknowledgement doctrine where only the existence of the government records is sought. The courts should also demonstrate a greater willingness to accept classified affidavits, because the justifications for discouraging in camera review are less applicable to the *Glomar* context. More importantly, increased in camera review of classified affidavits would help fulfill the statutory requirements for judicial review, improve the appearance of judicial neutrality, and further legitimize agency nondisclosure determinations.

157. Morton H. Halperin, *Freedom of Information and National Security*, 20 J. PEACE RES. 1, 2 (1983) ("The still unsatisfied requester, now the plaintiff in a lawsuit, can ask the judge to overrule the government and order the release of additional information. This never happens. . . . The system nevertheless works, and in many agencies works reasonably well.").