UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT MOORE, *et al.*, Plaintiffs,	)	
v.	)	Civil Action No. 20cv1027 (RCL)
UNITED STATES CENTRAL INTELLIGENCE AGENCY Defendant.	)	

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Defendant United States Central Intelligence Agency ("Defendant" or "CIA") moves for summary judgment. Specifically, this matter involves a Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, request by Plaintiffs to the Defendant, dated November 25, 2019, seeking the declassification and production of records held by Defendant concerning American prisoners of war ("POW") from the Korean War, particularly United States Air Force ("USAF") Captain Harry Cecil Moore. ECF No. 1. As reflected in the status reports submitted to the Court, Defendant has completed its processing responsive matter and has produced all responsive, non-exempt material to Plaintiffs. ECF Nos. 20. Accordingly, Defendant asserts that there are no issues of material fact in genuine dispute and that any information not provided was properly withheld pursuant to an exemption under FOIA. In support of its Motion, the Defendant refers this Court to the accompanying Memorandum of Point and Authorities, Statement of Material Facts as to Which There is no Genuine Dispute, Declaration of Vanna Blaine, the Vaughn Index, and the attached exhibits. A proposed Order is also attached.

Respectfully submitted,

MATTHEW M. GRAVES, D.C. Bar # 481052
United States Attorney

BRIAN HUDAK
Acting Chief, Civil Division

By: /s/ Darrell C. Valdez
DARRELL C. VALDEZ, D.C. Bar #420232
Assistant United States Attorney
555 4th Street, N.W., Civil Division
Washington, D.C. 20530
(202)252-2507
Darrell.Valdez@usdoj.gov

Counsel for Defendant

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
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MATTHEW M. GRAVES, D.C. Bar # 481052
United States Attorney

BRIAN HUDAK
Acting Chief, Civil Division

By: /s/ Darrell C. Valdez
DARRELL C. VALDEZ, D.C. Bar #420232
Assistant United States Attorney
555 4th Street, N.W., Civil Division
Washington, D.C. 20530
(202)252-2507
Darrell.Valdez@usdoj.gov

Counsel for Defendant

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

At issue in this Freedom of Information Act, 5 U.S.C. § 552 ("FOIA") lawsuit is a FOIA request served by Plaintiffs upon the United States Central Intelligence Agency ("Defendant" or "CIA") seeking all records relating to American prisoners of war ("POW") from the Korean Conflict, particularly United States Air Force ("USAF") Captain Harry Cecil Moore. This request seeks the same material sought by Plaintiffs in a prior FOIA matter to which the CIA asserted a *Glomar* response. *See Sauter, et al. v. CIA, et al.*, 17cv1596 (RCL). Nevertheless, the material facts in this matter are not in genuine dispute and demonstrate that Plaintiffs received all non-exempt documents in the possession of Defendant and that that the information redacted or otherwise withheld falls squarely within the FOIA Exemptions asserted by the Defendant. Accordingly, summary judgment should be entered in favor of the Defendant.

Procedural Background

Plaintiffs allege that they submitted a written FOIA request to the CIA on November 25, 2019. ECF No. 1. In their request, Plaintiffs seek 21 types of records relating to American POWs from the Korean Conflict, including USAF Captain Harry Cecil Moore, who was shot down over North Korea and possibly taken prisoner. *Id*.

On December 10, 2019, Defendant acknowledged receiving the Plaintiffs' request on December 3, 2019, and assigned an agency tracking number. Def. Ex. A. Plaintiffs filed this Complaint on April 20, 2020. ECF No. 1. Defendant filed an Answer to the Complaint on June 3, 2020. ECF No. 6.

Plaintiffs' Prior FOIA Request

On July 31, 2017, the CIA received a FOIA request from Plaintiffs requesting "nine separate categories of records about American prisoners of war captured during the Korean conflict." *Sauter v. Dep't of State, et al.*, 17cv1596 at ECF No. 30-2 at ¶ 96; *see also* Mem Op. (ECF No 47) at 3 (identifying the requestors as the same requestors in this matter).[1] The request contained nine separate subparts, some of which are similar to requests in this civil action. *Id*. at ECF No. 12 (Amended Complaint) at ¶ 24. The CIA conducted a search for records responsive to some of the Plaintiffs' requests and found no responsive records. *Id*. at ECF No. 30-2 (Statement of Material Facts) at ¶¶ 97-110. Where Plaintiffs requested information that would otherwise be classified, Defendant asserted a *Glomar* response and refused to confirm or deny the existence of any responsive records.[2] *Id.* at ¶¶ 111-113.[3]

After full briefing by the parties, this Court granted summary judgment in favor of the CIA. *Id*. at ECF Nos. 46 (Court Order), and 47 (Mem. Op.) at 9-10. Plaintiffs did not challenge the *Glomar* response, nor did they appeal the decision of the Court. *See generally,* 17cv1596, and ECF No. 62 (Notice of Concession).

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[1] Captain Moore's widow, Lois More, was a named plaintiff in both actions. Mrs. Moore passed away, however, during the pendency of this matter. ECF No. 20.

[2] *Phillippi v. CIA*, 655 F.2d 1325 (D.C. Cir. 1981) (affirming the CIA's use of the "neither confirm nor deny" response to a FOIA request for records concerning the CIA's reported contacts with the media regarding Howard Hughes' ship the "Hughes Glomar Explorer")-.

[3] The requests to which the CIA asserted a *Glomar* response include requests seeking documents showing the CIA's intelligence interest in, or clandestine connection to a particular individual (including Capt. Moore or any POW), documents showing an association between Capt. Moore and the CIA that were not made public, and records or correspondence with foreign countries regarding American POW/MIAs from the Korean Conflict. ECF No. 30-8 (Declaration of Antoinette Shiner) at ¶ 15.

Defendant's Response to the Present FOIA Request

In response to this Court's July 9, 2020 Order requiring that the parties meet and confer and file a Joint Status Report proposing a schedule for proceeding in this matter, ECF No. 11, the parties conferred and agreed that the Defendant prioritize 11 items identified by Plaintiffs from the FOIA request, and to a rolling processing/production of records. ECF No. 12. Thereafter, Defendant processed documents and provided non-exempt material to Plaintiffs. *See* ECF Nos. 12 - 20; *see also* Declaration of a Vanna Blaine ("Blaine Decl.") at ¶¶ 8 - 18 (attached). Defendant made its final production on October 13, 2021. ECF No. 20. In total, CIA produced six (6) documents in full, 29 documents in part, and withheld four (4) documents full. Blaine Decl. at ¶ 17. Where Plaintiffs requested information that would otherwise be classified (Plaintiffs Item Nos. 1, 5-6, 13, 16-17, and 21), the CIA re-asserted the *Glomar* response and refused to confirm or deny the existence of any responsive records. *Id.* at ¶ 18.

Plaintiffs' Objections to Defendant's Production

The parties held subsequent discussions in an attempt to narrow the issues to be resolved by the Court. Counsel for Plaintiffs informed Defendant that Plaintiffs were objecting to the redactions and withholdings made by Defendant. ECF No. 20.

ARGUMENT

I. LEGAL STANDARDS

A. Summary Judgment Standard

Summary judgment is appropriate when the pleadings and evidence "show[] that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). It is up to the party moving for summary judgment

to demonstrate the absence of a genuine issue of material fact. *See Celotex Corp.*, 477 U.S. at 323. A genuine issue is one that "might affect the outcome of the suit under the governing law." *Anderson*, 477 U.S. at 248. Once the moving party has met its burden, the nonmoving party "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue" in dispute. *Id.* Any factual assertions contained in affidavits and other evidence in support of the moving party's motion for summary judgment shall be accepted as true unless the facts are controverted by the nonmoving party through affidavits or other documentary evidence. LCvR 7(h).

Summary judgment is an appropriate method for a court to dispose of a FOIA complaint. *See Rugiero v. U.S. Dep't of Justice*, 257 F.3d 534 (6th Cir. 2001); *see also Jones v. FBI*, 41 F.3d 238,242 (6th Cir. 1994). Indeed, FOIA cases are typically decided on motions for summary judgment. *Judicial Watch, Inc. v. Dep't of the Navy*, 25 F. Supp. 3d 131, 136 (D.D.C. 2014)); *see also Brayton v. Office of the U.S. Trade Rep.*, 641 F.3d 521, 527 (D.C. Cir. 2011) ("[T]he vast majority of FOIA cases can be resolved on summary judgment"). To be entitled to summary judgment, the Defendant must prove that each document was produced, not withheld, is unidentifiable, or is exempt from disclosure. *Weisberg v. U.S. Dep't. of Justice*, 627 F.2d 365, 368 (D.C. Cir. 1980).

Under FOIA, federal courts may "enjoin the agency from withholding agency records and [may] order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B). Requesters may prevail in a FOIA action only if an agency has (1) improperly (2) withheld (3) agency records, and jurisdiction may only be invoked if "the agency has contravened all three components of this obligation." *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980). An agency satisfies the summary

judgment requirements in a FOIA case by providing the Court and the plaintiffs with affidavits, declarations, or other evidence showing that it has discharged its obligations under the FOIA. *Hayden v. Nat'l Sec. Agency Cent. Sec. Serv.*, 608 F.2d 1381, 1384 (D.C. Cir. 1979); *Church of Scientology v. U.S. Dep't of Army*, 611 F.2d 738, 742 (9th Cir. 1980). The declarations need not be overly detailed or otherwise provide "meticulous documentation," but rather only need "explain in reasonable detail the scope and method of the search conducted by the agency[.]" *Perry v. Block*, 684 F.2d 121, 127 (D.C. 1982).

Because the record before this Court demonstrates that Defendant has met its obligation under the FOIA, no genuine issue as to any material fact exists and summary judgment should be granted to Defendant as a matter of law. *See Perry v. Block*, 684 F.2d 121, 126 (D.C. Cir. 1982).

B. <u>The Purpose of the Freedom of Information Act.</u>

FOIA generally provides that any person has a right, enforceable in court, to obtain access to federal agency records, except to the extent that such records are protected from public disclosure by any of the nine exemptions or three special law enforcement record exclusions. While FOIA's statutory objective is to achieve "the fullest responsible disclosure," *see* S. Rep. No; 89-813, at 3 (1965), the Supreme Court has emphasized that only "[o]fficial information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press,* 489 U.S. 749, 773 (1989). Thus, FOIA's "basic purpose" reflects a "general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (citation omitted). "Congress recognized, however, that public disclosure is not always in the public interest." *CIA v. Sims*, 471 U.S. 159, 166-67 (1985). In passing FOIA, "Congress sought to reach a workable balance between the

right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy." *John Doe Agency*, 493 U.S. at 152 (citation and internal quotation marks omitted). "FOIA represents a balance struck by Congress between the public's right to know and the government's legitimate interest in keeping certain information confidential." *Ctr. for Nat'l Sec. Studies v. Dep't of Justice*, 331 F.3d 918, 925 (D.C. Cir. 2003) (citing *John Doe Agency*, 493 U.S. at 152).

The identity of the FOIA requester does not matter. *See e.g., EPA v. Mink*, 410 U.S. 73, 86 (1973) (declaring that FOIA is "largely indifferent to the intensity of a particular requester's need"); *Parsons v. FOIA Officer*, 121 F.3d 709, 1997 WL 461320, at *1 (6th Cir. Aug. 12, 1997) (holding that plaintiff's argument of "legitimate need for the documents superior to that of the general public or the press" fails because identity of requester is irrelevant to the determination of whether an exemption applies); *United Techs v. FAA*, 102 F.3d 688, 692 (2nd Cir. 1996) ("Congress created a scheme of categorical exclusion; it did not invite a judicial weighing of the benefits and evils of disclosure on a case-by-case basis"). So long as FOIA "is fundamentally designed to inform the public about agency action and not to benefit private litigants," a requestor's rights under FOIA "are neither increased nor decreased by reason of the fact that it claims an interest in the [matter sought]" greater than that shared by the average member of the public. *NLRB v. Sears, Roebuck & Co.,* 421 U.S. 132, 143 n.10 (1975).

II. FOIA EXEMPTIONs 1 AND 3 PROTECTS DOCUMENTS WITHHELD IN PART AND DEFENDANT'S *GLOMAR* RESPONSE

A. Exemptions 1 and 3 and *Glomar*

The CIA relied on Exemptions 1 and 3 when it redacted information from documents released in part, Blaine Decl. at ¶¶ 42-47, and when it asserted a *Glomar* response with respect to certain subparts of Plaintiffs' FOIA request. *Id.* at ¶¶ 48-54.

Exemption 1 protects from disclosure information that is "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" and "are in fact properly classified pursuant to such Executive Order." 5 U.S.C. § 552(b)(1). Under Executive Order 13,526, an agency may withhold information that an official with original classification authority has determined to be classified because its "unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security[.]" Exec. Order 13,526 § 1.4, 75 Fed. Reg. 707, 709 (Dec. 29, 2009). The information must also "pertain[] to" one of the categories of information specified in the Executive Order, including "intelligence activities (including covert action), intelligence sources or methods." Exec. Order 13,526 §§ 1.4(c); *see also Judicial Watch, Inc. v. Dep't of Defense*, 715 F.3d 937, 941 (D.C. Cir. 2013) ("[P]ertains is not a very demanding verb."). When it comes to matters affecting national security, the courts afford "substantial weight" to an agency's declarations addressing classified information, *King v. Dep't of Justice*, 830 F.2d 210, 217 (D.C. Cir. 1987), and defer to the expertise of agencies involved in national security and foreign relations. *See Fitzgibbon v. CIA*, 911 F.2d 755, 766 (D.C. Cir. 1990); *see also Benjamin v. State*, 178 F. Supp. 3d 1, 4 (D.D.C. 2016).

Exemption 3 permits an agency to withhold records "specifically exempted from disclosure by statute" provided that the statute either "(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3). As the D.C. Circuit has explained, "Exemption 3 differs from other FOIA exemptions in that its applicability depends less on the detailed factual contents of specific documents; the sole issue for decision is the existence of a relevant statute and the inclusion of

withheld material within that statute's coverage." *Goland v. CIA*, 607 F.2d 339, 350–51 (D.C. Cir. 1978). Judicial review of an assertion of Exemption 3 is limited to whether (1) the withholding statute qualifies as an Exemption 3 statute; and (2) the withheld material satisfies the criteria of the exemption statute. *See CIA v. Sims*, 471 U.S. 159, 167 (1985); *Fitzgibbon,* 911 F.2d at 761. The mandate to withhold information under Exemption 3 is broader than the authority under Exemption 1, as there is no need to demonstrate that disclosure will harm national security. *See Sims*, 471 U.S. at 167.

A *Glomar* response allows a Government agency to "refuse to confirm or deny the existence of records where to answer the FOIA inquiry would cause harm cognizable under a FOIA exception." *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007); *see also Sea Shepherd Conservation Soc'y v. IRS*, 208 F. Supp. 3d 58, 89 (D.D.C. 2016) ("The *Glomar* doctrine applies when confirming or denying the existence of records would itself cause harm cognizable under a FOIA exception"). In such instances, summary judgment is appropriate when the asserting agency provides a "public affidavit explaining in as much detail as is possible the basis for its claim that it can be required neither to confirm nor to deny the existence of the requested records." *Phillippi*, 546 F.2d at 1013. A *Glomar* response is appropriate if, upon a review of the agency's declaration, the assertion is deemed "logical" or "plausible." *Wolf*, 473 F.3d at 375. The Blaine Declaration demonstrates that requiring the CIA to confirm or deny the existence of responsive records about classified affiliations would reveal classified information protected by FOIA Exemptions 1 and 3. *See* Blaine Decl. at ¶¶ 48-60. And courts in this Circuit routinely uphold *Glomar* responses in such instances. *See, e.g., Wheeler v. CIA*, 271 F. Supp. 2d 132, 140 (D.D.C. 2003); *Morley v. CIA*, 699 F. Supp. 2d 244, 257–58 (D.D.C. 2010).

B. Documents Released in Part

1. Exemption 1

Here, the CIA released 29 documents in part, withholding information pursuant to FOIA Exemption 1. Blaine Decl. at ¶¶ 17; Vaughn Index at Entry Nos. 1-29. The records cover a range of CIA functions and operations, and contain classified information related to (1) intelligence activities and targets; (2) methods of collection of intelligence; and (3) classified relationships. Blaine Decl. at ¶ 44.

Information was withheld under Exemption 1 pursuant to the procedural and substantive requirements of Executive Order 13526, which governs classification. *See* Exec. Order 13526 § 1.l(a), § 1.4(c)-(d). Blaine Decl. at ¶ 40. Section 1.l(a) of Executive Order 13526 provides that information may be originally classified only if all of the following conditions are met: (1) An original classification authority is classifying the information; (2) the information is owned by, produced by or for, or is under the control of the U.S. Government; (3) the information falls within one or more of the categories of information listed in section 1.4 of Executive Order 13526; and (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in some level of damage to the national security, and the original classification authority is able to identify or describe the damage. Exec. Order 13526 § 1.l(a).

As provided in the attached Blaine Declaration states, Ms. Blaine "hold[s] classification authority," Blaine Decl. at ¶ 3, and has "determined that portions of the records responsive to Plaintiffs' request are currently and properly classified." Blaine Decl. at ¶ 42. In addition, the U.S. Government owns and controls this information, the information concerns "intelligence activities (including covert action), [or] intelligence sources or methods" and "foreign relations

or foreign activities of the United States" under section 1.4 of Executive Order 13526, and the disclosure of the information would result in damage to national security. *Id*. at ¶ 42.

"Intelligence activities" in this matter refer to the CIA's targets and operations, including the means used by the CIA to collect intelligence. Blain Decl. at ¶ 45. Disclosure of this information contained in CIA documents would reveal the means, policies, and approval processes used to collect certain CIA intelligence interests and activities. *Id.* Specifically, the documents requested by Plaintiffs here contain information that would reveal the priority of specific U.S. intelligence targets, the locations of CIA activities, and the targets of specific CIA operations, the disclosure of which would greatly impair effective collection of foreign intelligence. *Id.*; Vaughn Index at Document Entry Nos. 2, 5, 6, 8, 9, 10, 12, 15-21, 24, 25.

"Intelligence methods" are the means by which an intelligence agency accomplishes its objectives. Blaine Decl. at ¶ 46. Intelligence methods must be protected to prevent foreign adversaries, terrorist organizations, and others from learning the ways in which the CIA operates, which would allow them to take measures to hide their activities from the CIA or target CIA officers. *Id.* The documents requested by Plaintiffs contain information regarding specific types of intelligence methods, as well as policies and processes for conducting those intelligence methods. Disclosure of these details would neutralize the CIA's ability to apply those methods and would impair the CIA's ability to continue to collect intelligence and conduct operations. *Id.*; Vaughn Index at Document Entry Nos. 2-6, 8-13, 15-21, 24-27, 29.

"Classified relationships" includes information that would disclose specific intelligence sources, methods, and activities in operational use, including the identities of individuals and foreign partners who do business with the CIA. Blaine Decl. at ¶ 47. This includes "foreign government information" and "information pertaining to the foreign relations or activities of the

United States" under Executive Order 13526. *Id.* Revealing these relationships could hurt the CIA's relationship with these entities - entities that often agree to cooperate with the CIA on the understanding that the relationship will remain secret. *Id.* Here, certain documents requested by Plaintiffs discuss the process and policies for working with foreign services, individuals, and clandestine assets used to aid the CIA in its intelligence operations. *Id.* These details have been withheld because their disclosure would reveal intelligence priorities, and the CIA's information-sharing relationships information with foreign individuals and governments. *Id.* *See* Vaughn Index at Document Entry 2-6, 8-13, 15-21, 24-27, 29.

2. Exemption 3

FOIA Exemption 3 provides that FOIA does not apply to matters that are:

> Specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld....

5 U.S.C. § 552 (b) (3). Two statutes applicable here satisfy this Exemption – the National Security Act of 1947 (the "National Security Act") and the Central Intelligence Act of 1949 (the "CIA Act").

The National Security Act provides that the Director of National Intelligence ("DNI") "shall protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 3024 (i) (1). The National Security Act constitutes a federal statute which "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue." 5 U.S.C. §552(b)(3). Under the direction of the DNI pursuant to section 102A, and consistent with section l.6(d) of Executive Order 12333, the CIA is required to protect CIA intelligence sources and methods from unauthorized disclosure.

Section 6 of the CIA Act provides that the CIA shall be exempted from the provisions of "any other law" (here, the FOIA) which requires the publication or disclosure of the "organization, functions, names, official titles, salaries, or numbers of personnel employed by CIA". 50 U.S.C. § 3507; Blaine Decl. at ¶ 58. Pursuant to section 6, the CIA is exempt from disclosing information relating to its core functions - which plainly include clandestine intelligence activities - as well as information identifying the names or numbers of personnel. *Id.* Thus, the CIA Act constitutes a federal statute which "establishes particular criteria for withholding or refers to particular types of matters to be withheld" under Exemption 3 of the FOIA, 5 U.S.C. § 552(b) (3). *International Counsel Bureau v. CIA*, 774 F. Supp. 2d 262, 273 (D.D.C. 2011) ("the provisions of the NSA and the CIA Act cited by the Agency plainly are statutes contemplated by Exemption 3") (citing *Subh v. CIA*, 760 F.Supp.2d 66, 72–73 (D.D.C. 2011) ("It is well established that these provisions of the [NSA] and the [CIA] Act are 'precisely the types of statutes comprehended by exemption 3'")).

In the present matter, the CIA withheld released records in part in instances within the final response. Blaine Decl. at ¶ 58, and at Exh. I. Specifically, the CIA withheld titles, names, identification numbers, functions, and organizational information related to CIA employees, which is protected from disclosure pursuant to Exemption 3 of FOIA.[4] *Id.*

C. CIA *Glomar* Response

In response to items 1, 5-6, 13, 16-17, and 21 of Plaintiffs' FOIA request seeking records that would reveal a classified or unacknowledged connection to the CIA, or other statutorily protected fact, Defendant has asserted a *Glomar* response, stating that the CIA could neither

[4] Where the CIA issued a *Glomar* response under Exemption 3, the information sought would require the CIA to disclose information about its functions, the disclosure of which would substantially harm national security. *See infra.*

confirm or deny the existence or nonexistence of records responsive to the request. Blaine Decl. at ¶¶ 18, 21, 39, 48. *See also* Blaine Decl. at Exhs. H, I.

Summary judgment is appropriate under Exemptions 1 and 3 of FOIA when the asserting agency provides a "public affidavit explaining in as much detail as is possible the basis for its claim that it can be required neither to confirm nor to deny the existence of the requested records." *Phillippi*, 546 F.2d at 1013. A *Glomar* response is appropriate if, upon a review of the agency's declaration, the assertion is deemed "logical" or "plausible." *Wolf*, 473 F.3d at 375.

Exemption 1 protects from disclosure information that is "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" and "are in fact properly classified pursuant to such Executive Order." 5 U.S.C. § 552(b)(1). Under Executive Order 13,526, an agency may withhold information that an official with original classification authority has determined to be classified because its "unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security[.]" Exec. Order 13,526 § 1.4, 75 Fed. Reg. 707, 709 (Dec. 29, 2009). The information must also "pertain[] to" one of the categories of information specified in the Executive Order, including "intelligence activities (including covert action), intelligence sources or methods." Exec. Order 13,526 §§ 1.4(c); *see also Judicial Watch, Inc. v. Dep't of Defense*, 715 F.3d 937, 941 (D.C. Cir. 2013) ("[P]ertains is not a very demanding verb"). When it comes to matters affecting national security, the courts afford "substantial weight" to an agency's declarations addressing classified information, *King*, 830 F.2d at 217, and defer to the expertise of agencies involved in national security and foreign relations. *See Fitzgibbon*, 911 F.2d at 766; *see also Benjamin*, 178 F. Supp. 3d at 4.

Section 3.6(a) of Executive Order 13,526 additionally provides that an agency may refuse to confirm or deny the existence or nonexistence of requested records whenever the fact of their existence or nonexistence is itself classified under this order or its predecessors. Exec. Order 13,526, 75 Fed. Reg. 705 (2010). Here, Ms. Blaine "hold[s] original classification authority . . . under delegation of authority pursuant to . . . Executive Order…." Blaine Decl. ¶ 3. Ms. Blaine has further "determined the fact of the existence or nonexistence of classified records responsive to items 1, 5-6, 13, 16-17, and 21 of Plaintiffs' FOIA request are currently and properly classified," as they pertain to "intelligence activities (including covert action), [or] intelligence sources or methods" and "foreign relations or foreign activities of the United States, including confidential sources" within the meaning of sections 1.4(c) and 1.4(d) of the Executive Order. *Id*. at ¶ 48.

In the present FOIA action, mere confirmation or denial of the existence of responsive records would, in and of itself, reveal whether the CIA has an intelligence interest in or clandestine connection to a particular individual, group, subject-matter, or activity – a matter that is a classified fact. Blaine Decl. at ¶ 50. Confirmation or denial would reveal sensitive information about the CIA's intelligence interests, personnel, capabilities, authorities, and resources that Executive Order 13526 protects from disclosure. *Id.* at ¶ 53. Adversaries of the U.S. government could use such information to better predict CIA intelligence sources and methods, even with information as old as the information sought by Plaintiffs here. *Id.* at ¶¶ 52-53. Accordingly, the CIA has satisfied the thresholds required for demonstrating the propriety of its *Glomar* assertion with respect to FOIA Exemption 1. *See Wolf*, 473 F.3d at 375.

Exemption 3 permits an agency to withhold records "specifically exempted from disclosure by statute" provided that the statute either "(i) requires that the matters be withheld

from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3). As the Circuit Court has explained, "Exemption 3 differs from other FOIA exemptions in that its applicability depends less on the detailed factual contents of specific documents; the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within that statute's coverage." *Goland v. CIA*, 607 F.2d 339, 350–51 (D.C. Cir. 1978). Consequently, under Exemption 3, judicial review is limited to whether (1) the withholding statute qualifies as an Exemption 3 statute; and (2) the withheld material satisfies the criteria of the exemption statute. *See Sims*, 471 U.S. at 167; *Fitzgibbon v. CIA*, 911 F.2d 755, 761 (D.C. Cir. 1990). The mandate to withhold information under Exemption 3 is broader than the authority under Exemption 1, as there is no need to demonstrate that disclosure will harm national security. *See Sims*, 471 U.S. at 167.

As the Blaine Declaration details, CIA asserted a *Glomar* response under Exemption 3 based upon the National Security Act and the CIA Act. *See* Blaine Decl. at ¶ 56. Section 102A(i)(1) requires the Director of National Intelligence to "protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 3024(i)(1). The Supreme Court has recognized the "wide-ranging authority" provided by this provision to protect intelligence sources and methods. *Sims*, 471 U.S. at 159, 169–70, 177, 180; *see also Halperin v. CIA*, 629 F.2d 144, 147 (D.C. Cir. 1980) (explaining that the only question for the court is whether the agency has shown that responding to a FOIA request "can reasonably be expected to lead to unauthorized disclosure of intelligence sources and methods"). The Blaine Declaration demonstrates that confirming or denying the existence of responsive records would reveal information that would damage national security by revealing sensitive security requirements

that would potentially putting CIA officers at risk and increasing the likelihood of exposure of sensitive information. Blaine Decl. at ¶ 59. *See also Goland*, 607 F.2d at 350–51.

Accordingly, because the CIA has properly asserted Exemptions 1 and 3 and has further properly asserted a *Glomar* response to Plaintiff's FOIA requests, and this Court should grant summary judgment in favor of the Defendant.

III. FOIA EXEMPTIONS 6 PRECLUDES DISCLOSURE OF THE IDENTITIES AND OTHER INFORMATION REGARDING THIRD PARTIES AND CIA EMPLOYEES

Exemption 6 requires an agency to consider the personal privacy of the subject of the requested records. Specifically, Exemption 6 prohibits the release of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The threshold question for an agency justifying its withholding of a record pursuant to Exemption 6 is whether the records in question are personnel, medical or similar information. *N.Y. Times Co. v. Nat'l Aeronautics & Space Admin.*, 920 F.2d 1002, 1004 (D.C. Cir. 1990).

Once it is determined that Exemption 6 applies, the court must weigh the privacy interests implicated by the release of the requested records against the public's interest in their disclosure. *U.S. Dep't. of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762 (1989); *Nix v. United States*, 572 F.2d 998, 1002 (4th Cir. 1978). Exemption 6 bars any disclosure that "would constitute" an invasion of privacy that is "clearly unwarranted." *U.S. Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 497 n. 6 (1994).

Here, Defendant withheld information pursuant to Exemption 6 in Document Entry Nos. 1, 3, 4, 6, 15-20, 22-30. As set forth below, the records are "similar files" under Exemption 6, and the release of identifying information contained within those records would constitute a

clearly unwarranted of personal privacy. Accordingly, the records were properly redacted pursuant to Exemption 6.

1. Application of Exemption 6

Exemptions 6 requires an agency to consider the personal privacy of the subject of the requested records. Specifically, exemption 6 prohibits the release of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Therefore, the threshold question for an agency justifying its withholding of a record pursuant to Exemption 6 is whether the records in question are personnel, medical or similar information. *N.Y. Times,* 920 F.2d at 1004. As will be discussed below, the records in question are "similar files" for purposes of Exemption 6.

While "personnel and medical files" are easily identified, the term "similar files" is somewhat ambiguous. In *U.S. Department of State v. Washington Post Co.*, 456 U.S. 595 (1982), however, the Supreme Court firmly held the term is to be interpreted broadly rather than narrowly. *Id*. at 599-603. The Court stated that the protection of an individual's privacy "surely was not intended to turn upon the label of the file which contains the damaging information." *Id*. at 601. Rather, the Court made clear that all information that "applies to a particular individual" meets the threshold requirement for Exemption 6 protection. *Id*. at 602; *see also Sherman v. U.S. Dep't of the Army*, 244 F.3d 357, 361 (5th Cir. 2001) (recognizing the "Supreme Court has interpreted exemption 6 'files' broadly to include any 'information which applies to a particular individual'"). Therefore, the threshold inquiry requires a court to look not to the "'the nature of the file[ ] in which the information [is] contained,' but solely to whether the information in the file 'applies to a particular individual.'" *N.Y. Times*, 920 F.2d at 1007 (citing *Wash. Post*, 456 U.S. at 599, 602).

In considering the scope of the "similar files" language, the D.C. Circuit "has observed that Exemption 6 'is designed to protect personal information in public records, even if it is not embarrassing or of an intimate nature[.]'" *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002) (citing *Nat'l Ass'n of Retired Fed. Emps. v. Horner*, 879 F.2d 873, 875 (D.C. Cir. 1989)). The D.C. Circuit has previously described this threshold as "minimal." *Wash. Post Co. v. Dep't of Health & Human Servs.*, 690 F.2d 252, 260 (1982); *see also Reporters Comm.*, 489 U.S. at 776 ("categorical decisions may be appropriate and individual circumstances disregarded when a case fits into a genus in which the balance characteristically tips in one direction"). This protection even applies to identifying information of government employees. *N.Y. Times*, 920 F.2d at 1009-10. Thus, the D.C. Circuit held that the recorded voices of the NASA astronauts on the Space Shuttle Challenger constituted information that applies to particular individuals and, therefore, were "similar files" for purposes of Exemption 6. *Id*.

Applying the well-established case law, the documents, emails, and other matter containing employee and third-party identities and identifying information in this matter fall squarely within the "similar files" language of Exemption 6.

2. Balancing Private and Public Interests.

Once it is determined that Exemptions 6 applies to the matters sought, the inquiry shifts to whether disclosure of the information "would constitute a clearly unwarranted invasion of personal privacy," 5 U.S.C. § 552(b)(6). This inquiry involves a weighing of the privacy interest of the parties involved against "the only relevant public interest in the FOIA balancing analysis—the extent to which disclosure of the information sought would shed light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to." *Fed. Labor Relations Auth.*, 510 U.S. at 497 (internal quotation marks omitted).

With respect to the public interest in the information, the D.C. Circuit has long held that the public interest contemplated by FOIA is that of the general public, not a private litigant. *Ditlow v. Shultz*, 517 F.2d 166, 171-72 (D.C. Cir. 1975). The law is clear that a plaintiff's personal interest is entitled to no weight under FOIA. *Oguaju v. United States*, 288 F.3d 448, 450 (D.C. Cir. 2002), *judgment vacated*, 501 U.S. 970 (2004), *judgment reinstated,* 378 F.3d 1115 (D.C. Cir. 2004), *modified on other grounds*, 386 F.3d 273 (D.C. Cir. 2004). FOIA was not intended to be an "administrative discovery statute for the benefit of private parties."" *Brown v. FBI*, 658 F.2d 71, 75 (2d Cir. 1981) (citing *Ditlow*, 517 F.2d at 171-72). Nor did Congress intend to make the Federal Government a "clearinghouse for personal information." *Reporters Comm.*, 489 U.S. at 761. As mentioned above, the sole public interest in the FOIA balancing inquiry is to shed light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to. *Fed. Labor Relations Auth.*, 510 U.S. at 497.

In the absence of a public interest in the disclosure of the information withheld by the Defendant, any privacy interest will tilt the scale in favor of withholding the information, because, as the D.C. Circuit cogently observed, "something outweighs nothing, every time." *Oguaju*, 288 F.3d at 451 (citing *Horner*, 879 F.2d at 879).

In the present matter, the Defendant withheld only those narrow portions of 19 records that contain the names, titles, locations, telephone numbers, email addresses, and other identifying information related to working-level CIA personnel, third party individuals, and other private individuals mentioned in files under Exemption 6. Blaine Decl. at ¶¶ 62-64; *see generally* Vaughn Index at Entry Nos. 1, 3, 4, 6, 15-20, 22-30. These individuals have a substantial privacy interest in the withheld information. Courts have recognized that U.S. Government employees possess protectable privacy interests in their identities when release of

that information could cause the employees harassment and embarrassment, including in the conduct of their official duties. *See Brannum v. Dominguez*, 377 F. Supp. 2d 75, 84 (D.D.C. 2005) (upholding redaction of Air Force officials' names and signatures under Exemption 6). Furthermore, courts have recognized that the particular policies or matters with which U.S. Government employees and other third parties are associated can heighten the privacy interests in non-disclosure of their identities. *See, e.g., Elec. Privacy Info. Ctr.*, *v. DHS*, 384 F. Supp. 2d 100, 116-17 (D.D.C. 2005) ("threat to the privacy of DHS and TSA personnel derives from the nature of their employment . . . [a]s 'advocates for security measures that may be unpopular,' DHS and TSA employees are likely to experience annoyance or harassment following the disclosure of their involvement"); *Judicial Watch v. FDA*, 449 F. 3d 141, 152-53 (D.C. Cir. 2006) (upholding the redaction of the names of Food and Drug Administration employees involved in the regulatory approval of a controversial drug)). "[I]ntense scrutiny by the media that would likely follow disclosure" is one such harm that supports the finding of a substantial privacy interest in U.S. Government employee identities. *Judicial Watch, Inc. v. U.S. Dep't of State*, 875 F. Supp 2d 37, 46 (D.D.C. 2012).

The privacy interests of working-level CIA employees and third parties in non-disclosure of their identities outweigh any public interest in disclosure of that information. Release of their specific identities would not contribute to the public understanding of the CIA's activities for several reasons. First, the CIA has segregated and released personnel-related information that tends to shed light on the U.S. Government's activities. Blaine Decl. at ¶ 62. In particular, within the documents at issue, the CIA released the identities of more senior or high-ranking officials whose connection to the matter would be relevant to the understanding of the Government's actions. *Id.* The CIA also released the non-exempt contents of the documents,

which evidence CIA's activities. *See Judicial Watch*, 449 F.3d at 199 (distinguishing the public interest in substantive information about a particular drug's approval from the public interest in the identities of Food and Drug Administration employees who worked on the approval).

Courts have found such a tailored approach to satisfy the public interest in disclosure and justify the withholding of Government employee and third-party names. *See, e.g.*, *Judicial Watch Inc. v. U.S. Dep't of State*, 875 F. Supp. 2d at 48 (upholding the redaction of U.S. Government employee names and finding that the "public interest in the names of the two staffers is low because their involvement, and that of their offices, have been substantially disclosed"); *Davidson v. U.S. Dep't of State*, 206 F. Supp. 3d 178, 200 (D.D.C. 2016) (upholding the redaction of State Department employee names "[b]ecause [the names and contact information of State Department employees] would reveal 'little or nothing' more about the Department's conduct than the other information released to [Plaintiff]").

Given the significant privacy interest in non-disclosure of their identities, particularly in a high profile matter such as this that poses and increased likelihood of harassment abuse and harm to the individuals' lives and reputations, and the absence of a significant public interest in disclosure, the CIA properly found that that this information is exempt under FOIA Exemption 6.

After balancing the interests at stake, the CIA correctly determined that the personal information contained within its files must be withheld. The disclosure of the information could reasonably be expected to cause the persons referenced in its files embarrassment and harassment, and would do little, if anything at all, to aid the public's understanding of the CIA. Consequently, the substantial privacy interest outweighs any minimal public interest that would be served by its release, and the information is exempt under FOIA Exemption 6.

IV. ALL REASONABLY SEGREGABLE INFORMATION WAS PROVIDED

Because some of the documents comprised a mixture of material that could be released and material that could trigger harm to one or more interests protected by the cited FOIA Exemptions, Defendant conducted a document-by document and line-by-line review of these documents and segregated all reasonably segregable, non-exempt information. Blaine Decl. at ¶ 65. Indeed, this review was especially detailed because of the national security interests involved. *Id.* No further segregation of meaningful information in the documents could be made without disclosing information protected under the law. *Id.*; *see also* Vaughn Index.

V. CONCLUSION

Wherefore, for the reasons set forth above and in the accompanying Statement of Material Facts Not in Genuine Dispute, Defendant respectfully requests that the Court enter judgment in favor of the Defendant.

Respectfully submitted,

MATTHEW M. GRAVES, D.C. Bar # 481052
United States Attorney

BRIAN HUDAK
Acting Chief, Civil Division

By: /s/ Darrell C. Valdez
DARRELL C. VALDEZ, D.C. Bar #420232
Assistant United States Attorney
555 4th Street, N.W., Civil Division
Washington, D.C. 20530
(202)252-2507
Darrell.Valdez@usdoj.gov

Counsel for Defendant