IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS, INC.,	
Plaintiff,	
vs.	
THE CENTRAL INTELLIGENCE AGENCY, *et al.*,	**Civil Action No. 1:22-cv-11532-DJC**
Defendants.	

OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

From the outset, Plaintiff has framed the Freedom of Information Act (FOIA) requests at issue here with reference to the law enforcement investigation now being headed by the Special Counsel's Office. Plaintiff introduced each of its FOIA requests by referring to "federal law enforcement agents' search[]" of the premises located at 1100 S. Ocean Blvd., Palm Beach, Florida ("Premises"), a property of former President Donald J. Trump," and observed that, "[a]ccording to court documents, [that] search . . . resulted in the seizure of classified records." Plaintiff's FOIA Request, ECF No. 9-1 at 1.[1] Explaining the significance of its FOIA requests, Plaintiff argued that "[t]he requested records (or a response that no such records exist) would meaningfully inform the public as to the truthfulness or falsity of Mr. Trump's public

[1] The language of only a single request is cited herein for simplicity, but all four FOIA requests at issue in this case are identical except the recipient agency.

explanation for the apparent seizure of numerous highly classified records from [the Premises]." *Id.* at 2.

Against this backdrop, the connection between Plaintiff's FOIA requests with an ongoing law enforcement investigation—and evidence important to that investigation—is beyond dispute. The Declaration of Michael Seidel, submitted alongside Defendants' Motion for Summary Judgment ("Defendants' Motion"), detailed the FBI's assessment that disclosure of the withheld information—the existence or non-existence of the "Alleged Declassification Standing Order"—would interfere with law enforcement proceedings, placing the very fact of the records' existence or non-existence within the protection of FOIA Exemption (b)(7)(A). In sum, the existence or non-existence of the Alleged Declassification Standing Order would bear on whether records with apparent classification markings were in fact classified, an important issue in an investigation about the potential improper removal and storage of classified information. Prematurely disclosing the existence or non-existence of that important piece of evidence, in turn, would disclose facts gathered during the course of the pending investigation that might lead persons of interest to alter their testimony; destroy, adulterate, or fabricate evidence; or refuse to cooperate with the Government altogether. *See* Seidel Decl. ¶ 16.

Plaintiff nonetheless insists in its Memorandum of Law in Support of Plaintiff's Cross Motion for Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment, ECF No. 27-1 ("Pl's Mem."), that this information is not subject to protection from disclosure under FOIA. Plaintiff advances several arguments, each of them mistaken. First, Plaintiff errs as to the applicable law, urging an elevated standard for evaluating *Glomar* responses, and proposing that the Court impose requirements found neither in FOIA nor the applicable case law. Next, Plaintiff overlooks the specific showing of harm proffered by the

FBI, insisting that disclosure could not harm the ongoing investigation since its request seeks disclosure by agencies other than FBI or DOJ. But, as explained herein, Plaintiff is wrong. Supreme Court guidance requires Exemption 7 to be applied functionally, consistent with its purpose, and the Defendants' showing in this case demonstrates that harm to FBI's investigation would be wrought by premature disclosure of important evidence developed in that investigation, regardless of whether that disclosure originated with Defendant agencies or FBI.

Finally, and puzzlingly, Plaintiff argues that an official acknowledgement has occurred in this case, vitiating any otherwise valid claim to protection from disclosure under FOIA. But Plaintiff here lacks every building block fundamental to making such a showing: no public official has acknowledged the existence or non-existence of the Alleged Declassification Standing Order, and the statements on which Plaintiff relies are so poorly matched to the information requested that Plaintiff appears to expect to learn that the statements on which it relies are actually untrue. These circumstances cannot support a finding of "official acknowledgement."

For all these reasons, this Court should hold that the information at issue is properly protected under Exemption (b)(7)(A), grant Defendants' motion, and deny the Plaintiff's cross-motion.

II. DISCUSSION

A. In the *Glomar* Context, as in Non-*Glomar* Cases, an Agency's Burden is to Show that its Justification for Invoking an Exemption is "Logical" or "Plausible."

Plaintiff opens its argument with an erroneous statement of the applicable legal standard. *See* Pl's Mem. at 8–9. In their motion, Defendants explained that, when assessing whether the Government has appropriately provided a *Glomar* response to a FOIA request, "courts apply the general exemption review standards established in non-Glomar cases." *Wolf v. CIA*, 473 F.3d

370, 374 (D.C. Cir. 2007). Plaintiff overlooks this rule, and argues instead that an elevated standard applies when a Glomar response is at issue. Plaintiff asserts: "[a]gencies can only rely on a *Glomar* response under 'unusual circumstances, and only by a particularly persuasive affidavit." Pl.'s Mem. at 7–8 (quoting *Florez v. CIA*, 829 F.3d 178, 182 (2d Cir. 2016). This standard has never been adopted by the First Circuit, and, moreover, Defendants are aware of no court outside of the Second Circuit to have followed it. Indeed, the D.C. Circuit—a court with considerable experience on FOIA matters, *see* Defs' Mot. at 11 n.4—declined to adopt this approach.

In *Knight First Amend. Inst. at Columbia Univ. v. CIA*, the D.C. Circuit rejected the plaintiff's argument, based on *Florez*, that Glomar responses require "a particularly persuasive affidavit." *Knight First Amend. Inst. at Columbia Univ. v. CIA* ("*Knight First Am. Inst.*"), 11 F.4th 810, 819 (D.C. Cir. 2021) (noting that plaintiff cited only *Florez*, "one out-of-circuit case," in support of that approach). Instead, the D.C. Circuit reiterated: "in the Glomar context, 'courts apply the general exemption review standards established in non-Glomar cases.'" *Knight First Am. Inst. (quoting ACLU v. CIA*, 710 F.3d 422, 426 (D.C. Cir. 2013) (quoting *Wolf*, 473 F.3d at 374)). Thus, when assessing whether a Glomar response is proper, the courts assess whether an agency's justification for invoking a FOIA exemption is "logical or plausible." *Id.* at 819. Here, for the reasons explained below and in Defendants' Motion, Mr. Seidel's detailed and specific explanation fulfills and surpasses this requirement. *See infra* Section C.

B. Plaintiff Asks the Court to Adopt Requirements Found Nowhere in the Statute.

After advancing an erroneous legal standard, Plaintiff urges that Exemption (b)(7)(A) cannot apply to protect the Glomar fact in this case because 1) declassification orders are not "inherently secret," and 2) Plaintiff is not seeking the requested records directly from the Federal

Bureau of Investigation or the Department of Justice. Pl's Mem. at 8–13. But neither fact carries legal significance under FOIA.

1. Exemption (b)(7)(A) does not require information to be otherwise protected from disclosure before its provisions can apply.

Plaintiff's first argument, that "declassification orders are routinely public" and "agencies routinely respond to requests for such records," *id.* at 9, depends on an assumption that a document must be inherently protected from disclosure on some independent basis before Exemption (b)(7)(A) can apply. There is no such rule, and Plaintiff cites no case to support its position. Exemption (b)(7)(A) protects from disclosure "records or information compiled for law enforcement purposes" if disclosure of those records "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). It contains no additional prerequisite that records or information also be "secret," Pl.'s Mem. at 9, for some separate reason.

Plaintiff questions whether information that is not otherwise protected from disclosure can "*become*" subject to protection because of its role in a law enforcement investigation. Pl's Mem. at 9 (emphasis Plaintiff's). FOIA's answer is an unequivocal yes. To be sure, if the requested records or "their existence" were truly already in the public record as Plaintiff contends, *see* Pl.'s Mem. at 9, then no interference with enforcement proceedings could result from disclosure. But as Mr. Seidel explained, although the FBI's investigation in this case has been officially acknowledged, the existence or non-existence of the Alleged Declassification Standing Order, or whether Defendants currently have such an order, has not been officially acknowledged, and nor has any evidence the investigation has developed with regard to the existence or non-existence of the Alleged Declassification Standing Order. Seidel Decl. ¶ 15; *see also infra* Section D (explaining why Plaintiff errs in arguing the requested information has

been officially acknowledged). Indeed, Plaintiff's own discussion of the *Glomar* fact, stating Plaintiff's position "whether Mr. Trump is telling the truth or lying" in asserting the Alleged Declassification Standing Order exists, Pl's Mem. at 17, demonstrates that the *Glomar* fact has not been officially acknowledged, and is not, in fact, part of the public record as Plaintiff contends. *See also id.* at 20 (noting that Plaintiff is "highly skeptical" that the Alleged Declassification Standing Order exists).

In sum, although Plaintiff speaks of "wip[ing]" the existence of records "from the public record," *id.* at 9, that is not the situation before the Court: the *Glomar* fact is *not* in the public record, and Plaintiffs' own expressed uncertainty as to the existence of the Alleged Declassification Standing Order demonstrates that that is so. Furthermore, because its disclosure could reasonably be expected to interfere with ongoing law enforcement proceedings, Exemption (b)(7)(A) shields it from disclosure. Whether the *Glomar* fact would be subject to disclosure in the absence of the ongoing law enforcement proceedings is inapposite.

2. Exemption (b)(7)(A) does not require that information have been compiled for law enforcement purposes only by the agency responding to a given FOIA request.

Plaintiff also mistakenly argues that Defendant agencies must show that "*they* 'compiled' the requested records, or any information regarding the requested records," for Exemption (b)(7)(A) to apply. Pl.'s Mem. at 10 (emphasis added). But, again, Exemption (b)(7)(A) contains no such provision. Nothing in the statute requires the agency withholding the materials to be the same agency that compiled the information for law enforcement purposes, and no case law imposes such a requirement. For obvious reasons, FOIA requests for which responsive information is withheld under Exemption (b)(7)(A) most often do come to law enforcement agencies. *See* Pl.'s Mem. at 12 (citing cases concerning requests directed to law enforcement

agencies). But that does not signify that only information that is specifically requested from law enforcement agencies is protected. For example, in *Performance Coal Co. v. U.S. Dep't of Labor*, the court held that the Mine Safety and Health Administration properly withheld a page of handwritten notes about ventilation at a particular mine under Exemption (b)(7)(A). *Performance Coal Co. v. U.S. Dep't of Labor*, 847 F. Supp. 2d 6, 16 (D.D.C. 2012). Although—as in this case—that request had not been directed to the FBI and the FBI was not a party to the case, the court based its decision on a declaration submitted by the FBI explaining that "public disclosure of [these notes] could reasonably be expected to harm the FBI's investigation." *Id.*

The purpose of Exemption (b)(7)(A) is to "'prevent disclosures which might prematurely reveal the government's cases in courts, its evidence and strategies, or the nature, scope, and focus of investigations.'" *Agrama v. Internal Revenue Serv.*, 282 F. Supp. 3d 264, 273 (D.D.C. 2017), *aff'd*, 2019 WL 2064505 (D.C. Cir. Apr. 19, 2019), (quoting *Maydak v. U.S. Dep't of Justice*, 218 F.3d 760, 762 (D.C. Cir. 2000)). A limitation of the kind Plaintiff suggests, protecting only information *requested from a law enforcement agency*, would leave law enforcement investigations implicating information at other government agencies utterly and uniquely without protection.

If Plaintiff were correct, a FOIA requester, wishing to make public information concerning a law enforcement investigation that involved another government agency, could ask that other agency for all of its records relevant to the subject of the law enforcement investigation. Indeed, nothing would prevent a requester from asking that other, non-law enforcement agency to produce, for example, "all records provided to the FBI" in connection with a given investigation.

In *John Doe Agency v. John Doe Corp.*—the very decision in which the Supreme Court held that information not initially created or compiled for law enforcement purposes nonetheless fulfills Exemption (b)(7)'s threshold requirement if it is subsequently compiled for a valid law enforcement purpose at any time prior to "when the Government invokes the Exemption"—the Supreme Court instructed: "[t]he statutory provision that records or information must be 'compiled for law enforcement purposes' is not to be construed in a nonfunctional way." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 157 (1989). The Supreme Court further explained that "in applying Exemption 7, the Court carefully has examined the effect that disclosure would have on the interest the exemption seeks to protect." *Id.* Here, the interest that Exemption (b)(7)(A) seeks to protect is the integrity of law enforcement investigations, shielding them from the interference that would be wrought by premature disclosure of, *inter alia*, the evidence collected by law enforcement. *See supra*. That interest would be undermined if Plaintiff's reading of the statute were correct. It would be a simple matter for a requester to effect premature disclosure of the evidence collected by a law enforcement agency from another agency simply by directing a request to that agency seeking everything its records related to the topic of the investigation. Congress did not write such a gaping hole into the statute, and the guidance of the Supreme Court in *John Doe Agency* indicates this Court should not read in such a requirement now.

Of course, as Plaintiff notes, "merely because a piece of paper has wended its way into an investigative dossier created in anticipation of enforcement action, an agency – even one having a function as sensitive as the FBI – cannot automatically disdain to disclosure it." Pl.'s Mem. at 11 (quoting *Curran v. Dep't of Justice*, 813 F.2d 473, 475 (1st Cir. 1987)). But that concern has no application here. Plaintiff argues that "[t]he FBI cannot erase a public document residing in

the files of *other departments or agencies* simply by making a unilateral decision to open an investigation or to collect a copy of the document for an investigation, particularly where the scope and duration of that investigation is also under the unilateral control of the FBI and DOJ." *Id.* (emphasis Plaintiff's); *see also id.* at 13 ("government agencies cannot confer law enforcement purposes upon each other merely by coordinating their litigation positions"). This characterization turns the facts of this case upside down, and implies that, after the Defendants received Plaintiff's requests, FBI initiated its investigation, seeking to "erase a public document," potentially indefinitely. *Id.* Plaintiff's requests make clear that the opposite is true—it is the importance of the existence or non-existence of the Alleged Standing Declassification Order in an already ongoing law enforcement investigation that drove Plaintiff's request in the first place. *See supra* at 1. Rather than FBI being "a stranger to this litigation" as Plaintiff asserts, *see* Pl.'s Mem. at 11, Plaintiff introduces each FOIA request at issue here with a discussion of an FBI search and its results, notwithstanding that each request is directed to a different agency (and not the FBI). *See supra* at 1 (quoting Plaintiff's requests). Plaintiff further asserts that "[t]here is reason to believe that the Alleged Declassification Standing Order is simply a lie intended to obscure Mr. Trump's crimes," Compl., ¶ 33, and contends records responsive to its request "or a response that no such records exist" would "meaningfully inform the public as to the truthfulness or falsity of Mr. Trump's public explanation for the apparent seizure of numerous highly classified records from that location." In other words, Plaintiff's request intentionally aims to make public evidence at the heart of an ongoing law enforcement investigation, and Plaintiff effectively acknowledges that is so, even though its requests seek information from agencies that are not themselves conducting that investigation.

Plaintiff also hints at concerns about potential abuses of the breadth and length of protection Exemption 7 might provide in this case, noting that "the scope and duration of [the ongoing] investigation is . . . under the unilateral control of the FBI and DOJ." Pl.'s Mem. at 11. But the scope of the protection Defendants are seeking here cannot seriously be called into question, where the investigation at issue concerns the potential improper removal and storage of classified information in unauthorized spaces, and the evidence being protected from disclosure would bear on whether the documents with apparent classification marking on them were, in fact, classified.

Nor can the length of the investigation be cause for concern, at least at this time. The FBI search that Plaintiff featured in its requests occurred less than eight months ago. *See* Defs' Mot. at 3–7 (discussing the development of the ongoing investigation). The Attorney General appointed Jack Smith to be Special Counsel heading the investigation as recently as November 18, 2022. In so doing, the Attorney General emphasized: "Mr. Smith is the right choice to complete these matters in an even-handed and *urgent* manner." Dep't of Justice Office of Public Affairs, Appointment of a Special Counsel (Nov. 18, 2022) (emphasis added), *available at* https://www.justice.gov/opa/pr/appointment-special-counsel-0. The Attorney General committed that he would "ensure that the Special Counsel receives the resources to conduct this work quickly and completely," and noted the Special Counsel's appointment would allow "prosecutors and agents to continue their work expeditiously, and to make decisions indisputably guided only by the facts and the law." *Id.* Mr. Smith made a similar commitment in his own public statement issued on the same day: "The pace of the investigations will not pause or flag under my watch. I . . . will move the investigations forward expeditiously and thoroughly to whatever outcome the facts and the law dictate." Dep't of Justice Office of Public Affairs,

Statement of Special Counsel Jack Smith (Nov. 18, 2022), *available at* https://www.justice.gov/opa/pr/statement-special-counsel-jack-smith. Given these recent commitments, and the broader context of this case, Plaintiff's concerns about the potential duration of the investigation are unfounded.

C. Plaintiff overlooks the harm that would result from the disclosure Plaintiff seeks.

Plaintiff asserts that "confirming or denying the existence of documents responsive to [its] requests would not disclose anything about the FBI's investigation." Pl's Mem. at 14. But Plaintiff is mistaken.

Mr. Seidel specified the significance of the withheld information to the FBI's ongoing investigation: "the existence or non-existence of the 'Alleged Declassification Standing Order' would bear on whether records with apparent classification markings were in fact classified—a key fact in the investigation." Seidel Decl., ¶ 12. Mr. Seidel further explained that if such records existed, they would be compiled by the FBI for law enforcement purposes, *id.*, and that evidence the FBI investigation has developed with regard to the existence or non-existence of the Alleged Declassification Standing Order has not been officially acknowledged or disclosed. *Id.*, ¶ 15.

Plaintiff offers three objections: that Mr. Seidel's description of harm that would result from disclosure is similar to that offered by the FBI in another case; that the withheld information is not actually from the FBI's files; and that other agencies besides the four Defendants here have responded to similar FOIA requests from Plaintiff. All three are unavailing.

First, that Mr. Seidel's description of the harm from prematurely disclosing important evidence sounds similar to the FBI's description of the harm from premature disclosure of

important evidence in another case is not the result of "parrot[ing]" as Plaintiff contends. Pl.'s Mem. at 14. Rather, it is the natural product of the fact that similar harms threaten any ongoing law enforcement investigation when important evidence is made public prematurely. *Cf. Leopold v. Dep't of Just.*, 2021 WL 3128866, at *4 (D.D.C. July 23, 2021) (rejecting plaintiff's objection that similar explanations for different withholdings amounted to "boilerplate," explaining that "[i]f Defendant can specifically and successfully argue why a given reason applies to one category, the Court will not require a completely different rationale for others"). Mr. Seidel, as detailed above, tailored his analysis to this case by explaining the significance of the withheld information to the FBI's ongoing investigation addressing the potential improper removal and storage of classified information. Witnesses or persons of interest, having obtained an understanding of what investigators know as to that important aspect of the investigation, can then mold their testimony and behavior accordingly and damage the integrity of the investigation—the very harm Exemption (b)(7)(A) is designed to prevent.

Plaintiff's second objection, that disclosure of the withheld information "would not disclose anything about the FBI's investigation," is simply incorrect as a factual matter; as explained above and in Mr. Seidel's declaration, it would disclose what evidence the FBI has developed regarding whether materials that have classification marking are, in fact, classified. Mr. Seidel explained that the existence or non-existence of the requested materials would be part of the FBI's investigation. *See supra*. Accordingly, Plaintiff's contention that it is not requesting information "about the investigation"—evidently because its request is not directed to FBI or DOJ—amounts to an elevation of form over substance that Exemption 7 does not permit. *See John Doe Agency*, 493 U.S. at 157 (instructing that Exemption 7 must be interpreted functionally, and consistent with its purpose).

Indeed, in quoting from *Dow Jones & Co. v. U.S. Dep't of Justice*, 880 F. Supp. 145 (S.D.N.Y. 1995) to support its objection, Plaintiff overlooks the very passage that highlights the problem with Plaintiff's position. Plaintiff notes: "The government's declarant in that case maintained that public disclosure of information found in . . . reports, including 'statements by interviewees and the facts gathered and the conclusions reached' in the investigation, 'might affect the testimony or statements of other witnesses' and could hamper investigators' ability 'to elicit untainted testimony.'" Pl.'s Mem. at 15 (quoting 880 F. Supp. at 150). Plaintiff contends that *Dow Jones* is distinguishable because Plaintiff "does not seek investigative reports containing statements by interviewees that might reasonably affect the testimony of other witnesses." *Id.* But Plaintiff *does* effectively seek "the facts gathered" in the FBI's investigation, 880 F. Supp. at 150, which would, in turn, reveal "the conclusions reached." *Id.* And these, as Mr. Seidel explains, can compromise investigators' ability "to elicit untainted testimony," *id.*, no less than disclosure of formally compiled reports or witness statements.

Finally, with respect to Plaintiff's objection that three other agencies responded that they had no records responsive to similar FOIA requests: that is without moment because it does not affect the harm to the investigation that would occur by revealing that any of Defendant agencies does or does not have records responsive to Plaintiff's request. Defendant agencies in this case are the Central Intelligence Agency ("CIA"), the Office of the Director of National, Intelligence ("ODNI"), the United States Department of Defense ("DoD"), and the National Security Agency ("NSA"). Unlike the agencies that previously responded to similar requests, Defendants here include the office of the head of the Intelligence Community, *i.e.* ODNI, as well as the majority of the agencies and organizations comprising that community. The U.S. Intelligence Community is a coalition of 18 agencies and organizations, including the ODNI. *See* Office of the Director

of National Intelligence, What We Do, *available at* https://www.dni.gov/index.php/what-we-do. Nine of those organizations, including NSA, reside within DoD. *See* Office of the Director of National Intelligence, Members of the IC, *available at* https://www.dni.gov/index.php/what-we-do/members-of-the-ic. A hypothetical response that none of Defendants had responsive records would be significantly more informative—and therefore damaging to the investigation—than the isolated responses Plaintiff has received, and, conversely, the broader net cast by the request at issue here would stand a greater chance of yielding any hypothetical responsive records if such records were to exist.[2]

Plaintiff errs in analogizing to *Reporters Comm. For Freedom of the Press v. FBI*. *See* Pl's Mem. at 16 (discussing *Reporters Comm. for Freedom of the Press*, 369 F. Supp. 3d 212 (D.D.C. 2019)). *Reporters Committee* turned on the court's determination that a law enforcement technique was "commonly known to the public." 369 F. Supp. 3d at 215. The Court held that disclosure of records revealing the use of that technique would not "reduce or nullify" its effectiveness. *Id.* That rationale has no application to the instant case. The withheld information is not a law enforcement technique, but rather whether certain evidence important to an FBI investigation does or does not exist across a broad swath of Intelligence Community agencies. That three other agencies have provided responses has no bearing on whether Defendants do or do not have records responsive to Plaintiff's request and the damage such a disclosure would work to the FBI's ability collect further evidence and ascertain the truth in its investigation.

[2] Defendants offer this analysis by way of illustration only, and do not intend thereby to confirm or deny the existence of any responsive records.

Thus, notwithstanding the isolated responses that Plaintiff received to similar requests, the information at issue here remains protected from disclosure under Exemption (b)(7)(A).

D. There Has Been No Official Acknowledgement of the Withheld Information.

Finally, invoking the "official acknowledgement" doctrine, Plaintiff asserts that former President Trump and his representative under the Presidential Records Act ("PRA representative") officially acknowledged the existence of responsive records, Pl's Mem. at 19, thereby precluding a *Glomar* response. The official acknowledgement doctrine provides: "when an agency has officially acknowledged otherwise exempt information through prior disclosure, the agency has waived its right to claim an exemption with respect to that information." *Block & Leviton LLP v. FTC*, 2020 WL 6082657, at *7 (D. Mass. Oct. 15, 2020) (quoting *ACLU v. CIA*, 710 F.3d at 426). Plaintiff's argument that this doctrine should apply here—even "indirectly or by analogy," Pl's Mem. at 17—fails for multiple reasons.

Courts apply "[a] strict test" to claims that an official acknowledgement has occurred. *Moore v. C.I.A.*, 666 F.3d 1330, 1333 (D.C. Cir. 2011); *see also Eddington v. U.S. Dep't of Just.*, 581 F. Supp. 3d 218, 230 (D.D.C. 2022) (citing same). Under this test: "(1) the information requested must be as specific as the information previously released; (2) the information requested must match the information previously disclosed; and (3) the information requested must already have been made public through an official and documented disclosure." *Moore*, 666 F.3d at 1333 (quoting *ACLU v. DoD,* 628 F.3d 612, 620–21 (D.C. Cir. 2011).

This test is no less "strict" in the context of a *Glomar* response. *See Moore*, 666 F.3d at 1333 ("In *Wolf v. CIA,* where we first addressed the official acknowledgment doctrine in the *Glomar* context, we again applied it strictly."). "In the *Glomar* context, the first and second prongs . . . merge into one and the third prong continues to operate independently." *Eddington*,

581 F. Supp. 3d at 230 (quoting *James Madison Project v. DOJ*, 302 F. Supp. 3d 12, 21 (D.D.C. 2018)). The situation in this case fulfills none of these requirements.

As to the first two prongs, requiring a "match" between the requested information and that which has been officially made public, in the context of a *Glomar* response, these facets of the tests are only satisfied "if the prior disclosure establishes the *existence* (or not) of records responsive to the FOIA request." *Wolf*, 473 F.3d at 379. Here, however, far from asserting that the public statements by former President Trump or his PRA representative "establish the existence" of the requested records, Plaintiff asserts it is "highly skeptical that the alleged declassification order actually exists." Pl's Mem. at 20; *see also* Compl., ¶ 33 ("There is reason to believe that the Alleged Declassification Standing Order is simply a lie intended to obscure Mr. Trump's crimes."). Thus, instead of asserting that there is a match between the information upon which Plaintiff relies and the requested information, leading to "'the inescapable inference that the requested records in fact exist or' not," Pl's Mem. at 17 (quoting *ACLU*, 322 F. Supp. 3d at 475), Plaintiff appears to *expect* that the content of Defendants' responses would be diametrically opposed to the statements Plaintiff proffers as "official acknowledgements." Plainly, such a circumstance falls far short of what is required under the first and second prongs of the test for "official acknowledgement."

Plaintiff also cannot fulfill the third prong of the test for official acknowledgement: the requirement that "the information requested must already have been made public through an official and documented disclosure." *Eddington*, 581 F. Supp. 3d at 230 *(*quoting *Wolf*, 473 F.3d at 378). "[T]he source of the prior disclosure must be official; non-governmental releases . . . do not qualify." *Id.*; *see also ACLU v. U.S. Dep't of Def.*, 628 F.3d 612, 621 (D.C. Cir. 2011) ("[W]e are hard pressed to understand the ACLU's contention that the release of a non-

government document by a nonofficial source can constitute a disclosure affecting the applicability of the FOIA exemptions. The distinction between an official government disclosure and references in an unofficial document from a nonofficial source is essential and [is] fatal to the ACLU's argument.").

Here, Plaintiff acknowledges that "neither Mr. Trump nor Mr. Solomon are current officials." *Id.* at 18. This is determinative. There is no case supporting Plaintiff's position that an official acknowledgement may be effected by a former official—even a former President[3]—much less a case supporting the novel position that a representative designated by a former official may effect an "official acknowledgement." To the contrary, the case law uniformly requires that an "official acknowledgement" be made by an official source.

In sum, Plaintiff cannot satisfy any part of the test for official acknowledgement, and the withheld information therefore remains subject to the protection of Exemption (b)(7)(A) for all the reasons explained above and in Defendants' initial submission.

III. CONCLUSION

For all of the reasons explained herein and in Defendants' motion, the Court should grant Defendants' motion for summary judgment; deny the Plaintiff's cross-motion; and enter judgment for Defendants.

[3] Plaintiff notes that "the President, as the 'head' of the entire Executive Branch, may make official acknowledgements binding on its agencies," Pl.'s Mem. at 17 (quotation omitted), but that is of no moment here because "only the incumbent [President] is charged with performance of the executive duty under the Constitution." *Nixon v. Administrator of Gen. Serv.*, 433 U.S. 425, 448 (1977).

Dated: March 24, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this opposition and reply, along with accompanying proposed order and response to Plaintiff's statement of additional material facts, was filed through the ECF system and will therefore be sent electronically to Plaintiff's counsel identified on the Notice of Electric Filing (NEF).

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