UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS, INC., Plaintiff, v. THE CENTRAL INTELLIGENCE AGENCY, THE OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, THE UNITED STATES DEPARTMENT OF DEFENSE, and THE NATIONAL SECURITY AGENCY, Defendants.	Civil Action No. 22-CV-11532-DJC

REPLY IN SUPPORT OF PLAINTIFF'S
CROSS-MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

The material facts in this case are not genuinely disputed. The Alleged Declassification Standing Order, if it exists, would have been issued during the Trump Administration. *See* Def.'s Resp. to Pl.'s Statement of Facts (D.E. 30-2) ¶26. At that time, the Order would not have been secret or otherwise exempt from disclosure under FOIA. *See id.* ¶27. Declassification orders are routinely public documents. *See id.* ¶¶21-25, 28. This alleged order has already been publicly discussed by the only person who could have issued it. *See id.* ¶¶35-37. Three other agencies in the intelligence community have already responded to identical FOIA requests for the alleged order in the ordinary course, without invoking the *Glomar* doctrine and without claiming any harm to ongoing law enforcement proceedings. *See id.* ¶¶17-19.

To the extent the defendant agencies received such an order, there is no genuine dispute that they would have been merely passive recipients, without any nexus to investigative activity. *See id.* ¶30. It was not until years later—no earlier than February 2022—that the FBI opened the investigation upon which it now relies. *See id.* ¶33. All parties agree that ACLUM is not seeking

any records generated during that investigation, nor any records of any kind from the FBI or DOJ. *See id.* ¶¶31-32.

Nevertheless, the FBI is asking this Court to announce a rule that, merely because the FBI later opened an investigation—the existence, scope, and duration of which are all within the Executive's unilateral discretion—the FBI can order other agencies to retroactively disappear the Alleged Declassification Standing Order from the public domain under Exemption 7(A). If the Court were to announce such a rule, then the current and future Executive administrations would learn that they can utilize Exemption 7(A) to retroactively remove any public document from the public record—not only the content but also the document's very existence—merely by having a law enforcement agency open an investigation to which the document is arguably relevant.

To avoid this problem, the government suggests a limiting principle: that the Court could make findings that *this* investigation is reasonable in scope, and that *this* investigation is progressing at an acceptable pace. *See* Opp. (D.E. 30) at 10-11. But if the Court actually endeavored to second-guess those prosecutorial decisions, surely the government would object on separation of powers grounds. More to the point, to make those judgments, the Court would require far more information than the government has presented, including the evidence that triggered the investigation; the investigative steps taken to date; any additional evidence collected as a result; the investigative steps still planned for the future; and the schedule for completing them. The government has not volunteered such information, and would almost certainly object if the Court actually asked for it.

Thus, the problem remains: the government's proposed rule would grant the Executive essentially limitless and unreviewable power to excise public documents from the public record. There is no reason for the Court to announce such a rule. Nothing in FOIA's text confers such a

vast power to circumvent the foundational purposes of the act. And the First Circuit has specifically explained that Exemption (7)(A) does not apply "merely because a piece of paper has wended its way into an investigative dossier." *See Curran v. Dept. of Justice*, 813 F.2d 473, 475 (1st Cir. 1987).

In order to qualify for protection under Exemption 7(A), a record must be "compiled for law enforcement purposes" and its production must "reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. 552(b)(7)(A). Neither can be said of the Alleged Declassification Standing Order sought here. Accordingly, the Court should conclude that Exemption 7(A) does not apply, deny Defendant's motion for summary judgment, and grant Plaintiff's cross-motion.

ARGUMENT

I. DEFENDANTS HAVE NOT MET THEIR BURDEN TO JUSTIFY THEIR *GLOMAR* RESPONSES UNDER EXEMPTION 7(A).

Defendants assert that they need only show that their justification for invoking Exemption 7(A) is "logical" or "plausible." Opp. (D.E. 30) at 4. That is not the standard in this Circuit—in the *Glomar* context or otherwise. But even if that were the standard, summary judgment should still be granted for ACLUM because the application of Exemption 7(A) is neither logical nor plausible based on the undisputed facts.

A. Defendants Have Not Established that Harm to the FBI's Investigation is Reasonably Likely to Occur if They Respond the Same Way Other Agencies Have Already Responded to Identical Requests.

The government's *Glomar* response does not rest on an allegation that a FOIA response by an intelligence agency would be harmful. It cannot, because three members of the intelligence community have already responded to ACLUM's FOIA request in the ordinary course, without invoking *Glomar*. *See* Def.'s Resp. to Pl.'s Statement of Facts (D.E. 30-2) ¶¶17-19. Thus, the

defendants' *Glomar* response can only rest on an argument that *additional* responses beyond three would impose some special additional harm of sufficient magnitude to justify the *Glomar* response. They do not appear to cite any case where a court has ever accepted such an argument.

In apparent recognition that other agencies have let the proverbial cat out of the bag, the government asserts that that responses from the Office of the Director of National Intelligence ("ODNI"), the Central Intelligence Agency ("CIA"), the Department of Defense ("DoD"), and the National Security Agency ("NSA") would be "more informative" and "damaging" than the responses already provided by the Department of Homeland Security ("DHS"), the National Geospatial-Intelligence Agency ("NGA"), and the National Reconnaissance Office ("NRO"). Def. Reply at 13-14. As a preliminary matter, the government's assertion that responses from Defendants would be "more . . . damaging" than those already provided by other agencies obscures that fact that the government has neither asserted nor established that *any* damage to the FBI's investigation has resulted from the responses by the NGA, the NRO, and DHS. This fact alone renders the government's reliance on Exemption 7(A) implausible.

Nor does the government offer any logical explanation as to why confirmation or denial of the alleged order's existence by some members of the intelligence community is more damaging than others already received. Why, for example, is a response from DOD more harmful than the response already received from DHS? The government does not say. The government reasons that Defendants "include the office of the head of the Intelligence Community. . . as well as the majority of the agencies and organizations comprising that community." Def. Reply at 13. But this argument plainly ignores the fact that the NGA and NRO are part of the same Intelligence Community, as is an element of the DHS. *See* Office of the Director of National Intelligence, Members of the IC, https://www.dni.gov/index.php/what-we-do/members-of-the-ic (last visited

March 27, 2023) (listing NGA, NRO, and DHS's Office of Intelligence and Analysis among the Intelligence Community's members). That the ODNI heads the Intelligence Community and the DoD encompasses nine of its members is of no moment, as the individual members of the Intelligence Community apparently can respond without causing harm to the investigation.

The government also entirely ignores the fact that the information that it seeks to withhold—the existence or non-existence of the Alleged Declassification Standing Order—is already known by the person on whom the FBI seems to be focusing its efforts. Mr. Trump has already proposed the existence of the order on one of the most public forums available—national television—and he remains free to tell whomever he wants whether that statement was truthful or not. The government has not plausibly explained how further responses will inflict harm in light of Mr. Trump's own knowledge and prior public disclosures. *See* Pl. Opening Br. at 16-17.

B. Defendants Have Not Shown that the Alleged Declassification Standing Order Was Compiled for Law Enforcement Purposes.

Defendants' reply narrows the dispute on the "law enforcement purpose" element of the 7(A) Exemption to one key question of law: whether a public record in the possession of another agency must *become* secret when the FBI later opens an investigation that may implicate that record. The answer is no.

Defendants cite *John Doe Agency v. John Doe Corp.*, 493 U.S. 146 (1989), to argue that Exemption 7(A) must be employed in a "functional manner" that examines the interests raised by that exemption. Def. Reply at 8. But the Supreme Court's discussion in *Doe Agency* of the legislative history of Exemption 7(A) demonstrates precisely why the government's position in this case takes the exemption too far. As the Supreme Court explained, Congress amended Exemption 7 in 1974 to prevent "[e]vasional commingling" of "otherwise nonexempt materials with exempt materials in a law enforcement investigatory file and claim protection from disclosure

for all the contents." *Id.* at 477; *see also id.* at 481 (Scalia, J., dissenting) ("Congress did not extend protection to *all* documents that produced one of the six specified harms, but only to such documents 'compiled for law enforcement purposes.' The latter requirement is readily evaded (or illusory) if it requires nothing more than gathering up documents the Government does not wish to disclose, with a plausible law enforcement purpose in mind.") (emphasis in original).

The government also relies on one out-of-circuit district court case, the U.S. District Court for the District of Columbia's decision in *Performance Coal Co. v. U.S. Dep't of Labor*, 847 F. Supp. 2d 6, 16 (D.D.C. 2012). To be clear, there is no need to look outside this circuit. As the government acknowledges, *see* Opp. (D.E. 30) at 8, the Court of Appeals for the First Circuit has articulated the distinction upon which ACLUM now relies. In *Curran v. Dept. of Justice*, the First Circuit explained that, although Exemption 7(a) prevented a FOIA requester from obtaining investigative reports, interviews, and similar documents *from the files of the FBI* (which ACLUM is not trying to do), it is also true that "merely because a piece of paper has wended its way into an investigative dossier created in anticipate of enforcement action, an agency . . . cannot automatically disdain to disclose it." *See* 813 F.2d 473, 475 (1st Cir. 1987). In any event, *Performance Coal* is inapposite. That case did not involve a *Glomar* response, and most of the records withheld under Exemption 7(A) were records that the MSHA generated for its own investigation and enforcement purposes. *Id.* at 16-17. While the court allowed MSHA to withhold one page of notes, the court did so without addressing the arguments ACLUM makes here. *Compare id., with Elkins v. Federal Aviation Administration,* 99 F. Supp. 3d 90 (D.D.C. 2015) (holding that FAA's flight-tracking records, which the FAA created for "all planes within its airspace," and recordings of call signals, which were produced "twenty-four hours a day, seven days a week for regulatory purposes" had not been "compiled for law enforcement purposes").

As ACLUM explained in its opening brief, the government's position is also untenable because it invites abuse: the power to erase a public document residing in the files of other departments or agencies by making a unilateral decision to open an investigation of indefinite duration could easily be abused and is antithetical to the purpose of FOIA. *See* Pl. Opening Br. at 11. The government attempts to minimize these systemic concerns by asserting that *this* investigation is legitimate, and *this* investigation has been short. Opp. (D.E. 30) at 10. But the rule the government advocates would not have any such limitations, and surely the government would object on separation of powers grounds to any rule that would require a court to consider whether the investigation has a genuine premise or is moving along rapidly enough. The rule that the government advocates is not consistent with the text of Exemption 7, with the canon of construction that FOIA exemptions be narrowly construed, nor with the basic policy of the Act in favor of disclosure.

II. THE OFFICIAL ACKNOWLEDGMENT DOCTRINE APPLIES BY ANALOGY.

The government correctly articulates the elements of the official acknowledgement inquiry, which requires that (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 must already have been made public through an official and documented disclosure. Opp. (D.E. 30) at 15. It also rightly notes that in the *Glomar* context, the first and second prong "merge into one," *id.*, such that "if the prior disclosure establishes the *existence of* records responsive to the FOIA requests," it "necessarily matches" both the information and issue and the specific request for that information," Pl. Opening Br. at 18 (quoting *Wolf v. CIA*, 473 F.3d 370, 379 (D.C. Cir. 2007)).

Plaintiff can certainly establish the first and second prong of the official acknowledgment test. John Solomon, acting at Mr. Trump's direction, publicly asserted the existence of the Alleged Declassification Standing Order on television, stating that former President Trump "had a standing order that documents removed from the Oval Office and taken to the residence were deemed to be declassified the moment he removed them." Def. Response to PSOF, ¶ 35. This statement is both specific and matches the information requested by Plaintiff, *i.e.*, the existence of the alleged order. That ACLUM expressed skepticism about the existence of the alleged order does not change the fact that Mr. Solomon announced on television that the order does exist and did so on behalf of former President Trump. *Id.* The only remaining question for the Court is whether Mr. Solomon's statement, made on behalf of former President Trump, is sufficiently "official and documented" to warrant application of the official acknowledgement doctrine by analogy. It is.

Mr. Solomon and Mr. Trump are not government officials. They nevertheless possess certain authorities under the Presidential Records Act, including not only the ability to access the restricted Presidential records of the Trump Administration, but also to make public disclosures that place previously restricted records in the public domain. *See* 36 C.F.R. § 1270.40(a), (c)(3), (c); 36 C.F.R. 1270.44(a), (d); *see also* Pl. Opening Br. at 19. By virtue of Mr. Solomon's statutorily designated status as a former President's representative under the PRA, and because his statement originated from and was made on behalf of former President Trump and concerned one of Mr. Trump's Presidential records, the official acknowledgement doctrine should apply.

CONCLUSION

For the foregoing reasons, ACLUM respectfully requests that the Court deny the Defendants' motion for summary judgment and grant ACLUM's cross-motion.

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Respectfully submitted,

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