08-4726-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THOMAS WILNER, GITANJALI GUTIERREZ, MICHAEL J. STERNHELL, JONATHAN WELLS DIXON, JOSHUA COLANGELO BRYAN, BRIAN J. NEFF, JOSEPH MARGULIES, SCOTT S. BARKER, ANNE J. CASTLE, JAMES E. DORSEY, ASMAH TAREEN, RICHARD A. GRIGG, THOMAS R. JOHNSON, GEORGE BRENT MICKUM IV, STEPHEN M. TRUITT, JONATHAN HAFETZ, TINA M. FOSTER, ALISON SCLATER, MARC D. FALKOFF, DAVID H. REMES, H. CANDACE GORMAN, CHARLES CARPENTER, JOHN A. CHANDLER, CLIVE STAFFORD SMITH,
Plaintiffs-Appellants,
v.
NATIONAL SECURITY AGENCY and DEPARTMENT OF JUSTICE,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES

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STATEMENT OF JURISDICTION

In this action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, plaintiffs invoked the district court's jurisdiction under 5 U.S.C. § 552(a)(4)(B). See Second Amended Complaint ¶ 2, A-2. The district court entered partial summary judgment for the Government on June 25, 2008, A-380, and certified its decision under Fed. R. Civ. P. 54(b) on July 31, 2008, A-409. Plaintiffs filed a timely notice

of appeal (A-410) on September 24, 2008. See Fed. R. App. P. 4(a). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the Government properly issued a "Glomar response" – i.e., by neither confirming nor denying whether it possesses surveillance records pertaining to plaintiffs – under FOIA Exemptions 1 and 3, 5 U.S.C. § 552(b)(1), (3).

STATEMENT OF THE CASE

Plaintiffs requested records from the National Security Agency ("NSA") and the Department of Justice ("DOJ") under the Freedom of Information Act, relating to electronic surveillance information pertaining to them. The agencies issued a "Glomar response" pursuant to FOIA Exemptions 1 and 3, declining to confirm or deny whether responsive records exist. Plaintiffs brought suit to challenge the Government's Glomar response. In pertinent part, the district court entered summary judgment for the Government. A-380-400. Plaintiffs appeal.

STATEMENT OF FACTS

1. The Terrorist Surveillance Program.

Following the September 11, 2001 attacks on the United States, President Bush established the Terrorist Surveillance Program ("TSP"), authorizing NSA to intercept international communications into and out of the United States of persons linked to

al Qaeda or related terrorist organizations. The record explains that the TSP was a targeted program intended to help "connect the dots" between known and potential terrorists and their affiliates. Brand Decl. ¶ 11, A-53. To intercept a communication under the TSP, one party to the communication must have been located outside the United States, and there must have been a reasonable basis to conclude that one party to the communication was a member of al Qaeda, affiliated with al Qaeda, or a member of an affiliated organization. Ibid. The TSP was thus an "early warning system" to detect and prevent further terrorist attacks against the United States. Ibid.

President Bush publicly acknowledged the TSP's existence in December 2005. Brand Decl. ¶ 12, A-53. In January 2007, the Attorney General announced that any electronic surveillance that had been occurring under the TSP would henceforth be conducted subject to the approval of the Foreign Intelligence Surveillance Court ("FISC"), and that the President's authorization of the TSP had lapsed. See McConnell Decl. ¶ 13, A-111. The TSP is thus no longer operative. Brand Decl., p. 2 n.1, A-50 n.1.

Crucially, however, operational details regarding the TSP remain undisclosed and highly classified under the criteria set forth in Executive Order 12958, 60 Fed. Reg. 19825 (Apr. 17, 1995), as amended by Executive Order 13292, 68 Fed. Reg. 15315 (Mar. 25, 2003). See Brand Decl. ¶ 12, A-53-54. Unauthorized disclosure of

information concerning the TSP can be expected to cause exceptionally grave damage to national security, and thus, TSP-related information is classified at the Top Secret level. Ibid.; McConnell Decl. ¶¶ 4-5, A-107-08. Indeed, because information concerning the TSP involves or derives from particularly sensitive intelligence sources and methods, it is subject to special access and handling procedures reserved for Sensitive Compartmented Information ("SCI"). Brand Decl.¶ 12, A-53-54; McConnell Decl. ¶ 5, A-108.[1]

2. Plaintiffs' FOIA Request And The Government's "Glomar" Response.

Plaintiffs are lawyers and law professors representing individuals detained at Guantanamo Bay, Cuba. On January 18, 2006, plaintiffs filed FOIA requests with NSA and DOJ, seeking seven categories of records. The first category, the only one at issue in this appeal, sought disclosure of records pertaining to, inter alia, any TSP surveillance "regarding, referencing, or concerning any of the plaintiffs." A-4.

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[1] Access to Sensitive Compartmented Information requires specialized clearance in addition to the "Top Secret" level. "SCI is classified information that is required to be handled exclusively within formal access control systems established by the Director of [National] Intelligence." Guillot v. Garrett, 970 F.2d 1320, 1322 n.1 (4th Cir. 1992).

NSA and DOJ gave what is commonly known as a "Glomar response," i.e., the agencies declined to confirm or deny the existence of responsive records.[2] The agencies explained that the existence or non-existence of such records was properly and currently classified in accordance with Executive Order 12958, and was thus exempt from disclosure based on FOIA Exemption 1. A-79; see 5 U.S.C. § 552(b)(1) (exempting records that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order").

Additionally, the agencies informed plaintiffs that three Federal statutes precluded the release of such surveillance information, and the requested records were thus also exempt from disclosure under FOIA Exemption 3. A-79; see 5 U.S.C. § 552(b)(3) (exempting records that are "specifically exempted from disclosure by statute . . . 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

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[2] As the courts have explained, "[a] Glomar response neither confirms nor denies the existence of the documents sought in the FOIA request. The term has its origin in a case involving a FOIA request for information on the GLOMAR EXPLORER submarine-retrieval ship." Office of Capital Collateral Counsel v. Dep't of Justice, 331 F.3d 799, 801 n.3 (11th Cir. 2003) (citing Phillippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1976)).

withheld"). The agencies' Glomar responses were upheld on administrative appeal. A-102.

3. Plaintiffs' Suit And The District Court's Grant Of Partial Summary Judgment.

Plaintiffs filed this suit in May 2007, challenging in pertinent part the Government's Glomar response. A-1 (complaint). With respect to the Glomar issue, the Government filed a partial summary judgment motion, arguing that it was entitled to summary judgment under FOIA Exemptions 1 and 3.

The Government submitted a comprehensive declaration by the Director of National Intelligence, J. Michael McConnell, as well as declarations of responsible NSA and Federal Bureau of Investigation ("FBI") officials. The declarations explained that confirming or denying the existence of records responsive to plaintiffs' FOIA request would in and of itself divulge sensitive classified information and threaten national security. A-49 (Brand), A-106 (McConnell), A-116 (Hardy). On that basis, the Government urged that its Glomar response was proper under FOIA Exemption 1.

The Government's declarations also explained that three separate Federal statutes exempt from the FOIA confirmation or denial of the existence of responsive

records here. First, Section 6 of the National Security Agency Act of 1959, Pub. L. No. 86-36, § 6, 73 Stat. 63, 64, reprinted at 50 U.S.C. § 402 note, provides:

> [N]othing in this Act or any other law . . . shall be construed to require the disclosure of the organization or any function of the National Security Agency, of any information with respect to the activities thereof, or of the names, titles, salaries, or number of persons employed by such agency.

Ibid. Second, Section 102(A)(i)(1) of the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638, codified at 50 U.S.C. § 403-1(i)(1), requires the Director of National Intelligence to "protect intelligence sources and methods from unauthorized disclosure." Third, Section 798 of Title 18, U.S.C., criminalizes disclosure of information "concerning the communications intelligence activities of the United States." The declarations explained that each of these provisions exempts from disclosure information tending to reveal whether particular individuals have been subjected to NSA surveillance. See Brand Decl., A-49; McConnell Decl., A-106; Hardy Decl., A-116.

After briefing by both sides, the district court granted the Government's partial summary judgment motion, and, pursuant to plaintiffs' unopposed request, certified its ruling under Fed. R. Civ. P. 54(b). A-380, A-409. Noting that "[d]efendants need only proffer one legitimate basis for invoking the Glomar Response in order to succeed on their motion for summary judgment" (A-389), the district court upheld the

Government's Glomar response under one of the three cited Exemption 3 statutes: Section 6 of the National Security Agency Act. The court explained that confirmation or denial of the existence of records responsive to plaintiffs' FOIA request would reveal information with respect to NSA's functions and activities, and was thus exempted from disclosure by Section 6. A-389-400. Because the court found Section 6 by itself dispositive, it did not directly address the other two Exemption 3 statutes the Government invoked, nor did it rule on the Government's assertion that its Glomar response was independently justified under FOIA Exemption 1.

SUMMARY OF ARGUMENT

In this FOIA case, plaintiffs seek disclosure of NSA surveillance records that reference them. The Government asserted a "Glomar" response, declining to confirm or deny that responsive records exist. A Glomar response is appropriate where, as here, confirming or denying whether responsive records exist would itself cause harm implicated by the FOIA's exemptions. As the Government's declarations explain, FOIA Exemption 3 and Exemption 1 fully and independently support declining to confirm or deny the existence of records pertaining to whether particular persons have been subjected to surveillance.

The district court properly entered summary judgment for the Government under Exemption 3, which exempts from disclosure matters specifically exempt by

statute. The district court relied on Section 6 of the National Security Agency Act of 1959, 50 U.S.C. § 402 note, which provides that "nothing in this Act or any other law . . . shall be construed to require the disclosure of . . . any function of the National Security Agency, or any information with respect to the activities thereof." As the courts have recognized, the terms of this provision are absolute, and they categorically exempt from disclosure any information regarding NSA's functions or activities. The district court properly considered Section 6 in and of itself dispositive here, and correctly entered summary judgment for the Government on that basis.

Judgment for the Government is equally warranted under two additional statutes. Section 102(A)(i)(1) of the Intelligence Reform and Terrorism Prevention Act of 2004, 50 U.S.C. § 403-1(i)(1), requires the Director of National Intelligence to "protect intelligence sources and methods from unauthorized disclosure." Section 798 of Title 18, U.S.C., criminalizes disclosure of information "concerning the communications intelligence activities of the United States." As the case law and the record in this case establish, each of these provisions qualifies as well as an Exemption 3 statute, and exempts the Government from confirming or denying the existence of records responsive to plaintiffs' FOIA request.

Separate and apart from Exemption 3, the Government's Glomar response was also proper under FOIA Exemption 1, which exempts from disclosure matters that are

currently and properly classified. The Government's declarations explain that whether particular individuals have been subjected to NSA surveillance is currently and properly classified at the Top Secret level, and indeed is subject to heightened access and handling restrictions applicable to Sensitive Compartmented Information. As emphasized in the declaration of the Director of National Intelligence, no agency of the United States Government can confirm or deny the existence of records responsive to requests concerning whether particular individuals or organizations might have been subjected to surveillance, and disclosure of such information threatens serious harm to national security. Accordingly, while the district court's Exemption 3 reasoning is correct, Exemption 1 provides an independent and equally valid basis to sustain the court's judgment.

Plaintiffs' arguments to the contrary are without merit. Plaintiffs seek surveillance records that reference them. As the Government's declarations explain, either a positive or negative response would reveal information that is classified and protected from disclosure by statute. Thus, the only recourse is to neither confirm nor deny that responsive records exist. Plaintiffs' basic approach to the Government's substantial record showing is to ignore it. As the district court properly concluded, however, the Government's declarations fully support the agencies' Glomar response, and mandate that it be upheld.

Plaintiffs mistakenly urge that the Government's Glomar response should be rejected because President Bush, in December 2005, publicly confirmed the TSP's existence. The President's decision to make public the existence of an NSA intelligence-gathering program does not force the Government to reveal in addition the program's most sensitive operational details. The record makes clear that while the TSP's general existence has been officially acknowledged, its specific methods and means have not been disclosed. In particular, the Government has never publicly confirmed or denied that particular persons were targeted by or otherwise subjected to surveillance. Contrary to plaintiffs' premise, the fact that limited information regarding a clandestine activity has been disclosed does not mean that all such information must be disclosed.

Plaintiffs ultimately rest their case on the proposition that the underlying intelligence-gathering program was invalid on its merits. They argue that because the TSP was, in their view, unlawful, it follows that the Government cannot make a Glomar response to their request for TSP-related information. Plaintiffs thus base their appeal on a non-sequitur. Whether the TSP was or was not a valid exercise of Executive authority is not at issue in this FOIA action, and has no bearing on whether a Glomar FOIA response is proper. In this instance, a Glomar response was appropriate to protect serious national security concerns.

As this Court has noted, and as plaintiffs effectively acknowledge, the Government's Glomar response must be upheld if it is supported by the record and not made in bad faith. As the district court properly held, the Government's position here is amply documented in three substantial declarations, and no basis exists for concluding that it reflects any improper purpose. The district court thus properly upheld the Government's response, and its decision should be affirmed.

STANDARD OF REVIEW

This Court reviews de novo the district court's grant of partial summary judgment. Tigue v. Dep't of Justice, 312 F.3d 70, 75 (2d Cir. 2002).

ARGUMENT

I. THE DISTRICT COURT PROPERLY UPHELD THE GOVERNMENT'S GLOMAR RESPONSE.

A. A Glomar Response Is Appropriate When An Agency Cannot Confirm Or Deny The Existence Of Requested Records.

The FOIA generally mandates disclosure of Government records unless the requested information falls within an enumerated exemption. See 5 U.S.C. § 552(b). Notwithstanding the FOIA's "liberal congressional purpose," the statutory exemptions must be given "meaningful reach and application." John Doe Agency v. John Doe Corp., 493 U.S. 146, 152 (1989). "Requiring an agency to disclose exempt

information is not authorized." Minier v. CIA, 88 F.3d 796, 803 (9th Cir. 1996) (quoting Spurlock v. FBI, 69 F.3d 1010, 1016 (9th Cir. 1995)).

An agency's decision to neither confirm nor deny the existence of responsive records is "called a 'Glomar response,' taking its name from the Hughes Glomar Explorer, a ship built (we now know) to recover a sunken Soviet submarine, but disguised as a private vessel for mining manganese nodules from the ocean floor." Bassiouni v. CIA, 392 F.3d 244, 246 (7th Cir. 2004).

A Glomar response is appropriate where, as here, confirming or denying whether responsive records exist would itself cause harm implicated by the FOIA's exemptions. See, e.g., Bassiouni, 392 F.3d at 246 ("Every appellate court to address the issue has held that the FOIA permits the [agency] to make a 'Glomar response' when it fears that inferences . . . or selective disclosure could reveal classified sources or methods of obtaining foreign intelligence."); Minier, 88 F.3d at 800 ("[A] government agency may issue a 'Glomar Response,' that is, refuse to confirm or deny the existence of certain records, if the FOIA exemption would itself preclude the acknowledgment of such documents."); Gardels v. CIA, 689 F.2d 1100, 1103 (D.C. Cir. 1982) ("[A]n agency may refuse to confirm or deny the existence of records where to answer the FOIA inquiry would cause harm cognizable under an FOIA exception.").

Agency decisions to withhold information under the FOIA are reviewed de novo, and the agency bears the burden of proving its claim for exemption. 5 U.S.C. § 552(a)(4)(B); A. Michael's Piano, Inc. v. FTC, 18 F.3d 138, 143 (2d Cir. 1994). In evaluating the applicability of the FOIA's exemptions, however, courts must be mindful when the information requested "implicat[es] national security, a uniquely executive purview." Ctr. for Nat'l Sec. Studies v. Dep't of Justice, 331 F.3d 918, 926-27 (D.C. Cir. 2003).

Indeed, the Supreme Court has admonished that "weigh[ing] the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the [nation's] intelligence-gathering process" is a task best left to the Executive Branch. CIA v. Sims, 471 U.S. 159, 180 (1985); see also Ctr. for Nat'l Sec. Studies, 331 F.3d at 928 ("[T]he judiciary is in an extremely poor position to second-guess the executive's judgment in [the] area of national security."); Halperin v. CIA, 629 F.2d 144, 148 (D.C. Cir. 1980) ("Judges . . . lack the expertise necessary to second-guess [] agency opinions in the typical national security FOIA case."). Thus, in the FOIA context, the courts have "consistently deferred to executive affidavits predicting harm to the national security, and have found it unwise to undertake searching judicial review." Ctr. for Nat'l Sec. Studies, 331 F.3d at 927; see also Doherty v. Dep't of Justice, 775 F.2d 49, 52 (2d

Cir. 1985) (giving "substantial weight" to such agency affidavits); Salisbury v. United States, 690 F.2d 966, 970 (D.C. Cir. 1982) (noting that agencies possess "unique insights" into the adverse effects that might result from public disclosure of classified information).

Consistent with this approach, the only other court to consider a Glomar response to a plaintiff's request for TSP-related information also upheld the Government's refusal to confirm or deny the existence of records concerning whether particular individuals had been subjected to surveillance. Like plaintiffs here, the plaintiff in People for the American Way v. NSA, 462 F. Supp. 2d 21 (D.D.C. 2006), submitted FOIA requests concerning the TSP and sought, inter alia, any "records related to the surveillance of plaintiff." Id. at 29. Affording due deference to the Government's justifications, the court concluded that a Glomar response was proper under both Exemption 3, id. at 29-30, and Exemption 1, id. at 32. Here, as in People for the American Way, Exemption 3 and Exemption 1 fully and independently support declining to confirm or deny the existence of records responsive to requests for information regarding whether particular persons have been subjected to surveillance.

B. The Government's Glomar Response Was Proper Under Exemption 3.

Under the above principles, the NSA and DOJ properly issued a Glomar response under FOIA Exemption 3, 5 U.S.C. § 552(b)(3).

FOIA Exemption 3 protects records that are "specifically exempted from disclosure by statute . . . 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). In reviewing an agency's invocation of Exemption 3, "the Supreme Court [has] engaged in a two-prong review. First, is the statute in question a statute of exemption as contemplated by exemption 3? Second, does the withheld material satisfy the criteria of the exemption statute?" Fitzgibbon v. CIA, 911 F.2d 755, 761-62 (D.C. Cir. 1990) (citing Sims, 471 U.S. at 167).

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 the statute's coverage.'" Fitzgibbon, 911 F.2d at 761-62 (quoting Ass'n of Retired R.R. Workers v. U.S. R.R. Ret. Bd., 830

F.2d 331, 336 (D.C. Cir. 1987)). Here, three separate statutes exempt disclosure of the surveillance information sought by plaintiffs.

1. The first and wholly dispositive statute is Section 6 of the National Security Agency Act of 1959, Pub. L. No. 86-36, 73 Stat. 63, 64, which provides:

> [N]othing in this Act or any other law . . . shall be construed to require the disclosure of the organization or any function of the National Security Agency, of any information with respect to the activities thereof, or of the names, titles, salaries, or number of persons employed by such agency.

Ibid. (reprinted at 50 U.S.C. § 402 note).

It is well-established that Section 6 "is a statute qualifying under Exemption 3." Founding Church of Scientology v. NSA, 610 F.2d 824, 828 (D.C. Cir. 1979); accord Hayden v. NSA, 608 F.2d 1381, 1389 (D.C. Cir. 1979). Section 6 reflects a "congressional judgment that, in order to preserve national security, information elucidating the subjects specified ought to be safe from forced exposure." Church of Scientology, 610 F.2d at 828.

In enacting Section 6, Congress was "fully aware of the 'unique and sensitive activities of the [NSA],' which require 'extreme security measures.'" Hayden, 608 F.2d at 1390 (citing legislative history). Thus, "[t]he protection afforded by section 6 is, by its very terms, absolute. If a document is covered by section 6, NSA is entitled to withhold it." Linder v. NSA, 94 F.3d 693, 698 (D.C. Cir. 1996).

Here, "Signals Intelligence [SIGINT] is one of NSA's primary missions." Brand Decl. ¶ 5, A-51. Further, a specific function within the NSA's overall SIGINT mission is "to intercept communications in order to obtain foreign intelligence information necessary to the national defense, national security, or the conduct of foreign affairs." Ibid. Against this backdrop, disclosure of the existence or non-existence of information concerning NSA surveillance of particular individuals would by definition reveal information concerning NSA's functions and activities and, thus, as the district court properly concluded, such disclosure is exempted from the FOIA under Section 6. See Brand Decl. ¶¶ 27, 30, A-60-61. For this reason alone, the district court's decision should be affirmed.

Because the district court properly found Section 6 dispositive, it did not address the additional Exemption 3 statutes the Government cited. Two such statutes exist, and each justifies a Glomar response on its own terms.

2. The second applicable statute is Section 102A(i)(1) of the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638, codified at 50 U.S.C. § 403-1(i)(1). This statute provides that "[t]he Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure." Ibid.

It is settled that Section 102A(i)(1)falls within Exemption 3. See, e.g., Wolf v. CIA, 473 F.3d 370, 377 (D.C. Cir. 2007); see also Fitzgibbon, 911 F.2d at 761 ("There is thus no doubt that [the predecessor statute] is a proper exemption statute under exemption 3."); accord Sims, 471 U.S. at 168 ("Indeed, this is the uniform view among other federal courts.").[3]

The authority to protect intelligence sources and methods is rooted in the "practical necessities of modern intelligence gathering," Fitzgibbon, 911 F.2d at 761 (quotations and citations omitted), and has been described by the Supreme Court as "sweeping." Sims, 471 U.S. at 169. Sources and methods constitute "the heart of all intelligence operations," id. at 167, and "[i]t is the responsibility of the [intelligence community], not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the . . . intelligence-gathering process." Id. at 180.

Confirming or denying the existence of NSA surveillance records regarding specific individuals, which would tend to reveal surveillance targets, concerns

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[3] The predecessor statute was superseded by the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638, which shifted overall responsibility for protecting intelligence sources and methods from the Director of Central Intelligence to the Director of National Intelligence. See Berman v. CIA, 501 F.3d 1136, 1140 n.1 (9th Cir. 2007) ("The change in titles and responsibilities has no impact on this case.") (citing Wolf, 473 F.3d at 377 n.6).

"intelligence sources and methods" and thus implicates Section 102A(i)(1). McConnell Decl. ¶¶ 15-19, A-112-14; Brand Decl. ¶¶ 29-30, A-61; see Fitzgibbon, 911 F.2d at 762 (affirming agency decision to withhold information "relat[ing] to intelligence sources and methods"); Linder, 94 F.3d at 696 (upholding withholding of SIGINT information because "[i]t seems obvious" that "disclosure could reveal information about NSA's capabilities and techniques"). As fully explained in the declaration of the Director of National Intelligence, Section 102A(i)(1) is thus a second statute exempting the requested records here from disclosure. See McConnell Decl. ¶¶ 3, 15, A-107, A-112.

3. The third statute is 18 U.S.C. § 798. This criminal statute prohibits the disclosure of specific kinds of classified information, including information "concerning the communications intelligence activities of the United States." Id. § 798(a)(3). Specifically, section 798(a) provides:

> Whoever knowingly and willfully communicates, furnishes, transmits, or otherwise makes available to an unauthorized person, or publishes, or uses in any manner prejudicial to the safety or interest of the United States . . . any classified information . . . concerning the communications intelligence activities of the United States . . . [s]hall be fined under this title or imprisoned for not more than ten years, or both.

18 U.S.C. § 798(a). "Communications intelligence" includes "all procedures and methods used in the interception of communications and the obtaining of information from such communications by other than the intended recipients." Id. § 798(b).

This statute clearly identifies matters to be withheld from public disclosure. See 5 U.S.C. § 552(b)(3). Thus, it, too, qualifies as an Exemption 3 statute under the FOIA. Fla. Immigrant Advocacy Ctr. v. NSA, 380 F. Supp. 2d 1332, 1340 (S.D. Fla. 2005) ("Other exempting statutes include . . . 18 U.S.C. § 798"); Winter v. NSA, 569 F. Supp. 545, 548 (S.D. Cal. 1983) (same).

Disclosing the existence or non-existence of information relating to NSA surveillance of specified persons concerns "the communications intelligence activities of the United States." 18 U.S.C. § 798(a). Such information concerns "procedures and methods used in the interception of communications and the obtaining of information from such communications by other than the intended recipients," id. § 798(b), and is currently and properly classified. McConnell Decl. ¶ 19, A–114. Therefore, such disclosure is prohibited by 18 U.S.C. § 798, and, as the record explains, is accordingly exempt from disclosure under FOIA Exemption 3, in addition to and wholly apart from the Section 6 and Section 102A provisions discussed above. See McConnell Decl. ¶ 19, A-114; Brand Decl. ¶ 30, A-61.

C. The Government's Glomar Response Was Proper Under Exemption 1.

Because it ruled on the basis of Exemption 3, the district court did not pass upon FOIA Exemption 1, 5 U.S.C. § 552(b)(1). As we urged below, however, the agencies also properly issued a Glomar response under Exemption 1.

Exemption 1 protects records that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). Exemption 1 thus "establishes a specific exemption for defense and foreign policy secrets, and delegates to the President the power to establish the scope of that exemption by executive order." Military Audit Project v. Casey, 656 F.2d 724, 737 (D.C. Cir. 1981).

To invoke Exemption 1, the agency must provide, with sufficient "detail and specificity," information demonstrating both why the material has been kept secret and why such secrecy is allowed by the terms of an existing Executive Order. Campbell v. Dep't of Justice, 164 F.3d 20, 30 (D.C. Cir. 1998). The proper procedures in classifying the information must also be followed. See Salisbury v. United States, 690 F.2d 966, 970-73 (D.C. Cir. 1982); Military Audit Project, 656 F.2d at 737-38. If an agency satisfies these elements, it is entitled to summary

judgment. See, e.g., Carney v. Dep't of Justice, 19 F.3d 807, 812 (2d Cir. 1994); Abbotts v. NRC, 766 F.2d 604, 606 (D.C. Cir. 1985).

The Government's declarations here demonstrate that the existence or non-existence of records pertaining to NSA surveillance of plaintiffs is currently and properly classified in accordance with Executive Order 12958, 60 Fed. Reg. 19825 (Apr. 17, 1995), as amended by 68 Fed. Reg. 15315 (Mar. 25, 2003). See Brand Decl. ¶¶ 20-21, A-57; McConnell Decl. ¶ 5, A-108. Section 1.1(a)(4) of the Executive Order states that an agency may classify information falling within one or more classification categories when the appropriate classification authority "determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security." 68 Fed. Reg. at 15315. Section 3.6(a) further states that "[a]n 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." Id. at 15324.

Plaintiffs' request was reviewed by the NSA's Associate Director for Policy and Records, who was an Original Classification Authority. Brand Decl. ¶ 3, A-50. He determined that confirming or denying the existence of the information requested is currently and properly classified because such information meets all the classification criteria set forth in Executive Order 12958, as amended. Brand Decl.

¶ 20, A-57. In particular, the information meets the criteria under section 1.4(c), because it pertains to "intelligence activities (including special activities), intelligence sources or methods, or cryptology," and under section 1.4(g), because it pertains to "vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection systems relating to national security, which includes defense against transnational terrorism." Ibid. Moreover, "any such positive or negative response would disclose information that is subject to Sensitive Compartmented Information (SCI) control systems, which requires special access and handling restrictions." Ibid.; accord McConnell Decl. ¶ 5, A-108.

The NSA's declaration also explained that "[t]o identify targets under the TSP is to offer official confirmation that such persons have been identified as, or linked to, a potential threat." Brand Decl. ¶ 21, A-57-58. "Any disclosure of this information would obviously and immediately affect the ability of NSA to fulfill the primary purpose of the TSP, which is now authorized by the FISC: to detect and prevent the next terrorist attack against the United States." Ibid.

Because the existence or non-existence of surveillance records is thus currently and properly classified, such information is exempt from disclosure under FOIA Exemption 1, wholly apart from any Exemption 3 statutes. Accordingly, while the

district court's Exemption 3 reasoning is correct, Exemption 1 provides an independent and equally valid basis for affirming the district court's judgment.

II. PLAINTIFFS' ARGUMENTS ARE MERITLESS.

A. Plaintiffs Disregard The Record And The Government's Declarations.

Notwithstanding the Government's declarations, plaintiffs contend that publicly confirming or denying whether specified individuals have been subjected to surveillance threatens no harm to national security. See, e.g., Appellants' Br. 21-22. Plaintiffs can make this assertion only by turning a blind eye to the record.

We note initially that the applicability under FOIA Exemption 3 of Section 6 of the National Security Agency Act does not turn on any separate showing that confirming or denying the information at issue would harm national security. As demonstrated above, and as the district court properly concluded, Section 6 by its terms exempts from the FOIA's disclosure requirements "any function of the National Security Agency," or "any information with respect to the activities thereof." Pub. L. No. 86-36, § 6. The information request at issue here plainly falls within the scope of Section 6, and is thus categorically exempt from FOIA disclosure for that reason alone, without the need for any further showing. See Linder, 94 F.3d at 698; Brand Decl. ¶ 27, A-60 ("NSA is not required to demonstrate specific harm to national

security when invoking this statutory privilege, but only to show that the information relates to its activities.").

Putting this critical point aside, the record makes clear that confirming or denying the existence of responsive records in this case would in any event undermine national security. As the NSA's declaration noted, "[p]laintiffs seek surveillance records that reference them. NSA's only response to such a request is to state that it cannot confirm publicly in any particular case whether or not any communications were collected pursuant to the TSP or the surveillance now authorized by the FISC or, conversely, that no such collection occurred." Brand Decl. ¶ 18, A-56. Either "a positive or negative response . . . would reveal information that is currently and properly classified . . . and is protected from disclosure by statute." Brand Decl. ¶ 19, A-56-57.

The NSA's declaration explains that "[a]cknowledging the existence or non-existence of those individuals or organizations subject to surveillance would provide our adversaries with critical information about the capabilities and limitations of the NSA." Brand Decl. ¶ 22, A-58. "For example, if NSA were to admit publicly in response to an information request that no information about Persons X, Y, or Z exists, but in response to a separate information request about Person T state only that no response could be made, this would give rise to the inference that Person T is a

target." Ibid. "Over time, the accumulation of these inferences would disclose the targets and capabilities (sources and methods) of NSA's SIGINT activities and functions." Ibid.

Crucially, "NSA cannot respond to each case in isolation, but must acknowledge that our adversaries will examine all released information together." Brand Decl. ¶ 23, A-59. "This compilation of information, if disclosed, [would] provid[e] our adversaries a road map, instructing them which communications modes and personnel remain safe." Ibid.; see Sims, 471 U.S. at 178 ("[W]hat may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context." (quotations omitted)); Bassiouni, 392 F.3d at 245-46 (describing the dangers of accumulated information that might be provided in response to FOIA requests); Gardels, 689 F.2d at 1104 (same).

As the Director of National Intelligence elaborated, "no agency of the United States Government, or component thereof, can confirm or deny the existence of records responsive to requests concerning whether particular individuals or organizations, including Plaintiffs themselves, might have been" subjected to surveillance. McConnell Decl. ¶ 3, A-107. In particular, "a refusal to confirm or deny only in cases where surveillance is occurring would effectively disclose and

compromise that surveillance." McConnell Decl. ¶ 16, A-113. Thus, "[t]he only viable way for the Intelligence Community to protect [its] intelligence collection mechanism[s] is neither to confirm nor deny whether someone has been targeted or subject to intelligence collection." Ibid.

Indeed, "[t]he same is true for any United States agency that may or may not possess information concerning the targeting of surveillance." Ibid. "To say otherwise would result in the frequent, routine exposure of intelligence information, sources, and methods and would severely undermine surveillance activities in general." Ibid.; see Hardy Decl. ¶ 17, A-124-25.

In short, the Government's declarations validate that significant national security interests are at stake. Plaintiffs cannot make that showing go away by ignoring it.

B. The TSP's Existence Is Public But Its Operational Details Have Not Been Disclosed And Remain Highly Classified.

Plaintiffs urge that the Government's Glomar response should be rejected because President Bush, in December 2005, publicly confirmed the TSP's existence. According to plaintiffs, the fact that the TSP is thus known to have existed means that there can be no national security implications of confirming or denying whether particular individuals have actually been subjected to surveillance. See Appellants'

Br. 18-19. This assertion is fundamentally flawed, and the district court properly rejected it. A-398-400.

The President's decision to make public the existence of an NSA intelligence-gathering program does not force the Government to reveal in addition the program's most sensitive operational details. Contrary to plaintiffs' premise, it is settled under the FOIA that the fact that limited information regarding a clandestine activity has been released does not mean that all such information must therefore be released. See Hudson River Sloop Clearwater, Inc. v. Dep't of the Navy, 891 F.2d 414, 421 (2d Cir. 1989); Students Against Genocide v. Dep't of State, 257 F.3d 828, 836 (D.C. Cir. 2001); Afshar v. Dep't of State, 702 F.2d 1125, 1130-31 (D.C. Cir. 1983); Salisbury, 690 F.2d at 971; see also Fitzgibbon, 911 F.2d at 766 ("the fact that information resides in the public domain does not eliminate the possibility that further disclosures can cause harm to intelligence sources, methods, and operations").

Plaintiffs also overlook that the requester's identity is irrelevant to the merits of a FOIA request. See Dep't of Justice v. Reporters Committee, 489 U.S. 749, 771 (1989); NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975). "[A]ny member of the public may invoke the FOIA, and the agency must disregard the requester's identity." Bassiouni, 392 F.3d at 245-46. Thus, if the plaintiffs in this case are entitled to the information at issue, then so is the public at large. The FOIA does not

require the Government to systematically confirm or deny whether particular individuals have been subjected to NSA intelligence-gathering.

Indeed, plaintiffs' assertion founders on the record, which makes clear that while the TSP's general existence has been officially acknowledged, its specific methods and means have not been disclosed. As stated by the Director of National Intelligence, "[a]lthough the existence of the TSP is now publicly acknowledged, and some general facts about the TSP have been officially disclosed, . . . sensitive information about the nature, scope, operation, and effectiveness of the TSP and other communications intelligence activities remains classified and cannot be disclosed without causing exceptionally grave harm to U.S. national security." McConnell Decl. ¶ 14, A-112.

In particular, the Government has not publicly confirmed or denied that particular persons were targeted by or otherwise subjected to TSP surveillance. To the contrary, such "details about the TSP remain highly classified and subject to special access restrictions under the criteria set forth in Executive Order 12958, as amended." Brand Decl. ¶ 12, A-53-54. "Unauthorized disclosure of information regarding the TSP," including confirming or denying that particular persons have been subjected to intelligence collection, "can be expected to cause exceptionally

grave damage to the national security." Brand Decl. ¶ 12, A-54; see Hardy Decl. ¶ 5, A-118.

Al-Haramain Islamic Foundation v. Bush, 507 F.3d 1190 (9th Cir. 2007), cited by plaintiffs (see, e.g., Appellants' Br. 18), is not to the contrary. The United States there raised the state secrets privilege in the context of a merits challenge to the TSP. The Ninth Circuit noted that, in light of public acknowledgments, "the very subject matter of th[e] litigation, the existence of a warrantless surveillance program," was not a secret. Al-Haramain, 507 F.3d at 1200. Equally clearly, however, the court held that "there are details about the program that the government has not yet disclosed" (ibid.), and those details – specifically including "information as to whether the government [actually] surveilled [the plaintiff]" – remained fully covered by the Government's state secrets privilege assertion. Id. at 1203.

Nor do plaintiffs accurately portray the Justice Department's "White Paper" concerning the TSP (available at http://www.usdoj.gov/opa/whitepaperonnsa legalauthorities.pdf). See Appellants' Br. 20. The White Paper discusses the TSP only in broad generalities, explicitly noting (at 34 n.18) that "a full explanation of the basis for" the program "cannot be given in an unclassified document." See Electronic Privacy Information Ctr. v. Dep't of Justice, 584 F. Supp. 2d 65, 71 (D.D.C. 2008) ("just because some information about the TSP has been made public, it does not

follow that releasing [more information] poses any less of a threat to national security").

C. The Underlying Merits Of The TSP Are Not Properly At Issue In This FOIA Action.

Plaintiffs are ultimately relegated to maintaining that the Government's Glomar response should be rejected because, in plaintiffs' view, surveillance conducted under the TSP was unlawful. See Appellants' Br. 30; see also National Security Archive Amicus Br. 17. Plaintiffs' attempt to inject the merits of the underlying intelligence-gathering activity into this FOIA action is unavailing.

Plaintiffs insist that because the TSP was, in their view, unlawful, it follows that the Government cannot make a Glomar response to their request for TSP-related information. That is not, and cannot be, the law. If a FOIA plaintiff could pretermit a Glomar response and force public disclosure of sensitive, classified information simply by claiming that the underlying intelligence-gathering activity may have been illegal, the Government's capacity to safeguard national security would be severely compromised.

Especially in light of Section 6 of the National Security Agency Act, discussed above, the FOIA is not a vehicle for indirectly litigating the merits of classified surveillance programs. As the district court rightly recognized, the TSP's claimed

"illegality cannot be used . . . to evade the unequivocal language of Section 6, which prohibits the disclosure of information relating to the NSA's functions and activities." A-398; see Navasky v. CIA, 499 F. Supp. 269, 272-75 (S.D.N.Y. 1980). Indeed, plaintiffs cite no case, and we are aware of none, where an agency withholding claim under FOIA Exemption 1 or 3 was rejected on grounds that underlying Government activity was alleged to be illegal. See Hrones v. CIA, 685 F.2d 13, 19 (1st Cir. 1982) ("[Appellant] has chosen the wrong procedure for review of the legality of the operations of the agency. Such an investigation is not within the scope of court review of the denial of a FOIA request."); see also Halpern v. FBI, 181 F.3d 279, 296 (2d Cir. 1999); Lesar v. Dep't of Justice, 636 F.2d 472, 483 (D.C. Cir. 1980).

In arguing otherwise, plaintiffs misconstrue section 1.7(a) of Executive Order 12958. See Appellants' Br. 3, 28. That provision bars the Government from classifying otherwise unclassified information "in order to," i.e., for the purpose of, concealing violations of law. 68 Fed. Reg. at 15318. Thus, section 1.7(a) applies only where there is evidence of improper motive or intent on the part of the classifying authority. See United States v. Marzook, 412 F. Supp. 2d 913, 923 (N.D. Ill. 2006) (rejecting argument that information was improperly classified to conceal Israel's use of illegal interrogation methods where "there [wa]s simply no evidence that these materials [were] classified merely to prevent embarrassment to Israel");

Billington v. Dep't of Justice, 11 F. Supp. 2d 45, 58 (D.D.C. 1998) (rejecting similar argument where plaintiff did "not provide any proof of the FBI's motives in classifying the information"), aff'd in part, vacated in part, 233 F.3d 581 (D.C. Cir. 2000); Canning v. Dep't of Justice, 848 F. Supp. 1037, 1047 (D.D.C. 1994) (rejecting same argument because "the Court finds no credible evidence that the agency's motives for its withholding decisions were improper").

As plaintiffs acknowledge, the Government's showing in a FOIA case must be upheld where it is "not controverted by either contrary evidence in the record nor by evidence of agency bad faith." See Appellants' Br. 15 (quoting Miller v. Casey, 730 F.2d 773, 776 (D.C. Cir. 1984)). As the district court properly concluded, the record in this case fully supports the Government's Glomar response to plaintiffs' information request, and provides no basis to conclude that either the Glomar response itself, or the Government's underlying classification of TSP-related information, was undertaken for reasons reflecting bad faith. See A-391-93, A-395-96 & n.4.

Indeed, as noted, this Court has explained that, under the FOIA, "[a]ffidavits or declarations . . . giving reasonably detailed explanations why any withheld documents fall within an exemption" are necessary to sustain the agency's burden. Carney, 19 F.3d at 812. By the same token, absent any showing to the contrary,

"[a]ffidavits submitted by an agency are accorded a presumption of good faith." Ibid. The Government's detailed summary judgment showing here compels full application of that presumption. See People for the American Way v. NSA, 462 F. Supp. 2d 21, 33 (D.D.C. 2006) ("Even if the TSP were ultimately determined to be illegal, it does not follow that the NSA's decision regarding the classification of materials relating to the TSP was made 'in order to . . . conceal violations of law.' Because of the deference due to the NSA in matters of national security, and in the absence of any evidence to the contrary, the Court must accept defendant's reasonable explanation that the materials were classified in order to prevent damage to the national security.").

This analysis is underscored by the fact that the United States has formally asserted the state secrets privilege in litigation seeking to challenge the TSP on its merits. See Al-Haramain, supra; see generally In re NSA Telecomm. Records Litig., MDL No. 06-1791 (N.D. Cal.) (consolidating TSP-related cases). Indeed, in ACLU v. NSA, 493 F.3d 644 (6th Cir. 2007), cert. denied, 128 S. Ct. 1334 (2008), lawyers and others alleging contacts with persons with potential al Qaeda affiliations sued to enjoin the TSP, raising among other grounds the First and Fourth Amendments. The Sixth Circuit agreed with the Government that the state secrets privilege required dismissal of the case because the matter could not be litigated – indeed, plaintiffs

could not even establish their threshold standing to sue – without recourse to sensitive classified information the disclosure of which would impermissibly jeopardize national security. See id. at 648-89 (opinion of Batchelder, J.); id. at 689-93 (Gibbons, J., concurring). The fact that the United States on national security grounds has officially invoked state secrets in response to merits challenges to the TSP, and the privilege assertion has been judicially upheld, reinforces that the Glomar response to plaintiffs' FOIA request here reflects no improper purpose.

We note, finally, that plaintiffs express concern that any prospect of surveillance of their communications would undermine the representation of their clients. As plaintiffs recognize, however, the district courts considering the Guantanamo detainees' habeas corpus petitions have issued a number of decisions addressing questions of attorney-client confidentiality. See Appellants' Br. 33. To the extent plaintiffs seek to raise questions pertaining to the adequate representation of those habeas petitioners, the proper forum for pursuing such matters is in the habeas proceedings themselves, and not this collateral FOIA action seeking unrestricted public disclosure of protected information. As noted, a requester's identity and claimed need for information are legally irrelevant to the merits of a FOIA request. See Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 170 (2004); Reporters Committee, 489 U.S. at 771; United Technologies Corp. v. FAA,

102 F.3d 688, 690-91 (2d Cir. 1996). The district court's decision upholding the Government's Glomar response should be affirmed.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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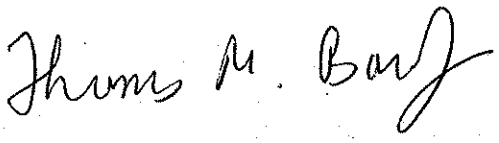

CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)(7)

I hereby certify that this brief is in compliance with Rule 32(a)(7) of the Federal Rules of Appellate Procedure. The brief contains 7,854 words, and was prepared in 14-point Times New Roman font using Corel WordPerfect 12.0.

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CERTIFICATE OF COMPLIANCE WITH SECOND CIRCUIT INTERIM RULE 25

Thomas Wilner, et al. v. NSA, No. 08-4726-cv (2d Cir.)

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of January, 2009, I served the foregoing Brief for Appellees by emailing a PDF digital version to the Court and counsel, and by causing 10 hard copies to be sent by overnight delivery (FEDEX) to the United States Court of Appeals for the Second Circuit, and two hard copies to be sent by overnight delivery (FEDEX) to the following counsel:

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