



OFFICE *of* GOVERNMENT INFORMATION SERVICES

June 20, 2016 — Sent via email

██████████  
██████████

Re: Case No.: 201600823  
NG: HK: CM

NATIONAL  
ARCHIVES  
*and* RECORDS  
ADMINISTRATION

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Dear ██████████:

This responds to your request for assistance from the Office of Government Information Services (OGIS), which we received on May 2, 2016. Your request for assistance pertains to your records request to the Central Intelligence Agency (CIA).

Congress created OGIS to complement existing Freedom of Information Act (FOIA) practice and procedure; we strive to work in conjunction with the existing request and appeal process. The goal is for OGIS to allow, whenever practical, the requester to exhaust his or her remedies within the agency, including the appeal process. OGIS has no investigatory or enforcement power, nor can we compel an agency to release documents. OGIS serves as the Federal FOIA Ombudsman and our jurisdiction is limited to assisting with the FOIA process.

We have reviewed your submission and we understand that you made a request to the CIA for records about ██████████. The CIA responded to your request by informing you that it found no responsive records reflecting an open and acknowledged relationship between ██████████ and the CIA; the Agency's letter further informed you that it can neither confirm nor deny the existence of any records that would reveal a classified connection between ██████████ and the CIA. You appealed that response, and the CIA upheld its initial decision on your request. You dispute this response and ask for OGIS's assistance with this matter.

OGIS staff spoke to CIA FOIA staff about the concerns you raise in your letter to OGIS. CIA FOIA staff affirmed the agency's position on your request for records. In cases such as this where an agency is firm in its position, there is little for OGIS to do beyond providing more information about the agency's actions.

In working with the CIA on cases similar to yours, we have learned that when the agency receives a request for records about a subject, it first searches for records that relate to an open or acknowledged relationship between that subject and the agency. As the CIA explains in its ██████████ response letter to you, the agency's search revealed no such records.

The CIA also maintains records that are, by statute, exempt from disclosure. In your case, the agency refused to confirm or deny whether it has classified records related to Mr. Nichols; this is known as the "Glomar" response. As the CIA explains in its response letter, the existence or nonexistence of responsive records is classified under FOIA Exemptions 1 and 3, 5 U.S.C. §§ 552(b)(1) and (b)(3). FOIA Exemption 1



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protects “information that has been deemed classified “under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy.” FOIA Exemption 3 incorporates other, separate statutes that require information to be withheld from release.

In the Exemption 1 context, intelligence agencies often issue Glomar responses to FOIA requests, in which they refuse to even confirm or deny whether responsive records exist. Courts have held that agencies may refuse to confirm or deny the existence of records where to answer the FOIA inquiry would cause harm cognizable under a FOIA exception. In the national security context, EO 13526 provides that agencies may issue Glomar responses “whenever the fact of their existence or nonexistence is itself classified under this order or its predecessors.” *See*, E.O. 13526 §3.6(a).

One way to challenge a Glomar response is to show that the information Glomared by the agency has been officially acknowledged to the public. In showing “official acknowledgement,” you must demonstrate that the information you requested is “as specific as the information previously released,” matches the previously disclosed information, and was publicized through an official, documented disclosure. *See, Int’l Counsel Bureau v. U.S.C.I.A.*, 774 F.Supp.2d 262 (D.D.C. 2011). A general acknowledgement of intelligence activity usually will not be enough to overcome a Glomar response as to specific details of an operation that have not been officially acknowledged by the government. Also, statements contained in media reports of government officials who are not authorized to speak for the agency do not constitute “official acknowledgement by an authoritative source.” *See, Am. Civil Liberties Union v. Dep’t of Def.*, 752 F.Supp.2d 361 (S.D.N.Y. 2010).

In citing FOIA Exemption 3, the CIA first points to the Central Intelligence Act of 1949, as amended, 50 U.S.C. § 403-4 *et seq.* (CIA Act), which exempts the CIA from “any...law which require(s) the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency.” 50 U.S.C. § 403g. In addition, the CIA proffers the National Security Act of 1947, as amended, 50 U.S.C. § 3001 *et seq.* (the NSA), which mandates that the “Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure.” 50 U.S.C. § 3024(i)(1).

I hope that this information about your request is useful to you. Thank you for contacting OGIS; we will now consider this matter closed.

Sincerely,

/s/

NIKKI GRAMIAN  
Acting Director

cc: CIA FOIA