

**FOIA Advisory Committee, 2020-22 Term
Classification Subcommittee
Recommendations Regarding Glomar Responses**

Members:

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Summary of Report

The Freedom of Information Act (FOIA) did not anticipate situations in which government agencies would not be able to acknowledge the existence or non-existence of records without violating a set of requirements to withhold information (*e.g.*, national security, privacy, etc.). Consequently, government agencies have instituted a practice known as the “Glomar response” in which they neither confirm nor deny the existence of responsive records. While it is widely recognized as legitimate, there is also public skepticism about this practice, particularly when it is used for national security reasons. This report makes three recommendations to improve transparency of agencies’ “neither confirm nor deny” responses, as well as a fourth recommendation for a further investigation by a body with the appropriate resources and access.

Overview of Recommendations

1. We recommend that the Department of Justice’s Office of Information Policy (OIP) issue guidance to government agencies that they use the internationally recognized nomenclature of “neither confirm nor deny” (NCND) to refer to Glomar responses.
2. We recommend that OIP require standardized tracking and reporting procedures for NCND responses.
 - a. Government agencies should be required to track and report on an annual basis:
 - i. The total number of NCND responses issued
 - ii. Whether these NCND responses were in whole or in part
 - iii. The relevant FOIA exemptions that justify NCND responses and the number of corresponding cases in which these were used [*e.g.*, (b)(1), (b)(3), (b)(6), (b)(7)(C)]
 - iv. The number of NCND responses that have not been affirmed on administrative appeal
 - v. The number of NCND responses that have not been upheld by a court in litigation
 - b. The Department of Justice (DOJ) should track and report annually aggregated data on NCND responses as reported by agencies.
3. We recommend that government agencies provide information to requesters on their websites regarding circumstances that will likely result in an NCND response, and, where possible, recommendations on how to avoid such a response.

4. We recommend that the Archivist of the United States direct a relevant organization (*e.g.*, OGIS, Information Security Oversight Office) to, or if necessary, recommend that a relevant organization (*e.g.*, Government Accountability Office, Intelligence Community Inspector General): 1) conduct a review of the use and practice of NCND responses across government; and 2) formulate a set of recommendations to ensure that these responses are being used in a manner consistent with the goals of the FOIA.

The Glomar Challenge

Glomar responses are responses to FOIA requests in which agencies neither confirm nor deny the existence of responsive records on the grounds that revealing the existence or non-existence of records would itself reveal information that is exempt from public disclosure under the FOIA, such as classified information. While not mentioned in the FOIA, Glomar responses have long been recognized by courts. The first district court ruling on Glomar responses came in 1975, when journalist Harriet Ann Phillippi requested records from the Central Intelligence Agency (CIA) regarding the agency's salvage operation of a sunken Soviet nuclear submarine, which was undertaken using a deep-sea drilling vessel known as the Glomar Explorer. In response, the CIA refused to either confirm or deny the existence of such records, asserting that to do so would itself endanger national security. The United States Court of Appeals for the DC Circuit ruled in 1976 that in such cases, government agencies "may refuse to confirm or deny the existence of records."¹

Since that time, the use of NCND responses has expanded from national security to other areas such as privacy and ongoing criminal investigations, and have frequently been endorsed by federal courts.² While there are no available statistics, it is likely that hundreds or even thousands of NCND responses are issued on an annual basis. They have also, notably, begun to appear in state and even local responses to freedom of information requests. The federal executive branch has also created some guidance for agencies on the use of NCND. For instance, Section 3.6 of Executive Order (E.O.) 13526 on Classified Information states that in regards to the FOIA, the Privacy Act of 1974, the Presidential Records Act, and the E.O.'s mandatory review processes, "[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."³ DOJ has issued guidance on the use of NCND in privacy matters.⁴ All of this suggests that there is a clear and compelling need for the NCND response to exist, particularly in

¹ *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976). On June 6, 2014, the CIA sent its first-ever Twitter message, from a verified account with the simple handle of @CIA. With characteristic secrecy, it said: "We can neither confirm nor deny that this is our first tweet."

² For a (partial) list of relevant Court of Appeals decisions concerning Glomar responses, see <https://www.justice.gov/archive/oip/courtdecisions/glomar.html>.

³ Executive Order 13526, Classified National Security Information, available at <https://www.archives.gov/isoo/policy-documents/cnsi-eo.html>

⁴ FOIA Update, OIP Guidance, "Privacy Glomarization," Vol. VII, No. 1, 1986, available at <https://www.justice.gov/oip/blog/foia-update-oip-guidance-privacy-glomarization>; "The Bifurcation Requirement for Privacy 'Glomarization,'" Vol. XVII, No. 2, 1996, available at <https://www.justice.gov/oip/blog/foia-update-oip-guidance-bifurcation-requirement-privacy-glomarization>

the realm of national security where government agencies are required by E.O. 13526 to protect national security information from disclosure, and that its existence is well-founded in law.

At the same time, some view the use of NCND responses as outside the norm. Glomar, according to one scholar, “was the product of extraordinary circumstances, to be applied sparingly by the federal government in withholding national security information.”⁵ The official position of the executive branch is that NCND responses are an “extraordinary response” that “can be justified only when the confirmation or denial of the existence of responsive records would, in and of itself, reveal exempt information.”⁶ In addition, many in the requester community perceive that NCND is frequently used as a way to avoid responding to FOIA requests, particularly in cases that concern national security, sometimes referred to as the “Glomar fig leaf.”⁷

In the opinion of this Subcommittee, the view that NCND responses are “extraordinary” is outdated and in need of revision. In fact, the circumstances that give rise to the use of NCND responses are everyday and ordinary. Intelligence agencies must continue to protect sources and methods, and other classified information. Law enforcement agencies must continue to protect ongoing investigations. Agencies must continue to protect individuals’ privacy interests. In other words, the failure of the FOIA to account for such occurrences represents a void in the law itself, leading to inadequate oversight.

Many complaints about alleged abuses of NCND responses do not dispute that they are legitimate in appropriate circumstances; the concern is with the use of such responses in inappropriate circumstances. In many cases, NCND responses are issued in response to requests even without performing a search for records. Many in the requester community believe that litigation is the only effective way to force agencies to reconsider an NCND response. In court cases involving national security and law enforcement courts are exceptionally deferential to agencies, while requesters and their representatives have limited means to challenge the validity of the NCND response, though there are examples of Glomar being successfully pierced, both at the administrative stage and in court.⁸ All of these concerns reinforce the idea that more oversight is necessary.

⁵ A. Jay Wagner, “Controlling Discourse, Foreclosing Recourse: The Creep of the Glomar Response,” *Communication Law and Policy*, Vol. 21, No. 4 (2016), 539.

⁶ See Department of Justice, OIP Guidance: FOIA Update, Vol. VII, No. 1 (1986), available at <https://www.justice.gov/oip/blog/foia-update-oip-guidance-privacy-glomarization>.

⁷ See for instance Jameel Jaffer, “The Torture Report and the “Glomar Fig Leaf,”” *Just Security*, Dec. 10, 2014, available at <https://www.justsecurity.org/18242/glomar-fig-leaf/>.

⁸ See Nathan Freed Wessler, “[We] Can Neither Confirm nor Deny the Existence or Nonexistence of Records Responsive to Your Request’: Reforming the Glomar Response Under FOIA,” *New York University Law Review*, Vol. 84, No. 4 (2010), 138, available at <https://www.nyulawreview.org/wp-content/uploads/2018/08/NYULawReview-85-4-Wessler.pdf>.

The Classification Subcommittee’s Glomar Survey

In order to establish adequate oversight, we need more information about the use of NCND responses. There are no requirements in place for government agencies to track or report data on the use of NCND responses.⁹ In an effort to gain additional insight into the scope and practice of NCND responses across government, in June 2021, this Subcommittee sent a questionnaire to 23 agencies and offices in the federal government that were seen as most likely to use NCND responses. Participation was voluntary, but the Subcommittee hoped agencies would see their involvement as supporting the intention of the FOIA to promote transparency. The Subcommittee asked for a response by July 15, 2021.

We asked questions concerning the following categories of information (see Appendix I):

- The practice of automatically issuing Glomar responses in response to all or certain types of FOIA requests
- Practices about tracking the number of Glomar responses issued
- Data regarding the agency’s use of Glomar responses to FOIA requests between 2015 and 2020.
- Data about appeals to Glomar responses between 2015 and 2020
- Data about litigation regarding Glomar responses to FOIA requests between 2015 and 2020
- Templates for Glomar responses used by the agency
- Public information available about Glomar responses

The Subcommittee would like to thank those agencies that participated for their contributions. Unfortunately, we did not receive enough responses to the questionnaire to provide a full overview of the use of NCND across the federal government. We received a total of six responses, some of which were partial and some of which themselves employed a Glomar response. Only two agencies provided statistics, and this was to indicate that they did not issue any security-related NCND responses during the period for which we sought information (2015-2020).

It is not entirely clear why more agencies did not respond, but informal conversations suggested at least two reasons. First, agencies were not required to respond, and devotion of staff time to responding to the questionnaire would require allocation of resources away from their core responsibilities, such as responding to FOIA requests. Second, many agencies did not have data at hand to answer some of our queries.

Nevertheless, questionnaire responses did produce useful data. One agency stated that it tracks statistics about the use of NCND; however, this agency reported that it has not issued a (b)(1) NCND response in four years. Another agency does not track NCND responses separately, but instead includes them in their annual FOIA reporting in the “denied in full” category. This indicates to the Subcommittee that there may be a wide variety of practices throughout government regarding the tracking of data on the use of NCND responses.

⁹ DOJ guidance suggests that the Glomar responses be treated as denials in full; however, it is not clear whether this is always followed. <https://www.justice.gov/oip/page/file/1438431/download> at page 12.

The questionnaire also revealed how important agencies consider the NCND response to be for their missions. For instance, a U.S. Army representative responded to our request for advice for requesters about how to “pierce the Glomar veil” as follows:

“[Glomar] is not a veil, it is a legitimate FOIA tool applied by agenc[ies] to protect sensitive and relevant national security information, as required by E.O. 13526, the very acknowledgement of which could cause irreparable harm to our and/or allied partner’s national security; as well as jeopardize the [lives] of U.S. and coalition military forces/personnel and confidential sources.”

Thus, while FOIA requesters are frustrated by the lack of confirmation or denial of the existence of particular records, agencies maintain that these responses are essential to their missions.

Reforming Glomar: Recommendations

Despite the relatively few responses to the questionnaire, the Subcommittee believes that it can make a number of recommendations for improving the use of NCND responses. These recommendations are designed to make policy around these processes easier to understand and more transparent. They will also set the stage for a more thorough investigation of the use of NCND responses across government.

1. From Glomar to “Neither Confirm Nor Deny”

We recommend that OIP issue guidance to government agencies that they use the internationally recognized nomenclature of “neither confirm nor deny” (NCND) to refer to Glomar responses.

Where possible, government agencies should use the term “neither confirm nor deny” rather than Glomar. FOIA’s purpose is to make the government more transparent and accountable to its citizens, and the use of terms of art or jargon make this more difficult. Some scholars have noted that the use of jargon can make it more difficult for ordinary citizens to interact with and participate in government.¹⁰

The use of the term “Glomar” to refer to these responses is problematic. Not only does the term refer to the name of a specific ship involved in a court case, it also originally involved an NCND response in connection with Exemption (b)(1), whereas NCND responses are now used in conjunction with several FOIA exemptions.

It should be noted that in practice, the term “neither confirm nor deny” is used in many places. For instance, the executive order on classification listed above does not use the term “Glomar.” Government agency communications with requesters generally use the phrase “neither confirm

¹⁰ See Hindy L. Schachter, *Reinventing Government Or Reinventing Ourselves: The Role of Citizen Owners in Making a Better Government*, SUNY Press (1997), 74-5; Angela M. Evans and Adriana Campos, “Open Government Initiatives: Challenges of Citizen Participation,” *Journal of Policy Analysis and Management*, Vol. 32, No. 1 (Winter 2013), pp. 172-185.

nor deny,” rather than Glomar. This recommendation urges that this be extended to other areas, such as agency websites and in reporting.

During a transition period, it may be desirable to use both terms (“neither confirm nor deny” and Glomar) in official guidance on the subject. It would be ideal if federal and other courts were to also adjust their use of terminology accordingly.

2. Tracking and Reporting Glomar Responses

We recommend that OIP require standardized tracking and reporting procedures for NCND responses.

Government agencies should be required to track and report on an annual basis:

- *The total number of NCND responses issued*
- *Whether these NCND responses were in whole or in part*
- *The relevant FOIA exemptions that justify NCND responses and the number of corresponding cases in which these were used [e.g., (b)(1), (b)(3), (b)(6), (b)(7)(C)]*
- *The number of NCND responses that have not been affirmed on administrative appeal*
- *The number of NCND responses that have not been upheld by a court in litigation*

The Department of Justice should track and report annually aggregated data on NCND responses as reported by agencies.

Congress does not currently require government agencies to track and report the use of NCND responses separately; rather, they are included in full denials based on exemptions. For several reasons, agencies should be required to do so regularly. The total number of NCND responses issued is an indicator of the frequency of NCND use. Both the requester community and government community have a strong interest in understanding trends related to the use of these responses. There is an impression of “Glomar creep” or increasing use of NCND responses throughout government, at the federal, state, and local level. Tracking data on the use of NCND responses will help the public better understand trends in these areas and their underlying causes. In addition, agencies themselves will gain a better understanding of how they use NCND responses – indeed, one apparent reason that agencies were not able to respond to the NCND questionnaire is that they claimed not to have this data readily available.

In this recommendation, we suggest that OIP require standardized tracking and reporting of information related to NCND responses. This is authorized by the FOIA, which states “The Attorney General of the United States, in consultation with the Director of the Office of Management and Budget, shall develop reporting and performance guidelines in connection with reports required by this subsection by October 1, 1997, and may establish additional requirements for such reports as the Attorney General determines may be useful.”¹¹

¹¹ 5 U.S.C. § 552 (e)(5).

To be meaningful, the data must be sorted and categorized. For instance, some agencies include a partial NCND response in every response to a FOIA request; counting this as a single NCND response would inflate the numbers used. For this reason, agencies should report FOIA data segregated by category, such as whether or not the NCND response is full or partial. They should also sort the NCND responses by exemption. In cases where NCND responses are based on more than one exemption, all should be tracked. For instance, if an agency issues an NCND response based on Exemptions (b)(1) and (b)(3), it should track each one.

While the categorization of response data is necessary, the Subcommittee believes that it is not possible at the moment to easily devise a typology that captures the multiple ways in which NCND responses are used throughout government. Therefore, the Subcommittee suggests leaving government agencies some latitude in the way in which they report response data, at least initially. In recommendation #4 below, we ask that an investigative body look into this issue further and make recommendations if appropriate.

It is also difficult to determine the best forum for reporting NCND responses. While this would ideally be included in the FOIA Annual Report that each agency issues, the content of these reports is determined by statute. Should Congress update FOIA, it may wish to add that “neither confirm nor deny” data be included in the Annual FOIA Report. In the interim, the Subcommittee suggests that OIP direct that this data be provided in the Chief FOIA Officer’s Report. Along with the statistics submitted, we suggest that the Chief FOIA Officer of each agency provide an explanation of the agency’s methodology for memorializing and tracking information related to NCND responses.

Tracking this data may require that agencies update the software used to manage FOIA requests. While we recognize that changes in procedures may be cumbersome, we believe that the interference will be minimal and ultimately worthwhile, both to the mission of the agencies and for public understanding of the inner workings of government.

In addition, we recommend that DOJ OIP include NCND responses in its annual summary of agency annual reports. Currently, the Attorney General’s reports do not include this information. This should include the number of NCND responses that have not been affirmed on administrative appeal or upheld by a court in litigation, as reported by agencies to DOJ in their annual reporting.

3. Agency Guidance to Requesters

We recommend that government agencies provide information to requesters on their websites regarding circumstances that will likely result in an NCND response, and, where possible, recommendations on how to avoid such a response.

Government agencies have a duty to provide the public with information on how they implement FOIA. For instance, there are explicit requirements in place for government agency websites

regarding the FOIA.¹² However, government agencies are not currently required to include information regarding NCND responses. Some agencies do include some of this information on their websites. For instance, the CIA posts a list of guidelines on its online FOIA reading room that include several mentions of “neither confirm nor deny,” including in its section regarding polygraph records, but there is no general policy statement regarding the use of NCND responses.¹³ Many other agencies’ websites that the Subcommittee has reviewed, however, do not provide any information at all.

We suggest the following guidelines for information be provided to the public:

- The agency should attempt to describe all circumstances that will likely result in an NCND response with as much relevant detail as possible.
- The agency should advise requesters on how to avoid an NCND response if possible.
- This information should be clearly written in plain language understandable to the non-expert.
- An ideal place for such a discussion is in the FOIA Reference Guide or Handbook.¹⁴

For instance, if the agency issues privacy NCND responses in response to all FOIA requests about third-party individuals, unless the requester provides evidence that the subject of the request is deceased, provides a privacy waiver from the third-party individual who is the subject of the request, or provides proof of sufficient public interest overriding the privacy interest, the agency should provide examples of the types of information sufficient to establish the subject’s death, *e.g.*, news articles, death certificate, etc. For each exemption the agency anticipates being cited for an NCND response, the agency should provide a set of criteria that it uses to evaluate whether to issue an NCND response. The Archivist should recommend that agencies be provided – perhaps by OIP or OGIS – with resources on information and advice they can provide to the public.

4. Further Investigation

We recommend that the Archivist of the United States direct a relevant organization (e.g., OGIS, Information Security Oversight Office) to, or if necessary, recommend that a relevant organization (e.g., Government Accountability Office, Intelligence Community Inspector General): 1) conduct a review of the use and practice of NCND responses across government; and 2) formulate a set of recommendations to ensure that these responses are being used in a manner consistent with the goals of the FOIA.

As we have indicated above, much remains unknown about the use of NCND responses across government. This Subcommittee endeavored to get targeted agencies to respond to a questionnaire but did not receive adequate responses. For this reason, we believe that a thorough,

¹² See

<https://www.justice.gov/oip/oip-guidance/OIP%20Guidance%3A%20%20Agency%20FOIA%20Websites%202.0>

¹³ CIA, “Freedom of Information Act; Privacy Act; and Executive Order 12958; Implementation, Interim Rule,” no date, available at <https://www.cia.gov/readingroom/docs/32CFR.pdf>.

¹⁴ U.S. Department of Justice, “OIP Guidance: Agency FOIA Websites 2.0,” no date, available at <https://www.justice.gov/oip/oip-guidance/OIP%20Guidance%3A%20%20Agency%20FOIA%20Websites%202.0>.

professional review of the use of NCND responses across government is necessary. In order for the review to be successful in eliciting the necessary information, agency participation must be mandatory.

The investigation should attempt to answer the following questions:

- What practices are currently in place across government for the use of neither confirm nor deny requests?
- Has the use of these responses expanded over time, and if so, are there any discernible causes for such expansion?
- What are the appropriate reporting practices regarding the use of these procedures? What categories should agencies use when reporting NCND responses? What data would agencies themselves find useful to collect?
- Under what circumstances do agencies issue NCND responses without conducting an initial search for records?
- Under what circumstances do agencies conduct an initial search for records before issuing an NCND response?

Based on the findings of the review, the investigatory body should make recommendations aimed at achieving the following goals:

- Ensuring that NCND responses are being used in a manner consistent with the goals of FOIA
- Implementing reporting requirements regarding the use of NCND responses
- Improving communication about NCND responses with the public
- Reducing the unnecessary or inappropriate use of NCND responses
- Ensuring that agencies only issue NCND responses without conducting an initial search for records when absolutely necessary

The recommendations should be addressed to both Congress and the Executive Branch. A complete solution to any issues the review identifies may require action by both branches of government, each within their sphere of influence.

Questionnaire/Request for Assistance

FOIA Advisory Committee, Subcommittee on Classification

Please return to stockerj@trinitydc.edu by July 15.

* The following questions are focused on Glomar responses based on Exemption 1 only.

1. Does your agency include a partial Glomar response as part of every FOIA response? If yes, what does it say?

For example, in response to first-party FOIA requests, the FBI issues a standard partial Glomar response explaining that to the extent the requester is seeking records about their Watchlist status, the FBI is neither confirming nor denying the existence of responsive records.

For the purposes of questions 2-4, please exclude any partial Glomar responses pursuant to the policies described in Question 1.

2. Does your agency maintain statistics regarding Glomar responses? If yes:
 - a. What data do you track about these responses (*e.g.*, number of responses issued per year, exemptions used, first-party vs. third-party requests, partial vs. full Glomar responses)?
 - b. Is this data currently publicly available and if so, where?
 - c. How long is this data maintained and which NARA-approved records control schedule applies to it?
3. Are there types or categories of requests that typically trigger a Glomar response? If yes,
 - a. What are the types or categories?
 - b. Is information or guidance about the types or categories of requests that typically trigger a Glomar response currently publicly available and if so, where?

For questions 4-6, please indicate if it is for the calendar year or fiscal year.

4. On average, how many Glomar responses does your agency issue annually? If possible, can you provide this data for 2015-2020?
5. For the period 2015-2020, how many requesters have appealed a Glomar response annually? How many appeals resulted in a change in the agency's response?

6. For the period 2015-2020, has a court overturned a Glomar response by your agency in litigation? If so, can you identify all litigation cases in which this occurred? (please include civil action number and court).

7. For the period 2015-2020, has your agency unilaterally modified a Glomar response during the course of litigation? If so, can you identify all litigation in which this occurred? (please include civil action number and court).

8. Do you have documents, guidance, standard operating procedures (SOPs), internal manuals or instructions for Government Information Specialists/others regarding when and how to issue Glomar responses?

If yes,

- a. Are these materials currently publicly available and if so, where?
- b. If they are not publicly available, are you willing to share copies of them with us?

If no,

- c. how does your agency ensure consistency in the use of Glomar responses?

9. Do you have standard Glomar response language or letters that your agency uses? If yes,

- a. Are these materials currently publicly available and if so, where?
- b. If they are not publicly available, are you willing to share copies with us?
- c. Can you explain the circumstances that trigger the use of particular Glomar language in response letters?

If no,

- d. What standards guide your agency's issuance of Glomar responses?

10. What materials do you make available to the public about Glomar responses? Do you post that material on your FOIA website/electronic reading room/library?

11. What guidance would you give to FOIA requesters who wish to avoid a Glomar response *ab initio*? What guidance would you give to FOIA requesters so that they can effectively and legitimately pierce the Glomar veil?

11. Would you be willing to have a follow-up conversation with a representative of the FAC regarding Glomar responses to FOIA requests? Yes or No.