IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER Plaintiff, v. NATIONAL SECURITY AGENCY Defendant.	)	No. 1:10-cv-01533-RJL

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

Plaintiff the Electronic Privacy Information Center ("EPIC") submits the following reply in support of its motion for summary judgment against Defendant the U.S. National Security Administration ("NSA"). EPIC challenges the NSA's "*Glomar* response" to EPIC's Freedom of Information Act ("FOIA") request seeking records concerning the agency's communications with Google, Inc. regarding cybersecurity.

FACTUAL BACKGROUND

On January 12, 2010, Google reported a major cyber attack from "highly sophisticated" hackers in China. On February 4, 2010, the Washington Post and the Wall Street Journal reported that Google contacted the NSA regarding the firm's security practices, immediately following the attack. The Wall Street Journal reported that the NSA's general counsel drafted a "cooperative research and development agreement" within twenty-four hours of Google's January 12, 2010 announcement, authorizing the agency to "examine some of the data related to the intrusion into Google's systems."

On February 4, 2010, EPIC filed a FOIA request with the NSA ("EPIC's FOIA Request"). EPIC's request sought:

1. All records concerning an agreement or similar basis for collaboration, final or draft, between the NSA and Google regarding cyber security;
2. All records of communication between NSA and Google concerning Gmail, including but not limited to Google's decision to fail to routinely encrypt Gmail messages prior to January 13, 2010; and
3. All records of communications regarding NSA's role in Google's decision regarding the failure to routinely deploy encryption for cloud-based computing service, such as Google Docs.

The NSA failed to disclose records. On March 10, 2010, the NSA denied EPIC's FOIA Request and issued a "*Glomar* response," writing to EPIC that the agency would neither confirm nor deny the existence of any agreement with Google concerning cybersecurity.

EPIC's reply supports its cross-motion for summary judgment, Dkt. No. 10 ("EPIC's Motion") and responds to the NSA's Reply and Opposition to Plaintiff's Motion for Summary Judgment, Dkt. Nos. 12-13 ("NSA's Reply").

ARGUMENT

The NSA's Reply reiterates the Agency's contention that "confirming or denying the existence of the records requested by EPIC would reveal information related to 'any function' or 'the activities' of NSA." NSA's Reply at 2.

However, the Agency fails to rebut EPIC's argument that the NSA is required to perform a search and segregability analysis prior to issuing a response to EPIC's FOIA Request. Indeed, none of the cases cited in the NSA's Reply support the proposition that an agency may issue a

Glomar response before searching for responsive documents. It is apparent that some records or portions of records demanded in EPIC's FOIA Request will fall outside the scope of the Section 6. The NSA must identify those records, perform a segregability analysis, and disclose the non-exempt records or portions of records.

Further, the NSA's assertion that the Janosek Declaration sufficiently supports the Agency's *Glomar* response is not persuasive in light of binding case law.

I. The NSA Must Perform a Search and Segregabilty Analysis Before the Agency May Issue a Lawful *Glomar* Response

The FOIA permits an agency to withhold documents that are specifically exempt from disclosure by statute. 5 U.S.C. § 552 (b)(3). The National Security Agency Act is such a statute, barring disclosure of any document that relates to "the organization or any function of the National Security Agency, or any information with respect to the activities thereof…" 50 U.S.C. § 402 note. In addition, this court has held that the National Security Agency may "refuse to confirm or deny the existence of certain records … if [a] FOIA exemption would itself preclude the acknowledgement of such documents. *Wilner v. NSA*, 592 F.3d 60, 65 (2d Cir. 2009), quoting *Milner v. CIA*, 88 F.3d 796, 800 (9th Cir. 1996).

An 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." *Gardels v. CIA,* 689 F.2d 1100, 1103 (D.C. Cir.1982); *see also Miller v. Casey,* 730 F.2d 773, 776-77 (D.C. Cir.1984); *Phillippi v. CIA,* 546 F.2d 1009, 1012 (D.C. Cir.1976). "Such an agency response is known as a *Glomar* response and is proper if the fact of the existence or nonexistence of agency records falls within a FOIA exemption." *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007) (internal citations omitted).

However, an agency's *Glomar* response must be grounded on a factual determination that the requested records are exempt from disclosure under FOIA. *Phillipi v. Central Intelligence Agency*, 546 F.2d 1009, 1013 (D.D.C. 1976) (holding that an agency is required to "provide a public affidavit explaining in as much detail as possible the basis for its claim that it can be required neither to confirm nor to deny the existence of the requested records."). The requisite factual basis cannot be formulated absent a lawful agency search for records and subsequent segregability analysis.

In this case, the NSA admits that the agency has not spent a single minute searching for documents that are responsive to EPIC's FOIA Request. Janosek Decl. at ¶ 10. The agency has not identified a single record responsive to EPIC's FOIA Request. *Id*. And the NSA has failed to perform any segregability analysis. Janosek Decl. at ¶ 14 .The NSA may not lawfully issue a *Glomar* response to EPIC's FOIA Request without developing a factual basis for its assertion of Exemption 3.

To be sure, an Exemption 3 determination turns "less on the detailed factual contents of specific documents" than on "the existence of a relevant statute and the inclusion of withheld material within the statute's coverage." NSA's Reply at 5, quoting *Ass'n of Retired R.R. Workers v. U.S. R.R. Retirement Bd.*, 830 F.2d 331, 336 (D.C. Cir. 1987) (internal citations omitted). However, *Ass'n of Retired R.R. Workers* assumes that the agency has identified the "specific documents" and analyzed the relevant statute's application to the "withheld material." In this case, the NSA has done neither. The authorities cited in the NSA's Reply do not support the agency's failure to search for responsive records in this case. *Ass'n of Retired R.R. Workers* upheld U.S. Railroad Retirement Board's Exemption 3 assertion, but only after the agency searched for and identified documents in response to the request. *Id*. at 335 (noting that the

agency determined that "the particular matter sought (*i.e.,* the mailing list)" was exempt under Exemption 3.) The NSA's Reply also cites *Hunt v. CIA*, *Larson v. Department of State*, *People for the American Way Foundation v. NSA*, and *Moore v. Bush*. These cases uphold *Glomar* responses, but only after the agency searched for responsive records and determined that the records, if any, were properly the subject of a *Glomar* response. *See Hunt v. CIA*, 981 F.2d 1116, 1119 (9th Cir. 1992) (holding that records had been identified that contained information on "foreign nationals who are CIA intelligence sources, or who are suspected foreign intelligence operatives, or, who are CIA intelligence targets."); *Larson v. Department of State*, 565 F.3d 857, 861-2 (D.C. Cir. 2009) (finding that records were "'derived from the most sensitive and fragile' signals intelligence targets and identifies targets whose communications the NSA has exploited or pertains to intelligence collection assignments and the technical details of collection.") (internal citations omitted); *People for the American Way Foundation v. NSA*, 462 F.Supp.2d 21, 31 (D.D.C. 2006) (finding that "the defendant's declarations describe the information withheld and the 'justifications for nondisclosure with reasonably specific detail.'") (internal citations omitted); *Moore v. Bush*, 601 F.Supp.2d 6, 20 (D.D.C. 2009) ("NSA has shown that it too conducted a search reasonably calculated to uncover all relevant documents in response to Mr. Moore's requests.").

As a practical matter, the NSA is simply not able to determine that all documents responsive to EPIC's FOIA Request are subject to Section 6 without any knowledge of what those documents may consist of or what information they might contain. The NSA's reply fundamentally misconstrues the scope of EPIC's FOIA Request by limiting it to only those matters that reflect a judgment call by the Agency. The NSA alleges that it is "apparent from the face of EPIC's request that to confirm or deny the existence of responsive records would …

reveal whether NSA did or did not consider a particular cybersecurity incident or security settings in certain commercial technologies to potentially expose U.S. government information systems to an external threat." NSA's Reply at 6. However, EPIC's FOIA Request is much more broad. EPIC's FOIA Request concerns a wide range of documents that do not reflect on the NSA's activities in any way. For example, as EPIC has previously stated, documents that are responsive to EPIC's FOIA Request might include emails, letters, voicemails, or other communications from Google to the NSA that are likely to reveal much about Google, but little, if anything, about the NSA's functions and activities. EPIC's Motion at 8.

By failing to even conduct a search for documents, it is impossible for the NSA to claim that all hypothetical responsive documents would necessarily reveal the activities of the Agency. In addition, the Agency's response creates an incomplete record that prevents this Court from conducting an adequate review of the Agency's action, which would stand unchecked – a result that is contrary to the D.C. Circuit's direction to trial courts. *See Phillippi v. Central Intelligence Agency*, 546 F.2d 1009, 1013 (D.C. Cir. 1976) ("it is clear that the FOIA contemplates that the courts will resolve fundamental issues in contested cases on the basis on in camera examinations of the relevant documents." Also stating that "The Agency's arguments should then be subject to testing by appellate, who should be allowed to seek appropriate discovery when necessary to clarify the Agency's position or to identify the procedures by which that position was established.").

II. The Janosek Declaration is Not Sufficient to Support the NSA's *Glomar* Response

The NSA re-asserts that the Janosek Declaration is "reasonably specific" to demonstrate that "the information withheld logically falls within the claimed exemption." NSA Reply at 10

(internal citations omitted). However, the Declaration fails to state the agency's factual basis for its response in the required level of detail.

Although Congress drafted Section 6 with an "exceptionally wide scope," courts have emphasized that care must be used when "scrutinizing claims of exemptions based on such expansive terms." *Founding Church of Scientology of Wash., D.C., Inc. v. NSA*, 610 F.2d 824, 829 (D.C. Cir. 1979). EPIC does not suggest, as the NSA believes, that "in explaining why the protected information falls within the scope of a protective statute, the agency should not use the words of the statute too often." NSA Reply at 12, note 2. However, the NSA cannot use mere repetition of statutory language as a crutch for a lack of substantive reasoning to support the use of a *Glomar* response. "Barren assertions that an exempting statute has been met cannot suffice to establish that fact." *Scientology*, 610 F.2d at 831. As EPIC indicates, in the two pages (double-spaced) that the Janosek Declaration devotes to justifying the Agency's response, the statutory standard is reiterated no less than seven separate times. The Janosek Declaration then states three substantive, though conclusory, rationales for withholding a response to EPIC's FOIA Request:

1. "To confirm or deny the existence of any such records would be to reveal whether NSA, in fulfilling one of its key missions, determined that vulnerabilities or cybersecurity issues pertaining to Google or certain of its commercial technologies could make U.S. government information systems susceptible to exploitation or attack by adversaries and, if so, whether NSA collaborated with Google to mitigate them." Janosek Decl. at ¶ 13.

2. "[A]ny acknowledgement by NSA of the existence or nonexistence of a relationship or agreement with Google related to a specific cybersecurity incident would reveal whether or not NSA considered the alleged attack to be of consequence for critical U.S government information systems." Janosek Decl. at ¶ 13.

3. "[S]uch information falling in either category could alert our adversaries to NSA priorities, threat assessments, or countermeasures that may or may not be employed against future attacks." Janosek Decl. at ¶ 13.

Though these assertions contain plenty of "doomsday" language about prevention of future cybersecurity attacks, the Janosek Declaration fails to provide any factual support for why all

responsive documents in the Agency's possession would reveal the "vulnerabilities or cybersecurity issues" to which the Declaration alludes. For example, the Janosek Declaration states that "any acknowledgement…of the existence or nonexistence of a relationship with Google related to a specific cybersecurity incident would reveal whether or not the NSA considered the alleged attack to be of consequence for critical U.S. government information systems. Janosek Decl. at ¶ 13. However, EPIC's FOIA Request is explicitly not limited to communications related to a specific cybersecurity attack, and is likely to include documents that have no relation at all to the January 12, 2010 cyber-attack.[1]

CONCLUSION

For the foregoing reasons, EPIC asks the Court to deny Defendant's Motion for Summary Judgment and grant EPIC's Cross-motion for Summary Judgment as to the NSA's invocation of a *Glomar* response to EPIC's FOIA Request.

Respectfully submitted,
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[1] Compare this to the specificity of the affidavits in other cases that describe specific cause and effect reasoning to show that a *Glomar* response is appropriate to prevent disclosure of the Agency's activities or functions. *See People for the American Way Foundation v. NSA*, 462 F.Supp.2d at 29 ("The NSA's declarations explain that 'confirmation by NSA that a person's activities are not of foreign intelligence interest or that NSA is unsuccessful in collecting foreign intelligence information on their activities on a case-by-case basis would allow our adversaries to accumulate information and draw conclusions about NSA's technical capabilities, sources, and methods."); *Larson v. Department of State*, 565 F.3d at 866-7 ("The agency similarly determined that confirming the existence or nonexistence of records responsive to Portillo-Bartow's request would reveal vulnerabilities of communications systems, the success or lack of success in collecting information, and projects or plans relating to national security."); *Hunt v. CIA*, 981 F.2d 1116 at 1119 ("[the affidavits] describe the scope of CIA record-keeping on foreign nationals. The CIA possesses records on foreign nationals who are CIA intelligence operatives, or, who are CIA intelligence targets. To confirm or deny the existence of records on Eslaminia could therefore reveal intelligence sources or targets… According to CIA affidavits, barring a Glomar response, CIA intelligence gathering would be impaired by its own disclosures in response to FOIA requests. CIA sources could find themselves under suspicion and in grave danger. The CIA avers that potential future sources would be reluctant to come forward; targets of intelligence security would be alerted and could take additional precautions; and foreign operatives could learn whether or note the CIA was aware of their activities.").

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of March 2011, I served the foregoing PLAINTIFF'S REPLY IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT, including all exhibits and attachments, by electronic case filing upon:

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