COURT DECISIONS

GLOMAR

Court of Appeals Decisions

Elec. Priv. Info. Ctr. v. NSA, No. 11-5233, 2012 WL 1654943 (D.C. Cir. May 11, 2012) (Brown, J.). Holding: Affirming the district court's grant of summary judgment to NSA on the basis that it properly asserted the Glomar response in conjunction with Exemption 3. The D.C. Circuit affirms the district court's decision that found that NSA properly asserted the Glomar response in conjunction with Exemption 3 and Section 6 of the National Security Act, which protects information pertaining to NSA's organizations, functions, or activities. At the outset, the court notes that "[b]ecause Section 6 of the National Security Agency Act 'is a statute qualifying under Exemption 3,' . . . the only question is whether the withheld material satisfies the criteria of the exemption statute, i.e., whether acknowledging the existence or nonexistence of the requested material would reveal a function or an activity of the NSA." The D.C. Circuit rejects plaintiff's argument that the NSA Act would not protect "unsolicited communications from Google to NSA." Rather, the D.C. Circuit agrees with NSA that "any information pertaining to the *relationship*between Google and NSA would reveal protected information about NSA's implementation of its Information Assurance mission." The D.C. Circuit determines that "[t]he existence of a relationship or communications between the NSA and any private company certainly constitutes an 'activity' of the agency subject to protection under Section 6." Moreover, the court finds that "[e]ven if [plaintiff] is correct that NSA possesses records revealing information *only*about Google, those records, if maintained by the agency, are evidence of some type of interaction between the two entities, and thus still constitute an NSA 'activity' undertaken as part of its Information Assurance mission, a primary 'function' of the NSA." The D.C. Circuit further notes that if such information were disclosed, private entities "might hesitate or decline to contact the agency, thereby hindering its Information Assurance mission." With respect to plaintiff's challenge to the adequacy of NSA's declaration, the D.C. Circuit finds that "the NSA's affidavit describes which functions and activities would be implicated by disclosure, as well as how acknowledging the existence or nonexistence of requested records would reveal those functions or activities." The D.C. Circuit dismisses plaintiff's contention that "the same logic that requires secrecy in intelligence gathering does not apply to the NSA's Information Assurance mission because it is public knowledge that the U.S. government uses Google applications and that the NSA is investigating security vulnerabilities in Google's commercial products." Rather, the D.C. Circuit declines to draw distinctions between the NSA's various missions and notes that Sections 6 "broadly exempts *any*information pertaining to the agency's 'activities' or 'functions.'"

Moore v. CIA, No. 10-5248, 2011 WL 6355313 (D.C. Cir. Dec. 20, 2011) (Henderson, J.). Holding: Affirming the district court's grant of summary judgment to the CIA, which had issued a Glomar response to the request for records on a third party. Exemptions 1 & 3 (Glomar): The D.C. Circuit affirms the decision of the district court and holds that the CIA's declaration in this action, which stated that "the CIA asked the FBI to redact some 'CIA-originated information' from [an FBI] Report [concerning the subject of the request] in order to protect intelligence source and methods" "does not constitute an official acknowledgement sufficient to waive *Glomar*." The D.C. Circuit recounts that in its earlier decision in *Wolf v. CIA*it held that the CIA had waived its ability to invoke Glomar where the then-CIA director officially acknowledged certain information by quoting from dispatches during Congressional testimony.Distinguishing the instant case from its decision in *Wolf,*the D.C. Circuit finds that here the CIA's "declaration dose not identify specific records or dispatches matching [plaintiff's] FOIA request." The D.C. Circuit comments that "[i]ndeed, because the CIA-originated information was redacted before the FBI released its report to him, [plaintiff] cannot show that the redacted information even relates to [the subject of the request]." Rather, "[a]ll [plaintiff] can establish is that some unspecified 'CIA-originated information' was redacted from the Report."

Roth v. DOJ, 642 F.3d 1161 (D.C. Cir. 2011) (Tatel, J.). Holding: Affirming, in part, the district court's decision that the FBI properly withheld certain information pursuant to Exemptions 7(C) and 7(D); and reversing, in part, the district court's approval of the FBI's *Glomar*response and certain information withheld pursuant to Exemption 7(D); and remanding for further proceedings. At the outset, the D.C. Circuit rejects plaintiff's arguments that "the privacy interests implicated by his FOIA requests are attenuated for two reasons: (1) more than a quarter century has passed since the 1983 murders, and (2) since [the subjects of the targeted request] have significant criminal records, they would likely suffer less embarrassment or reputational harm from being associated with the FBI's investigation of the murders than would ordinary, law-abiding citizens." As to plaintiff's first argument, the D.C. Circuit finds that "if, as [it] held in *Shrecker v. Department of Justice*, . . . the passage of approximately a half century did not 'materially diminish' individuals' privacy interests in not being associated with McCarthy-era investigations, then certainly individuals continue to have a significant interest in not being associated with an investigation into a brutal quadruple homicide committed less than thirty years ago." In addition, the D.C. Circuit notes that plaintiff's second argument "runs contrary to" the Supreme Court's holding in *Reporter's Committee*that "even convicted criminals have a substantial privacy interest in their 'rap sheets.'" Accordingly, the D.C. Circuit recognizes that the subjects of the request maintain "substantial privacy interests protected by Exemption 7(C)."

The D.C. Circuit then examines the two public interests identified by plaintiff, namely, that disclosure will: (1) "advance the public's interest in knowing whether the federal government complied with its *Brady*obligation to disclose material, exculpatory information to [plaintiff's] trial counsel" in connection with his state criminal trial, and (2) "further the public's interest in knowing whether the FBI is withholding information that could corroborate a death-row inmate's [i.e., plaintiff's] claim of innocence." At the outset, the D.C. Circuit draws a distinction between these two stated interests, finding that "the public's interest in knowing whether the federal government complied with its *Brady*obligations at the time of [plaintiff's] trial is narrower than and does not fully encompass the public's more general interest in knowing whether the FBI is withholding information that could corroborate [his] claim of innocence." Moreover, the D.C. Circuit further notes that it has "no doubt that the second non- *Brady*-related public interest identified by [plaintiff] is substantial" and finds that "[t]he fact that [he] has been sentenced to the ultimate punishment strengthens the public's interest in knowing whether the FBI's files contain information that could corroborate his claim of innocence."

As to the FBI's invocation of the *Glomar*response in connection with plaintiff's targeted request for information pertaining to three specific individuals, the D.C. Circuit notes that "[w]here, as here, the asserted public interest is the revealing of government misconduct, the Supreme Court's decision in . . . *Favish*requires that the FOIA requester 'establish more than a bare suspicion' of misconduct." With regard to plaintiff's *Brady*-related public interest, the D.C. Circuit finds that "given the Fifth Circuit's decision affirming the denial of [plaintiff's] habeas petition," which reviewed and discounted "the very FBI disclosures [plaintiff] contends constituted *Brady*material," his argument "falters at the *Favish*threshold." With regard to the public interest premised on plaintiff's claims of innocence, the D.C. Circuit concludes that plaintiff satisfied the *Favish*standard by demonstrating that "a reasonable person could believe . . . (1) that the Oklahoma drug dealers [who were the subjects of plaintiff's request] were the real killers, and (2) that the FBI is withholding information that could corroborate that theory." The D.C. Circuit finds that statements made by two witnesses implicating the drug dealers in the murders "might well cause a reasonable person to doubt [plaintiff's] guilt." Additionally, the D.C. Circuit finds that the fact that the FBI withheld certain information favorable to plaintiff's claim of innocence in connection with his FOIA request "until 2001, approximately seventeen years after [his] trial, 'would warrant a belief by a reasonable person' that the FBI 'might' have other potentially exculpatory information in its files, possibly including information regarding [the three named subjects of the request]." Balancing the competing privacy and public interests, the court concludes that "the balance tips decidedly in favor of disclosing whether the FBI's files contain information linking [the three subjects] to the FBI's investigation of the killings." Accordingly, the D.C. Circuit reverses the district court's decision as to the FBI's assertion of the *Glomar*response and remands for further proceedings, "emphasiz[ing] that the FBI need not disclose whether it has information about the three men that is unrelated to its investigation into the 1983 murders." Moreover, the D.C. Circuit comments that the FBI "must either produce any records it has linking [the three individuals] to its investigation into the four murders, or it must follow its normal practice in FOIA cases of identifying records it has withheld and stating its reasons for doing so."

Pickard v. DOJ, No. 08-15504, 2011 WL 3134505 (9th Cir. July 27, 2011) (Silverman, J.). Holding: Reversing district court's grant of summary judgment and concluding that the DEA cannot assert the *Glomar*response in conjunction with Exemptions 7(C) and 7(D) to deny the subject of the request's status as an informant where the government officially confirmed that status in open court in the course of official proceedings; and remanding the matter for the district court to determine the appropriateness of DEA's exemption claims. The Ninth Circuit holds that the DEA cannot invoke a *Glomar*response in conjunction with Exemptions 7(C) and 7(D) with respect to an informant in plaintiff's criminal case because the government has "officially confirmed" his status as an informant within the meaning of FOIA's (c)(2) exclusion. The (c)(2) exclusion provides that an "'agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.'" Quoting the D.C. Circuit in *Boyd v. Criminal Division of the U.S. Department of Justice,*the Ninth Circuit notes that "'[w]here an informant's status has been officially confirmed, a *Glomar*response is unavailable, and the agency must acknowledge the existence of any responsive records it holds.'"

Although DEA's submissions demonstrated that there was "'no official public pronouncement regarding the status of [the subject] as a confidential source,'" the Ninth Circuit determines that "nothing in the statute or legislative history suggests that in the context of the interests protected by the (c)(2) exclusion, 'official confirmation' requires that the government issue a press release publishing the identity of a confidential informant or that the director of a law enforcement agency personally identify the informant." Rather, the Ninth Circuit finds that "the plain language of the term 'official confirmation' in the context of 5 U.S.C. § 552(c)(2) leads to . . . a 'rational common-sense result' when read to mean an intentional, public disclosure made by or at the request of a government officer acting in an authorized capacity by the agency in control of the information at issue."

In this case, the Ninth Circuit finds that "[a]t [plaintiff's] criminal trial, the government, as part of its case-in-chief, intentionally elicited testimony from [the subject] and several DEA agents as to [his] activities as a confidential informant in open court and in the course of official and documented public proceedings." Accordingly, "the revelation of [the subject's] identity as an informant was not the product of an unofficial leak, nor was it improperly disclosed in an unofficial setting by careless agents." Having allowed "agents and confidential informants testify at trial in open court about the identity and activities of those confidential informants," the Ninth Circuit concludes that the government "may no longer refuse to confirm or deny" the existence of records concerning that informant. However, the Ninth Circuit notes that "[t]his is not to say that the DEA is now required to disclose any of the particular information requested by [plaintiff]," and remands the matter to the district court to "determine whether the contents, as distinguished from the *existence*, of the officially confirmed records may be protected from disclosure under the DEA's claimed exemptions."

Wilner v. Nat'l Sec. Agency, No. 08-4726, 2009 WL 5158035 (2d Cir. Dec. 30, 2009) (Cabranes, J.). Exemption 3 (Glomar): As an initial matter, the court joins other "Circuits in holding that 'an agency may refuse to confirm or deny the existence of records where to answer the FOIA inquiry would cause harm cognizable under a[] FOIA exception.'" With respect to this specific case, the court

concludes that the government may invoke a Glomar response in connection with the Terrorist Surveillance Program (TSP), a program whose existence the government has publicly acknowledged. "The record is clear that, although the general existence of the TSP has been officially acknowledged, the specific methods used, targets of surveillance, and information obtained through the program have not been disclosed." The court confines its analysis to the applicability of the agency's use of the Glomar response in connection with Exemption 3. The court adopts the "thorough analysis" of the district court, which found that Section 6 of the National Security Agency Act of 1959 constitutes a nondisclosure statute for the purposes of Exemption 3 and that NSA's affidavits are sufficiently detailed to demonstrate that the records sought are exempted from disclosure under that law. Moreover, NSA was justified in utilizing the Glomar response in association with that Exemption 3 statute because "the very nature of [plaintiff's] request – which seeks records concerning whether the communications were monitored by the NSA – establishes that any response would reveal 'information with respect to the activities' of the NSA." Despite plaintiffs' arguments to the contrary, the court finds no evidence that "even arguably suggests bad faith on the part of the NSA, or that the NSA provided a Glomar response to plaintiffs' request for the purpose of concealing illegal or unconstitutional actions."

Moore v. Obama, No. 09-5072, 2009 WL 2762827 (D.C. Cir. Aug. 24, 2009) (unpublished disposition) (per curiam)."The National Security Agency properly invoked a 'Glomar' response to appellant's request for information pertaining to any surveillance conducted on him" [Exemptions 1 & 3/Glomar].

Larson v. Dep't of State, No. 06-5112, 2009 WL 1258276 (D.C. Cir. May 8, 2009) (Sentelle, C.J.). Defendant CIA properly invoked Exemption 1 to withhold "four intelligence cables that report detailed descriptions of information obtained from a particular CIA source and provide general information about the source." These documents were properly classified by the CIA, as their release "would seriously undermine the CIA's ability to retain its current intelligence sources and attract future intelligence sources." Additionally, "disclosing the cables could lead to the unauthorized disclosure of intelligence methods. . . ." Courts properly "'accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record because the Executive departments responsible for national defense and foreign policy matters have unique insights in what adverse affects [sic] might occur as a result of [disclosure of] a particular classified record.'" Defendant "CIA sufficiently detailed the classified information in the withheld cables, why that information was classified, and why it logically must remain classified in the interest of national security." Furthermore, the CIA has explained that the passage of time does not lessen the agency's need to protect its sources. Similarly, the court "easily conclude[s]" that the CIA properly utilized Exemption 3 as well for the withheld material, by means of the National Security Act, 50 U.S.C. § 403-1(i)(1) (2006), which allows for the withholding of material relating to intelligence sources and methods. Defendant NSA also properly invoked Exemptions 1 and 3, providing sufficient details to justify nondisclosure, i.e., "the necessity to foreign intelligence gathering of keeping targets and foreign communications vulnerabilities secret." NSA's affidavit provides sufficient information for the court to rule on its withholdings, given "the substantial weight owed agency explanations in the context of national security." NSA has also demonstrated that the withheld information was properly classified. Plaintiffs' demand for further details from both the CIA and NSA "is not required by-indeed is even contrary to-[the court's] precedent." NSA has also shown that the withheld information is covered by section 6 of the National Security Act, 50 U.S.C. § 402 (2006), which protects from disclosure "the organization or any function of the National Security Agency"; 18 U.S.C. § 798(a)(3)-(4) (2006), which "prohibits the unauthorized disclosure of classified information 'concerning the communication intelligence activities of the United States'"; and 50 U.S.C. § 403-1(i), "which . . . instructs the Director of National Intelligence to protect intelligence sources and methods from unauthorized disclosure." Finally, defendant NSA properly refused to confirm or deny the existence of records responsive to one plaintiff' s request, concluding that acknowledgment of the existence of such information "could reasonably be expected to cause serious damage to the national security.

District Court Decisions

McMichael v. DOD, No. 11-2119, 2012 WL 6585113 (D.D.C. Dec. 18, 2012) (Collyer, J.). Holding: Denying DOD's motion to dismiss and remanding for DOD to perform a FOIA analysis. The court concludes that DOD improperly invoked a Glomar response in response to plaintiff's request for IG records concerning an alleged investigation of a command under the leadership of a named captain. The court notes that while the captain "has a legitimate interest in keeping private the record of any investigation into allegations of an abusive command climate," his "status as a federal employee with leadership responsibilities diminishes his privacy interest." In addition, plaintiff produced "evidence that some number of USSTRATCOM employees were aware of the investigation and its subject." The court goes on to agree that "the public has a strong interest in knowing whether the IG investigated allegations of an abusive command climate by the J4 Director." Balancing the public interest against the captain's privacy interest, the court determines "that a *Glomar*response was inappropriate even if the records in question, if they exist, may otherwise be exempt from disclosure under FOIA exemptions 7(C) and 6." "Balancing [the Captain's] diminished expectation of privacy against the public's interest in knowing whether the IG investigated allegations of misconduct, it must be concluded that the public interest prevails. Particularly where the fact of the IG investigation was known to a number of people and the identity of the person under investigation was equally apparent, a *Glomar*response cannot satisfy."

National Security Counselors v. CIA, Nos. 11-443, 11-444, 11-445, 2012 WL 4903377 (D.D.C. Oct. 17, 2012) (Howell, J.). Holding: Concluding that plaintiff has standing to pursue certain claims under FOIA and the APA; granting CIA's motion to dismiss on certain claims and denying CIA's motion to dismiss for certain claims. The plaintiff "complain[s] that, even when other federal agencies acknowledge the existence of responsive CIA records by referring FOIA requests to the CIA, the CIA has a policy of nevertheless issuing *Glomar*responses post-referral." The court dismisses this claim stating "the D.C. Circuit has clearly held that courts must apply the 'official acknowledgment' exception 'strictly,' such that the 'official acknowledgment' only extends to the specific records that are acknowledged by the agency." The court explains that the D.C. Circuit has held that acknowledgment is not "official" when it is made by another agency.

Judicial Watch, Inc. v. DOJ, No. 11-1121, 2012 WL 4845656 (D.D.C. Oct. 12, 2012) (Howell, J.). Holding: Granting defendant's motion for summary judgment as to the Glomar response in conjunction with Exemption 7(C) for certain categories of the request; denying plaintiff's cross-motion for summary judgment. The court finds that the plaintiff incorrectly asserts that "whatever privacy interest [the subject] might have once held in the requested information has now evaporated" because "'on numerous occasions'" the subject's association with specific criminal activity has already been confirmed by the defendant. The court declines to "waive [the subject's] relevant privacy interests *in toto*based solely on the fact that he has, at one time, been associated with criminal activity." The court notes that "there is a distinction between 'scattered bits of information' connecting [the subject] to criminal activity and an official prosecutorial record containing a decision not to charge him with a crime." It is "more intrusive of personal privacy interests" to reveal formal consideration of prosecution than to reveal an association with criminal activity through "pieces of information presented in the media or in the criminal prosecutions of others."

"Although public disclosure of a person's association with criminal activity does not waive that person's privacy interest completely, such public disclosure diminishes the person's privacy interest to some degree." However, the court does not need to quantify the subject's privacy interest because "the plaintiff has not articulated any argument to support a public interest in...disclosure." The evidence offered of improper political influences on the decision to decline prosecution "does not amount to a 'meaningful evidentiary showing'" and is "directly contradicted by evidence submitted by the plaintiff itself." The court notes that "the plaintiff has not articulated how the public interest would be served by merely acknowledging" the requested records. The court concludes "a decision not to prosecute a person, standing alone, does very little to 'shed[] light on the agency's performance of its statutory duties.'"

Skurow v. DHS, No. 11-1296, 2012 WL 4380895 (D.D.C. Sept. 26, 2012) (Sullivan, J.). Holding: Granting defendants' motion for summary judgment; denying plaintiff's cross-motion for summary judgment and determining that plaintiff is not entitled to attorney's fees. The court holds that the TSA properly refused to confirm or deny whether the plaintiff was on a Federal Watch List. "Federal Watch Lists constitute 'Sensitive Security Information' that is exempted from disclosure." The court cites to prior case law establishing that revealing this sort of information "'would enable criminal organizations to circumvent the purpose of the watch lists by determining in advance which of their members may be questioned.'"

North v. DOJ, No. 08-1439, 2012 WL 4373459 (D.D.C. Sept. 26, 2012) (Kollar-Kotelly, J.). Holding: Denying the defendant's motion for summary judgment and granting plaintiff's motion for summary judgment. Waiver of Glomar: The court concludes that the evidence presented by the plaintiff demonstrates a genuine issue of material fact and defendant's motion for summary judgment must be denied. The plaintiff submitted transcripts from the trial which indicate "that the DEA publicly acknowledged [the subject] as a DEA informant during Plaintiff's trial, triggering the 'public domain' exception and barring the DEA from employing a Glomarresponse."

The court finds that "Plaintiff is entitled to summary judgment to the effect that the DEA has officially acknowledged [the subject] as a DEA informant and therefore the DEA's Glomarresponse was improper."

Seme v. FBI, No. 11-2066, 2012 WL 4336251 (D.D.C. Sept. 20, 2012) (Leon, J.). Holding: Granting defendant's motion for summary judgment **.**The court concludes that the FBI's Glomar response was appropriate. The plaintiff was not able to meet his obligation "to articulate a public interest sufficient to outweigh the [subject's] privacy interest." While the plaintiff may already know certain information about the subject, the subject "maintains [his privacy] interest even if the requester already knows, or is able to guess, his identity." Even if a third party's "status as an FBI informant [has] been disclosed in deposition testimony" or that individual "testif[ied] in open court," the third party may "still maintain an interest in his personal privacy." Finally, the court determines that the plaintiff has not met his "obligation to articulate a public interest sufficient to outweigh the individual's privacy interest" because "[p]laintiff [] puts his personal interest in challenging his criminal conviction above the recognized privacy interest of the subject of his FOIA request."

Wonders v. McHugh, No. 11-cv-1130, 2012 WL 3962750 (D.D.C. Sept. 11, 2012) (Wilkins, J.). Holding: Granting defendant's motion for summary judgment. Glomar: The court holds that the Army properly asserted Exemption 7C to neither confirm nor deny the existence of records pertaining to the charges against the attorney and any documents or findings regarding the charges. The court states that the attorney "has a privacy interest in the records should they exist," and agrees that "any evidence regarding [Army Professional Responsibility Branch] investigations can lead to rumors, professional prejudice, embarrassment, harassment and can significantly and irreparably damage the reputation of the investigated attorney." With regard to the public interest, the court notes that the plaintiff has "assert[ed] only a personal interest in the requested information." With regard to plaintiff's comments that disclosure would be for the "'good of the government and all concerned,'" the court notes that plaintiff has not provided "evidence of misconduct" and "the documents he submitted do not support any alleged misconduct by the agency." The court finds that because any information that is protected by Exemption 6 would also be protected by Exemption 7C, it need not address Exemption 6 Glomar separately. The court declines to address the Army's Exemption 5 Glomar.

Bonilla v. DOJ, No. 11-20450, 2012 WL 3759024 (S.D. Fla. Aug. 29, 2012) (Cooke, J.). Holding: Granting defendant's motion for summary judgment on the basis that it properly withheld information under Exemptions 6 and 7(C) and that plaintiff failed to exhaust his administrative remedies. The court holds that DOJ properly asserted Exemptions 6 and 7(C) to neither confirm nor deny the existence of records pertaining to certain federal employees maintained by the Office of Professional Responsibility, which "is responsible for investigating allegations of misconduct involving DOJ attorneys or law enforcement personnel." The court notes that such records raise privacy concerns because they "constitute DOJ employees' personnel records, and reflect an OPR investigation into DOJ employees alleged to have committed acts of professional misconduct," "contain personal reflections and assessments on the reasons why DOJ employees took certain actions," and "contain third parties' reflections and assessments."

As to the public interest, the court finds that the plaintiff has not demonstrated a sufficient reason for the disclosure. "Although the public has an interest in knowing about governmental misconduct, [plaintiff] does not provide any facts or information to suggest some form of governmental misconduct would come to light if he had access to the requested materials."

Inst. for Pol'y Stud. v. CIA, No. 06-960, 2012 WL 3301028 (D.D.C. Aug. 14, 2012) (Lamberth, J.). Holding: Granting, in part, defendants' motion for summary judgment on the basis that certain withholdings under Exemptions 1, 2, 3 and 7(E) were proper and that plaintiff conceded other withholdings under Exemptions 2, 3, 6, 7(C), 7(D) and 7(F), and that all reasonably segregable material was released; denying plaintiff's motion to strike portions of the declarations; and ordering CIA to conduct searches for responsive records in three different directorates which were not initially searched. The court concludes that the CIA cannot invoke a Glomar response in conjunction with Exemption 1 "[b]ecause defendant has demonstrated the existence of documents pertaining to 'Pablo Escobar' [beyond open source material and therefore] . . . has acknowledged their existence." The court also notes that because Escobar is deceased "it would be incredibly difficult for [him] to frustrate the CIA's [intelligence methods]," as initially argued in defendant's submissions.

Moore v. FBI, No. 11-1067, 2012 WL 3264566 (D.D.C. Aug.13, 2012) (Kollar-Kotelly, J.). Holding: Dismissing complaint against the Executive Office of the President under Federal Rule of Civil Procedure 12(b)(6); granting, as conceded, the Criminal Division and U.S. Parole Commission's motions for summary judgment; and granting FBI and CIA's motions for summary judgment based on the adequacy of their searches and the CIA's assertion of the *Glomar*response in conjunction with Exemptions 1 and 3; and granting BOP and EOUSA's motions for summary judgment on the basis that plaintiff failed to exhaust his administrative remedies. The court holds that the CIA properly refused to confirm or deny "the existence of records [concerning plaintiff] 'that would reveal a classified connection to the CIA'" pursuant to Exemptions 1 and 3. The court concludes that CIA properly asserted "the *Glomar*response in accordance with § 3.6(a) of Executive Order 13,526" "[a]s to any potentially classified records pertaining to intelligence sources or activities." Further, the court determines that "[t]he CIA properly relied upon the Central Intelligence Agency Act of 1949 . . ., 50 U.S.C. § 403(g), also to support its *Glomar*response." Moreover, the court finds that "[p]laintiff has not adequately countered the CIA's reasonably detailed declaration with any contradictory evidence of bad faith." To the extent that plaintiff asserts that disclosure of the information would be in the public interest, the court finds that "it is only exemptions 6 and 7(C) – not asserted here – that 'the court is called upon to balance the conflicting [public/private] interests and values involved; in other exemptions Congress has struck the balance and the duty of the court is limited to finding whether the material is within the defined category.'"

Venkataram v. Office of Info.Policy, No. 09-6520, 2011 U.S. Dist. LEXIS 118661 (D. N.J. Oct. 14, 2011) (Simandle, J.). Holding: Remanding matter to DOJ for a more particularized analysis of plaintiff's FOIA requests. 7(C) Glomar: The court rejects DOJ's arguments in response to its order to show cause which sought the continued application of an Exemption 6 and 7(C) Glomar in connection with a request for law enforcement records related to a third party. For one, the court concludes that "Defendant's argument that EOUSA's policy of categorical non-disclosure [for requests for records pertaining to third parties] is entitled to deference is without merit and unsupported by the plain statutory language" of the FOIA. The court notes that "Defendant is in essence arguing that the Court give deference to EOUSA's policy interpreting the exemptions under (b)(6) and (b)(7) of FOIA, " but finds that "[t]his argument is contrary to the plain language of the statute which grants the court de novo review of an agency's refusal to disclose requested records." Second, the court finds unavailing defendant's assertion that the Glomar response is "necessary because confirmation of the documents would associate [the third party] with criminal activity and denial of the documents would allow adverse inferences to be drawn." Rather, the court finds that "[d]isclosure of the requested records would not associate [the third party] 'unwarrantedly with alleged criminal activity' because [he] is already associated with such criminal activity by virtue of his indictment." Moreover, the court observes "it is hard to see any privacy rationale at stake for an individual such as [the subject of the request] who was actually indicted for the criminal activity associated with the requested documents." The court finds that "[i]t is only when the privacy concerns addressed by an exemption are present that the requestor must establish a sufficient reason for the disclosure."

People for the Ethical Treatment of Animals v. NIH, No. 10-1818, 2012 WL 1185730 (D.D.C. Apr. 10, 2012) (Jackson, J.). Holding: Dismissing, without prejudice, and treating as conceded plaintiff's claim concerning NIH's decision to withhold certain records in response to one of its requests and its Administrative Procedure Act claim where plaintiff did not respond to defendant's arguments with respect to those issues; denying defendant's motion to dismiss the remaining FOIA claim on exhaustion grounds where NIH adjudicated plaintiff's administrative appeal despite its untimeliness; and granting defendant's motion for summary judgment on the grounds that it properly invoked the Glomar response in conjunction with Exemption 7(C). The court holds that NIH properly asserted Exemption 7(C) in conjunction with the Glomar response to neither confirm nor deny the existence of records pertaining to an investigation of three named researchers and a confidentiality agreement between NIH and the research center with respect to one of those individuals. In terms of the privacy interest, the court finds that "[t]here is no question that a response from the agency acknowledging the existence of the records and processing of the FOIA requests further would confirm that those three individuals were being or had been investigated." The court further notes that "[t]his confirmation goes to the heart of the privacy interest that Exemption 7(C) was designed to protect." Contrary to plaintiff's argument, the court finds that the relevant case law does not "make a distinction between whether the alleged investigation concerns an individual's personal or professional conduct – what matters is that there is a privacy interest in a person's identity being associated with the investigation." The court comments that if it "were to accept plaintiff's theory that a person never has a personal privacy interest in investigations into their professional conduct, it would mean that no target of a white collar criminal grand jury investigation would have a privacy interest in that fact, which cannot be true." Although the court acknowledges cases within the D.C. Circuit "recognize that '[t]he privacy exemption does not apply to information regarding professional or business activities,'" it finds "that is not the nature of the privacy interest that is at stake in this case," which is instead an interest in "being identified as a target of a law enforcement investigation."

Leonard v. U.S. Dep't of Treasury, No. 10-6625, 2012 WL 813837 (D.N.J. Mar. 9, 2012) (Kugler, J.). Holding: Denying the parties motions for summary judgment without prejudice; and ordering defendant to submit, for *in camera* review, a *Vaughn* index and any responsive records, and to provide plaintiff with an opportunity to reformulate his generalized request. The court concludes that the defendant cannot assert the Glomar response in connection with Exemption 3 and 26 U.S.C. § 6103(e)(7), which prohibits the release of tax return information when disclosure would seriously impair tax administration, to refuse to confirm or deny the existence of certain whistleblower forms pertaining to plaintiff. The court "does not find that Defendant has shown that the mere existence of whistleblower forms filed about Plaintiff would lead to the necessary conclusion that an IRS investigation has been undertaken against him." Moreover, the court finds that "it is not clear that disclosure of the existence of [these forms] will offer Plaintiff any further incentive 'to alter or destroy evidence' than he already has." Additionally, the court notes that "[g]iven that cases necessitating a *Glomar* response have been deemed 'exceptional' by the Third Circuit, this Court does not find that a *Glomar* response is necessary here, and will not expand the use of the response to this case." As such, the court "orders Defendant to submit to the Court a private *Vaughn* index for *in camera* review 'correlating justifications for non-disclosure with the particular portions of the documents requested' – if, indeed, such documents exist" as well as any responsive material.

North v. DOJ, No. 08-1439, 2011 WL 4071634 (D.D.C. Sept. 14, 2011) (Kollar-Kotelly, J.). Holding: Granting plaintiff's motion for reconsideration, and vacating the court's earlier grant of summary judgment to defendant with respect to records related to a witness at plaintiff's criminal trial; ordering DEA to determine whether certain information is in the public domain. Exemptions 6, 7(C) &7(D)/ *Glomar*: The court notes that it "previously declined to decide whether DEA properly issued a Glomar response based on the fact that [plaintiff] was requesting information pertaining to an informant." However, because plaintiff "has produced trial transcripts demonstrating that the government referred to [the witness] as an informant and that [the witness] testified that he entered into a cooperation agreement to assist the prosecution in [plaintiff's] case in exchange for lenient sentencing in his own case," the court now finds that it "cannot affirm DEA's issuance of a Glomar response."

ACLU v. DOJ, No. 10-436, 2011 WL 4005324 (D.D.C. Sept. 9, 2011) (Collyer, J.). Holding: Granting summary judgment to the CIA on the basis that it properly refused to confirm or deny the existence of records responsive to the request in conjunction with Exemptions 1 and 3. The court holds that the CIA properly refused to confirm or deny the existence of responsive records pursuant to Exemption 3 in conjunction with Central Intelligence Agency Act of 1949, which protects from disclosure "the organization, functions, names, official titles, salaries, or numbers of personnel employed," and the National Security Act of 1947 (NSA), which protects from disclosure "intelligence sources and methods." As a preliminary matter, the court notes that "[i]t is well-established that both statutory provisions cited by the CIA qualify as withholding statutes for purposes of Exemption 3." Contrary to plaintiff's argument, the court determines that the CIA properly relies on Section 403g of the CIA Act because information about drone strikes relates to "functions" of CIA personnel. The court finds that "[t]he fact of the existence or nonexistence of responsive information falls within the ambit of § 403g because whether the CIA cooperates with, is interested in, or actually directs drone strikes pertains to (possible) functions of CIA personnel." Based on the CIA's declaration, "which is entitled to 'substantial weight,'" the court concludes that "the CIA is justifiably concerned that revealing the existence or nonexistence of records sought on the various topics sought by Plaintiffs could alone reveal information on the CIA's internal structure and its capabilities and potential interests and involvement in/operation of the drone program."

The court also rejects plaintiffs' argument that the withheld information is not "intelligence sources and methods" protected by the NSA because "a program that targets certain persons for death or incapacitation cannot be deemed a means of collecting intelligence, so that neither a source nor a method of intelligence gathering is implicated by the fact of whether CIA has responsive records." Although the court acknowledges that "[a]t first blush, there is force to Plaintiffs' argument that a 'targeted-killing program is not an intelligence program' in the most strict and traditional sense," it ultimately finds that "Plaintiffs seek too narrow a reading of the authority conferred by the NSA to protect 'intelligence sources and methods.'" The court notes that the Supreme Court in *CIA v. Sims*"'has recognized the broad sweep of 'intelligence sources' warranting protection in the interest of national security.'" The court notes that it "has no reason to second-guess the CIA as to which programs that may or may not be of interest implicate the gathering of intelligence" and concludes that "taking into account the deference owed the CIA's declaration in the FOIA context, . . . the CIA's justification for its concerns about unauthorized disclosure of intelligence sources or methods to be both 'logical' and 'plausible.'" The court also concludes that "Plaintiff's argument that a program of drone strikes cannot form the basis of, or involve, intelligence sources or methods also ignores the scope of the CIA's specific authority to engage in activities beyond 'traditional' intelligence gathering (however defined), such as intelligence activities and operations, covert operations, and foreign relations activities." The court observes that "[i]t would surprise no one that the CIA may be authorized to engage in more than gathering facts around the world; the NSA's grant of protection to 'intelligence sources and methods' cannot be so limited." As such, the court holds that "[c]onfirming the existence or nonexistence of pertinent agency records on drone strikes could reasonably be expected to lead to the unauthorized disclosure of intelligence sources and/or methods."

The court also holds that the CIA properly invoked the *Glomar* response in conjunction with Exemption 1 with respect to the information requested. The court concludes that through its declaration "the CIA has sufficiently demonstrated that disclosure of records sought by Plaintiffs would cause damage to national security by providing insight into the CIA's intelligence activities, sources and methods, which are properly classifiable under §1.4(c) of Executive Order 13526." The court notes that in its analysis of the propriety of CIA's application of Exemption 3, it "has already determined that the records sought pertain to 'intelligence sources and methods' under the NSA;" and, indeed, finds that "[i]nformation on drone strikes is even easier to fit within the purview of intelligence activities" covered by the Executive Order and that "[t]he fact of whether or not the CIA has responsive records would reveal whether the CIA has an interest in, or can employ, drone technology." Additionally, "[i]ndependently, the CIA also demonstrates that the fact of whether or not the CIA maintains responsive records also implicates 'foreign relations or foreign activities of the United States, including confidential sources.'" The court notes that "[b]ecause the CIA's operations are conducted almost exclusively outside the United States, they inherently involve foreign activities." Additionally, the court concludes that

"[w]hile Plaintiffs may hold a general knowledge of the existence and use of drones, that knowledge does not mean that the underlying intelligence efforts that reveal and guide weapons to targets are somehow unprotected under FOIA and open to any requester." Noting that with respect to invocation of the *Glomar*response "the 'test is not whether the court personally agrees in full with the CIA's evaluation of the danger – rather, the issue is whether on the whole record the Agency's judgment objectively survives the test of reasonableness, good faith, specificity, and plausibility in this field of foreign intelligence in which the CIA is expert and given by Congress a special role.'" Here, the court determines that "[t]he CIA has met its burden of showing that the release of any acknowledgment of responsive records could damage national security; [and, accordingly,] FOIA 'bars the courts from prying loose from the government even the smallest bit of information that is properly classified or would disclose intelligence sources or methods.'"

Pugh v. FBI, No. 10-1016, 2011 WL 2474026 (D.D.C. June 23, 2011) (Wilkins, J.). Holding: Dismissing plaintiff's constitutional tort and *Bivens*claims; denying plaintiff's request for monetary damages; and concluding that the FBI properly invoked Exemption 7(C) Glomar to neither confirm nor deny the existence of records on the two informants. The court concludes that the FBI properly invoked Glomar in connection Exemption 7(C) in response to plaintiff's request for information concerning the identities of informants. "In this case, because plaintiff submitted neither privacy waivers nor proof of death for [two informants], the FBI 'had to determine whether the plaintiff's asserted public interest in disclosure of these records outweighed privacy interests' of these individuals." The court quotes the FBI's declarant who attested that "'[i]nherent in [the FBI's] 'Glomar' response [was] its conclusion that the privacy interests of these two individuals outweighed any public interest in disclosure, which plaintiff failed to articulate.'" The court finds that "[p]laintiff's unsupported assertion of government wrongdoing is far less than is needed to demonstrate 'that the public interest sought to be advanced is a significant one,' and that the release of the requested information 'is likely to advance that interest.'" The court likewise determines that the fact "[t]hat the FBI's denial of [plaintiff's] FOIA request may hinder his efforts to challenge his conviction or sentence . . . is irrelevant." Additionally, the court notes that "[p]laintiff cannot overcome the informants' privacy interests by claiming he already knows their identities," "[n]or does the passage of time diminish [the informant's] privacy interests."

Amnesty Int'l USA v. CIA, No. 07-5435, 2010 WL 5421928 (S.D.N.Y. Dec. 21, 2010) (Preiska, J.). Exemptions 1 & 3 (Glomar): The court finds that the CIA properly used *Glomar*responses to neither confirm nor deny the existence of records pertaining to the agency's approval and use of the "attention grasp" technique in connection with two detainees. The court finds that the CIA's *Glomar*responses "are appropriate under exemption 3 'because it would reveal intelligence sources and methods protected by the [National Security Act]'" and notes that responding to the request "'would reveal details regarding the CIA's detention and interrogation program and whether or not the CIA used certain specified methods to interrogate certain individuals.'" The court rejects plaintiff's argument that official disclosures by the CIA regarding the use of enhanced interrogation techniques (EITs) "vitiate" its *Glomar*responses. Instead, the court determines that the CIA never confirmed the use of specific interrogation techniques in connection with certain individuals and that general official disclosures regarding EITs are not sufficient to show that the "'specific information sought'" is already in the public domain.

Additionally, the court concludes that the CIA properly asserted *Glomar*in connection with Exemption 1, because "[t]he revelation of these records' existence or non-existence 'could reasonably be expected to cause at least serious damage to the national security'" and that the "information sought . . . is specifically authorized to be kept secret under criteria established by Executive Order No. 12,958 . . . [and] properly classified thereunder." Again, the court rejects plaintiff's contention that the "official disclosures amounts to a waiver of a *Glomar*response tied to FOIA exemption 1."

ACLU v. DOD, No. 09-8071, 2010 U.S. Dist. LEXIS 114441 (S.D.N.Y. Oct. 25, 2010) (Jones, J.). Exemption 1 (Glomar): The CIA properly refused to confirm or deny the existence of records related to the rendition or transfer of detainees to Bagram and the interrogation and treatment of detainees. The court rejects plaintiffs' claim that the CIA should "process" the request because "acknowledging whether or not the CIA has responsive documents, would not reveal secret intelligence methods, tools, activities, the location of secret CIA activity, or secret CIA sources or targets." To the contrary, the court finds that "[i]n situations such as this, where the agency has determined that the requested records are classified under the terms of Executive Order 12,958, the responding agency may simply 'refuse to confirm or deny the existence or non-existence of requested records.'" The court likewise dismisses plaintiffs' contention that "CIA's classification and determination of the harm that may result from acknowledging the existence of responsive records" is contradicted by "volumes of contrary evidence" that are "'publicly-acknowledged and well-known.'" Rather, the court finds that the CIA has not lost its ability to assert the Glomar response because "'no authorized United States Executive Branch official has officially acknowledged the CIA's association or lack thereof with the "rendition and/or transfer," detention and treatment of individuals held at Bagram.'" Moreover, "none of the statements [presented by plaintiffs] specifically disclose the existence or nonexistence of [the requested] records." The court concludes that "[a]lthough Plaintiffs may disagree with the CIA's assessment of the potential harm to national security based on public awareness of the CIA's activities in Afghanistan, Plaintiffs have not presented contrary evidence that controverts the CIA's justification for providing a Glomar response." The court declines to consider the applicability of Exemption 3, since it finds all of the records at issue were properly withheld pursuant to Exemption 1.

Lewis v. DOJ, No. 09-0746, 2010 WL 3271283 (D.D.C. Aug. 19, 2010) (Walton, J.). Exemption 7(C)/Glomar: The court determines that DEA properly invoked the Glomar response in connection with Exemption 7(C) with regard to acknowledging the existence of any investigative records pertaining to two named DEA agents. The court notes that "[i]ndividuals' privacy interests are substantial given the nature of law enforcement records" and plaintiff "does not ... argue the existence of a public interest in disclosure." Furthermore, "[i]f the DEA were to confirm the existence of [those] investigative records[,] . . . the DEA necessarily reveals the information its Glomar response is intended to shield."

Schulze v. FBI, No. 05-0180, 2010 WL 2902518 (E.D. Cal. July 22, 2010) (Ishii, J.). Exemptions 6, 7(C), 7(D), 7(F)/Glomar: The court concludes that the FBI and DEA "failed to show a statutory basis for application of the *Glomar*response based on the FOIA exemptions they relied upon in refusing to confirm or deny the existence of records, or to conduct a search to determine the existence of records responsive to Plaintiff's request for information pertaining to [two alleged informants.]" With respect to the defendants' assertions of a *Glomar*response based on Exemptions 6 and 7(C), the court finds that the "privacy exemptions contemplate requests for information pertaining to third parties where the waiver of privacy is not obtained" and "[b]ecause privacy interests are not absolute under these exemptions, an agency cannot categorically refuse to undertake the search for such records or at least afford the requesting party the opportunity to meaningfully oppose the non-disclosure of the records based solely on those exemptions."

With regard to the application *Glomar*and Exemption 7(D), the court concludes that "[n]otwithstanding the fact that the protection of the identity of confidential sources under FOIA exemption (b)(7)(D) is categorical if it is applicable, the disclosure of the mere *existence*of records responsive to Plaintiff's FOIA request pertaining to [the two individuals] does not create any harm cognizable under that exemption because, at its broadest, Plaintiff's request asked for all records in possession of FBI or DEA pertaining to those third parties" and "the disclosure of the existence of records pertaining to a third party does not identify that third party as a confidential source." The court finds that despite plaintiff's characterizations of the individuals' activities "as governmental witnesses and informants, such requests are made within the broader context of Plaintiff's request for all records pertaining to the two third parties." Additionally, the court finds that plaintiff "is entitled to challenge" whether the source can be considered confidential under Exemption 7(D) and "such challenge . . . would be unduly disadvantaged by the refusal of the agencies to disclose even the existence of records responsive to Plaintiff's request." The court also notes that to the extent that the agencies produced any documents to plaintiff through discovery in connection with his criminal case, the agencies "cannot refuse to acknowledge the existence of those same documents in response to a subsequent FOIA request." With respect to use of Exemption 7(F) *Glomar*, the court finds that "Defendants have failed to show that the acknowledgment of the *existence*of records responsive to Plaintiff's FOIA requests would cause the harm prohibited by the exemption; that is, would endanger the lives of [the two individuals.]"

Valfells v. CIA, No. 09-1363, 2010 WL 2428034 (D.D.C. June 17, 2010) (Collyer, J.). Exemptions 1 & 3 (Glomar)/waiver: "In this case, Plaintiffs do not challenge whether Exemptions 1 and 3 were legitimately raised nor do they dispute that a *Glomar*response is proper in cases where the fact of the existence or nonexistence of an agency record itself falls within a FOIA exemption." Instead, plaintiffs asserted that the CIA waived its ability to assert the Glomar response due to the fact that the FBI released a report containing "redactions of CIA-originating information made at the request of the CIA on the basis of Exemption 1." However, the court finds that plaintiffs' "[l]ogical deductions [about the source of the information] are not . . . official acknowledgments" and notes that, in fact, "[t]he CIA asked for redactions and thus attempted to avoid anything that could constitute an official acknowledgment, while the FBI, which has very different interests, was able to fulfill the goals of the FOIA and release most of the documents to Plaintiffs." The court contrasts the instant case with D.C. Circuit decision in *Wolf v. CIA*. In *Wolf*, "it was the Director of the CIA himself who divulged information before a Congressional committee," but, here, despite the fact that "responses to FOIA requests are also official to some degree, it cannot be said that an FBI response to a FOIA request constitutes an official action by the CIA." The court also notes that even if the FBI's disclosure of the report represented an "'official acknowledgment' by the CIA, as the CIA had the opportunity to review the report and request redactions, Plaintiffs would still be entitled to nothing more," and "the CIA would be required only to acknowledge the existence of information contained in the [report]."

Morley v. CIA, No. 03-2545, 2010 WL 1233381 (D.D.C. Mar. 30, 2010) (Leon, J.). Exemptions 1 & 3/Glomar: The CIA has now adequately explained the basis for its use of a Glomar response to neither confirm nor deny "the CIA's participation in a covert action." In particular, the CIA has detailed the possible damage to foreign relations that could result from acknowledgment of the existence of records pertaining to an agent's participation in covert activities. The CIA has made an exception to this with regard to two covert projects whose existence the CIA has already acknowledged. Plaintiff has failed to support his allegation that the CIA has previously acknowledged participation by the agent in question in two covert operations.

Lieff, Cabraser, Heimann& Bernstein, LLC v. DOJ, No. 09-00157, 2010 WL 1063785 (D.D.C. Mar. 24, 2010) (Kennedy, J.).Exemption 7(A)/Glomar. Defendant ATD properly refused to confirm or deny the existence of correspondence between itself and any other entities regarding requests for leniency in this particular market. Disclosing "the existence of another confidential source within the cartel under investigation would lead members of the cartel to attempt to identify and intimidate the leniency applicant and to more carefully hide information."

Bilderbeek v. DOJ, No. 08-1931, 2010 WL 1049618 (M.D. Fla. Mar. 22, 2010) (Antoon, J.).Exemption 7(C)/Glomar. Plaintiffs have sought information concerning a number of third parties who were alleged to have connections to the DEA's investigation of plaintiffs. "Numerous courts, however, have held that the disclosure of information relating to an individual's involvement in law enforcement proceedings constitutes an unwarranted invasion of personal privacy under Exemption 7(C). . . . Other than vague assertions of an improper investigation, the Plaintiffs have articulated no genuine public interest in the release of the records at issue. Accordingly, the Court finds that the Department properly issued a Glomar response pursuant to Exemption 7(C)."

Smith v. FBI, No. 07-1183, 2009 WL 3347186 (D.D.C. Oct. 19, 2009) (Roberts, J.). Exemption 6/Glomar: Plaintiff previously failed to show an overriding public interest in the records he requested concerning an FBI Special Agent. "Because defendant's confirmation of records concerning '[a]ny adverse action or disciplinary reports on [its Special Agent]' would necessarily reveal the precise information Exemption 6 shields, the Glomar response was proper."

Roth v. DOJ, No. 08-822, 2009 WL 3019781 (D.D.C. Sept. 23, 2009) (Huvelle, J.). The FBI properly refused to confirm or deny the existence of any responsive records related to three named third parties alleged to be the "'real perpetrators'" of certain murders,

because the information sought would be contained in "criminal investigative files" and "for the FBI to confirm that it maintains records relating to these individuals would thus associate them with criminal activity." The court comments that "it is irrelevant that 25 years have passed since the 1983 murders and investigation, as the passage of time does not necessarily diminish privacy interests." Additionally, the fact that those named individuals "may have been convicted of other offenses does not negate their interest in keeping their involvement, if any, in the investigation of different crimes secret." There is no public interest in the release of this information because plaintiff's attempt to overturn his conviction represents a personal, not a public, stake in the records [Exemption 7(C)(Glomar)] .