IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SABRINA DESOUSA, Plaintiff, v. CENTRAL INTELLIGENCE AGENCY *et al.*, Defendants.	Case No. 14-cv-1951(BAH)

DEFENDANTS' COMBINED OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Dated: June 8, 2016

Respectfully Submitted,

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INTRODUCTION

Plaintiff seeks disclosure of records related to the alleged kidnapping and extradition of a cleric in Italy, allegedly conducted by CIA agents, including Plaintiff. Defendants United States Department of State ("State"), United States Department of Defense ("DoD"), and the Central Intelligence Agency ("CIA") moved for summary judgment on the basis of the sufficiency of CIA and State's *Glomar* responses, the adequacy of State's searches, and the justifications for withholdings asserted by State and DoD.

Summary Judgment in Defendants' favor is proper. In her Opposition to Defendants' Motion for Summary Judgment (ECF No. 24) and Cross-Motion for Summary Judgment (ECF No. 25), Plaintiff does not challenge, and therefore concedes, the adequacy of State's searches and withholdings under FOIA and the Privacy Act. Plaintiff also concedes that DoD's search was adequate, challenging only DoD's assertion of FOIA Exemption 5 over a single record. For the reasons explained in the Second Declaration of Mark Herrington, that document was properly withheld in accordance with the deliberative process privilege.

The bulk of Plaintiff's arguments challenge the adequacy of CIA and State's issuance of *Glomar* responses to Plaintiff's requests for records. Contrary to Plaintiff's claims, confirming the existence or non-existence of records responsive to Plaintiff's requests would reveal highly sensitive, classified information. Accordingly, Defendants' *Glomar* assertions were proper. Finally, Defendants State and DoD have produced to Plaintiff all non-exempt, reasonably segregable portions of the responsive records. This Court should grant Defendants' Motion for Summary Judgment and deny Plaintiff's Cross-Motion for Summary Judgment.

ARGUMENT

I. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT

A. CIA Properly Asserted a Comprehensive Glomar Response

The CIA properly asserted a comprehensive *Glomar* response to Plaintiff's FOIA requests, which generally sought records containing communications regarding the alleged rendition of Abu Omar. Indeed, Plaintiff concedes that two of her requests are framed in such a way that if the CIA were to respond, the agency would reveal a *Glomar* fact. *See* Pl.'s Cross-Mot. at 6 ("*With a few exceptions,* disclosure of the existence or nonexistence of records responsive to Plaintiff's FOIA requests would not reveal a *Glomar* fact.") (emphasis added); *see also id.* at 8 n.3 (identifying two parts of her request that, if responded to with anything other than a *Glomar* assertion, could reveal a properly classified fact).

i. Plaintiff's First FOIA Request to CIA

The remaining portions of Plaintiff's FOIA requests to CIA are likewise drafted in such a manner that admitting the existence or non-existence of responsive records would reveal classified information. Plaintiff disagrees, suggesting that responding to her first FOIA request regarding CIA involvement in the alleged rendition and kidnapping of Abu Omar would not reveal whether the CIA had an interest in the rendition, but at most would reveal only that the CIA had an interest in "allegations" of its involvement. Pl.'s Cross-Mot. at 7.

The Court should reject Plaintiff's attempt to rewrite her FOIA requests. As Plaintiff acknowledges, *id*. at 12, her FOIA/PA requests to the CIA do not reference "allegations." *See* Compl. ¶¶ 50, 56. Moreover, Plaintiff's argument would create an end-run around the *Glomar* doctrine: anytime a FOIA requester sought information for which a *Glomar* response was necessary, the requester could defeat the *Glomar* assertion by simply claiming that the information sought concerned merely "allegations." But an agency's interest in "allegations" cannot be separated from the agency's interest in an underlying event; that is to say, disclosing

the CIA's interest (or lack thereof) in *allegations* concerning the Abu Omar rendition cannot be parsed from any CIA interest in the alleged rendition itself. Ms. Shiner explained, in meticulous detail, the grave consequences that could flow from acknowledging or denying CIA involvement in the alleged rendition. Shiner Decl. ¶¶ 23, 29-40; *see also* Defs.' Mot. for Summ. J. (ECF No. 22) at 13-15. Plaintiff's reliance on rhetorical parsing fails to contradict Ms. Shiner's declaration, and accordingly, CIA's *Glomar* response to Plaintiff's first FOIA request was proper.

ii. Plaintiff's Second FOIA Request to CIA

CIA's *Glomar* assertion was likewise proper with respect to Plaintiff's second FOIA request. Acknowledging the existence or non-existence of records responsive to this request—seeking records discussing whether clemency was considered for any of the Americans convicted of kidnapping Abu Omar in Italy and discussing a letter sent by Plaintiff to CIA—would unquestionably reveal the CIA's intelligence interest (or lack thereof) in the alleged rendition, a classified fact. Shiner Decl. ¶ 23. If, for instance, the CIA acknowledged that records discussing clemency for the convicted individuals existed, it would imply that the agency, at a minimum, had an intelligence interest in the alleged rendition, and at most could reveal its alleged involvement. Conversely, if the CIA admitted the non-existence of records discussing clemency, despite receiving a letter from Plaintiff requesting clemency, it would indicate that the CIA did not have an intelligence interest or involvement in the alleged rendition. The notion that "[c]lemency is a matter of grace," Pl.'s Cross-Mot. at 8, does not alter this chain of logic. It makes no sense to suggest that an agency would consider clemency for individuals involved in an incident with which it had no affiliation whatsoever, even accepting that clemency is a matter of discretion or courtesy. Acknowledging the existence or non-existence of records indicating internal discussions about a letter regarding clemency would likewise directly link (if their

existence was confirmed) or disassociate (if denied) the agency to the alleged rendition, and ultimately to Plaintiff, who sent the letter.

Plaintiff argues that private correspondence between Plaintiff's prior attorney and the CIA and Director of National Intelligence reveal an association between Plaintiff and the CIA, and therefore defeat the CIA's *Glomar* assertion. *See* Pl.'s Cross-Mot. at 9. Plaintiff is mistaken. Plaintiff has not met the demanding test for establishing that such letters constitute official disclosures, and regardless, courts have concluded that letters of this type definitively do not amount to official disclosures.

The standard for official disclosure requires Plaintiff to identify 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. Specifically, the information requested must be (1) "as specific as the information previously released;" (2) "must match the information previously disclosed;" and (3) must already have been made public through an official and documented disclosure. *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990). This "stringen[t]" test, *Pub. Citizen v. Dep't of State*, 11 F.3d 198, 202 (D.C. Cir. 1993), is to be applied with "exactitude," *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007), and represents a "high hurdle," in view of "the Government's vital interest in information relating to national security," *Pub. Citizen*, 11 F.3d at 203.

Plaintiff has made no effort to explain how the two letters to which Plaintiff refers—one from the CIA to Plaintiff's former attorney asking an unnamed individual ("your client") to "sign a memorandum acknowledging travel restrictions placed on certain affected CIA employees;" and the other, from the Director of National Intelligence to Plaintiff's former attorney, noting that an unnamed individual "has been, and continues to be, invited to regular meetings at the Central

Intelligence Agency"—satisfy the D.C. Circuit's test for official disclosure. *See* Pl.'s Cross-Mot. at 9. Indeed, although the CIA's letter acknowledges that it is a response to a letter from Ms. Desousa's prior counsel, Ms. Desousa's name is not referenced in either of these letters. *See* Exs. 2-3 of Pl.'s Cross-Mot. for Summ. J. To suggest that two letters that *do not name* Sabrina Desousa nevertheless constitute an official acknowledgment of the CIA's alleged association with Sabrina Desousa defies logic. For this reason, such private correspondence cannot be considered an official public disclosure, or otherwise indicate CIA acknowledgment of any kind of relationship with Plaintiff.[1] Plaintiff has not met her burden of identifying an official disclosure that defeats Defendants' *Glomar* assertion.

Furthermore, the Second Circuit has made clear that letters of this nature decidedly *do not* constitute official disclosures. *See Wilson v. CIA*, 586 F.3d 171 (2d Cir. 2009). In *Wilson*, the Second Circuit held that a letter sent by the CIA to a former employee, Valerie Wilson, containing Ms. Wilson's classified dates of service did not qualify as a "disclosure" because "Ms. Wilson's dates of service were not something hidden from her" and therefore sending plaintiff the letter was "akin to providing classified information 'to individuals with proper security clearance.'" *Id.* at 189. The Court further determined that the letter was not "made public" by the CIA, because the letter was not a "'matter[] of public record' that could be 'easily discoverable' by any interested member of the public." *Id.* (citation omitted). Because the letter was "private correspondence," "such a limited transmittal of classified information to an employee contractually bound to maintain its secrecy does not constitute an official disclosure."

[1] Plaintiff also argues that "CIA officials continued to discuss with Ms. Desousa her former affiliation with the agency in unclassified emails." Pl.'s Cross-Mot. at 10. The relevant portion of the email to which Plaintiff refers, merely states that "[w]e did find your file." *Id.* (citing Ex. 4). This correspondence likewise does not meet the rigorous test for an "official disclosure" of Plaintiff's alleged relationship with the CIA.

Id. Indeed, this was so even though the letter "was written on CIA letterhead . . . and contained no classification markings." *Id.* at 178.

The *Wilson* court's logic plainly applies to the letters relied upon by Plaintiff. Assuming *arguendo* that the letters cited concern Plaintiff, these letters were not "matters of public record," but rather private correspondence between Government entities and Plaintiff (through her attorney). Moreover, the information regarding travel restrictions purportedly applicable to Ms. Desousa and meetings to which Ms. Desousa had allegedly been invited contained in the letters, like Ms. Wilson's classified dates of service, were not "hidden from [plaintiff]," *id.* at 189, such that their inclusion amounted to any of kind of disclosure. Finally, that the letters addressed to Plaintiff's former attorney contained no classification markings, *see* Pl.'s Cross-Mot. at 9, does not tip the scales in favor of finding a public disclosure. *See Wilson*, 586 F.3d at 178. This Court should join the Second Circuit in rejecting the notion that such private correspondence constitutes an official disclosure.[2]

B. State Properly Asserted a Partial *Glomar* Response

State's assertion of a partial *Glomar* response to Plaintiff's FOIA requests was proper. As explained in the Declaration of Eric Stein, acknowledging the existence or non-existence of records responsive to parts 1 and 3 Plaintiff's first FOIA request (which sought records

[2] In any event, the existence or non-existence of Plaintiff's relationship with the CIA is merely one of three *Glomar* facts that CIA has identified as classified. *See* Pl.'s Cross-Mot. at 6 (citing Shiner Decl. ¶ 23). Thus, even if this Court were to determine that Plaintiff has succeeded in meeting the rigorous test for an official disclosure with respect to her alleged relationship with the CIA, such a finding would not overcome Defendants' comprehensive *Glomar* assertion. The CIA also asserted a *Glomar* response to protect from disclosure whether or not "the CIA had an intelligence interest in Abu Omar and/or his alleged rendition/kidnapping;" and "whether or not the CIA was involved in the alleged rendition operation in Milan." *See id*. Plaintiff has not provided any evidence or advanced any argument that these *Glomar* facts have been officially disclosed. *See id.*

containing communications regarding the Secretary of State's concurrence for authorization to proceed with the alleged rendition of Abu Omar and records discussing whether or not to defend individuals other than Plaintiff charged with participation in the alleged rendition), and Plaintiff's second FOIA request (which sought records containing communications surrounding clemency for "CIA officers") would have revealed classified information. *See* Defs.' Mot. for Summ. J. at 15-16; Stein Decl. ¶¶ 51-53, 57-59, 68, 72. Specifically, disclosure of the existence or nonexistence of the requested records would reveal intelligence sources or methods, including particular United States' interests, operations, targets, capabilities and methods, as well as the limits of such methods, and would implicate foreign government information. Defs.' Mot. for Summ. J. at 16.

i. Plaintiff's First FOIA Request to State

Plaintiff appears to misunderstand State's *Glomar* assertion, refuting the logic of asserting a *Glomar* response "[w]ith respect to Item 4 in Plaintiff's first FOIA request to State." Pl.'s Cross-Mot. at 11. State did *not* assert a *Glomar* response over part 4 of Plaintiff's first FOIA request; rather, State only asserted a *Glomar* response over parts 1 and 3 of that request. Defs.' Mot. for Summ. J. at 15 n.2 ("State asserts a *Glomar* response only as to parts 1 and 3 of Plaintiff's first FOIA/PA request and the entirety of Plaintiff's second request."). Plaintiff does not challenge any other aspect of State's assertion of a *Glomar* response over her first FOIA request and therefore concedes its sufficiency.

ii. Plaintiff's Second FOIA Request to State

With respect to State's *Glomar* response to Plaintiff's second FOIA request, Plaintiff claims that "[n]one of the requests relate to the underlying allegations of whether or not a kidnapping took place and, if so, who participated in it." Pl.'s Cross-Mot. at 11-12. This

suggestion is plainly inaccurate. Each of the items contained in Plaintiff's second FOIA request refers to "CIA officers" that were, according to Plaintiff, convicted *in abstentia* in Italy for their involvement in the Abu Omar rendition. Compl. ¶ 72. The notion that "[n]one of the requests relate to . . . who participated [in the alleged kidnapping]," Pl.'s Cross-Mot. at 11-12, is contradicted by the record: Plaintiff's requests were framed in such a way so as to *presume* CIA participation in the alleged rendition. As previously discussed, CIA's involvement or non-involvement in the alleged rendition has not been officially disclosed and is a properly classified fact. *See* Shiner Decl. ¶ 23.

Plaintiff complains that by failing to read the word "*alleged*" into her FOIA request (*i.e.*, "*alleged* CIA officers"), State has engaged in a "hyper-technical reading of Ms. Desousa's FOIA requests," thereby "frustrating the purpose and language of FOIA." Pl.'s Cross-Mot. at 12. But it is Plaintiff's approach that would contradict settled FOIA law: "an agency is required to read a FOIA request as drafted, 'not as either the agency or [the requester] might wish it was drafted.'" *Judicial Watch, Inc. v. Dep't of State*, No. 15-CV-690 (RMC), 2016 WL 1367731, at *3 (D.D.C. Apr. 6, 2016) (alterations in original) (citing *Miller v.* Casey, 730 F.2d 773, 777 (D.C. Cir. 1984)). The suggestion that the burden is on the State Department to reframe Plaintiff's FOIA request to avoid disclosing classified information turns longstanding precedent on its head: "it is *the requester's* responsibility to frame requests with sufficient particularity." *Id.* (emphasis added) (citing *Judicial Watch, Inc. v. Exp.-Imp. Bank*, 108 F. Supp. 2d 19, 27 (D.D.C. 2000)). State therefore appropriately read Plaintiff's FOIA requests as written. Because responding to

Plaintiff's second FOIA request would reveal a classified fact, State's assertion of a partial *Glomar* response was proper.[3]

C. DoD Properly Asserted Exemptions of FOIA

DoD's assertion of various FOIA exemptions was proper. Indeed, Plaintiff challenges DoD's withholding of just one record, "Cole-61-62." Pl.'s Cross-Mot. at 12. In its *Vaughn* Index, DoD explained that this record is a draft letter from the Secretary of Defense to the President of the United States regarding the assertion of the Status of Forces Agreement by the Department of Defense and was withheld pursuant to the deliberative process privilege. *See* Cole *Vaughn* Index. As described in Defendants' Motion for Summary Judgment, disclosure of such material would hamper DoD's ability to explore and consider a range of potential options in responding to a sensitive foreign relations matter that might not ultimately be selected and could cause confusion as to the actual position of the United States. Defs.' Mot. for Summ. J. at 36 (citing First Herrington Decl. ¶ 16). Moreover, disclosing records of this sort risks chilling "full, frank and open discussions on matters of policy between subordinates [here, the Secretary of Defense] and superiors [the President of the United States]." *Id.*

Plaintiff complains that DoD's justification for withholding the document was insufficient because the document was undated and therefore "it is unclear whether it is pre-decisional." Pl.'s Cross-Mot. at 13. However, as explained in the Second Herrington Declaration (attached as Ex. A), although the document was unsigned and undated, "it is most likely the draft letter referenced is an email bates-numbered Cole DoD/OGC 121, dated June 11, 2009." Second Herrington Decl. ¶ 3. Because the assertion of the Status of Forces Agreement

[3] Plaintiff does not mention the Privacy Act in her brief and therefore has not contested the Privacy Act exemptions claimed.

was not made until September of 2009, Mr. Herrington explains that it is "unlikely that this letter was ever more than a draft." *Id.* Although a draft document is not "*per se* exempt" under Exemption 5, *see* Pl.'s Cross-Mot. at 13 (citing *Arthur Andersen & Co. v. IRS*, 679 F.2d 254, 257 (D.C. Cir. 1982), the relevant context suggests that the draft letter was in fact sent months prior to the ultimate decision as to whether to assert the Status of Forces Agreement and accordingly can properly be classified as pre-decisional.

Regardless, the decision of whether or not to assert the Status of Forces Agreement ultimately lies with the President, Second Herrington Decl. ¶ 3, and therefore even if the letter had been final and signed, it would remain a pre-decisional recommendation from a subordinate to a superior. *See Judicial Watch, Inc. v. U.S. Dep't of Treasury*, 796 F. Supp. 2d 13, 25 (D.D.C. 2011). Because the document reflects the "give and take of the consultative process"—here, between the Secretary of Defense and the President—it is clearly deliberative. *Id.* Accordingly, "Cole-61-62" falls squarely within the deliberative process privilege of Exemption 5 and was properly withheld.

D. State and DoD Produced All Reasonably Segregable Information to Plaintiff

State and DoD released all reasonably segregable, non-exempt information. Far from issuing merely a "conclusory legal statement," Pl.'s Cross-Mot. at 13, both State and DoD explained that they reviewed responsive documents on a line-by-line basis and concluded that it is impossible to further segregate and release purely factual material from these documents without disclosing the pre-decisional and deliberative communications of the documents' authors, privileged attorney-client communications, or attorney work product. *See* Stein Decl. ¶ 76; Herrington Decl. ¶ 25. Indeed, Plaintiff has only challenged a single withholding of DoD (and none of the State Department), and points to no documents that State or DoD have produced

that could be further segregated without revealing information protected by law. State and DoD have thus produced all non-exempt, "reasonably segregable portion[s]" of the responsive records. 5 U.S.C. § 552(b).

CONCLUSION

CIA's comprehensive *Glomar* assertion and State's partial *Glomar* assertion were proper. In addition, DoD appropriately withheld information under Exemption 5 of the FOIA. Finally, all reasonably segregable information was released to Plaintiff. For these reasons, this Court should grant Defendants' Motion for Summary Judgment and deny Plaintiff's Cross-Motion for Summary Judgment.

Dated: June 8, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2016, a copy of the foregoing Combined Opposition to Plaintiff's Cross-Motion for Summary Judgment and Reply in Support of Defendant's Motion for Summary Judgment was filed electronically. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

/s/ Caroline J. Anderson
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