No. 11-55754

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CENTER FOR HUMAN RIGHTS AND CONSTITUTIONAL LAW,

Plaintiff-Appellant,

v.

NATIONAL GEOSPATIAL-INTELLIGENCE AGENCY,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLEE

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STATEMENT OF JURISDICTION

The Center for Human Rights and Constitutional Law invoked the jurisdiction of the district court under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(a)(4)(B). The district court granted summary judgment to the government on March 14, 2011. ER 1:5-30. Plaintiff filed a timely notice of appeal on May 6, 2011. ER 1:2-3; *see* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the district court properly determined that Exemptions 1 and 3 of the Freedom of Information Act permit the government to refuse to confirm or deny the existence of documents responsive to plaintiff's FOIA request.

STATEMENT OF THE CASE

Plaintiff submitted a Freedom of Information Act request to the National Geospatial-Intelligence Agency ("NGA") and National Aeronautics and Space Administration ("NASA") seeking satellite images of Cuban coastal waters on a particular date in February 1996, when two private aircraft were shot down by the Cuban government. The NGA informed plaintiff that it could "neither confirm nor deny the existence or nonexistence of records responsive to your request." Add. 9.[1]

Plaintiff filed suit challenging the government's response to their FOIA request. The district court awarded summary judgment to the government, holding that its refusal to confirm or deny the existence of records was supported by two separate FOIA exemptions. Plaintiff appealed to this Court.

[1] Plaintiff's FOIA request, and the NGA's acknowledgment of that request and response thereto, are attached as an Addendum ("Add.") to this brief. These documents are not included in plaintiff's Excerpts of Record.

STATEMENT OF FACTS

I. Statutory Background

A. The Freedom of Information Act

The Freedom of Information Act, 5 U.S.C. § 552, requires that federal agencies disclose agency records in response to valid requests. "Congress recognized, however, that public disclosure is not always in the public interest," *CIA v. Sims*, 471 U.S. 159, 166-67 (1985), and therefore it enacted nine statutory exemptions to the FOIA that limit requesters' access to certain types of documents or records. *See* 5 U.S.C. § 552(b).

Two of those statutory exemptions – Exemptions 1 and 3 – are relevant to this case because they shield classified intelligence sources and methods from compelled disclosure. These exemptions work in distinct ways, however.

Exemption 1, 5 U.S.C. § 552(b)(1), protects records that are: "(A) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive Order." *Id.* § 552(b)(1). Executive Order No. 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009), sets out numerous categories of information subject to classification, including "intelligence activities," "intelligence sources or methods," and the "foreign relations or foreign activities of the United States." E.O. 13,526,

§ 1.4(c)-(d).[2]

Exemption 3, 5 U.S.C. § 552(b)(3), incorporates the protections of other statutes, shielding records that are "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3). Section 102A(i)(1) of the National Security Act of 1947, as amended, which provides that "[t]he Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure," 50 U.S.C. § 403-1(i)(1), has long been held to trigger the protections of FOIA Exemption 3. *Sims*, 471 U.S. at 167; *Hunt v. CIA*, 981 F.2d 1116, 1118 (9th Cir. 1992).[3]

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[2] Although the President issued Executive Order 13,526 the same day that plaintiff filed its FOIA request, that Order did not become effective for 180 days. *See* E.O. 13,526, § 6.3. Thus, at the time the NGA was considering plaintiff's request, the relevant Executive Order for Exemption 1 purposes was Executive Order No. 12,958, 60 Fed. Reg. 19,825 (April 17, 1995), as amended by Executive Order No. 13,292, 68 Fed. Reg. 15,315 (Mar. 25, 2003). The agency's declaration therefore references Executive Order 12,958, as amended, in describing NGA's response. Because Executive Order 13,526 supercedes that prior Order, this brief refers to the Order now in effect. None of the relevant provisions cited in this brief were substantively altered when the President issued the new Order.

[3] At the time that *Sims* and *Hunt* were decided, the duty to protect intelligence sources and methods was vested in the Director of Central Intelligence and was set forth in Section 102(d)(3) of the National Security Act. The responsibility has since been transferred to the Director of National Intelligence and has been recodified as Section 102A(i)(1), 50 U.S.C. § 403-1(i)(1), but the nondisclosure requirement itself remained unchanged. *See* Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, Title I, § 1011(a), 118 Stat. 3638, 3651 (2004); *Berman v. CIA*, 501 F.3d 1136, 1140 n.1 (9th Cir. 2007).

B. "Glomar" Doctrine

Executive Order 13,526 also permits an agency, in response to a FOIA request, to "refuse to confirm or deny the existence or nonexistence of requested records whenever the fact of their existence or nonexistence is itself classified under this order or its predecessors." E.O. 13,526, § 3.6(a). This type of response is commonly known as a "Glomar" response, after the seminal D.C. Circuit case holding that the government could refuse to confirm or deny the existence of records revealing the CIA's connection with the activities of a ship named the *Hughes Glomar Explorer*. *See Phillippi v. CIA*, 546 F.2d 1009, 1011 (D.C. Cir. 1976). This Court has approved the use of a Glomar response when "the FOIA exemption would itself preclude the acknowledgment of such documents." *Minier v. CIA*, 88 F.3d 796, 800 (9th Cir. 1996); *see also Hunt*, 981 F.2d at 1118.

II. Factual Background and Procedural History

The National Geospatial-Intelligence Agency is a component of the Department of Defense that "develops imagery and map-based intelligence solutions for U.S. national defense, homeland security and safety of navigation." ER 1:40 (¶2). NGA analyzes imagery and other information "to describe, assess and visually depict physical features and geographically referenced activities on the Earth." ER 1:41 (¶2).

A. Plaintiff's FOIA Request

Plaintiff filed a FOIA request on December 29, 2009, seeking from NGA any

satellite photographs or videos "of the area in which an incident took place on February 24, 1996 over or near the north coast of Cuba in which two aircraft flown by the Brothers to the Rescue organization of Florida were intercepted in flight and shot down by Cuban MiGs." Add. 2. The request included, but was not limited to, "images showing any of the Brothers to the Rescue or Cuban aircraft involved in the incident" and "images or photos of any wreckage." *Ibid.* It also sought "[a]ny documents or records relating to" the requested images and videos. *Ibid.*[4]

NGA acknowledged receipt of plaintiff's request in January 2010. Add. 5. After reviewing the request and the implications of any response, NGA informed plaintiff on April 6, 2010 that it could "neither confirm nor deny the existence or nonexistence of records responsive to your request." Add. 9. NGA determined that the information requested, "unless it has been officially acknowledged and disclosed, or otherwise properly released to the public, would be classified for reasons of national security" and that "the fact of the existence or nonexistence of such records would also relate directly to information concerning intelligence sources, methods, or capabilities" and thus was subject to withholding under statute. *Ibid.*[5] NGA therefore

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[4] Plaintiff also sought documents from the National Aeronautics and Space Administration (NASA), which had no responsive records, and was voluntarily dismissed from this suit by stipulation of the parties at a January 31, 2011 hearing. ER 1:6 n.3.

[5] The agency's letter invoked 10 U.S.C. § 457. In its summary judgment motion, the agency invoked the National Security Act as the basis of its Exemption 3

denied plaintiff's request, invoking FOIA exemptions 1 and 3. *Ibid.*

Plaintiff administratively appealed. While that appeal was pending, plaintiff filed suit in district court to challenge the NGA's denial of its FOIA request. The agency deemed the appeal abandoned and ceased processing it. ER 1:44 (¶11).

B. District Court Litigation

1. The agency filed a motion for summary judgment, supported by the declaration of Barry M. Barlow, Director of NGA's Acquisition Directorate. *See* ER 1:40-57. Mr. Barlow, an original classification authority, described in detail how "[o]fficial NGA acknowledgment of the requested records would reveal information that concerns intelligence activities, intelligence sources and methods, and foreign relations" and "reasonably could be expected to cause damage to the national security of the United States." ER 1:43 (¶7).

The agency invoked two distinct FOIA exemptions: Exemptions 1 and 3. First, Mr. Barlow explained, the agency invoked Exemption 1 because the "mere confirmation or denial of the existence of responsive records would reveal classified facts – NGA's interest, ability, or involvement in obtaining satellite data, and the breadth and scope of that interest." ER 1:45 (¶12). If NGA were to admit that it had such documents, that fact "would alert foreign intelligence services to NGA's

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claim. *See* ER 1:55 (¶34). Plaintiff correctly argues (Br. 13 n.6) that the National Security Act is the only relevant statute for purposes of the Exemption 3 analysis.

intelligence capabilities and interests." ER 1:47 (¶16). Likewise, if the agency denied having responsive records, that response, too, "would likewise alert foreign intelligence services to NGA's intelligence capabilities and interests, or lack thereof." ER 1:48 (¶17). Therefore, and "[i]n order to be credible and effective, NGA must use the Glomar response consistently in all cases where the existence or nonexistence of records responsive to a FOIA request is a classified fact, including those instances in which NGA does not possess" responsive records. ER 1:47 (¶15). The declaration further explained the consequences to the national security and foreign relations of the United States that likely would result if NGA confirmed or denied the existence of responsive records. ER 1:50-55 (¶¶23-32).

Second, Mr. Barlow explained, the agency invoked Exemption 3 because confirmation or denial of the existence of responsive records would reveal sources and methods of intelligence gathering that are shielded from disclosure by the National Security Act. ER 1:55-56 (¶¶33-36).

2. After a hearing, the district court granted NGA's motion for summary judgment, holding that its Glomar response was justified by both Exemption 1 and Exemption 3.

a. The court first addressed Exemption 3. Because it "is clear that National Security Act is a statute within the scope of Exemption 3," the "only remaining issue is whether the withheld information falls within the scope of the National Security

Act." ER 1:13-14.

The court determined that the agency's "Glomar response properly seeks to protect intelligence sources or methods from disclosure." ER 1:17. Although the agency had made public some general descriptions of its capabilities, "the facts that are public are not the same as those the agency seeks to protect with its Glomar response." ER 1:20. For example, "while the public may know that the NGA possesses reconnaissance satellite technology, it does not know 'the reach, locations, and capabilities or limitations of NGA's intelligence activities and operations.'" ER 1:21 (quoting ER 1:47 (¶16)). Moreover, the court noted, "the fact that the agency has released *some* information regarding *some* of its capabilities does not mean that other information regarding intelligence methods is not protected from disclosure." ER 1:21 (collecting authorities).

The court also rejected plaintiff's argument that it would not reveal intelligence sources and methods for NGA to deny that it had any responsive records, as NASA had done in this case. The court noted that NGA, unlike NASA, is an intelligence agency, and thus "foreign intelligence services and others may be able to 'cobble together' information regarding this nation's intelligence methods" from even seemingly innocuous pieces of information about NGA's activities. ER 1:23-24 n.34 (citing *Sims*, 471 U.S. at 178; *Hunt*, 981 F.2d at 1119; *Berman v. CIA*, 501 F.3d 1136, 1144 (9th Cir. 2007); and *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998)).

The court likewise rejected plaintiff's argument that the government's Exemption 3 claim is undermined by the amount of time that has elapsed since the incident in question occurred. The court found that "'the passage of time has not vitiated [the agency's] interest in maintaining the secrecy' of its satellite capabilities." ER 1:20 (quoting *Berman*, 501 F.3d at 1144). It noted that "revealing whether or not its satellites were capable of capturing the requested images in 1996 would 'tend to reveal' the current capabilities of its intelligence satellites, which are properly exempt from disclosure under the National Security Act." *Ibid.*

b. Finally, the court held that the Glomar response also was proper under Exemption 1, which shields from disclosure information that is properly classified under Executive Order. For the same reasons it found Exemption 3 applicable, the court held that the withheld information concerns the government's "intelligence activities" and "intelligence sources or methods," which are exempt from disclosure under section 1.4(c) of Executive Order 13,526. ER 1:26. The court found that the agency's declaration "provides significant support" for the conclusion that "unauthorized disclosure of the information plaintiffs have requested 'could be expected to result in some level of damage to the national security." ER 1:27-28 (quoting ER 1:50 (¶23)). It found the agency's rationale for withholding was "'not controverted by contrary evidence in the record or by evidence of . . . bad faith,'" and thus was entitled to "'substantial weight.'" ER 1:30 (quoting *Hunt*, 981 F.2d at 1119).

SUMMARY OF ARGUMENT

The district court correctly held that NGA properly issued a Glomar response because confirming or denying the existence of responsive records could reveal information exempted from disclosure. In this case, two separate FOIA exemptions justified the agency's action.

1. The National Security Act, which has long been recognized as a valid withholding statute under FOIA Exemption 3, permits the government to withhold information if disclosing it could tend to reveal the sources and methods of intelligence gathering. As explained in the agency's declaration, confirming or denying the existence of responsive records in this case would permit an interested observer to determine the classified capabilities, activities, and interests of the NGA, all of which constitute sources and methods of intelligence gathering. Confirming or denying the existence of responsive records could reveal, for example, whether NGA satellites were in position to capture the requested images on the particular date in question, whether they are capable of capturing the images in certain weather or visibility conditions, and whether the United States maintained an active intelligence interest in that subject.

The possibility of revealing sources and methods of intelligence gathering by responding to plaintiff's request is underscored by the fact that a foreign adversary might compare responses to numerous similar FOIA requests in order to reverse

engineer the NGA's capabilities and interests. From a pattern of responses, a skilled adversary could determine how many satellites are in use by NGA; where they have been positioned at a given time; the technological capabilities and limitations of those satellites; and the NGA's strategic use of those assets. This concern is not conjectural, as plaintiff contends. Numerous courts – including this Circuit – have recognized that intelligence gathering is akin to assembling a mosaic, and that foreign adversaries can acquire useful information about our intelligence activities from even seemingly innocuous information.

Plaintiff's reliance on declarations from its purported experts is misplaced. In matters of national security, deference is owed solely to the officially expressed views of the Executive Branch, and not to opinions of private citizens, whatever their background. That is particularly true in this case, where plaintiff's experts have no first-hand knowledge of the NGA's classified capabilities, and their declarations in any event do not seriously rebut the considered judgment of responsible agency.

Plaintiff further argues that Exemption 3 claims under the National Security Act must be personally asserted by the Director of National Intelligence, but this argument was not raised in district court and therefore has been waived. It is, moreover, without merit. The Act does not require the DNI to take any specific action to protect sources and methods from disclosure in litigation, and even if it did, those procedural steps would not be necessary to assert a privilege in a FOIA case.

2. The NGA's Glomar response is separately justified under Exemption 1, because confirming or denying the existence of responsive records would tend to reveal information properly classified under Executive Order 13,526. As the NGA's declaration explains, the information withheld relates to intelligence activities, intelligence sources and methods, and the foreign relations of the United States. The declaration further explains that release of this information reasonably could be expected to harm the national security and foreign relations of the United States. Those assessments, which are explained in considerable detail in the declaration, are entitled to substantial deference from this Court.

Plaintiff's arguments against the NGA's Exemption 1 claim lack merit. It is beside the point that the incident in question, and the NGA's possession of reconnaissance satellites, are supposedly "well known"; what is at issue here is specific information about whether the NGA utilized its classified intelligence gathering capabilities to monitor a particular incident of interest to plaintiff. It is equally irrelevant that the incident in question occurred over fifteen years ago, as the Supreme Court and this Circuit have held the government may properly protect sources and methods of intelligence gathering that are decades old.

STANDARD OF REVIEW

This Court uses a two-step process to review a district court's grant of summary judgment in a FOIA case. *Berman v. CIA*, 501 F.3d 1136, 1139 (9th Cir. 2007). First, this Court reviews *de novo* whether the documents submitted by the agency provide an adequate factual basis for the district court's decision. *Ibid.* Next, the Court reviews whether the district court was correct in determining that the relevant FOIA exceptions applied. *Ibid.* This Court reviews the district court's determination for clear error if it turned "mainly on findings of fact." *Ibid.* Conversely, if the district court's determination rested primarily on its legal conclusions, this Court conducts *de novo* review. *Ibid.*

In FOIA cases where the government invokes Exemptions 1 and 3, courts must "accord 'substantial weight' to [the agency's] affidavits." *Hunt v. CIA,* 981 F.2d 1116, 1119 (9th Cir. 1992) (quoting *Miller v. Casey*, 730 F.2d 773, 777 (D.C. Cir. 1984)). This Court must defer to the agency's assessment that disclosing information could reveal the sources and methods of intelligence gathering or harm the national security so long as the government's affidavits "describe the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemptions, and show that the justifications are not controverted by contrary evidence in the record or by evidence of [agency] bad faith." *Ibid.*

ARGUMENT

I. Federal Courts Have Uniformly Upheld Glomar Responses Where Confirming or Denying the Existence of Records Would Reveal Information Exempt From Disclosure Under FOIA

In a traditional FOIA case, the government identifies responsive records and releases all information not subject to withholding under one of the statute's nine exemptions. In some cases, however, an agency's mere acknowledgment of responsive records may "cause harm cognizable under an FOIA exception." *Gardels v. CIA*, 689 F.2d 1100, 1103 (D.C. Cir. 1982). In those cases where the existence of responsive records is itself exempt from disclosure under FOIA, the government may issue a "Glomar" response that neither confirms nor denies whether responsive records exist. *Minier*, 88 F.3d at 800; *Hunt*, 981 F.2d at 1118; *see also Phillippi*, 546 F.2d at 1013 n.7 ("[T]he 'document' the Agency is currently asserting the right to withhold is confirmation or denial of the existence of the requested records . . . .").

Courts have consistently upheld Glomar responses where, as here, confirming or denying the existence of records would either reveal classified information protected by Exemption 1, or disclose information about intelligence sources and methods exempt from disclosure under Exemption 3 (which incorporates the protections of the National Security Act of 1947). *See, e.g.*, *Wilner v. NSA*, 592 F.3d 60, 71 (2d Cir. 2009) (Glomar response justified under Exemption 3); *Larson v. Dep't of State*, 565 F.3d 857, 861-62 (D.C. Cir. 2009) (Exemptions 1 and 3); *Wolf v. CIA*, 473

F.3d 370, 375-79 (D.C. Cir. 2007) (Exemptions 1 and 3); *Minier*, 88 F.3d at 800-01 (Exemption 3); *Hunt*, 981 F.2d at 1118 (Exemption 3).

As Mr. Barlow explained in his declaration on behalf of the NGA, a Glomar response is necessary to ensure that the agency does not reveal protected information simply through a pattern of responses. "In order to be credible and effective, NGA must use the Glomar response consistently in all cases where the existence or nonexistence of records responsive to a FOIA request is a classified fact, including those instances in which NGA does not possess records responsive to a particular request." ER 1:47 (¶15). If NGA invoked a Glomar response only when it possessed responsive records and notified requesters when it did not have responsive records, "the Glomar response would unsurprisingly be interpreted as an admission that responsive records exist." *Ibid.*

If the Glomar response was not invoked, furthermore, the mere processing of any responsive, but exempt, records could reveal classified and exempt information even when the underlying records were protected from disclosure, as they likely would be here.[6] For instance, in producing the itemized index required by *Vaughn v.*

[6] There is little doubt that any photographs taken by classified satellite systems could be withheld under Exemptions 1 and 3. In *Students Against Genocide v. Dep't of State*, 257 F.3d 828, 835 (D.C. Cir. 2001), for example, the court of appeals approvingly noted the CIA's assessment "that professional image analysts would be able to combine a [satellite] photograph with other known information to determine the technical capabilities of the reconnaissance system that produced it." *See also Students Against Genocide v. Dep't of State*, 1998 WL 699074, at *7 (D.D.C. Aug. 24, 1998) (CIA declaration

Rosen, 484 F.2d 820 (D.C. Cir. 1973), the agency would need to reveal a short description of the content of each individual document, as well as descriptive information about the document, all of which could reveal classified and exempt information. *See Bassiouni v. CIA*, 392 F.3d 244, 246 (7th Cir. 2004).

As explained below, NGA's Glomar response was justified by two separate FOIA exemptions. Because an agency need only identify a single basis to withhold information, either exemption is sufficient on its own to justify the NGA's Glomar response. *See, e.g.*, *Wolf*, 473 F.3d at 375; *Minier*, 88 F.3d at 800 n.5.

II. NGA's Glomar Response Was Proper Under FOIA Exemption 3

Exemption 3, 5 U.S.C. § 552(b)(3), shields from disclosure records specifically protected by statute. Under Exemption 3, the government need not show that disclosure of the information could potentially harm national security; Congress has already made that determination in passing the relevant withholding statute. *Lahr v. National Transp. Safety Bd.*, 569 F.3d 964, 985 (9th Cir. 2009); *Linder v. NSA*, 94 F.3d 693, 696 (D.C. Cir. 1996). Rather, the government need only show that: (1) "there is

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explained that from a photograph taken by a space-based reconnaissance satellite, an imagery analyst could "determine a whole host of classified technical and operational capabilities of the satellite," including "the optical resolution (how small an object can be seen and accurately identified), minimum elevation (how low to the horizon, and thus how far away, can the satellite be and still see distant objects), field-of-view and blindspots (how wide or narrow is the satellite's vision), duration of coverage (how long during its orbit can the satellite view a particular object), and weather capabilities (day or night, good or bad weather)").

a statute within the scope of Exemption 3" and (2) "the requested information falls within the scope of the statute." *Minier*, 88 F.3d at 801 (citing *Sims*, 471 U.S. at 167).

The National Security Act's directive to protect "intelligence sources and methods from unauthorized disclosure," 50 U.S.C. § 403-1(i)(1), has long been held to trigger the protection of Exemption 3. *See Sims*, 471 U.S. at 167-68; *Hunt*, 981 F.2d at 1120. It is also common ground that Congress vested in the Director of National Intelligence "very broad authority to protect all sources of intelligence information from disclosure," *Sims*, 471 U.S. at 168-69, without which the intelligence community "would be virtually impotent," *id.* at 170. *See also Berman*, 501 F.3d at 1143 (recognizing that the Act "entrusts the Director with the discretion to determine that documents should remain secret because the substantial risk that sources and methods will be compromised outweighs the public interest in disclosure"). In consequence, section 403-1(i)(1) operates as a "near-blanket FOIA exemption." *Hunt*, 981 F.2d at 1120.

To resolve this case, this Court need only decide "whether the withheld material relates to intelligence sources and methods." *Larson*, 565 F.3d at 865. The definition of sources and methods under the National Security Act is a broad one: "The 'plain meaning' of [the Act] may not be squared with any limiting definition that goes beyond the requirement that the information fall within the Agency's mandate to conduct foreign intelligence." *Sims*, 471 U.S. at 169; *see also, e.g.*, *Berman*, 501 F.3d at

1140 ("The term 'sources' is to be broadly construed and encompasses not only 'secret agents,' but instead reaches all sources of information the [intelligence agency] relies upon, including publicly available information.").

The Supreme Court and this Court have further made clear that the Executive Branch receives "great deference" in determining what types of information constitute sources and methods of intelligence gathering. *Sims*, 471 U.S. at 179; *Berman*, 501 F.3d at 1140; *see also Phillippi v. CIA*, 655 F.2d 1325, 1332 (D.C. Cir. 1981) (CIA affidavits on Exemption 3 claims are to be accorded substantial weight); *Halperin v. CIA*, 629 F.2d 144, 147-48 (D.C. Cir. 1980) (same). Indeed, the deference due to the government when it invokes Exemption 3 and the National Security Act is even greater than the (already substantial) deference due to the government's view about whether that information is properly classified under Exemption 1. *See Berman*, 501 F.3d at 1142 n.3.

The government "need not demonstrate to a certainty that disclosure will result in intelligence sources or methods being revealed." *Berman*, 501 F.3d at 1143. Instead, it need only establish that confirming or denying whether it has documents responsive to plaintiff's FOIA request "can reasonably be expected to lead to unauthorized disclosure of intelligence sources and methods." *Halperin*, 629 F.2d at 147 (internal quotation marks omitted).

1. The government's detailed declaration in this case warrants deference under these Exemption 3 standards. It explains in as much detail as possible in an unclassified filing why it can neither confirm nor deny the existence of responsive records without revealing sources and methods of intelligence gathering.[7] Mr. Barlow explained, for example, that if NGA were to confirm or deny the existence of records responsive to plaintiff's request, it could reveal the technological capability, or lack thereof, of NGA's satellites. ER 1:45, 51-52 (¶¶12, 25). If NGA confirmed the existence of responsive imagery, it would confirm not only that NGA had the capability to capture such images, but also that it had deployed its resources in order to do so on a particular date and in a particular place. To an informed foreign observer, this sort of information may reveal "sensitive sources and methods," such as NGA's "sophisticated technological tools, liaison relationships, and NGA's identification of targets for intelligence collection activity." ER 1:51-52 (¶25); *see also* ER 1:45-48 (¶¶12, 14, 16).

Conversely, if NGA stated it did not have responsive imagery, it might reveal that NGA lacked the technological capability necessary to capture responsive

[7] This Court has recognized that "'[i]t is conceivable that the mere explanation of why information must be withheld can convey valuable information to a foreign intelligence agency.'" *Berman*, 501 F.3d at 1142 (quoting *Sims*, 471 U.S. at 179); *see also Church of Scientology of Cal. v. Dep't of the Army*, 611 F.2d 738, 742 (9th Cir. 1979) (in FOIA cases, "the government need not specify its objections in such detail as to compromise the secrecy of the information").

imagery. ER 1:47-48 (¶¶16, 17). With such information, foreign intelligence services could gain valuable knowledge about NGA's ability to monitor particular targets, and could use this information "to develop 'denial and deception' techniques to defeat those capabilities." ER 1:48 (¶17); *see also* ER 1:52 (¶27) ("[T]hese admissions would be of great benefit [to U.S. adversaries], by enabling the foreign services to redirect their resources to identify potential NGA sources, circumvent the NGA's monitoring efforts, and generally enhance their intelligence activities at the expense of the United States.").

The Barlow declaration also explains that if NGA were to confirm or deny the existence of responsive records, it could reveal whether NGA maintains an intelligence interest in a particular area of world, as well as the breadth and scope of any such interest. ER 1:45 (¶12). Such a response also could expose whether NGA intelligence methods have or have not been utilized for a specific target. ER 1:46 (¶14). From this type of information, foreign intelligence services and terrorist organizations would gain valuable knowledge about which targets have been, and may continue to be, monitored by NGA (ER 1:51 (¶24)), and could use this information to thwart our intelligence collection efforts. If foreign adversaries know "where and when NGA seeks to collect data," they could "seek to provide false sources of data or to prevent collection of data altogether." ER 1:47-48 (¶16).

The Barlow declaration further describes why a consistent Glomar policy is

required in all cases where confirming or denying the existence of records could reveal sources and methods of intelligence gathering, even where the information sought would appear to an uninformed observer to be relatively innocuous. "Every country or intelligence service has limited resources." ER 1:48 (¶18). Foreign intelligence services are aware of this, but cannot know precisely where the United States has chosen to focus its finite resources at a given time. "The disclosure of potential U.S. intelligence target areas and interests would," however, provide a clearer picture of "how NGA allocates its resources." ER 1:48 (¶18). And while "[a]ny one FOIA request standing alone might not allow great insight into where NGA is (and is not) monitoring foreign adversaries," the ability to "cobble together" data released in response to multiple requests would permit foreign adversaries to "create a picture of NGA's overall capabilities and intelligence interests" and "would potentially allow adversaries to hide their activities by exploiting data about how NGA allocates its collection resources." ER 1:48-49 (¶18); *see also* ER 1:53 (¶28) (by reviewing officially-released information, foreign intelligence services may gather information and "deduce means and methods (from disparate and even seemingly unimportant details) to defeat NGA collection efforts").

2. These sorts of facts concerning the government's intelligence capabilities and interests are at the very core of the "sources and methods" of intelligence-gathering. The classified capabilities of NGA's reconnaissance satellites plainly

constitute intelligence sources and methods. *See, e.g.*, *Larson*, 565 F.3d at 866 (intelligence agency's capabilities constitute sources and methods); *Students Against Genocide*, 257 F.3d at 840 (same). The agency's interest in a particular intelligence target is similarly protected by Exemption 3 and the National Security Act, as the Supreme Court and this Court have held. *See, e.g.*, *Sims*, 471 U.S. at 176-77 ("A foreign government can learn a great deal about the Agency's activities by knowing the . . . sources of information that interest the Agency."); *Berman*, 501 F.3d at 1144 (revealing copies of the President's Daily Briefing from the CIA could disclose sources and methods by "reveal[ing] what information was of primary interest to the President at a given time").

Moreover, in Exemption 3 Glomar cases, courts have regularly deferred to the government's assessment that simply confirming or denying the existence of responsive records could disclose classified intelligence capabilities and interests. In *Larson*, for example, the court affirmed the National Security Agency's refusal to confirm or deny whether it had documents concerning a kidnapping in Guatemala, because revealing whether it possessed that specific information could "reveal vulnerabilities of communications systems, the success or lack of success in collecting information, and projects or plans relating to national security." *Larson*, 565 F.3d at 866-67. Similarly, in *Wolf*, the court deferred to the CIA's assessment that confirming or denying whether records of a particular foreign national existed could disclose

sources and methods by, among other things, "revealing CIA priorities," which in turn would "provid[e] foreign intelligence sources with a starting point for applying countermeasures against the CIA and thus wasting Agency resources." *Wolf*, 473 F.3d at 377.

In *Minier*, this Court similarly held that confirming or denying whether the CIA had an employment relationship with a particular individual "would also provide a window into the CIA's 'sources and methods.'" *Minier*, 88 F.3d at 802. And in *Hunt*, this Court held that disclosing whether or not the CIA had records about a particular foreign national could reveal sources and methods by disclosing whether that person was a "CIA intelligence source[]," a "suspected foreign intelligence operative[]," or a "CIA intelligence target[]." *Hunt*, 981 F.2d at 1119. *See also Bassiouni*, 392 F.3d at 246 (revealing whether CIA had files about requester could disclose sources and methods of intelligence gathering).

In upholding Glomar assertions under Exemption 3, each of these courts recognized that revealing the government's intelligence gathering capabilities, or whether those capabilities were deployed in a particular way, could risk the disclosure of classified intelligence sources and methods. That is true even where the agency's general mission and capabilities are thought to be widely known, because "there may be some advantage in leaving the [foreign] intelligence agencies with lingering doubts" about the accuracy of widely held suppositions about the government's

intelligence activities. *Military Audit Project v. Casey*, 656 F.2d 724, 744-45 (D.C. Cir. 1981); *see also Wilson v. CIA*, 586 F.3d 171, 195 (2d Cir. 2009) (same).

3. a. Plaintiff therefore misses the point when it argues that it "is no secret" that NGA has the ability to take satellite photographs, as it has described in general terms on its web site and elsewhere. Br. 15-18. The question here is not whether the agency has the ability to produce geospatial imagery – that is its very mission – but whether it can be forced to confirm or deny that it deployed its classified, proprietary capabilities at a particular place and time.

As the Barlow declaration explains, information of that type could indeed be quite revealing to a trained adversary. ER 1:47-49 (¶¶16-18). It might demonstrate, for example, whether the NGA satellites were in position to photograph a particular place at a particular time; whether its technology was capable of capturing images on the particular scale (whether large or small) or specific image quality sought by a FOIA requester; or whether it was capable of capturing images in certain (known) weather conditions. Confirming or denying the existence of records could, moreover, reveal whether the United States had an active intelligence interest at that time in a particular place or subject.

Plaintiff effectively concedes that confirming or denying the existence of responsive records could reveal these sorts of facts. Br. 20. It nevertheless argues that NGA could simply deny having responsive records, and there would be no way

for an observer to know why NGA had no records in any given case. *See* Br. 20. Plaintiff also contends that acknowledging the existence of responsive records would not reveal the agency's "current, recent, or planned intelligence gathering capabilities, sources or methods." Br. 21 (quoting ER 1:63). These arguments run counter to the very purpose of the Glomar doctrine: if NGA did not refuse to confirm or deny all requests for documents that could be as revealing as the records requested by plaintiff, interested parties could easily use the FOIA to reverse engineer the classified technological capabilities and activities of the agency. ER 1:48 (¶18).

The risk of revealing sources and methods by confirming whether the agency has responsive documents is magnified when viewed in light of the possibility that a foreign adversary could compare the responses to numerous different FOIA requests. Someone could, for example, file FOIA requests seeking images of multiple locations on the same day, and compare the responses in an attempt to determine how many satellites the government uses and where they might have been positioned (or not) on that day. Similarly, FOIA requesters could seek images of a particular location on numerous different days in an attempt to determine, among other things, whether the government has the ability to capture images in certain weather conditions, and how frequently the government captured images of a given place – which could, in turn, reveal whether the United States had a long-running interest in a particular intelligence target, and how often it deployed its assets to monitor that target.

This concern is not "conjectural," as plaintiff asserts. Br. 12. Courts have long endorsed the "common sense premise" that intelligence collection is akin to assembling a mosaic, and thus "the impact of disclosing protected documents must be evaluated not only based upon the information appearing within the four corners of the document, but also with regard to what secrets the document could divulge when viewed in light of other information available to interested observers." *Berman*, 501 F.3d at 1143. "[B]its and pieces of data may aid in piecing together bits of other information even when the individual piece is not of obvious importance in itself." *Sims*, 471 U.S. at 178 (quotation marks and citation omitted). Indeed, "[w]hat may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context." *Ibid.* (quotation marks and citation omitted, alteration in original). *See also Bassiouni*, 392 F.3d at 245-46 ("[A]ny information available to [plaintiff] is available to North Korea's secret police and Iran's counterintelligence service too."); *Gardels*, 689 F.2d at 1106 ("The CIA has the right to assume that foreign intelligence agencies are zealous ferrets.").[8]

[8] Plaintiff argues that neither the Supreme Court's opinion in *Sims* nor this Court's opinion in *Hunt* adopted the mosaic theory, as the district court held. Br. 22-24. That argument lacks merit, as this Court stated precisely the opposite in *Berman*, 501 F.3d at 1143 – a case cited nowhere in plaintiff's brief – which itself went on to reaffirm this "common sense premise." *See also Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1082 (9th Cir. 2010) (*en banc*); *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998).

b. Plaintiff also errs in arguing that the declarations of its purported experts call the NGA's considered judgment into question. Because the President alone is vested by the Constitution with the "authority to classify and control access to information bearing on national security," *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988), the Supreme Court has repeatedly held that the Executive Branch's assessments of matters relating to national security and foreign affairs are due special deference, particularly where such "conclusions must often be based on informed judgment rather than concrete evidence." *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2711 (2010); *see also Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 24 (2008). This Court, too, has repeatedly acknowledged "'the need to defer to the Executive on matters of foreign policy and national security'" and to avoid "'second guessing the Executive in this arena.'" *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1081-82 (9th Cir. 2010) (*en banc*) (quoting *Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007)); *Berman*, 501 F.3d at 1143 ("We must therefore defer to the CIA's determination that disclosure would run the unacceptable risk that sources or methods would be revealed.").

In contrast, private citizens – even if former members of the intelligence community – are given no deference when opining about matters of national security. *See Gardels*, 689 F.2d at 1106 n.5 ("[T]he affidavit of [a former CIA employee], giving his own views as to the lack of harm which would follow the disclosure requested by

plaintiff, is insufficient to undermine the Agency's presentation."). Indeed, even outside the national security context, declarations from former government employees are not sufficient to rebut the officially-expressed views of an agency on questions where the government's view is entitled to deference. *See United States v. Lachman*, 387 F.3d 42, 54 (1st Cir. 2004); *Rumsfeld v. United Technologies Corp.*, 315 F.3d 1361, 1369 (Fed. Cir. 2003).

In any event, nothing in plaintiff's declarations seriously challenges the Executive Branch's security judgments. As the district court held, the declarants have no personal knowledge of NGA's classified satellite imagery capabilities, and thus have no "factual basis for their opinions regarding the NGA's reconnaissance satellite capabilities and national security concerns of the United States." ER 1:15 n.20. These purported experts are in no position to know whether confirming or denying the existence of records responsive to this type of FOIA request could, in fact, reveal certain capabilities and interests of the agency. Rather – and as plaintiff acknowledges – these declarants are only able to "confirm[] the obvious": "'that satellites exist and constantly image portions of the earth and outer space.'" Br. 17-18 (quoting ER 1:61).[9]

[9] The district court also noted that it was not presented with information that would allow it to confirm whether one of the declarants, John Pike, is qualified to serve as an expert. ER 1:15 n.20.

c. Finally, plaintiff argues that the government is not entitled to rely on Exemption 3 unless the Director of National Intelligence personally invokes the privilege. Br. 28-31. This procedural objection has been waived, because it was never raised in district court. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *Broad v. Sealaska Corp.*, 85 F.3d 422, 430 (9th Cir. 1996). Plaintiff had every opportunity to do so; its contention on appeal is largely a response to arguments raised in the government's summary judgment motion. *See* Br. 29-30.

Plaintiff's argument lacks merit in any event. The National Security Act, while requiring the Director of National Intelligence to "protect intelligence sources and methods from unauthorized disclosure," 50 U.S.C. § 403-1(i)(1), does not specify how the Director is to ensure that sources and methods are safeguarded in litigation. Rather, this obligation is one of several high-level duties given to the Director as the head of the intelligence community.[10] It strains credulity to suggest that Congress, in creating this important position overseeing more than a dozen intelligence agencies, intended for the Director to become personally involved in every case that implicated

[10] The Act also requires him to act as the principal advisor to the President (and other senior members of the Executive Branch) on intelligence matters related to national security; oversee the National Intelligence Program, the National Counterterrorism Center, and intelligence agency budgets; establish priorities and guidance for intelligence collection, processing, analysis, and dissemination, as well as policies to ensure intelligence sharing within the intelligence community; and coordinate relationships between the intelligence community and foreign governments. 50 U.S.C. §§ 403(b), 403-1.

the government's intelligence sources and methods.

But even if the statute did require the Director to personally assert a National Security Act privileges in litigation generally,[11] that does not mean that he would be required to personally assert the privilege in every FOIA case. The Freedom of Information Act does not specify the particular government official that must justify the government's exemption claims, and it has long been clear that subordinate agency officials may submit declarations justifying a FOIA exemption under a privilege that, were it to be asserted in traditional civil litigation, would need to be asserted by an agency head or high-level official. To take just one example, although it is clear that an assertion of the deliberative process privilege in civil litigation must be made by the head of the agency in control of the relevant information, *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 405 n.11 (D.C. Cir. 1984), the government routinely invokes this privilege in FOIA litigation in declarations submitted by agency FOIA officers. *See also Lardner v. U.S. Dep't of Justice*, 2005 WL 758267, at *6 (D.D.C. Mar. 31, 2005) ("Even assuming that the President must personally invoke the presidential communications privilege in civil discovery . . . this

[11] The government sometimes asserts a National Security Act privilege to shield information from disclosure in civil litigation between private parties. In *Jeppesen*, for example, the Director of the CIA asserted both a state secrets privilege claim and a statutory privilege claim under the National Security Act. *See, e.g.*, *Mohamed v. Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d 1128, 1132 n.4 (N.D. Cal. 2008) (noting government's "Formal Claim of State Secrets and Statutory Privileges"), *aff'd* 614 F.3d 1070 (9th Cir. 2010) (*en banc*).

rule should not be imported into the far different context of FOIA.").

The reason for this rule is obvious: Virtually anyone can request almost anything under FOIA, including materials that reflect the most sensitive secrets or deliberations of the government. FOIA was not meant to convert high-ranking officials into full-time document reviewers. Rather, in order for a document to be withheld under that statute, it simply must meet the substantive criteria for withholding. For Exemption 3, that means that the "information falls within the scope of the [withholding] statute." *Minier*, 88 F.3d at 801; *see also Morley v. CIA*, 508 F.3d 1108, 1126 (D.C. Cir. 2007) ("Exemption 3 differs from other FOIA exemptions in that its applicability depends less on the detailed factual contents of specific documents; the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within the statute's coverage." (internal quotation marks omitted)).

As plaintiff acknowledges, Exemption 3 claims under the National Security Act have always operated this way. Courts of appeals – including this Court – have for decades upheld Exemption 3 claims made by persons other than the Director of National Intelligence (or the Director of Central Intelligence before him), and indeed have continued to uphold Exemption 3 claims asserted by CIA officials even after the duty to protect intelligence sources and methods was transferred from the CIA Director to the Director of National Intelligence. *See, e.g.*, *ACLU v. Dep't of Defense*,

628 F.3d 612, 625 (D.C. Cir. 2011) (CIA); *Berman*, 501 F.3d at 1140 (CIA); *Lahr*, 569 F.3d at 985 (National Security Agency); *Larson*, 565 F.3d at 865, 868-69 (CIA and National Security Agency); *Wolf*, 473 F.3d at 378 (CIA); *Krikorian v. Dep't of State*, 984 F.2d 461, 466 (D.C. Cir. 1993) (State Department). Against this long-established practice, plaintiff has not identified a single case holding that an Exemption 3 claim *must* be personally asserted by the official named in the National Security Act.[12]

III. NGA's Glomar Response Was Proper Under FOIA Exemption 1

If this Court determines that confirming or denying the existence of documents responsive to plaintiff's FOIA request could reveal the sources and methods of intelligence gathering, it need go no further to affirm. But affirmance likewise would be warranted under Exemption 1, 5 U.S.C. § 552(b)(1), which shields from disclosure information that is "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) [is] in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). Executive Order 13,526 "specifically countenances the

[12] Plaintiff suggests that a footnote in the district court's opinion in *Talbot v. CIA*, 578 F. Supp. 2d 24, 29 n.3 (D.D.C. 2008), supports its position (Br. 30), but that case does not merit the reliance that plaintiff places upon it. *Talbot* simply quotes the language of the National Security Act and notes that in that case, the Director of National Intelligence instructed the State Department to "take all necessary and appropriate measures to ensure the protection of intelligence sources and methods." That opinion does not hold that Exemption 3 claims may *only* be asserted by the Director himself, contrary to decades of practice.

Glomar Response, permitting a classifying agency to refuse to confirm or deny the existence or nonexistence of requested records whenever the fact of their existence or nonexistence is itself classified." *Wilner*, 592 F.3d at 71 (internal quotation marks omitted); E.O. 13,526, § 3.6(a).

As with Exemption 3, the government's assessment of whether information is properly classified under the Executive Order is entitled to "'substantial weight'" by the reviewing court. *See Hunt*, 981 F.2d at 1119 (quoting *Miller v. Casey*, 730 F.2d 773, 776, 778 (D.C. Cir. 1984)).[13] This Court need not find that the government has definitively proven that the withheld information concerns a recognized category of classified information, or that its release would result in harm to the national security; it need only satisfy itself that the government's explanation "appears 'logical' or 'plausible.'" *Wolf*, 473 F.3d at 374-75 (quoting *Gardels*, 689 F.2d at 1105).

1. The Barlow declaration amply "demonstrate[s] that the information withheld logically falls within the claimed exemptions." *Berman*, 501 F.3d at 1140. To be properly classified under Executive Order 13,526, information must meet four criteria: (1) it must be classified by an original classification authority; (2) it must be

[13] *See also Frugone v. CIA*, 169 F.3d 772, 775 (D.C. Cir. 1999) ("Mindful that courts have little expertise in either international diplomacy or counterintelligence operations, we are in no position to dismiss the CIA's facially reasonable concerns."); *King v. U.S. Dep't of Justice*, 830 F.2d 210, 217 (D.C. Cir. 1987) ("[T]he court owes substantial weight to detailed agency explanations in the national security context.").

owned or controlled by the United States Government; (3) it must fall within one or more of the categories of information listed in section 1.4 of the Executive Order; and (4) unauthorized disclosure of the information reasonably could be expected to result in damage to the national security. E.O. 13,526, § 1.1(a).[14]

The Barlow declaration establishes that each of these criteria is met. It shows that: Mr. Barlow is an original classification authority (ER 1:41 (¶3)) and has determined that existence or nonexistence of the requested records is itself properly classified information (ER 1:41-43 (¶¶ 4, 6)); the requested information is owned and controlled by the United States Government (ER 1:50 (¶23)); and the existence of records responsive to plaintiff's FOIA requests concerns two categories of information listed in the Executive Order and, if disclosed, could reasonably be expected to harm national security. ER 1:50 (¶23).

a. First – and as explained in greater detail above – Mr. Barlow determined that this information concerns "intelligence activities" and "intelligence sources or methods," which are classifiable under Section 1.4(c) of Executive Order 13,526. *Ibid.* Confirming whether or not responsive records exist could, for example, reveal whether NGA maintains an intelligence interest in a particular area of world, as well

[14] "Damage to the national security" of the United States is broadly defined to include "harm to the national defense or foreign relations of the United States from the unauthorized disclosure of information, taking into consideration such aspects of the information as the sensitivity, value, utility, and provenance of that information." E.O. 13,526 § 6.1(l)

as the breadth and scope of any such interest, by exposing whether NGA intelligence methods have or have not been utilized for a specific target. ER 1:45-46 (¶¶12, 14). Identifying whether responsive records exist also could reveal information about the agency's technological capabilities, or lack thereof. ER 1:48 (¶17). Consequently, anything other than a Glomar response could risk revealing the "business practices" and "basic 'tools' used by NGA to accomplish its mission," including "sophisticated technological tools, liaison relationships, and NGA's identification of targets for intelligence collection." ER 1:51 (¶25).

The Barlow declaration further explains the harms that could reasonably be expected to result from disclosure of this information. Revealing that the United States has a particular "intelligence interest, capability, or technique" would "be of material assistance to those who seek to detect, prevent, or damage U.S. intelligence operations," and could permit adversaries to "take countermeasures to nullify [their] effectiveness." ER 1:52 (¶26). Thus, "[o]nce an intelligence source or method (or the fact of its use in a certain situation) is discovered, its continued successful use by NGA is seriously jeopardized." *Ibid.*

The declaration also makes clear that "discovery of NGA capabilities" is a primary objective of foreign intelligence agencies. ER 1:52 (¶27). Any admission about the scope of NGA's intelligence gathering capabilities or the fact of its past use, therefore, could "enabl[e] foreign services to redirect their resources to identify

potential NGA sources, circumvent NGA's monitoring efforts, and generally enhance their intelligence activities at the expense of the United States." *Ibid.*

Finally, Mr. Barlow explains that the need to keep the NGA's sources and methods confidential is not limited merely to disclosure of the NGA's actual interests and technical capabilities. Rather, it also requires the government to prevent even "indirect references to such a source or method." ER 1:53 (¶28). Foreign intelligence services have the "ability to gather information from myriad sources, analyze it, and deduce means and methods" of intelligence gathering "from disparate and even seemingly unimportant details" when "juxtaposed with other publicly[] available data." *Ibid.*

b. Second, the Barlow declaration explains that revealing whether NGA possesses satellite imagery of a particular country on a particular date concerns the "foreign relations or foreign activities of the United States," which are classifiable under Section 1.4(d) of the Executive Order. Plaintiff's own complaint demonstrates this obvious fact: it states that plaintiff needs the information sought in order to determine whether the incident took place "in Cuban or international airspace," and that the requested records are relevant to an issue "which has generated national and international attention." ER 1:35 (¶¶10-11).

The Barlow declaration further explains that revealing the existence of responsive records could "damage U.S. foreign relations." ER 1:53-54 (¶30). If NGA

were to confirm the existence of records demonstrating that it captured satellite imagery of that country on a particular date and time, such a response could be "construed by a foreign government, whether friend or foe, to mean that NGA has collected intelligence information on its citizens or resident aliens." ER 1:54 (¶31). While it may be generally known that the United States collects foreign satellite intelligence and conducts satellite operations in other countries, a specific "acknowledgment could suggest NGA has operated undetected within [a particular] country's borders," ER 1:54 (¶31), which "could well cause the affected or interested foreign government to respond in ways that would seriously damage U.S. national interests," ER 1:53 (¶30). "The foreign government's response could be of a diplomatic or economic nature, a ground for anti-American propaganda, or a reason for retaliation against American citizens or other American interests." ER 1:54 (¶30). Moreover, "[s]uch responses could reasonably be expected even though the events may be several years past. Perceptions of violation of sovereignty can generate retribution even years later." *Ibid.*

These foreign relations concerns, too, are both logical and plausible. Numerous courts have acknowledged the severe consequences to foreign relations and national security that could result if the United States were to officially confirm or deny whether it was conducting intelligence operations about a given nation or its citizens. *See, e.g.*, *Wolf*, 473 F.3d at 376 (deferring to CIA's judgment that confirming

or denying existence of a covert relationship with a foreign national could harm the United States' foreign relations); *Bassiouni*, 392 F.3d at 246 ("Even allies could be unpleasantly surprised by information that discloses espionage operations.").

2. Plaintiff challenges the government's determination that disclosing the existence of responsive records could reveal classified information the release of which reasonably could be expected to harm the national security or foreign relations of the United States. As with its response to the district court's Exemption 3 holding, none of plaintiff's arguments has merit.

a. Plaintiff errs in arguing that confirming or denying the existence of responsive records would not reveal any classified information because the capabilities of NGA are supposedly "well known" (Br. 34), and because the "shoot-down incident" has been "fully and publicly disclosed" (Br. 45). The question in this case is not whether the NGA possesses reconnaissance satellites, or whether the "shoot-down" incident in fact occurred. Rather, and as explained above, the issue is whether confirming or denying the existence of records concerning a specific incident at a particular place and time might reveal classified information. *See, e.g.*, ER 1:20 ("[T]he facts that are public are not the same as those the agency seeks to protect with its Glomar response.").

Numerous courts have held that these sorts of details about an intelligence agency's technical capabilities or strategic interests constitute classified intelligence

activities, sources, and methods. *See, e.g*, *Wolf*, 473 F.3d at 376-77 ("revealing CIA priorities" would disclose classified sources and methods); *Larson*, 565 F.3d at 867 (noting "the necessity to foreign intelligence gathering of keeping targets and foreign communications vulnerabilities secret"); *Students Against Genocide*, 257 F.3d at 840 (disclosing targets of intelligence activities could reveal classified sources and methods); *see also Houghton v. National Security Agency*, 378 Fed. App'x 235, 238 (3d Cir. 2010) (revealing "intelligence targeting, priorities, and capabilities" could disclose classified sources and methods). That is true even where the general parameters of the government's intelligence capabilities are supposedly "well known," as plaintiff here asserts (Br. 34). *See Military Audit Project*, 656 F.2d at 744-45; *Wilson*, 586 F.3d at 195. Indeed, courts have found that revealing facts about past intelligence activities can damage national security even where the government has expressly disclosed, and discontinued the use of, the method in question. *See ACLU*, 628 F.3d at 623.

b. Plaintiff likewise errs by suggesting at various points (*see* Br. 35-47) that no harm could come to the United States for disclosing whether or not it possesses records of an event that occurred 15 years ago. This argument ignores that "it is virtually impossible for an outsider to ascertain what effect the passage of time may or may not have had to mitigate the harm from disclosure of sources and methods." *Maynard v. CIA*, 986 F.2d 547, 555 n.6 (1st Cir. 1993); *see also Oglesby v. U.S. Dep't of Army*, 79 F.3d 1172, 1183 (D.C. Cir. 1996) ("[T]he mere passage of time is not a per

se bar to reliance on exemption 1."); *Fitzgibbon v. CIA*, 911 F.2d 755, 763 (D.C. Cir. 1990) (rejecting "contention that the District Court was under an obligation to consider the effect of the passage of time" in deciding whether documents concern intelligence sources and methods). For this reason, courts have routinely held that the government may continue to withhold properly-classified sources and methods of intelligence gathering even if they are decades old. *See, e.g.*, *Sims*, 471 U.S. at 161, 173-77; *Berman*, 501 F.3d at 1145.

In this case, there is no genuine dispute that the intelligence activities, sources, and methods implicated by plaintiff's request are properly classified. The President has declassified *some* satellite imagery taken by specific satellite systems used between 1959 and 1972. *See* Exec. Order No. 12,951, 60 Fed. Reg. 10,789 (Feb. 22, 1995). All other "imagery acquired by a space-based national intelligence reconnaissance system," however, "shall be kept secret in the interests of national defense and foreign policy until deemed otherwise by the Director of [National] Intelligence." E.O. 12,951, § 2(a).[15]

These past disclosures only underscore the need to maintain the secrecy of currently classified intelligence activities, sources, and methods, because they

[15] In 2002, the Director of Central Intelligence further declassified other obsolete satellite imagery collected between 1963 and 1980 on different systems. *See* National Archives Releases Recently Declassified Satellite Imagery, October 9, 2002, *available at* http://www.archives.gov/press/press-releases/2003/nr03-02.html

demonstrate a good faith effort by the government to release information when the public interest in its disclosure outweighs the continued need for secrecy. *See, e.g.*, *Students Against Genocide*, 257 F.3d at 835 ("Moreover, particularly because the government did release numerous photographs, we see no reason to question its good faith in withholding the remaining photographs on national security grounds."). Such disclosures do not, moreover, require the government to disclose other classified information, even if it is deemed to be similar in nature to information already disclosed. *Id.* at 835-36; *see also Center for Nat. Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 930-31 (D.C. Cir. 2003). A contrary rule would be antithetical to the purposes of open government: "[I]f even a smidgen of disclosure required the [government] to open its files, there would be no smidgens." *Bassiouni*, 392 F.3d at 247.

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

Respectfully submitted,

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DECEMBER 2011

CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)(B)

I hereby certify that the foregoing brief satisfies the requirements of Federal Rule of Appellate Procedure 32(a)(7) and Ninth Circuit Rule 32-1. The brief was prepared in Garamond 14-point font and contains 10,205 words.

s/Michael P. Abate
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ADDENDUM

CENTER FOR HUMAN RIGHTS AND CONSTITUTIONAL LAW
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December 29, 2009

Via Certified Mail
National Geospatial-Intelligence Agency
FOIA Requester Service Center
4600 Sangamore Road, D-10, FOIA
Bethesda, Maryland 20816
Phone 301-227-2268; DSN 287-2268

Re: Freedom of Information Act Request

To Whom It May Concern:

This request is made pursuant to the Freedom of Information Act ("FOIA") on behalf of Leonard Weinglass, Attorney at Law, 6 West 20th Street #10A, New York, NY 10011-9263, and the Center for Human Rights and Constitutional Law (CHRCL), 256 S. Occidental Blvd. Los Angeles CA 91104.

Location of documents sought

This request seeks copies of documents and records in the possession of the National Geospatial-Intelligence Agency and any of its divisions, sub-agencies or facilities.

Purpose of document request

The Requesting Parties seek access to the records described below in order to adequately prepare for an impending *habeas* petition on behalf of Gerardo Hernandez, one of the so-called Cuban Five. The requesting parties also seek the records requested because they are relevant to a better understanding of the case of the Cuban Five (discussed in detail in the opinion of the Eleventh Circuit Court of Appeals reported at *United States v. Campa*, 529 F.3d 980 (2008)), which has generated national and international attention by elected officials, academics, NGOs, and the media, among others. CHRCL will disseminate without charge information obtained as a result of this FOIA request to a range of academics, journalists, human rights organizations, and elected officials who have expressed a serious interest in the Cuban Five case.

Time to Respond

If you find it impossible to produce all documents called for by this request within the statutorily prescribed time limit (20 days), please produce all documents that are located by you within such time and advise us when you believe the remainder of the documents requested will be produced.

Payment of search and copying fees

Leonard Weinglass and CHRCL jointly and separately agree to pay all reasonable search and copying fees incurred responding to this request.

Records requested

The Requesting Parties seek access to inspect and copy or copies of the following:

1. Any satellite images, satellite imagery, satellite photographs, or satellite video images of the area in which an incident took place on February 24, 1996 over or near the north coast of Cuba in which two aircraft flown by the Brothers to the Rescue organization of Florida were intercepted in flight and shot down by Cuban MiGs, including but not limited to satellite images, satellite imagery, satellite photographs, or satellite video images showing any of the Brothers to the Rescue or Cuban aircraft involved in the incident. We are requesting records whether created any time before, during, or after the downing of the two aircraft, including any images or photos of any wreckage.

2. Any documents or records relating to the items sought in number 1 above including but not limited to reports, requests, assessments, data compilations, directives, instructions, guidance, memoranda, correspondence, notes, indices, cables, telexes, telegrams, or letters, whether maintained in paper, digital, video, digital tape, audio tape, or any other preserved form, regarding the aforementioned satellite images, satellite imagery, satellite photographs, or satellite video images.

The Requesting Parties would like to bring to your attention the fact that on March 23, 2001, testimony was offered by a retired United States Air Force Colonel, Col. George E. Buchner, USAF-Ret., a multiple decorated air combat pilot during the Vietnam War and a graduate of the Air Force Academy, under oath before the Hon. Joan A. Lenard of the United States District Court, Southern District of Florida in the matter of *United States v. Campa, et al.*, Docket No. 98-721-CR-LENARD, to the effect that

> **it is my opinion that the Government has satellite photos that would resolve this whole issue [as to where the shootdown occurred].**

See Vol. 66 p. 10,183 of the transcript of the aforementioned case (emphasis added).

In addition, ample other evidence and testimony was offered that the United States Government, aware of the impending confrontation described above,

activated radar or other assets of the national defense establishment to record and document the February 24, 1996 shootdown.

Handling claimed exemptions

If you locate any Documents responsive to these requests regarding which you claim an exemption in whole or in part from disclosure, please identify (1) the author and his/her position in the Government, (2) the addressee(s), (3) the date of the document, (4) the general topic of the document, (5) the number of pages in the document, and (6) the specific exemption claimed.

If you claim an exemption to part of a Document, please produce the portion for which no exemption is claimed and provide the information listed above for the portion for which exemption is claimed.

Further, if you assert that the law permits you to neither affirm nor deny the existence of a requested Document, please produce an affidavit by an appropriate official claiming such exemption. This will permit us to determine whether or not to seek administrative and/or judicial review of your claims of exemption.

Expedited processing

We respectfully request that this matter be processed expeditiously and before other FOIA requests that have not reasonably sought expediting processing. Expedited processing is requested because the information sought may directly bear upon the appropriateness of Mr. Hernandez's conviction and his impending habeas corpus petition.

If we do not hear from you by the expiration of the statutory time period, we will deem your non-response to be a denial of this request and may seek administrative review.

If you have any questions please feel free to call me at (323) 251-3223 or email me at pschey@centerforhumanerights.org. Thank you for your consideration and assistance.

Sincerely,

Peter Schey

ccs: Leonard I. Weinglass, Esq.
Gerardo Hernandez

NATIONAL GEOSPATIAL-INTELLIGENCE AGENCY
4600 Sangamore Road
Bethesda, Maryland 20816-5003

OGCA-20100067F

January 12, 2010

Peter Schey
Center for Human Rights and Constitutional Law
256 South Occidental Boulevard
Los Angeles, CA 90057

RE: Freedom of Information Act (FOIA) Request 20100067F

Dear Mr. Schey,

This is in response to your Freedom of Information Act (FOIA) request submitted to the National Geospatial-Intelligence Agency (NGA) dated December 29, 2009 and received by the NGA FOIA Office on January 6, 2010. You requested satellite imagery, satellite photographs and satellite video as well as other documents related to a February 24, 1996 incident near the north coast of Cuba in which two aircraft were shot down.

Your request has been placed in our complex processing queue and a search has been initiated for the records requested. We are unable to make a release determination on your request at this time as there are unusual circumstances which impact our ability to quickly process your request. These unusual circumstances are: (a) the need to search for and collect records from a facility geographically separated from this Office; (b) the potential volume of records to be searched and reviewed; and (c) the potential need for coordination with one or more other agencies or DoD components having a substantial interest in either the determination or the subject matter of the records.

Regarding your request for expedited processing, you are asking this Office to place your request ahead of all other requests received. This Office receives numerous FOIA requests and it is our policy to process these requests on a "first-in first-out" basis. According to Department of Defense (DoD) Regulation 5400.7-R, in order to qualify for expedited processing, a requester must demonstrate a "compelling need" for the information, i.e., that failure to obtain the records on an expedited basis reasonably could be expected to pose an imminent threat to the life or physical safety of an individual, an imminent loss of substantial due process rights, or humanitarian need. Compelling need also can mean that the information is urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged federal government activity.

In requesting expedited processing, you state the following: "The Requesting Parties seek access to the records described below in order to adequately prepare for an impending *habeas* petition on behalf of Gerardo Hernandez, one of the so-called Cuban Five." You also state the records "are relevant to a better understanding of the case of the Cuban Five ... which has generated national and international attention..." and that the records will be

disseminated to a range of academics, journalists, human rights organizations and others with an interest in the Cuban Five case.

Expedited processing may be granted when the requester demonstrates a compelling need for the information and shows that the information has a particular value that would be lost if not processed on an expedited basis. Aside from a mere mention of a pending *habeas* case you have not demonstrated how any of the requested information presents a compelling need based on imminent threat to life or physical safety of an individual, an imminent loss of substantial due process rights, or humanitarian need. You also have not demonstrated that any of the records requested will contain allegations of unlawful conduct or activities which may be viewed as constituting actual or alleged federal government activity. It is therefore, incumbent upon you to demonstrate that the requested records will serve an urgency purpose and that they also will be meaningful in the sense that they will provide for a greater understanding of actual or alleged federal government activity on the part of the public-at-large than that which existed before such information was disseminated.

My decision to deny expedited processing constitutes a denial of your request. The decision to deny your request may be appealed in writing to the National Geospatial-Intelligence Agency. Any appeal should be post-marked no later than 60 calendar days of the date of this letter. Please enclose a copy of this letter with your appeal. Include in your appeal any reasons for reconsideration which you wish to present. Your appeal may be mailed to the National Geospatial-Intelligence Agency, thru: NGA/OGCA, 4600 Sangamore Road, Mail Stop D-10, Bethesda, Maryland 20816-5003.

Sincerely,

JENNIFER McKENNA
Assistant General Counsel

McKenna Jennifer M NGA-OGCA USA CIV

From: McKenna Jennifer M NGA-OGCA USA CIV
Sent: Tuesday, April 06, 2010 8:53 AM
To: 'Peter Schey'
Subject: RE: Contact Information for Peter Schey re FOIA Request OGCA-20100067F

Attachments: 20100067F-Shey-FOIA Request.pdf

20100067F-Shey-F
OIA Request.pd...

Mr. Schey,

Please see the attached letter in response to your FOIA request. The original letter will be sent via regular mail.

v/r,
Jennifer McKenna
Assistant General Counsel
National Geospatial-Intelligence Agency
301-227-7292
-----Original Message-----
From: Peter Schey [mailto:peter@peterschey.com]
Sent: Thursday, March 25, 2010 2:42 PM
To: McKenna Jennifer M NGA-OGCA USA CIV
Cc: Lenny Weinglass; Christopher Scherer
Subject: Contact Information for Peter Schey re FOIA Request OGCA-20100067F
Importance: High

Dear Jennifer,

Thanks for chatting today about our pending FOIA request for any satellite images, satellite imagery, satellite photographs, or satellite video images of the area in which an incident took place on February 24, 1996 over or near the north coast of Cuba in which two aircraft flown by the Brothers to the Rescue organization of Florida were intercepted in flight and shot down by Cuban MiGs. See attached request letter. My contact info is below. My cell is (323) 251-3223. We will likely move forward with a district court case unless you're able to provide a substantive response by the middle of next week. Thanks for your consideration and courtesy.

Sincerely,

Peter Schey

Peter A. Schey
President and Executive Director
Center for Human Rights and Constitutional Law
256 S. Occidental Blvd.
Los Angeles, Ca. 90057
Telephone: (213) 388-8693 ext. 104
Facsimile: (213) 386-9484
Electronic mail: pschey@centerforhumanrights.org www.centerforhumanrights.org
http://www.centerforhumanrights.org

NATIONAL GEOSPATIAL-INTELLIGENCE AGENCY
4600 Sangamore Road
Bethesda, Maryland 20816-5003

OGCA- 20100067F

Peter Schey
256 South Occidental Boulevard
Los Angeles, Ca 90057

RE: FREEDOM OF INFORMATION ACT (FOIA) Request #20100067F

Dear Mr. Schey,

This letter is in response to your Freedom of Information Act (FOIA) request submitted to the National Geospatial-Intelligence Agency (NGA) by letter dated December 29, 2009. You requested satellite imagery, photographs or video of a single location on a specific date, namely an area over Cuba on February 24, 1996.

We appreciate your concerns and interest in this area, but unfortunately with regard to the records you requested, the National Geospatial-Intelligence Agency can neither confirm nor deny the existence or nonexistence of records responsive to your request. The information you requested, unless it has been officially acknowledged and disclosed, or otherwise properly released to the public, would be classified for reasons of national security under Executive Orders 12951 and 12958. Further, the fact of the existence or nonexistence of such records would also relate directly to information concerning intelligence sources, methods, or capabilities and, as a result, is exempt from search, review, publication, or disclosure in accordance with Title 10, Section 457, of the United States Code.

I have determined that under these circumstances, your request is denied pursuant to sections "(b)(1)" and "(b)(3)" of the FOIA on the basis that, respectively, any records, should they exist: (i) are properly and currently classified under criteria established by an Executive Order; or (ii) fall within the scope of a particular statute which permits withholding designated types of information.

This response constitutes a denial of your request. You may appeal this decision in writing to the National Geospatial-Intelligence Agency. Any appeal should be post-marked no later than 60 calendar days of the date of this letter. Please enclose a copy of this letter with the appeal along with your reasons for reconsideration. Your appeal may be mailed to the National Geospatial-Intelligence Agency, thru: NGA/OGCA, 4600 Sangamore Road, Mail Stop D-10, Bethesda, Maryland 20816-5003.

Sincerely,

Karen A. Finn

KAREN A. FINN
Chief, Public Affairs NGA

CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF system on December 21, 2011. Participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/Michael P. Abate
Michael P. Abate