UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES MADISON PROJECT, *et al.*,	)	
Plaintiffs,	)	
v.	)	**No. 1:17-cv-00144-APM**
DEPARTMENT OF JUSTICE, *et al.*,	)	
Defendants.	)	

DEFENDANTS' SUPPLEMENTAL SUBMISSION AND FURTHER RESPONSE TO PLAINTIFFS' POST-BRIEFING NOTICES

PRELIMINARY STATEMENT

The Court has asked defendants Office of the Director of National Intelligence (ODNI), Central Intelligence Agency (CIA), Department of Defense, and Department of Justice to provide "insight on . . . the President's tweets and what they are, how official they are, are they statements of the White House and the President." Stat. Conf. Tr. at 6:8-10 (Nov. 2, 2017). When it made its request, the Court referred to the argument in the "final pleading" of plaintiffs James Madison Project and Josh Gerstein "that we just can't dismiss these tweets out of hand." *Id.* at 6:11-12.

Going beyond the argument in their "final pleading," plaintiffs have filed several post-briefing "notices" asserting that the President and the White House Press Secretary have disclosed in five recent statements, including three that are not tweets, that ODNI, the CIA, the National Security Agency (NSA), or the Federal Bureau of Investigation (FBI) has made a final determination as to the veracity of one or more of the factual allegations allegedly contained in the two-page synopsis of the so-called dossier. ECF No. 23 at 1-2; ECF No. 24 at 1-2; ECF No.

26 at 3; ECF No. 27 at 1-2. Plaintiffs argue on the basis of that assertion that ODNI, CIA, NSA, and the FBI have waived the *Glomar* responses they have provided to Items 2 and 3 of plaintiffs' request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552.[1] *See id.*

Plaintiffs' argument is without merit. The government is treating the statements upon which plaintiffs rely as official statements of the President of the United States, but nothing in the statements states or even implies that ODNI, the CIA, NSA, or the FBI has made a final determination as to the veracity of any factual allegation allegedly contained in the two-page synopsis. That fact is dispositive because an official statement cannot waive a *Glomar* response unless the information disclosed matches exactly the information requested. Neither the President nor the White House Press Secretary has disclosed the basis for any of the statements that he or she has made about the so-called dossier. Plaintiffs complain, in fact, that the President has not done so. Nothing in the statements upon which plaintiffs rely thus constitutes a waiver of the *Glomar* responses of ODNI, the CIA, NSA, or the FBI to Items 2 and 3 of plaintiffs' FOIA request.

[1] Directed to ODNI, the CIA, NSA, and the FBI, Items 2 and 3 of plaintiffs' request seeks "final determinations regarding the accuracy (or lack thereof) of any of the individual factual claims listed in the two page synopsis" and "investigative files relied upon in reaching the final determinations referenced in category #2." ECF No. 7 ¶ 14. The two-page synopsis has not been produced to plaintiffs and plaintiffs do not challenge its withholding pursuant to FOIA Exemptions 1 and 3.

FACTUAL BACKGROUND

The five statements to which plaintiffs point in arguing that the *Glomar* responses of ODNI, the CIA, NSA, and the FBI to Items 2 and 3 of plaintiffs' request have been waived are the following:

1. A tweet of October 19, 2017, in which the President said: "Workers of firm involved with the discredited and Fake Dossier take the Fifth. Who paid for it, Russia, the FBI or the Dems (or all)?" ECF No. 25-4.[2]

2. A tweet of October 21, 2017, in which the President said: "Officials behind the now discredited 'Dossier' plead the Fifth. Justice Department and/or FBI should immediately release who paid for it." ECF No. 25-5.

3. An October 21, 2017, interview conducted by Lou Dobbs of Fox Business. Ex. A at 1.[3] Asked during the interview to comment on "efforts by the Hillary Clinton campaign and the Democratic National Committee (DNC) to fund research in [an] attempt to smear his presidential campaign," the President said:

> Don't forget Hillary Clinton totally denied this. She didn't know anything. She knew nothing. All of a sudden they found out. What I was amazed at, it's almost $6 million that they paid and it's totally discredited, it's a total phony. I call it fake news. It's disgraceful. It's disgraceful.

Id.

4. An October 31, 2017 press briefing during which the White House Press Secretary was asked to provide a "definition of collusion" that would explain her view that "Trump didn't

[2] All of the tweets to which plaintiffs refer are from @realDonaldTrump, the personal Twitter account President Trump established in 2009 and continues to use to tweet about a variety of topics.

[3] References to exhibits are to the exhibits to this memorandum.

collude [with the Russians] but Hillary did." Ex. B at 9. Her response was: "I think the exchanging [of] millions of dollars to create false information is a pretty big indication." *Id.*

5. An interview of the President, broadcast on November 5, 2017, during which he was asked by Sharyl Atkisson to respond to revelations that "the Hillary Clinton campaign . . . funded that so-called dossier." Ex. C at 2. His response included the following:

> [W]hen you look at that horrible dossier which is a total phony fake deal like so much of the news that I read when you look at that and take a look at what's gone on with that and the kind of money we're talking about it is a disgrace.

Id.

ARGUMENT

NOTHING IN THE STATEMENTS UPON WHICH PLAINTIFFS RELY CONSTITUTES A WAIVER OF THE *GLOMAR* RESPONSES OF ODNI, THE CIA, NSA, OR THE FBI TO ITEMS 2 AND 3 OF PLAINTIFFS' FOIA REQUEST.

The Court has asked, broadly, about the official status of the President's tweets. *See* Stat. Conf. Tr. at 6: 8-10 (asking the parties to "provide insight on . . . the President's tweets and what they are, how official they are, are they statements of the White House and the President"). In answer to the Court's question, the government is treating the President's statements to which plaintiffs point – whether by tweet, speech or interview – as official statements of the President of the United States. The key point, however, is that, regardless of the medium, none of those statements matches the information plaintiff is seeking. Accordingly, the statements cannot constitute a waiver of the *Glomar* responses that ODNI, the CIA, NSA, and the FBI have provided to Items 2 and 3 of plaintiffs' request

"[L]ike other information withheld pursuant to an exemption, an agency can waive a *Glomar* response through official acknowledgment." *Mobley v. CIA*, 806 F.3d 568, 584 (D.C. Cir. 2015). "An agency's official acknowledgment of information by prior disclosure . . . cannot be based," however, "on mere public speculation, no matter how widespread." *Wolf v. CIA*, 473

F.3d 370, 378 (D.C. Cir. 2007). "[A] strict test [thus] applies to claims of official disclosure.'" *Moore v. CIA*, 666 F.3d 1330, 1333 (D.C. Cir. 2011) (quoting *Wilson v. CIA*, 586 F.3d 171, 186 (2d Cir. 2009). This test requires the plaintiff to show that "'the information requested [is] as specific as the information previously released . . . match[es] the information previously disclosed . . . and . . . [has] already . . . been made public through an official and documented disclosure.'" *Id.* (quoting *ACLU v. Dep't of Def.*, 628 F.3d 612, 620-21 (D.C. Cir. 2011)); *accord ACLU v. Dep't of Justice*, 640 F. App'x 9, 11 (D.C. Cir. 2016); *Mobley*, 806 F.3d at 583 (D.C. Cir. 2015); *Wolf*, 473 F.3d at 378; *Pub. Citizen v. Dep't of State*, 11 F.3d 198, 202 (D.C. Cir. 1993); *Krikorian v. Dep't of State*, 984 F.2d 461, 467-68 (D.C. Cir. 1993); *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990).

None of the statements upon which plaintiffs rely identifies information provided by ODNI, the CIA, NSA, or the FBI as the basis for the assertions contained in the statements that the so-called dossier is "discredited," "phony," "fake," or "false." No "'match'" therefore exists between anything disclosed in the statements and the information plaintiffs seek in Items 2 and 3 of their FOIA request. *See Moore*, 666 F.3d at 1333 (quoting *ACLU*, 628 F.3d at 620). The Court cannot assume that the President was expressing a view based on "some knowledge and understanding" *provided by these agencies*. Stat. Conf. Tr. at 6:17-18. No waiver of the *Glomar* responses of ODNI, the CIA, NSA, or the FBI to Items 2 and 3 may therefore be inferred from any of the statements.

ACLU v. CIA, 710 F.3d 422 (D.C. Cir. 2013), which the Court referred to at the status conference, does not suggest otherwise.[4] *See* Stat. Conf. Tr. at 7:17-21 The court found in

[4] The Court asked whether a Presidential tweet is "the equivalent of" the "public statements and speeches" at issue in *ACLU v. CIA*. Stat. Conf. Tr. at 7:17-21. The answer is that a tweet can be

ACLU that the CIA's broad *Glomar* response to a request for ten categories of documents pertaining to drone strikes generally, and not merely to the CIA, was not "logical" or "plausible" due to official acknowledgments by the President and others that the United States engages in targeted strikes using drones. 710 F.3d at 431. The court did not purport to deviate from its long-standing doctrine on the official acknowledgment of information. Using the standard instead for evaluating the validity of withholdings under FOIA exemptions, the court said: "The question before us, then, is whether it is 'logical or plausible['] . . . for the CIA to contend that it would reveal something not already officially acknowledged to say that the Agency 'at least has an intelligence interest' in such strikes." *Id.* at 429 (quoting *Wolf*, 473 F.3d at 375). The portion of *Wolf* on which the court expressly relied was a discussion of Exemption One, and whether it met the "logical and plausible" standard by which courts normally evaluate that exemption.

The "'logical' or 'plausible'" standard has never been the standard for the official acknowledgment of information. Although the court was less than precise in *ACLU*, it has subsequently reiterated its adherence to the traditional standard. It did so, in fact, in a later appeal in the same case. Stating that "[t]his circuit applies a three-part test to determine when an agency has 'officially acknowledged' requested information," the court said:

> This test is quite strict. "Prior disclosure of similar information does not suffice; instead, the *specific* information sought by the plaintiff must already be in the public domain by official disclosure." This court has explained that this "insistence on exactitude recognizes the Government's vital interest in information relating to national security and foreign affairs." In each case where a FOIA requester contends that an agency has acknowledged information it seeks to withhold, the burden is on the requester to point to specific information in the public domain that "appears to duplicate that being withheld."

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the equivalent of a public statement or speech, but the medium is not determinative. The significance of any statement, regardless of the medium, will depend on its substance.

ACLU v. DOJ, 640 F. App'x 9, 11 (D.C. Cir. 2016) (quoting *Wolf*, 473 F.3d at 378) (citations omitted).

Nor would *ACLU* be apposite even assuming, *arguendo*, that it had any applicability beyond its facts. Plaintiffs concede that President Trump may have "issued his tweets based strictly and exclusively upon his own personal knowledge independent of what he has learned as President of the United States, as well as what he may have seen on cable television." ECF No. 26 at 2. Plaintiffs thereby concede that the characterization of the so-called dossier as something that is "discredited," "phony," "fake," or "false" in the statements upon which they rely may be based on something other than information provided by ODNI, the CIA, NSA, or the FBI. None of those statements thus waives the *Glomar* responses provided by ODNI, the CIA, NSA, and the FBI to Items 2 and 3 of plaintiffs' FOIA request.

Plaintiffs express dismay that the President has not identified the information that forms the basis for his views about the so-called dossier, *see* ECF No. 26 at 2-3, but plaintiffs are not entitled to clarification of what the President has chosen to say. The above *Glomar* responses should therefore be upheld.

CONCLUSION

Defendants' motion for summary judgment should be granted, and plaintiffs' cross motion for summary judgment denied, for the reasons set forth above and for the other reasons presented by defendants.

Respectfully submitted,

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Dated: November 13, 2017

CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2017, I served the within memorandum and the exhibits to the memorandum on all counsel of record by filing them with the Court by means of its ECF system.

s/ *David M. Glass*