



Exemption 1

Exemption 1 of the Freedom of Information Act protects from disclosure information that has been deemed classified "under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" and is "in fact properly classified pursuant to such Executive order."¹ The Supreme Court has recognized that the President bears immediate responsibility for protecting national security, which includes the development of policy that establishes what information must be classified to prevent harm to national security.²

Each President, beginning with President Harry S. Truman in 1951,³ has issued a new or revised executive order, or adopted a previous President's executive order, establishing the uniform policy of the Executive Branch concerning the protection of national security information.⁴ The executive order provides the procedural and

¹ [5 U.S.C. § 552\(b\)\(1\) \(2018\)](#); see also [ACLU v. DOJ](#), 640 F. App'x 9, 10 (D.C. Cir. 2016) (acknowledging that Exemption 1 protects information properly classified under national security executive order); [Larson v. Dep't of State](#), 565 F.3d 857, 861 (D.C. Cir. 2009) (same).

² See, e.g., [Dep't of the Navy v. Egan](#), 484 U.S. 518, 527-28 (1988) (discussing responsibility for protecting national security entrusted in the President as Commander in Chief of the military and as head of Executive Branch) (non-FOIA case).

³ See Exec. Order No. 10,290, 16 Fed. Reg. 9795 (Sept. 24, 1951). See generally Exec. Order No. 8,381, 5 Fed. Reg. 1147 (Mar. 22, 1940) (establishing initial classification structure within military to protect information related to "vital military installations and equipment").

⁴ See, e.g., Exec. Order No. 10,501, 3 C.F.R. 398 (1949-1953 Comp.) (Eisenhower Administration); Exec. Order No. 10,985, 27 Fed. Reg. 439 (Jan. 2, 1962) (Kennedy Administration); Exec. Order No. 11,652, 3 C.F.R. 678 (1971-1975 Comp.) (Nixon Administration); Exec. Order 11,862, 40 Fed. Reg. 25,197 (June 11, 1975) (Ford Administration); Exec. Order No. 12,065, 3 C.F.R. 190 (1978) (Carter Administration); Exec. Order No. 12,356, 3 C.F.R. 166 (1983) (Reagan Administration); Exec. Order No. 12,958, 3 C.F.R. 333 (1996) (Clinton Administration); Exec. Order No. 12,958, as amended, 3 C.F.R. 196 (2004) (George W. Bush Administration); [Exec. Order No. 13,526](#), 3 C.F.R. 298 (2010) (Obama Administration) (retained by Trump Administration).

substantive legal framework for the classification decisions of the designated subject matter experts who have been granted classification authority by the President.⁵ Exemption 1 protects from disclosure national security information that has actually been properly classified in accordance with the substantive and procedural requirements of the appropriate executive order; the mere fact that information *could be* classified is not sufficient.⁶

The current executive order in effect is Executive Order 13,526.⁷ The relevant provisions of this executive order are discussed below.

Executive Order 13,526

Executive Order 13,526 sets forth the current standards governing national security classification and the mechanisms for declassification.⁸ As with prior executive orders, Executive Order 13,526 recognizes both the right of the public to be informed about activities of its government and the need to protect national security information from unauthorized or untimely disclosure.⁹

⁵ See [Exec. Order No. 13,526](#); see also NARA Classification Directive, 32 C.F.R. § 2001 (2010) (directive issued by NARA's Information Security Oversight Office (ISOO) describing procedures that agencies must follow to classify information pursuant to [Executive Order 13,526](#)).

⁶ See [5 U.S.C. § 552\(b\)\(1\)](#); see also [Lesar v. DOJ](#), 636 F.2d 472, 481 (D.C. Cir. 1980) (explaining that agency bears the burden of "demonstrating proper classification under both the procedural and substantive criteria contained in the governing Executive Order") (decided under Executive Order 11,652); [Canning v. U.S. Dep't of State](#), 346 F. Supp. 3d, 16 (D.D.C. 2018) (observing that "FOIA Exemption 1 applies only to records that have been 'properly classified' pursuant to the governing Executive Order" and acknowledging that there are both "procedural and substantive requirements for classification of national security information" under [Executive Order 13,526](#)); [Schoenman v. FBI](#), 841 F. Supp. 2d 69, 80 (D.D.C. 2012) (stating information must be "classified pursuant to the proper procedures and . . . substantively fall within the scope" of the executive order) (decided under [Executive Order 13,526](#)); [Assassination Archives & Rsch. Ctr. v. CIA](#), 177 F. Supp. 2d 1, 8-9 (D.D.C. 2001) (same), [aff'd](#), 334 F.2d 55 (D.C. Cir. 2003) (explaining that defendant must demonstrate that it has followed classification procedures and that documents are actually properly classified).

⁷ [Exec. Order No. 13,526](#).

⁸ See [Exec. Order No. 13,526](#), § 5.2; 3 C.F.R. 298 (2010) (establishing Information Security Oversight Office (ISOO), which holds governmentwide oversight responsibility for classification matters under Executive Order 13,526).

⁹ See [Exec. Order No. 13,526](#) (commenting in introductory statement that "our Nation's progress depends on the free flow of information both within the Government and to the American people," while at the same time noting that throughout history "the national defense has required that certain information be maintained in confidence," and concluding that both "are equally important priorities").

Section 1.1(a) of Executive Order 13,526 provides the following four standards, each of which must be satisfied in order for information to be originally classified:¹⁰

- (1) "an original classification authority is classifying the information;"¹¹
- (2) "the information is owned by, produced by or for, or is under the control of the United States Government;"¹²
- (3) "the information falls within one or more of the categories of information listed in section 1.4 of this order;"¹³ and"
- (4) "the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, which includes defense against transnational terrorism, and the original classification authority is able to identify or describe the damage."¹⁴

With regard to the required determination under Section 1.1(a)(4) that disclosure reasonably could be expected to result in harm to national security, courts have consistently recognized that an agency's articulation of such harm must always be speculative to some extent, and to require a showing of actual harm would be judicial

¹⁰ [Exec. Order No. 13,526](#), § 1.1(a).

¹¹ [Exec. Order No. 13,526](#), § 1.1(a)(1).

¹² [Id.](#) § 1.1(a)(2).

¹³ [Id.](#) § 1.1(a)(3).

¹⁴ [Id.](#) § 1.1(a)(4); see NARA Classification Directive, 32 C.F.R. § 2001.10 (2010) (emphasizing importance of agency classifier's ability to identify and describe damage to national security caused by unauthorized disclosure); see also, e.g., [Rosenberg v. DOD](#), 342 F. Supp. 3d 62, 83-88 (D.D.C. 2018) (reviewing agency's assertions, for variety of records, that disclosure would pose harm to national security and finding that there would be harm for release of some records but not for others); [Elec. Priv. Info. Ctr. v. DOJ](#), 296 F. Supp. 3d 109, 126 (D.D.C. 2017) (finding that "it is eminently logical that publicly disclosing the strengths, weaknesses, and/or changes in the [Foreign Intelligence Surveillance Court's] own processes . . . presents a risk that potential targets will alter their behavior to account for the disclosed practices and/or limitations"); [Associated Press v. FBI](#), 265 F. Supp. 3d 82, 94 (D.D.C. 2017) (finding that release of information regarding phone hacking tool, specifically vendor identity and purchase price, could reasonably be expected to cause harm by limiting agency's ability to gain access to terrorists' phones in future).

"overstepping."¹⁵ Further, Section 1.1(d) establishes a presumption of harm to national security from the unauthorized disclosure of foreign government information.¹⁶

Section 1.4 of Executive Order 13,526 specifies the types of information that may be considered for classification.¹⁷ This section provides that "[i]nformation shall not be considered for classification unless its unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security in accordance with section 1.2 of th[e] order."¹⁸ The information must also "pertain[]" to¹⁹ at least one of the following categories:

- (a) military plans, weapons systems, or operations;²⁰

¹⁵ Halperin v. CIA, 629 F.2d 144, 149 (D.C. Cir. 1980); see also Wolf v. CIA, 473 F.3d 370, 375 (D.C. Cir. 2011) (same); Smith v. CIA, 393 F. Supp. 3d 72, 82 (D.D.C. 2019) (acknowledging that "agency statement of threatened harm to national security will always be speculative to some extent"); ACLU v. DOJ, 265 F. Supp. 2d 20, 30 (D.D.C. 2003) (reiterating that "[t]he test is not whether the court personally agrees in full with the [agency's] evaluation of the danger—rather, the issue is whether on the whole record the Agency's judgment objectively survives the test of reasonableness, good faith, specificity, and plausibility in this field of foreign intelligence in which the [agency] is expert" (quoting Gardels v. CIA, 689 F.2d 1100, 1105 (D.C. Cir. 1982))); cf. Elec. Priv. Info. Ctr., 296 F. Supp. 3d at 129 (finding "that the government's explanation of the harm that might result from release of the Westlaw printouts, and how such a disclosure could reveal national security information that is not evident from looking at the documents in isolation, is reasonable and sufficient to support its invocation of Exemption 1"); N.Y. Times v. NSA, 205 F. Supp. 3d 374, 382 (S.D.N.Y. 2016) (finding that although specific program at issue is no longer operational, disclosure of records regarding program could still pose harm by revealing techniques that agency is still authorized to use and which may be used in other ongoing programs).

¹⁶ See Exec. Order No. 13,526, § 1.1(d).

¹⁷ See id. § 1.4(a)-(h).

¹⁸ Id. § 1.4.

¹⁹ Id.; see also ACLU v. DOJ, 640 F. App'x 9, 11-12 (D.C. Cir. 2016) (noting that "pertains is not a very demanding verb" and rejecting plaintiff's argument that "pertains to" be read narrowly for consistency with the FOIA's purposes because the executive order "has relevance beyond FOIA, and [the court's] task is not to construe it in light of FOIA's purposes" (quoting Jud. Watch v. DOD, 715 F.3d 937, 941 (D.C. Cir. 2013))).

²⁰ Exec. Order No. 13,526, § 1.4(a); see, e.g., Taylor v. Dep't of the Army, 684 F.2d 99, 109 (D.C. Cir. 1982) (protecting combat-ready troop assessments) (decided under Executive Order 12,065); Rosenberg, 342 F. Supp. 3d 62 at 81-87 (holding that detainees' individual reactions to news of being moved was not properly classified, but the government's withholding of information pertaining to detainee conduct, detainee health, detainee movements to third countries, an order affecting female guards, and court and commission proceedings was properly classified) (decided under Executive Order 13,526); ACLU v. Dep't of State, 878 F. Supp. 2d 215, 222 (D.D.C. 2012) (protecting details of military flight

(b) foreign government information;²¹

operations and procedures for obtaining allied cooperation in performance of military flight operations) (decided under [Executive Order 13,526](#)); Miller v. DOJ, 562 F. Supp. 2d 82, 101 (D.D.C. 2008) (holding that disclosure of records concerning "noncombatant evacuation operation" of American citizens from foreign nation could harm future attempts to evacuate or protect citizens abroad) (decided under Executive Order 12,958, as amended); Tawalbeh v. U.S. Dep't of the Air Force, No. 96-6241, slip op. at 10-11 (C.D. Cal. Sept. 4, 1997) (protecting information about military readiness and operational security related to operations Desert Shield and Desert Storm) (decided under Executive Order 12,958); Pub. Educ. Ctr., Inc. v. DOD, 905 F. Supp. 19, 21 (D.D.C. 1995) (protecting videotapes made during U.S. military action in Somalia) (decided under Executive Order 12,356).

²¹ [Exec. Order No. 13,526](#), § 1.4(b); see, e.g., Peltier v. FBI, 218 F. App'x 30, 32 (2d Cir. 2007) (holding that disclosure of foreign government information "would breach express promises of confidentiality made to a foreign government, on which the provision of the information was expressly contingent") (decided under Executive Order 12,958); Am. Ctr. for L. & Just. v. U.S. Dep't of State, 354 F. Supp. 3d 1, 10-11 (D.D.C. 2018) (finding agency assertions sufficient that information was provided by foreign government or international organization and that representative of the source confirmed that confidentiality was still expected) (decided under [Executive Order 13,526](#)); Miller, 562 F. Supp. 2d at 102 (finding that disclosure of foreign government information would show that government's cooperation, capabilities and vulnerabilities and would lead to negative diplomatic consequences and diminished intelligence capabilities) (decided under Executive Order 12,958, as amended); Azmy v. DOD, 562 F. Supp. 2d 590, 600 (S.D.N.Y. 2008) (holding that agency properly classified foreign government information and that disclosure could be expected to "impair DOD's ability to obtain information from foreign governments in the future, who will be less likely to cooperate with the United States if they cannot be confident that the information they provide will remain confidential") (decided under Executive Order 12,958, as amended); Wash. Post v. DOD, No. 84-2403, slip op. at 3 (D.D.C. Apr. 15, 1988) (protecting foreign military information) (decided under Executive Order 12,356).

(c) intelligence activities, intelligence sources, or methods,²² or cryptology;²³

²² [Exec. Order No. 13,526](#), § 1.4(c); see, e.g., [Schrecker v. DOJ](#), 254 F.3d 162, 166 (D.C. Cir. 2001) (protecting intelligence sources because release would harm national security by "dissuading current and future sources from cooperating") (decided under Executive Order 12,958); [Jones v. FBI](#), 41 F.3d 238, 244 (6th Cir. 1994) (protecting "numerical designators" assigned to national security sources) (decided under Executive Order 12,356); [Patterson v. FBI](#), 893 F.2d 595, 597, 601 (3d Cir. 1990) (protecting information concerning intelligence sources and methods FBI used in investigation of student who corresponded with 169 foreign nations) (decided under Executive Order 12,356); [Elec. Frontier Found. v. DOJ](#), 376 F. Supp. 3d 1023, 1035 (N.D. Cal. 2019) (protecting opinions and orders of Foreign Intelligence Surveillance Court which would "reveal critical information about the intelligence community, including its targets, methods, limitations, resources, and sources") (decided under [Executive Order 13,526](#)); [N.Y. Times v. NSA](#), 205 F. Supp. 3d at 379 (protecting details regarding the NSA's collection of information and "technical means and analytic methods by which the NSA collected metadata" and other information); [Elec. Frontier Found. v. DOJ](#), 892 F. Supp. 2d 95, 99 (D.D.C. 2012) (protecting "actual intelligence activities, sources or methods") (decided under [Executive Order 13,526](#)); [Singh v. FBI](#), 574 F. Supp. 2d 32, 42 (D.D.C. 2008) (holding that FBI properly classified "numerical designator, which serves as a singular identifier for an intelligence source utilized to provide information on a specific individual or organization determined to be of national security interest") (decided under Executive Order 12,958, as amended); [Schoenman v. FBI](#), 575 F. Supp. 2d 136, 153, 156-57 (D.D.C. 2008) [hereinafter [Schoenman I](#)] (noting that foreign intelligence sources "can be expected to furnish information only when confident that they are protected from retribution by the absolute secrecy surrounding their relationship to the U.S. government" and finding that disclosure of source information "regardless of whether they are active or inactive, alive or deceased, can reasonably be expected to jeopardize the safety of the source or his or her family") (decided under Executive Order 12,958 as amended); [Cozen O'Connor v. U.S. Dep't of Treasury](#), 570 F. Supp. 2d 749, 774 (E.D. Pa. 2008) (agreeing that agency had properly classified information received through confidential sources) (decided under Executive Order 12,958, as amended); [Azmy](#), 562 F. Supp. 2d at 599 (finding that agency properly withheld "intelligence assessments and conclusions") (decided under Executive Order 12,958, as amended); [Miller](#), 562 F. Supp. 2d at 105 (finding that FBI properly classified detailed information provided by human intelligence source, and noting that "[i]n certain parts of the world, the consequences of public disclosure to an individual that has served as a U.S. source are often swift and far reaching, from economic reprisals to possible harassment, imprisonment, or even death") (decided under Executive Order 12,958, as amended).

²³ [Exec. Order No. 13,526](#), § 1.4(c); see, e.g., [McDonnell v. United States](#), 4 F.3d 1227, 1244 (3d Cir. 1993) (upholding classification of cryptographic information dating back to 1934 when release "could enable hostile entities to interpret other, more sensitive documents similarly encoded") (decided under Executive Order 12,356); [Gilmore v. NSA](#), No. 92-3646, 1993 U.S. Dist. LEXIS 7694, at *18-19 (N.D. Cal. May 3, 1993) (finding mathematical principles and techniques in agency treatise protectable under this executive order category) (decided under Executive Order 12,356).

(d) foreign relations or foreign activities of the United States, including confidential sources;²⁴

²⁴ [Exec. Order No. 13,526](#), § 1.4(d); see, e.g., *Jud. Watch, Inc.*, 715 F.3d at 941 (withholding photographs from military operation in Pakistan resulting in death of Osama bin Laden because "all 52 images plainly 'pertain[] to . . . foreign activities of the United States") (decided under [Executive Order 13,526](#)); *Peltier*, 218 F. App'x at 32 (holding that disclosure of foreign government information "would breach express promises of confidentiality made to a foreign government, on which the provision of the information was expressly contingent") (decided under Executive Order 12,958); *Bassiouni v. CIA*, 392 F.3d 244, 246 (7th Cir. 2004) (observing that "[e]ven allies could be unpleasantly surprised" by disclosure of CIA espionage information involving one of its citizens) (decided under Executive Order 12,958); *Am. Ctr. for L. & Just.*, 354 F. Supp. 3d at 11 (finding that disclosure could harm foreign relations by causing foreign officials to believe confidentiality might not be observed and risking inability to obtain information from foreign governments) (decided under [Executive Order 13,526](#)); *Intell. Prop. Watch v. USTR*, 205 F. Supp. 3d 334, 356 (S.D.N.Y. 2016) (protecting draft U.S. trade proposals because "disclosure of the U.S.'s evolving negotiating positions could damage other ongoing or future trade negotiations with other countries" but denying the protection of proposals made by the private sector) (decided under [Executive Order 13,526](#)); *Muttitt v. Dep't of State*, 926 F. Supp. 2d 284, 300 (D.D.C. 2013) (protecting information concerning "United States' role in formulating Iraq's proposed hydrocarbon laws and developing Iraq's oil and gas sector") (decided under [Executive Order 13,526](#)); *Schoenman I*, 575 F. Supp. 2d at 153 (holding that intelligence agency properly classified "deliberative descriptions, commentary and analysis on [foreign] government and defense establishment" because disclosure would damage "working relationship" and lead to less effective foreign intelligence collection) (decided under Executive Order 12,958); *Miller*, 562 F. Supp. 2d at 102-04, 107 (finding that declarants had properly demonstrated potential for harm to foreign relations in disclosing information concerning foreign cooperation in plans to evacuate American citizens and an assessment of that foreign government's military and police capabilities) (decided under Executive Order 12,958, as amended); *Wheeler v. DOJ*, 403 F. Supp. 2d 1, 12 (D.D.C. 2005) (noting that "foreign relations between Cuba and the United States remain tenuous at best" and that it would follow that information about persons in Cuba who provided information to the United States could still be very dangerous and, if disclosed, result in "embarrassment or imprisonment, if not death") (decided under Executive Order 12,958); *ACLU v. DOD*, 389 F. Supp. 2d 547, 561 (S.D.N.Y. 2005) (reasoning that "even if the only question was whether to recognize officially that which was informally or unofficially believed to exist, the niceties of international diplomacy sometimes make it important not to embarrass a foreign country or its leaders, and exemptions from FOIA protect that concern as well") (decided under Executive Order 12,958, as amended); *Wolf v. CIA*, 357 F. Supp. 2d 112, 116 (D.D.C. 2004) (reasoning that the fact of the CIA's covert interest in a foreign citizen "could adversely affect relations with a foreign government because that government might believe that the CIA has collected intelligence information on or recruited one of its citizens or resident aliens") (decided under Executive Order 12,958), aff'd in pertinent part & remanded on other grounds, 473 F.3d 370, 377-80 (D.C. Cir. 2007).

(e) scientific, technological, or economic matters relating to national security;²⁵

(f) United States Government programs for safeguarding nuclear materials or facilities;²⁶

(g) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans or protection services relating to the national security;²⁷ and

(h) development, production, or use of weapons of mass destruction.²⁸

²⁵ [Exec. Order No. 13,526](#), § 1.4(e); see, e.g., *Am. Friends Serv. Comm. v. DOD*, No. 83-4916, 1986 WL 10659, at *1, *5 (E.D. Pa. Sept. 25, 1986) (affirming withholding of "bi-weekly listing of military research and scientific and technical reports") (decided under Executive Order 12,356), vacated on other grounds, 831 F.2d 441, 447 (3d Cir. 1987).

²⁶ [Exec. Order No. 13,526](#), § 1.4(f); see, e.g., *Weinberger v. Cath. Action of Haw.*, 454 U.S. 139, 144-45 (1981) (protecting "information relating to the storage of nuclear weapons") (decided under Executive Order 12,065); *Abbots v. NRC*, 766 F.2d 604, 607 (D.C. Cir. 1985) (protecting "the NRC's determination as to the number of attackers a nuclear facility should be able to defend against successfully" because release of this information would allow potential attackers to "compute the size of the assault force needed for optimum results") (decided under Executive Order 12,356); *Loomis v. DOE*, No. 96-149, 1999 WL 33541935, at *6 (N.D.N.Y. Mar. 9, 1999) (protecting nuclear containment layout plan and referenced document on propagation of radiological requirements and procedures) (decided under Executive Order 12,958), summary affirmance granted, 21 F. App'x 80 (2d Cir. 2001).

²⁷ [Exec. Order No. 13,526](#), § 1.4(g); see, e.g., *Rosenberg*, 342 F. Supp. 3d 62 at 89 (affirming withholding of information about movement of detainees to other countries, possible mission changes, and threat assessments regarding movement of detainees because release could reveal vulnerabilities); *Friedman v. U.S. Secret Serv.*, 923 F. Supp. 2d 262, 276 (D.D.C. 2013) (affirming withholding of report "outlin[ing] security measures in place at the White House to thwart aerial attacks" (decided under Executive Order 12,958, as amended); *Jud. Watch, Inc. v. DOT*, No. 02-566, 2005 WL 1606915, at *8 (D.D.C. July 7, 2005) (holding that disclosure of testing data, minimum detection rates, and false alarm rates for explosive-detection systems would harm national security by exposing vulnerabilities in airport security) (decided under Executive Order 12,958); *Pub. Educ. Ctr., Inc.*, 905 F. Supp. 19 at 21-22 (identifying videotapes made during raid by U.S. forces in Somalia as relating to vulnerabilities or capabilities of projects concerning national security) (decided under Executive Order 12,356); cf. *U.S. News & World Report v. Dep't of the Treasury*, No. 84-2303, 1986 U.S. Dist. LEXIS 27634, at *12 (D.D.C. Mar. 26, 1986) (providing protection for information regarding armored limousines for the President) (Exemptions 1 and 7(E)) (decided under Executive Order 12,356).

²⁸ [Exec. Order No. 13,526](#), § 1.4(h).

Additionally, courts have recognized that in certain circumstances legal analysis may be protected where its disclosure would reveal information protected under one of these eight classification categories.²⁹

As with prior orders, Executive Order 13,526 contains a number of distinct limitations on classification; specifically, Section 1.7(a) states that information may not be classified in order to:

- (1) conceal violations of law, inefficiency, or administrative error;³⁰
- (2) prevent embarrassment to a person, organization, or agency;³¹
- (3) restrain competition;³² or
- (4) prevent or delay the disclosure of information that does not require national security protection.³³

²⁹ See ACLU v. NSA, 925 F.3d 576, 601 (2d Cir. 2019) (affirming withholding of legal analysis in memoranda and reaffirming that "in some circumstances legal analysis could be so intertwined with facts entitled to protection that disclosure of the analysis would disclose such facts"); ACLU v. CIA, 109 F. Supp. 3d 220, 236 (D.D.C. 2015) (finding that legal analysis may warrant protection even though it does not constitute intelligence activity, source, or method by itself, "so long as it *pertains* to an intelligence activity, source, or method").

³⁰ Exec. Order No. 13,526, § 1.7(a)(1); cf. Billington v. DOJ, 11 F. Supp. 2d 45, 59 (D.D.C. 1998) (dismissing plaintiff's "unsubstantiated accusations" that information should be disclosed because FBI engaged in illegal "dirty tricks" campaign) (decided under Executive Order 12,958), rev'd in part on other grounds, 233 F.3d 81 (D.C. Cir. 2000).

³¹ Exec. Order No. 13,526, § 1.7(a)(2); cf. Am. Ctr. for L. & Just. v. U.S. Dep't of State, 354 F. Supp. 3d 1, 13 (D.D.C. 2018) (holding that "[e]ven if certain portions could be considered embarrassing to State, 'it would nonetheless be covered by Exemption 1'" because "independent of any desire to avoid embarrassment, the information [was] properly classified" (quoting Wilson v. DOJ, No. 87-2415, 1991 WL 111457, at *2 (D.D.C. June 13, 1991))); Billington, 11 F. Supp. 2d at 58 (rejecting plaintiff's argument that information was classified by FBI to shield agency and foreign government from embarrassment); Canning v. DOJ, 848 F. Supp. 1037, 1048 (D.D.C. 1994) (finding no credible evidence that the FBI improperly withheld information to conceal the existence of "potentially inappropriate investigation" of a French citizen, and noting that "if anything, the agency released sufficient information to facilitate such speculation") (decided under Executive Order 12,356).

³² Exec. Order No. 13,526, § 1.7(a)(3).

³³ Id. § 1.7(a)(4).

Executive Order 13,526 also prohibits the classification of "[b]asic scientific research information not clearly related to national security."³⁴

Additionally, Executive Order 13,526 reintroduced the requirement that agency classification authorities not classify information if there is "significant doubt" about the need to classify it.³⁵

Compilation of Information

Executive Order 13,526 recognizes that compilations of information maintained by the government, that are themselves unclassified, may be classified "if the compiled information reveals an additional association or relationship that meets the standards for classification under this order [and] is not otherwise revealed in the individual items of information."³⁶ This concept has been widely recognized by courts in Exemption 1 cases.³⁷

³⁴ [Exec. Order No. 13,526](#), § 1.7(b).

³⁵ See *id.* § 1.1(b). Compare Exec. Order No. 12,958, § 1.2(b) (including the language: "If there is significant doubt about the need to classify information, it shall not be classified."), with Exec. Order No. 12,958, as amended (omitting same language).

³⁶ [Exec. Order No. 13,526](#), § 1.7(e).

³⁷ See, e.g., *Bassiouni v. CIA*, 392 F.3d 244, 246 (7th Cir. 2004) (recognizing that "[w]hen a pattern of responses itself reveals classified information, the only way to keep secrets is to maintain silence uniformly") (decided under Executive Order 12,958); *Am. Friends Serv. Comm. v. DOD*, 831 F.2d 441, 444-45 (3d Cir. 1987) (recognizing validity of "compilation" theory, and ruling that certain "information harmless in itself might be harmful when disclosed in context") (decided under Executive Order 12,356); *Taylor v. Dep't of the Army*, 684 F.2d 99, 104-05 (D.C. Cir. 1982) (upholding classification of compilation of information on Army combat units) (decided under Executive Order 12,065); *Elec. Priv. Info. Ctr. v. ODNI*, 281 F. Supp. 3d 203 (D.D.C. 2017) (holding that "unclassified and declassified information in the classified report may maintain a TOP SECRET classification" upon compilation) (decided under [Executive Order 13,526](#)); *Loomis v. DOE*, No. 96-149, 1999 WL 33541935, at *7 (N.D.N.Y. Mar. 9, 1999) (finding that safety measures regarding nuclear facilities set forth in manuals and lay-out plans contain highly technical information and that "such information in the aggregate could reveal sensitive aspects of operations") (decided under Executive Order 12,958), summary affirmance granted, 21 F. App'x 80 (2d Cir. 2001); *Billington v. DOJ*, 11 F. Supp. 2d 45, 55 (D.D.C. 1998) (stating that "aggregate result does not have to be self-evident" to qualify for Exemption 1 protection) (decided under Executive Order 12,958), summary judgment granted in pertinent part, 69 F. Supp. 2d 128 (D.D.C. 1999), aff'd in part, vacated in part & remanded on other grounds, 233 F.3d 581 (D.C. Cir. 2000).

Relatedly, courts have recognized protection for information using a "mosaic theory" approach³⁸ that considers the consequences of piecing together information maintained by the government with information in the public domain.³⁹ Particularly in national security contexts, courts have recognized that "[w]hat may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and

³⁸ See Halperin v. CIA, 629 F.2d 144, 150 (D.C. Cir. 1980) (applying the Mosaic theory in the Exemption 1 context); see also CIA v. Sims, 471 U.S. 159, 178 (1985) (Exemption 3 Mosaic); Djenasevic v. EOUSA, 319 F. Supp. 3d 474, 490 (D.D.C. 2018) (Exemption 7E Mosaic); Shapiro v. DOJ, 239 F. Supp. 3d 100, 115-16 (D.D.C. 2017) (Exemption 7E Mosaic); Rosenberg v. ICE, 13 F. Supp. 3d 92, 107 (D.D.C. 2014) (applying Mosaic theory under Exemption 6 where "disclosure of pieces of information could potentially lead to the identification of third parties"); L.A. Times Commc'ns, LLC v. Dep't of the Army, 442 F. Supp. 2d 880, 899-90 (C.D. Cal. 2006) (Exemption 7F Mosaic).

³⁹ See, e.g., ACLU v. DOJ, 681 F.3d 61, 71 (2d Cir. 2012) (finding that information that "seems innocuous in the context of what is already known by the public . . . may reveal more information than their apparent insignificance suggests") (decided under Executive Order 12,958); Salisbury v. United States, 690 F.2d 966, 971 (D.C. Cir. 1982) (acknowledging "mosaic-like nature of intelligence gathering") (decided under Executive Order 12,065); Halperin, 629 F.2d at 150 (observing that "[e]ach individual piece of intelligence information, much like a piece of a jigsaw puzzle, may aid in piecing together other bits of information even when the individual piece is not of obvious importance in itself" and that "[w]hen combined with other small leads, the [information] could well prove useful for identifying a covert transaction"); Brennan Ctr. for Just. v. Dep't of State, 296 F. Supp. 3d 73, 87-88 (D.D.C. 2017) (accepting State Department's Mosaic argument that "someone knowledgeable of the complex web of U.S. diplomatic relations with other countries could look at a gap in the alphabetical list and predict with a high degree of certainty the country that would fill that gap" and discussing Mosaic approach for other records at issue) (decided under [Executive Order 13,526](#)) (internal quotations omitted); ACLU v. ODNI, No. 10-4419, 2011 WL 5563520, at *10-11 (S.D.N.Y. Nov. 15, 2011) (explaining that releasing case numbers containing geographical prefix "could allow a hostile analyst to create a 'partial mosaic' of the specific intelligence activity, 'leading to the exposure of actual current activities or methods'") (decided under [Executive Order 13,526](#)); Edmonds v. DOJ, 405 F. Supp. 2d 23, 33 (D.D.C. 2005) (upholding the agency's Mosaic argument and finding that "[w]hen combined with plaintiff counsel's notes, . . . the five government-withheld documents could prove useful for identifying information gathering methods and activities") (decided under Executive Order 12,958, as amended); ACLU v. DOJ, 321 F. Supp. 2d 24, 37 (D.D.C. 2004) (applying Mosaic approach and adopting FBI's explanation that disclosure of statistics, which on their face may appear innocuous, would be harmful to national security when coupled with "information that has already been placed in the public domain (through statutory disclosures, media accounts, etc.)") (decided under Executive Order 12,958); Edmonds v. FBI, 272 F. Supp. 2d 35, 47-48 (D.D.C. 2003) (accepting that "some information required classification because it was intertwined with the sensitive matters at the heart of the case" and that "in view of the information relevant to this matter that is already in the public arena, they would tend to reveal matters of national security even though the sensitivity of the information may not be readily apparent in isolation") (decided under Executive Order 12,958).

may put the questioned item of information in its proper context."⁴⁰ Put another way, "'bits and pieces' of data 'may aid in piecing together bits of other information even when the individual piece is not of obvious importance itself.'"⁴¹ As a result, the Court of Appeals for the District of Columbia Circuit has held that Exemption 1 "bars the court from prying loose from the government even the smallest bit of information that is properly classified."⁴²

Reclassification of Information

Executive Order 13,526 provides that information "may not be reclassified after declassification and release to the public under proper authority" unless certain specified conditions are met.⁴³ To do so the agency must make a document-by-document determination that the reclassification is necessary to prevent "significant and demonstrable damage" to national security.⁴⁴ This determination must be "personally approved in writing by the agency head."⁴⁵ Further, the agency must determine that the information previously declassified and released "may be reasonably recovered without bringing undue attention to the information."⁴⁶ The "reclassification action" must be "reported promptly to the Assistant to the President for National Security Affairs (National Security Advisor) and the Director of the Information Security Oversight

⁴⁰ Brennan Ctr. for Just., 296 F. Supp. 3d at 84 (quoting CIA v. Sims, 471 U.S. 159, 178 (1985)); see also Scudder v. CIA, 254 F. Supp. 3d 135, 143 (D.D.C. 2017) (same); Shapiro v. CIA, 247 F. Supp. 3d 53, 72 (D.D.C. 2017) (same); ACLU v. DOD, 752 F. Supp. 2d 361, 371 n.4 (S.D.N.Y. 2010) (same); ACLU v. DOJ, 321 F. Supp. 2d at 37 (same) (quoting Ctr. for Nat'l Sec. Stud. v. DOJ, 331 F.3d 918, 928 (D.C. Cir. 2003)).

⁴¹ Brennan Ctr. for Just., 296 F. Supp. 3d at 84 (quoting CIA v. Sims, 471 U.S. 159, 178 (1985)); see also Shapiro v. CIA, 247 F. Supp. 3d at 72 (same); ACLU v. DOD, 752 F. Supp. 2d at 371 n.4 (same); ACLU v. ODNI, 2011 WL 5563520, at *11 (explaining that "[m]inor details of intelligence information may reveal more information than their apparent insignificance suggests").

⁴² Abbotts v. NRC, 766 F.2d 604, 608 (D.C. Cir. 1985) (quoting Afshar v. Dep't of State, 702 F.2d 1125, 1130 (D.C. Cir. 1983)) (decided under Executive Order 12,356).

⁴³ See Exec Order No. 13526, § 1.7(c); see also NARA Classification Directive, 32 C.F.R. § 2001.13(b) (2010) (directive issued by Information Security Oversight Office describing procedures for reclassifying information pursuant to Section 1.7(c) of Executive Order 13,526).

⁴⁴ Exec. Order No. 13,526, § 1.7(c)(1); see also NARA Classification Directive, 32 C.F.R. § 2001.13(b).

⁴⁵ Exec. Order No. 13,526, § 1.7(c)(1); NARA Classification Directive, 32 C.F.R. § 2001.13(b).

⁴⁶ Exec. Order No. 13,526, § 1.7(c)(2); see also NARA Classification Directive, 32 C.F.R. § 2001.13(b)(1).

Office."⁴⁷ Finally, if the document is in the physical and legal custody of NARA and has been available for public use, the Executive Order sets out procedures for suspending public access to the document pending approval of the reclassification action by the Director of the Information Security Oversight Office.⁴⁸

Classifying Information After Receiving a FOIA Request

Executive Order 13,526 provides that "[i]nformation that has not previously been disclosed to the public under proper authority may be classified or reclassified after an agency has received a [FOIA] request for it."⁴⁹ This provision applies whether the record was never classified or had been declassified pursuant to a specific date or event.⁵⁰ Further, an agency has no obligation to explain "the timing of the decision [to classify records post-request or]... 'what changed' to justify classification of previously unclassified documents."⁵¹

However, such post-request classification must (1) "meet the requirements of" Executive Order 13,526, (2) "be accomplished on a document-by-document basis," and (3) "be accomplished... with the personal participation or under the direction of" designated high level officials.⁵² With regard to the third requirement, "[s]ub-delegation

⁴⁷ [Exec. Order No. 13,526](#), § 1.7(c)(3); see also NARA Classification Directive, 32 C.F.R. § 2001.13(b)(5).

⁴⁸ See [Exec. Order No. 13,526](#), § 1.7(c)(4); see also NARA Classification Directive, 32 C.F.R. § 2001.13(b)(2).

⁴⁹ [Exec. Order No. 13,526](#), § 1.7(d); see also *Darui v. Dep't of State*, 798 F. Supp. 2d 32, 42 (D.D.C. 2011) (clarifying that documents disclosed to plaintiff during his trial were not disclosed to the public and therefore could be classified after they had been requested under the FOIA).

⁵⁰ See [Exec. Order No. 13,526](#), § 1.7(d); cf. *Canning v. Dep't of State*, 346 F. Supp. 3d 1, 19 (D.D.C. 2018) (holding that the existence of residual "UNCLASSIFIED" markings on a document that was previously unclassified does not negate its proper classification so long as an accompanying declaration or index confirms that all classification requirements were met and provides an explanation for the discrepancy).

⁵¹ *Canning*, 346 F. Supp. 3d at 17-18 (quoting *Canning v. Dep't of State*, 134 F. Supp. 3d 490, 507 (D.D.C. 2015)) (internal quotation marks omitted).

⁵² [Exec. Order No. 13,526](#), § 1.7(d); see also *Mobley v. CIA*, 806 F.3d 568, 584-85 (D.C. Cir. 2015) (affirming post-request classification action of FBI conducted by delegated agency official on records that met requirement of Executive Order 13,526, after document-by-document review); *Canning*, 346 F. Supp. 3d at 16, 20 (describing process for classifying records after submission of relevant FOIA request and upholding validity of regulations that closely tracked language of [Executive Order 13,526](#) § 1.7(d) or that stated that procedures must comply with that section); *Muttitt v. Dep't of State*, 926 F. Supp. 2d 284, 303 (D.D.C. 2013) (affirming validity of regulation designating specific official "to be the official to

to a subordinate federal official is presumptively permissible, absent affirmative evidence in the original delegation of a contrary intent," and so long as the agency can show that the subordinate official is acting under the direction of the designated high-level official.⁵³ "[T]his does not mean that [the designated high-level official] must review and approve each decision."⁵⁴ "Rather, one acts under the 'direction' of another if [they are] subject to that person's guidance, supervision, or management."⁵⁵

Proper National Security Markings

Executive Order 13,526 requires that each classified document be marked with the appropriate classification level,⁵⁶ the identity of the original classification authority,⁵⁷ the identity of the agency and office classifying the document if not otherwise evident,⁵⁸ declassification instructions,⁵⁹ and "a concise reason for classification" that cites the applicable classification category or categories.⁶⁰ In addition, Executive Order 13,526

classify information on document-by-document basis consistent with "[Executive Order 13,526](#), § 1.7(d)); *Jud. Watch, Inc. v. DOD*, 857 F. Supp. 2d 44, 58 (D.D.C. 2012) (noting that any classification after receipt of FOIA request was accomplished by review of each record under the direction of CIA Director) (decided under [Executive Order 13,526](#)).

⁵³ *Mobley*, 806 F.3d at 585 (holding that because the FBI's sub-delegation order contained an ongoing notification requirement by the sub-delegee to the high-level official, this sub-delegee's classification decisions qualify as being made "under the direction" of the high-level official).

⁵⁴ *Canning*, 346 F. Supp. 3d at 20-23 (internal citations and quotation marks omitted).

⁵⁵ *Id.* (holding that "'direction' requires something more than an unconstrained delegation" and finding requirements met for certain documents because Under Secretary "had the opportunity to disagree when he was 'apprised' of [] decisions" but not for others where declarant "merely asserts that he 'will apprise the Under Secretary [in the future]'" and where there was "no evidence that he had an opportunity to express a contrary view").

⁵⁶ See [Exec. Order No. 13,526](#), § 1.6(a)(1); see also *id.* § 1.2 (authorizing classification at the following levels, and using these descriptive terms: (1) "Top Secret" level, when disclosure could reasonably be expected to cause "exceptionally grave damage to the national security"; (2) "Secret" level, when disclosure could reasonably be expected to cause "serious damage to the national security"; and (3) "Confidential" level, when disclosure could reasonably be expected to cause "damage to the national security").

⁵⁷ See *id.* § 1.6(a)(2).

⁵⁸ See *id.* § 1.6(a)(3).

⁵⁹ See *id.* § 1.6(a)(4).

⁶⁰ *Id.* § 1.6(a)(5); see *Am. Ctr. for L. & Just. v. Dep't of State*, 354 F. Supp. 3d 1, 8, 13 (D.D.C. 2018) (finding "there are no magic words required to meet this standard" and simple

requires agencies to use portion markings to indicate levels of classification within documents,⁶¹ and encourages the use of classified addenda in cases in which classified information comprises only "a small portion of an otherwise unclassified document."⁶² The Information Security Oversight Office has issued governmentwide guidelines on all the marking requirements.⁶³ The Court of Appeals for the District of Columbia Circuit has held that markings that appear on a document that was properly classified pursuant to a previous, then-governing executive order, are valid if they satisfy that executive order's markings requirements.⁶⁴

Multiple courts have held that in order to properly withhold information under Exemption 1, the government must show both that the information was classified under the proper procedures and that the withheld information substantively falls under the Executive Order.⁶⁵ To show that the proper procedures were followed, "general statements of procedural compliance may suffice" absent a showing of bad faith.⁶⁶

reference to Section 1.4(d) as classification reason was sufficient, and holding further that "[t]he fact that the original [document] held one fewer classification rationale [§ 1.4(d) alone rather than both § 1.4(b) and § 1.4(d)] has no bearing on whether the information was properly classified originally" because agency established that document was properly classified under § 1.4(d)).

⁶¹ See [Exec. Order No. 13,526](#), § 1.6(c).

⁶² *Id.* § 1.6(g).

⁶³ See NARA Classification Directive, 32 C.F.R. §§ 2001.20-.26 (providing detailed guidance on identification and marking requirements of [Executive Order 13,526](#)).

⁶⁴ See [DiBacco v. U.S. Army](#), 795 F.3d 178, 196 (D.C. Cir. 2015) (holding that documents classified decades ago under "Clinton/Bush Order" were properly classified because they contained markings required by that order).

⁶⁵ See, e.g., [Lesar v. DOJ](#), 636 F.2d 472, 483 (D.C. Cir. 1980) (holding that "[t]o be classified properly, a document must be classified in accordance with the procedural criteria of the governing Executive Order as well as its substantive terms"); [McGehee v. DOJ](#), 362 F. Supp. 3d 14, 20 (D.D.C. 2019) (holding that FBI properly classified information pursuant to proper procedures and withheld information substantively fell under Executive Order 13,526); [Int'l Couns. Bureau v. DOD](#), 906 F. Supp. 2d 1, 4 (D.D.C. 2012) (finding that "to show that it has properly withheld information under Exemption 1, an agency must show both that the information was classified pursuant to the proper procedures, and that the withheld information meets the standard for classification"); [Schoenman v. FBI](#), 575 F. Supp. 2d 136, 151-52 (D.D.C. 2008) (holding that agencies asserting Exemption 1 are required to "show both that the information was classified pursuant to the proper procedures, and that the withheld information substantively falls within the scope of [the applicable] Executive Order") (decided under Executive Order 12,958).

⁶⁶ [Am. Ctr. for L. & Just.](#), 354 F. Supp. 3d at 8.

Further, compliance with the proper procedures need not be established by the original classifier, but rather "the determining factor is whether a present-day original classification authority . . . is able to certify, based on [their] own independent review of the information, that it presently meets the standards for classification."⁶⁷

Duration of Classification and Declassification

Executive Order 13,526 establishes limitations on the length of time information may remain classified⁶⁸ and procedures for the declassification of older government information.⁶⁹

At the time of original classification, Executive Order 13,526 requires agencies "to establish a specific date or event for declassification based upon the duration of the national security sensitivity."⁷⁰ The Executive Order provides that information is "automatically declassified" upon reaching that date or event.⁷¹ Further, the Executive Order specifies that if the agency is unable to determine "an earlier specific date or event for declassification, information shall be marked for declassification 10 years from the date of the original decision, unless the original classification authority otherwise determines that the sensitivity of the information requires that it be marked for declassification for up to 25 years from the date of the original decision."⁷² Executive Order 13,526 provides that "[n]o information may remain classified indefinitely."⁷³

Executive Order 13,526 contains procedures for declassification, including automatic declassification.⁷⁴ It also provides for a "mandatory declassification review" program.⁷⁵ The Second Circuit has determined that it will generally not infer that statements by the President constitute a declassification determination unless the statements "are sufficiently specific" and "subsequently trigger[] actual

⁶⁷ Id. at 9.

⁶⁸ See [Exec. Order No. 13,526](#), § 1.5; 3 C.F.R. 298 (2010).

⁶⁹ See [Exec. Order No. 13,526](#), §§ 3.3-3.5.

⁷⁰ Id. § 1.5(a); see also NARA Classification Directive, 32 C.F.R. § 2001.12(a)(1) (2010) (establishing guidelines for the duration of the classification).

⁷¹ See [Exec. Order No. 13,526](#), § 1.5(a).

⁷² [Exec. Order No. 13,526](#), § 1.5(b); see also NARA Classification Directive, 32 C.F.R. § 2001.12(a)(1)(ii).

⁷³ [Exec. Order No. 13,526](#), § 1.5(d).

⁷⁴ See id. §§ 3.1-3.4.

⁷⁵ Id. § 3.5.

declassification."⁷⁶ The Second Circuit is aware of "no authority [that] stands for the proposition that the President can inadvertently declassify information."⁷⁷ Further, the court held that a finding by the judiciary of inadvertent declassification would raise separation of powers concerns.⁷⁸ That said, in situations where a President's statements may suggest declassification, an agency defending Exemption 1 has the burden of dispelling any ambiguity to establish for the court that the information is, in fact, still classified.⁷⁹

Finally, the Executive Order states that "[i]t is presumed that information that continues to meet the classification requirements under this order requires continued protection."⁸⁰ The Executive Order nonetheless recognizes that "[i]n some exceptional cases, . . . the need to protect . . . information may be outweighed by the public interest in disclosure of the information, and in these cases the information should be declassified."⁸¹

Applicability of Successive Executive Orders

The issuance of each executive order concerning classification, or the amendment of an existing one, raises the question of the applicability of successive executive orders to records that were in various stages of an administrative proceeding or litigation as of the current executive order's effective date.⁸² The Court of Appeals for the District of Columbia Circuit has established a rule that the appropriate executive order to apply, with its particular procedural and substantive standards, is the order in effect when "the

⁷⁶ See *N.Y. Times v. CIA*, 965 F.3d 109, 122-23 (2d Cir. 2020) (declining to find President's statements constituted declassification action because they were "insufficiently specific to quell any 'lingering doubts' about what they reference," and CIA's affidavits "expressly stated that no declassification procedures had been followed with respect to any documents pertaining to the alleged covert program").

⁷⁷ *Id.* at 123.

⁷⁸ *Id.* (noting that "such [judicial] determinations encroach upon the President's undisputedly broad authority in the realm of national security").

⁷⁹ See *James Madison Project v. DOJ*, No. 17-0597, 2019 WL 3430728, at *2 (D.D.C. July 30, 2019) (holding that agency "bears the burden to show that [documents are properly classified]" and that agency "cannot carry that burden by suggesting that a potential declassification order is ambiguous;" "[r]ather, the agency must dispel any ambiguity").

⁸⁰ [Exec. Order No. 13,526](#), § 3.1(d).

⁸¹ *Id.*

⁸² See *Lesar v. DOJ*, 636 F.2d 472, 479 (D.C. Cir. 1980) (addressing "issue of which Executive Order should apply" when documents were classified under one Executive Order which "was supplanted by" a different Executive Order as the case proceeded in litigation); see also [FOIA Update, Vol. XVI, No. 2](#) ("OIP Guidance: The Timing of New E.O. Applicability").

classifying official acted."⁸³ Only when "a reviewing court contemplates remanding the case to the agency to correct a deficiency in its classification determination is it necessary" to apply the standards of a superseding executive order.⁸⁴ At the same time, the D.C. Circuit has permitted an agency, as a matter of discretion, to reexamine its classification decision under a newly issued or amended executive order to take into account "changed international and domestic circumstances."⁸⁵ The D.C. Circuit has held, though, that "absent a request by the agency to reevaluate an exemption 1 determination based on a new executive order, the district court may not require an agency to apply the new order" and must instead "evaluate the agency's decision under the executive order in force at the time the classification was made."⁸⁶

Deference to Agency Judgment

Courts generally defer to agency expertise in national security cases.⁸⁷ The Court of Appeals for the District of Columbia Circuit has articulated an expansive standard of

⁸³ Lesar, 636 F.2d at 480; accord ACLU v. DOJ, 681 F.3d 61, 70 n.5 (2d Cir. 2012) (noting that "the propriety of a classification decision is considered under the criteria of the executive order that applied when the decision was made"); Campbell v. DOJ, 164 F.3d 20, 29 (D.C. Cir. 1998) ("[A]bsent a request by the agency to reevaluate an exemption 1 determination based on a new executive order . . . the court must evaluate the agency's decision under the executive order in force at the time the classification was made.").

⁸⁴ King v. DOJ, 830 F.2d 210, 217 (D.C. Cir. 1987); see also Campbell, 164 F.3d at 31 n.11 (recognizing that when court remands to agency for rereview of classification determination, such review is performed under superseding executive order); Greenberg v. U.S. Dep't of Treasury, 10 F. Supp. 2d 3, 12 (D.D.C. 1998) (applying Executive Order 12,356 to records at issue, but noting that Executive Order 12,958 would apply if court "[found] that the agencies improperly withheld information pursuant to Exemption 1").

⁸⁵ Baez v. DOJ, 647 F.2d 1328, 1334 (D.C. Cir. 1980) (upholding agency's classification reevaluation under executive order issued during course of district court litigation); see, e.g., Miller v. U.S. Dep't of State, 779 F.2d 1378, 1388 (8th Cir. 1985) (noting that agency chose to reevaluate under "new Executive Order which [became] effective during pendency of the lawsuit").

⁸⁶ Campbell, 164 F.3d at 29 (examining provisions of superseding order and finding that it "defines classified information to include information classified under prior orders" and "does not contain any provision that requires an agency to reconsider classification decisions in pending FOIA litigation"); see also DiBacco v. U.S. Army, 795 F.3d 178, 196 (D.C. Cir. 2015) (same) (analyzing [Executive Order 13,526](#)).

⁸⁷ See, e.g., Broward Bulldog v. DOJ, 939 F.3d 1164, 1182-83 (11th Cir. 2019) (rejecting plaintiff's assertion that the court should review agency's classification decisions de novo and finding district court properly accorded "substantial weight" to agency explanations because "Congress has approved of deference within the context of Exemption 1"); ACLU v. NSA, 925 F.3d 576, 601 (2d Cir. 2019) (adopting a deferential posture and declining to "second-guess the predictive judgments made by the government's intelligence agencies" (citing Wilner v.

deference in national security cases, noting that "little proof or explanation is required beyond a plausible assertion that information is properly classified."⁸⁸ Courts have consistently applied a deferential "logical and plausible" standard of review in cases involving classified information.⁸⁹ Such deference is based upon the "magnitude of the

NSA, 592 F.3d 60, 76 (2d Cir. 2009)); Leopold v. DOJ, 697 F. App'x 9, 9-10 (D.C. Cir. 2017) (stating that courts "have consistently granted substantial deference to the government's determination that information has important national security implications, and that the disclosure of such information would have harmful ramifications for national security"); Students Against Genocide v. Dep't of State, 257 F.3d 828, 837 (D.C. Cir. 2001) (holding that because courts lack expertise in national security matters, they must give "substantial weight to agency statements" (quoting Halperin v. CIA, 629 F.2d 144, 149 (D.C. Cir. 1980))); Bowers v. DOJ, 930 F.2d 350, 357 (4th Cir. 1991) (observing that "[w]hat fact . . . may compromise national security is best left to the intelligence experts"); Elec. Frontier Found. v. DOJ, 376 F. Supp. 3d 1023, 1035 (N.D. Cal. 2019) (accordig "substantial weight" to agency declaration); Cozen O'Connor v. U.S. Dep't of Treasury, 570 F. Supp. 2d 749, 773 (E.D. Pa. 2008) (noting that courts have "neither the expertise nor the qualifications to determine the impact upon national security" and a "court must not substitute its judgment for the agency's regarding national defense or foreign policy implications" (citing Halperin, 629 F.2d at 148)).

⁸⁸ Morley v. CIA, 508 F.3d 1108, 1124 (D.C. Cir. 2007); see also Smith v. CIA, 393 F. Supp. 3d 72, 82 (D.D.C. 2019) (acknowledging that courts "approach affidavits with the awareness that the Executive Branch has a fuller knowledge of what information ought to be classified"); Am. Ctr. for L. & Just. v. U.S. Dep't of State, 354 F. Supp. 3d 1, 12 (D.D.C. 2018) (rejecting plaintiff's suggestion that related or similar information on internet diminishes "long list of potential harms" described by agency, "tak[ing agency declarant]—not the Internet—at his word"); cf. DiBacco, 795 F.3d at 195-96 (noting that court "must accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record" (internal quotation marks omitted)).

⁸⁹ See, e.g., ACLU v. DOJ, 640 F. App'x 9, 11 (D.C. Cir. 2016) (finding that "agency's explanations as to why the records are classified are both logical and plausible"); Ctr. for Const. Rts. v. CIA, 765 F.3d 161, 169 (2d Cir. 2014) (finding that release of images of Guantanamo Bay detainee could "logically and plausibly" damage national security because images could be used as propaganda by extremists); Larson v. Dep't of State, 565 F.3d 857, 862 (D.C. Cir. 2009) (noting that court need only examine whether agency's classification decision "appears 'logical' or 'plausible'" (citing Wolf v. CIA, 473 F.3d 370, 374-75 (D.C. Cir. 2007))); Elec. Frontier Found., 376 F. Supp. 3d at 1035 (finding agency's declaration "provides sufficient detail . . . to make the Exemption 1 classification plausible"); Rosenberg v. DOD, 342 F. Supp. 3d 62, 84 (D.D.C. 2018) (finding that defendant's statements "readily satisfie[d] the standard for a plausible and logical explanation for classification"); N.Y. Times Co. v. NSA, 205 F. Supp. 3d 374, 381 (S.D.N.Y. 2016) (holding that agency's explanation was "detailed, logical, and plausible" and thus demonstrated that its withholdings fit within Exemption 1); Schoenman v. FBI, 841 F. Supp. 2d 69, 82 (D.D.C. 2012) (finding it "both plausible and logical" that disclosure could damage national security); Schoenman v. FBI, 575 F. Supp. 2d 136, 153 (D.D.C. 2008) (same); Summers v. DOJ, 517 F. Supp. 2d 231, 238 (D.D.C. 2007) (same).

national security interests and potential risks at stake,"⁹⁰ and it is extended by courts because national security officials are uniquely positioned to view "the whole picture" and "weigh the variety of subtle and complex factors" in order to determine whether the disclosure of information would damage national security.⁹¹ Indeed, courts ordinarily are very reluctant to substitute their judgment in place of the agency's "unique insights"⁹² in the areas of national defense and foreign relations.⁹³ This is because courts have

⁹⁰ Ctr. for Nat'l Sec. Stud. v. DOJ, 331 F.3d 918, 927 (D.C. Cir. 2003) (quoting CIA v. Sims, 471 U.S. 159, 179 (1985)) (Exemption 7(A) case); see also L.A. Times Commc'ns, LLC v. Dep't of the Army, 442 F. Supp. 2d 880, 899-900 (C.D. Cal. 2006) (deferring to judgment of senior Army officers regarding risks posed to soldiers and contractors by enemy forces in Iraq).

⁹¹ CIA v. Sims, 471 U.S. 159, 179-80 (1985); see, e.g., Zadvydas v. Davis, 533 U.S. 678, 696 (2001) (commenting that "terrorism or other special circumstances" may warrant "heightened deference to the judgments of the political branches with respect to matters of national security") (non-FOIA case); Dep't of the Navy v. Egan, 484 U.S. 518, 530 (1988) (explaining that "courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs") (non-FOIA case); Ctr. for Nat'l Sec. Stud., 331 F.3d at 928 (rejecting artificial limits on deference and explaining that "deference depends on the substance of the danger posed by disclosure – that is, harm to the national security – not the FOIA exemption invoked").

⁹² Larson, 565 F.3d at 864 (recognizing that "Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects [sic] might occur as a result of a particular classified record").

⁹³ See, e.g., Ctr. for Int'l Env't. L. v. U.S. Trade Representative, 718 F.3d 899, 903 (D.C. Cir. 2013) (rejecting district court's second guessing of agency's harm judgment and finding that harm to ability of United States to negotiate future trade agreements "is not for us to speculate"); Maynard v. CIA, 986 F.2d 547, 556 n.9 (1st Cir. 1993) (explaining court is "not in a position to 'second-guess'" agency's determination regarding need for continued classification of material); Krikorian v. Dep't of State, 984 F.2d 461, 464 (D.C. Cir. 1993) (explaining that because judges "lack the expertise necessary to second-guess . . . agency opinions in the typical national security FOIA case," they must accord substantial deference to an agency's affidavit (quoting Halperin, 629 F.2d at 148)); Hall v. CIA, 881 F. Supp. 2d 38, 64 (D.D.C. 2012) (opining that "[t]here will always be a certain level of speculation when assessing the dangers of releasing [classified] information"); Cozen O'Connor, 570 F. Supp. 2d at 773 (acknowledging "court must not substitute its judgment for the agency's regarding national defense or foreign policy implications"); Summers, 517 F. Supp. 2d at 238 (noting that assessing potential for harm to intelligence source from disclosure "is the duty of the agency, and not the court"); ACLU v. FBI, 429 F. Supp. 2d 179, 188 (D.D.C. 2006) (reasoning that "while a court is ultimately to make its own decision, that decision must take seriously the government's predictions" of harm to national security); Aftergood v. CIA, No. 98-2107, 1999 U.S. Dist. LEXIS 18135, at *9-10 (D.D.C. Nov. 12, 1999) (declaring that courts must respect agency predictions concerning potential national security harm from disclosure, and recognizing that these predictions "must always be speculative to some extent").

recognized that national security is a "uniquely executive purview"⁹⁴ and that "the judiciary is in an extremely poor position to second-guess the executive's judgment" on national security issues.⁹⁵ For the same reasons, Congressional requests for declassification do not undermine an agency's classification determinations.⁹⁶ At the same time, it is the court's role to review an agency's classification decision and to determine whether the agency has met its burden.⁹⁷

The D.C. Circuit has declared that "[w]hen an agency meets its burden through affidavits, *in camera* review is neither necessary nor appropriate, and *in camera* inspection is particularly a last resort in national security situations."⁹⁸ Further, courts

⁹⁴ Ctr. for Nat'l Sec. Stud., 331 F.3d at 927-28; see also L.A. Times Commc'ns, LLC, 442 F. Supp. 2d at 899 (echoing the belief that national security is "a uniquely executive purview" (citing Zadvydas, 533 U.S. at 696)).

⁹⁵ Ctr. for Nat'l Sec. Stud., 331 F.3d at 928; see also Ctr. for Int'l Env't. L., 718 F.3d at 904 (reversing judgment of district court because "[t]he question is not whether the court agrees in full with the Trade Representative's evaluation of the expected harm to foreign relations" but "whether on the whole record the [a]gency's judgment objectively survives the test of reasonableness, good faith, specificity, and plausibility" (quoting Gardels v. CIA, 689 F.2d 1100, 1105 (D.C. Cir. 1982))); Mobley v. CIA, 924 F. Supp. 2d 24, 51 (D.D.C. 2013) ("To the extent that plaintiffs ask this Court to second-guess the CIA's statements . . . their request is inappropriate."), aff'd on other grounds, 806 F.3d 568 (D.C. Cir. 2015); ACLU v. Dep't of State, 878 F. Supp. 2d 215, 222 (D.D.C. 2012) (recognizing "courts are generally ill-equipped to second-guess the Executive's opinion in the national security context").

⁹⁶ See Am. Ctr. for L. & Just., 354 F. Supp. 3d 1 at 12 ("It is the Executive, and not Congress and not the Court, who has the expertise to make such determinations.").

⁹⁷ See King v. DOJ, 830 F.2d 210, 226 (D.C. Cir. 1987) (holding that trial court erred in deferring to agency's judgment that information more than thirty-five years old remained classified when executive order presumed declassification of information over twenty years old and agency merely indicated procedural compliance with order); Fla. Immigr. Advoc. Ctr. v. NSA, 380 F. Supp. 2d 1332, 1338 (S.D. Fla. 2005) (granting *in camera* review "to satisfy an 'uneasiness' or 'doubt' that the exemption claim may be overbroad given the nature of the Plaintiff's arguments"); Larson v. Dep't of State, No. 02-1937, 2005 WL 3276303, at *9 (D.D.C. Aug. 10, 2005) (observing that deference "does not mean acquiescence"); Coldiron v. DOJ, 310 F. Supp. 2d 44, 53 (D.D.C. 2004) (cautioning that court's deference should not be used as "wet blanket" to avoid proper justification of exemptions and that its "review is not 'vacuous.'" (internal citation omitted)); Laws. Comm. for Human Rts. v. INS, 721 F. Supp. 552, 561 (S.D.N.Y. 1989) (reminding that such deference does not give agency "carte blanche" to withhold responsive documents without "valid and thorough affidavit"), subsequent decision, No. 87-1115, slip op. at 1-2 (S.D.N.Y. June 7, 1990) (upholding Exemption 1 excisions after *in camera* review of certain documents and classified Vaughn affidavit).

⁹⁸ Mobley v. CIA, 806 F.3d 568, 588 (D.C. Cir. 2015); see, e.g., ACLU v. DOJ, 640 F. App'x at 12 (holding that because plaintiff failed to point to any officially acknowledged, duplicate information, *in camera* review was unnecessary to determine whether the information was properly withheld); Nat'l Sec. Archive Fund, Inc. v. CIA, 402 F. Supp. 2d 211, 221 (D.D.C.

have rejected the notion that additional judicial review should be triggered solely by a requester's unsupported allegations of wrongdoing against the government.⁹⁹

When reviewing the propriety of agency classification determinations, courts have generally accorded little or no weight to opinions of persons other than the agency classification authority,¹⁰⁰ including persons who may have previously maintained some knowledge of the subject matter while employed within the Executive Branch.¹⁰¹

2005) (declining to conduct in camera review merely "to verify the agency's descriptions and provide assurances, beyond a presumption of administrative good faith, to FOIA plaintiffs that the descriptions are accurate and as complete as possible" (quoting Mead Data Ctr., Inc. v. Dep't of Air Force, 566 F.2d 242, 262 n.59 (D.C. Cir. 1977))).

⁹⁹ See Bassiouni v. CIA, 392 F.3d 244, 247 (7th Cir. 2004) (commenting that "Exemption 1 would not mean much if all anyone had to do, to see the full list of the CIA's holdings, was allege that the agency had some documents showing how he 'exercises rights guaranteed by the First Amendment'"); Competitive Enter. Inst. v. Dep't of Treasury, 319 F. Supp. 3d 410, 422 (D.D.C. 2018) (finding in camera inspection unnecessary without "tangible evidence of agency wrongdoing"); Mobley, 924 F. Supp. 2d at 63 (finding that inconsistency in defendant's declaration "is not evidence of bad faith, nor is it indicative of 'a general sloppiness in the declassification or review process'" (quoting Afshar v. Dep't of State, 702 F.2d 1125, 1131 (D.C. Cir. 1983))); Peltier v. FBI, No. 03-905, 2005 WL 735964, at *7 (W.D.N.Y. Mar. 31, 2005) (finding that plaintiff's bare claim that agency classified requested records solely in order to prevent embarrassment does not alone necessitate greater judicial scrutiny).

¹⁰⁰ See, e.g., Goldberg v. U.S. Dep't of State, 818 F.2d 71, 79-80 (D.C. Cir. 1987) (accepting classification officer's national security determination even though more than 100 ambassadors did not initially classify information); Mobley, 924 F. Supp. 2d at 52 (noting that "unsworn opinions of non-governmental actors . . . carry little or no weight in that calculus"); Van Atta v. Def. Intel. Agency, No. 87-1508, 1988 WL 73856, at *1-2 (D.D.C. July 6, 1988) (rejecting opinion of requester about willingness of foreign diplomat to discuss issue); Wash. Post v. DOD, No. 84-2949, 1987 U.S. Dist. LEXIS 16108, at *19-20 (D.D.C. Feb. 25, 1987) (rejecting opinion of U.S. Senator who read document in official capacity as member of Committee on Foreign Relations); cf. Laws. All. for Nuclear Arms Control v. DOE, No. 88-7635, 1991 WL 274860, at *1-2 (E.D. Pa. Dec. 18, 1991) (rejecting requester's contention that officials of former Soviet Union consented to release of requested nuclear test results).

¹⁰¹ See, e.g., Hudson River Sloop Clearwater, Inc. v. Dep't of the Navy, 891 F.2d 414, 421-22 (2d Cir. 1989) (rejecting opinion of former admiral); Gardels, 689 F.2d at 1106 n.5 (rejecting opinion of former CIA agent); Berman v. CIA, 378 F. Supp. 2d 1209, 1219 (E.D. Cal. 2005) (rejecting opinions of retired member of CIA's Historical Advisory Committee and former Special Assistant to the President of the United States) (Exemption 3 case); Rush v. Dep't of State, 748 F. Supp. 1548, 1554 (S.D. Fla. 1990) (rejecting opinion of former ambassador who had personally prepared some of records at issue); Pfeiffer v. CIA, 721 F. Supp. 337, 340-41 (D.D.C. 1989) (rejecting opinion of former CIA staff historian).

In Camera Submissions and Adequate Public Record

Courts have permitted or sometimes required agencies to submit explanatory in camera affidavits in order to protect the national security information that could not be discussed in a public affidavit.¹⁰² In camera affidavits have also been employed when even acknowledging the existence of records at issue would pose a threat to national security and consequently the agency has used the "Glomar response" to neither confirm nor deny the existence of records.¹⁰³ In camera affidavits have also been used when "the very association of the identities of the original classifying authorities . . . is itself a classified fact."¹⁰⁴ Courts have held that if an agency submits an in camera affidavit, however, it is under a duty to "create as complete a public record as is possible" before doing so.¹⁰⁵ This public record is intended to provide both a meaningful and fair

¹⁰² See, e.g., Patterson v. FBI, 893 F.2d 595, 598-99 (3d Cir. 1990) (allowing in camera affidavit in order to supplement public affidavit and describe national security harm); Simmons v. DOJ, 796 F.2d 709, 711 (4th Cir. 1986) (same); Ingle v. DOJ, 698 F.2d 259, 264 (6th Cir. 1983) (same); Salisbury v. United States, 690 F.2d 966, 973 n.3 (D.C. Cir. 1982) (same); Stein v. DOJ, 662 F.2d 1245, 1255-56 (7th Cir. 1981) (same); Mobley v. CIA, 924 F. Supp. 2d 24, 64 (D.D.C. 2013) (accepting in camera declaration when agency "cannot publicly describe these records or articulate the basis for their classification in greater detail" than provided in public declaration), aff'd on other grounds, 806 F.3d 568 (D.C. Cir. 2015); N.Y. Times v. DOJ, 915 F. Supp. 2d 508, 532 (S.D.N.Y. 2013) ("A district court may also conduct in camera review of classified affidavits when national security is at issue."), aff'd in pertinent part & remanded on other grounds, 752 F.3d 123, 144 (2d Cir. 2014); Eslaminia v. FBI, No. 99-03249, 2011 WL 5118520, at *2 (N.D. Cal. Oct. 28, 2011) (affirming withholdings only after in camera declarations provided sufficient detail to justify use of Exemption 1); Edmonds v. FBI, 272 F. Supp. 2d 35, 46-47 (D.D.C. 2003) (approving the use of an in camera affidavit, noting that "extensive public justification would threaten to reveal the very information for which a FOIA exemption is claimed").

¹⁰³ See Phillippi v. CIA, 546 F.2d 1009, 1013 (D.C. Cir. 1976) (addressing response to request for records regarding *Glomar Explorer* submarine-retrieval ship, with result that "neither confirm nor deny" response is now known as a "Glomar" response or as "Glomarization"); see also Ctr. for Human Rts. & Const. L. v. Nat'l Geospatial-Intel. Agency, 506 F. App'x 547, 548 (9th Cir. 2013) (remanding case for filing of classified declaration when public declaration "failed to provide 'reasonably specific detail'" that demonstrates harm of acknowledging existence of records); Hunt v. CIA, 981 F.2d 1116, 1119-20 (9th Cir. 1992) (noting that court accepted in camera affidavits to explain basis for Glomar assertion); Cozen O'Connor v. U.S. Dep't of Treasury, 570 F. Supp. 2d 749, 786-87 (E.D. Pa. 2008) (explaining that "court may examine classified affidavits in camera if the public record is not sufficient to justify the *Glomar* responses").

¹⁰⁴ Mobley v. DOJ, 870 F. Supp. 2d 61, 69 (D.D.C. 2012) (acknowledging that even the "banal information," like date, author, and number of pages, is properly classified) (internal quotation marks omitted).

¹⁰⁵ Phillippi, 546 F.2d at 1013; see also Armstrong v. Exec. Off. of the President, 97 F.3d 575, 580 (D.C. Cir. 1996) (holding that when district court uses an in camera affidavit, even in national security cases, "it must both make its reasons for doing so clear and make as much

opportunity for a plaintiff to challenge and an adequate evidentiary basis for a court to rule on an agency's invocation of Exemption 1.¹⁰⁶

Courts have found that counsel for plaintiffs are not entitled to participate in such in camera proceedings.¹⁰⁷ In other instances involving voluminous records, courts have on occasion, either by order¹⁰⁸ or agreement of the parties,¹⁰⁹ had agencies submit samples of the documents at issue for in camera review.

Glomar Response

Executive Order 13,526 provides that "[a]n agency may refuse to confirm or deny the existence or nonexistence of requested records whenever the fact of their existence or

as possible of the in camera submission available to the opposing party" (citing Lykins v. DOJ, 725 F.2d 1455, 1465 (D.C. Cir. 1984)); Patterson, 893 F.2d at 600 (explaining that "public submissions represent a good faith effort by the [agency] to provide as much access to the information as possible"); Simmons, 796 F.2d at 710 (affirming that courts "should strive to develop as complete as possible a public record"); Scott v. CIA, 916 F. Supp. 42, 48-49 (D.D.C. 1996) (denying request for in camera review until agency "creates as full a public record as possible").

¹⁰⁶ See Campbell v. DOJ, 164 F.3d 20, 30 (D.C. Cir. 1999) (requiring defendant to provide plaintiff with "a meaningful opportunity to contest, and the district court [with] an adequate foundation to review, the soundness of the withholding" (quoting King v. DOJ, 830 F.2d 210, 218 (D.C. Cir. 1987))); Coldiron v. DOJ, 310 F. Supp. 2d 44, 49 (D.D.C. 2004) (finding that agency "must provide a basis for the FOIA requester to contest, and the court to decide, the validity of the withholding"); ACLU v. DOJ, 265 F. Supp. 2d 20, 27 (D.D.C. 2003) (acknowledging that agency affidavits "are entitled to substantial weight" but finding that they "must nevertheless afford the requester an ample opportunity to contest" them).

¹⁰⁷ See Salisbury, 690 F.2d at 973 n.3 (holding that "[i]n any FOIA case in which considerations of national security mandate in camera proceedings, the District Court may act to exclude outside counsel when necessary for secrecy or other reasons"); Hayden v. NSA, 608 F.2d 1381, 1385-86 (D.C. Cir. 1979) (noting that "this court has accepted the idea of [i]n camera review of affidavits and documents without the presence of requester's counsel[] . . . when security is at stake"); El Badrawi v. DHS, 596 F. Supp. 2d 389, 400 (D. Conn. 2009) (finding that although plaintiff's counsel maintained personnel security clearance, he did not have a "need to know" withheld information, and thus failed to satisfy second requirement for access to classified information); cf. Ellsberg v. Mitchell, 709 F.2d 51, 61 (D.C. Cir. 1983) (holding that plaintiff's counsel not permitted to participate in in camera review of documents arguably covered by state secrets privilege).

¹⁰⁸ See, e.g., Wilson v. CIA, No. 89-3356, 1991 WL 226682, at *3 (D.D.C. Oct. 15, 1991) (ordering in camera submission of "sample" of fifty documents because it was "neither necessary nor practicable" for court to review all 1,000 processed ones).

¹⁰⁹ Schoenman v. CIA, 604 F. Supp. 2d 174, 197 (D.D.C. 2009) (reviewing "a sample—selected by Plaintiff—of the documents withheld in full or in part").

nonexistence is itself classified under this order or its predecessors."¹¹⁰ Known as a Glomar response, this term comes from a series of requests made in the 1970s to the CIA and the Department of Defense seeking access to records showing a connection between the agencies and a ship named the *Glomar Explorer*, which purportedly was being used to recover a sunken Soviet submarine.¹¹¹ In that case, the agencies would neither confirm nor deny the existence of the requested records because "such an admission or denial could itself compromise national security."¹¹² Although there "had been a great deal of speculation in the press concerning the nature of the mission" of the *Glomar Explorer*, the agencies described to the court "why official confirmation of the involvement of the particular agencies in question was undesirable."¹¹³ Since that time, when agencies neither confirm nor deny the existence of records, the response is referred to as a Glomar response, or Glomarization.

This response has been routinely upheld by the courts where it is logical and plausible that revealing the existence of records would harm national security.¹¹⁴ At the

¹¹⁰ [Exec. Order No. 13,526](#), § 3.6(a); 3 C.F.R. 298 (2010); see, e.g., [ACLU v. DOJ](#), 808 F. Supp. 2d 280, 298 (D.D.C. 2011) (acknowledging that executive order authorizes agencies to refuse to confirm or deny existence or non-existence of requested information whenever fact of its existence is classified), [rev'd on other grounds sub nom, ACLU v. CIA](#), 710 F.3d 422 (D.C. Cir. 2013); [ACLU v. DOD](#), No. 09-8071, 2010 WL 4449375, at *3 (S.D.N.Y. Oct. 25, 2010) (same).

¹¹¹ See [Mil. Audit Project v. Casey](#), 656 F.2d 724, 728-31 (D.C. Cir. 1981) (providing background and history of request and subsequent litigation).

¹¹² [Id.](#) at 729-30.

¹¹³ [Id.](#) at 732.

¹¹⁴ See, e.g., [Freedom Watch v. NSA](#), 783 F.3d 1340, 1345 (D.C. Cir. 2015) (finding that DOD properly issued Glomar response to requester seeking documents concerning leak of information about cyberattacks on Iran's nuclear facilities); [Carter v. NSA](#), No. 13-5322, 2014 WL 2178708, at *1 (D.C. Cir. Apr. 23, 2014) (finding NSA properly invoked Glomar response to first-party request for NSA surveillance records); [Smith v. CIA](#), 393 F. Supp. 3d 72, 80 (D.D.C. 2019) (holding that "President Obama's remark does not undermine or contradict the CIA's proffered reasons for issuing the Glomar response"); [James Madison Project v. DOJ](#), 302 F. Supp. 3d 12, 22, 31 (D.D.C. 2018) (holding that "the 'logical and plausible' standard . . . is used to evaluate an agency's justification for invoking [FOIA Exemption 1] to . . . issue a Glomar response" and finding that "FBI properly issued a Glomar response" to plaintiff's request seeking copy of Synopsis that plaintiff alleged to exist of "Dossier" prepared by former British intelligence operative Christopher Steele); [Klayman v. CIA](#), 170 F. Supp. 114, 121 (D.D.C. 2016) (finding that "the mere confirmation or denial of the existence of responsive records would reveal a classified fact—namely, whether [the] CIA has a covert relationship with [the subject]"); [Moore v. FBI](#), 883 F. Supp. 2d 155, 164 (D.D.C. 2012) (concluding CIA properly invoked a Glomar response for a first party request because "[i]f a *Glomar* response is provided only when classified records are found, the response would in fact be useless because it 'would unsurprisingly be interpreted as an admission that classified response records exist'") (decided under [Executive Order 13,526](#)); [Moore v. Bush](#), 601 F. Supp. 2d 6,

same time, courts have held that if an "agency has already disclosed the fact of the existence (or nonexistence) of responsive records," a Glomar response is not appropriate.¹¹⁵ (For further discussion, see Exemption 1, Waiver of Exemption 1 Protection, Waiver in the Glomar Context, below.)

In a decision by the District Court for the District of Columbia addressing a challenge to compliance with the Executive Order's procedural requirements, the court found that Glomar responses are "intangible forms of classified information" that "arise[] solely in the context of a response to a request for records."¹¹⁶ Because an agency is not required to create or maintain a tangible record in response to a FOIA request, the court held that an agency "is not required to establish a declassification timeline in order to 'properly classif[y]' a *Glomar* fact."¹¹⁷ For this particular situation, the court held "that

14-15 (D.D.C. 2009) (affirming use of Glomar response by National Security Agency to first-party request for surveillance records) (decided under Executive Order 12,958, as amended); Cozen O'Connor v. U.S. Dep't of Treasury, 570 F. Supp. 2d 749, 788-89 (E.D. Pa. 2008) (affirming use of Glomar response in national security context by law enforcement component of Department of Treasury) (decided under Executive Order 12,958, as amended); ACLU v. DOD, 406 F. Supp. 2d 330, 333 (S.D.N.Y. 2005) (upholding Glomar response despite limited disclosure in news reports); Wheeler v. CIA, 271 F. Supp. 2d 132, 140 (D.D.C. 2003) (allowing agency to give Glomar response to request for records concerning plaintiff's activities as journalist in Cuba during 1960s) (decided under Executive Order 12,958, as amended); Marrera v. DOJ, 622 F. Supp. 51, 53-54 (D.D.C. 1985) (applying Glomar response to request for any record which would reveal whether requester was target of surveillance pursuant to Foreign Intelligence Surveillance Act) (decided under Executive Order 12,356); cf. Bassiouni v. CIA, No. 02-4049, 2004 WL 1125919, at *6-7 (N.D. Ill. Mar. 31, 2004) (explaining that "no number, no list" response – i.e., admission that records existed, coupled with refusal to further describe them – is appropriate to protect classified national security information even though agency previously acknowledged existence of records) (decided under Executive Order 12,958), aff'd, 392 F.3d 244 (7th Cir. 2004).

¹¹⁵ ACLU v. CIA, 710 F.3d at 432 (finding that "it strains credulity to suggest that an agency charged with gathering intelligence affecting the national security does not have an 'intelligence interest' in drone strikes, even if that agency does not operate the drones itself" and concluding that such a program had been implicitly acknowledged); see, e.g., ACLU v. DOD, 322 F. Supp. 3d 464, 478 (S.D.N.Y. 2018) (rejecting use of Glomar – which sought to prevent revealing whether CIA had intelligence interest in matter or whether certain individuals had decision-making authority on matter – because White House press secretary made public statements that "clearly disclosed the CIA's intelligence interest in the matter, . . . explicitly acknowledged that the U.S. participated, . . . and that the Director of the [CIA] (explicitly referred to by his title) was in the room when the matter was decided"). But see Mobley v. CIA, 806 F.3d 568, 584 (D.C. Cir. 2015) (finding that acknowledgment by foreign government or due to "a simple clerical mistake in FOIA processing" cannot waive Glomar response).

¹¹⁶ Mobley v. CIA, 924 F. Supp. 2d 24, 49 (D.D.C. 2013), aff'd on other grounds, 806 F.3d 568 (D.C. Cir. 2015).

¹¹⁷ 924 F. Supp. 2d at 50.

the requirement . . . to establish a declassification timeline is not an absolute prerequisite to classifying information."¹¹⁸ (For declassification requirements, see Duration of Classification and Declassification, above).

Waiver of Exemption 1 Protection

An agency waives its ability to invoke Exemption 1 as to any information the agency has "officially acknowledged."¹¹⁹ The D.C. Circuit has held that, in what is sometimes referred to as the Fitzgibbon test, a plaintiff must satisfy three elements to prove that information has been "officially acknowledged."¹²⁰ Under that test, information has been "officially acknowledged" if (1) "the information requested [is] as specific as the information previously released;" (2) "[the information requested] match[es] the information previously disclosed;" and (3) "[the information requested] already ha[s] been made public through an official and documented disclosure."¹²¹ Further, the D.C. Circuit has elaborated that "[t]his test is quite strict" and "[p]rior 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."¹²²

¹¹⁸ Id. at 49.

¹¹⁹ Leopold v. CIA, No. 20-5002, 2021 WL 446152, at *3 (D.C. Cir. Feb. 9, 2021) (explaining that if "President Trump's tweet officially acknowledged the existence of [CIA] records . . .," then CIA's Glomar would have been waived); Mobley v. CIA, 806 F.3d 568, 583 (D.C. Cir. 2015) (reiterating that "when information has been 'officially acknowledged,' its disclosure may be compelled even over an agency's otherwise valid exemption claim" (citing Fitzgibbon v. CIA, 911 F.2d 755, 765-66 (D.C. Cir. 1990) (same)); ACLU v. DOD, 628 F.3d 612, 620-21 (D.C. Cir. 2011)).

¹²⁰ Fitzgibbon, 911 F.2d at 765-66.

¹²¹ Leopold v. CIA, 2021 WL 446152, at *3; see also, e.g., N.Y. Times v. CIA, 965 F.3d at 116 (same); ACLU v. DOD, 628 F.3d at 620-21; Wilson v. CIA, 586 F.3d 171, 186 (2d Cir. 2009) (same); Fitzgibbon, 911 F.2d at 765-66 (same); Rosenberg v. DOD, 342 F. Supp. 3d 62, 83-84 (D.D.C. 2018) (same). But see N.Y. Times v. DOJ, 756 F.3d 100, 120 (2d Cir. 2014) (applying only two parts of test and stating that "matching" aspect of the test does not require absolute identity because "such a requirement would make little sense" and "[a] FOIA requester would have little need for undisclosed information if it had to match precisely information previously disclosed").

¹²² ACLU v. DOJ, 640 F. App'x 9, 11 (D.C. Cir. 2016) (quoting Wolf v. CIA, 473 F.3d 370, 378 (D.C. Cir. 2007)) (internal quotation marks omitted); see also Students Against Genocide v. Dep't of State, 257 F.3d 828, 835 (D.C. Cir. 2001) (holding that prior release of photographs similar to those withheld did not waive Exemption 1 because fact that "some 'information resides in the public domain does not eliminate the possibility that further disclosures can cause harm to [national security]'" (quoting Fitzgibbon, 911 F.2d at 766)).

Courts have consistently held that the plaintiff in a FOIA case bears the burden of proving waiver.¹²³ (For further discussion, see Waiver and Discretionary Disclosure, Waiver.)

Matching and Specificity Prongs

The first two elements of the Fitzgibbon test require the requested information "match" and be "as specific as" the disclosed information.¹²⁴ The D.C. Circuit has held

¹²³ See, e.g., Leopold v. CIA, 2021 WL 446152, at *4 (holding that "the initial burden rests with the requester, who must 'point to specific information in the public domain that appears to duplicate that being withheld'" (quoting Wolf, 473 F.3d at 378)); Pub. Citizen v. Dep't of State, 276 F.3d 634, 645 (D.C. Cir. 2002) (rejecting waiver claim based on speculation that records were potentially viewed by researchers where there was only a "remote possibility of very limited disclosure," and reaffirming that burden is on requester to establish that specific record in public domain duplicates that being withheld (citing Afshar v. Dep't of State, 702 F.2d 1125, 1133 (D.C. Cir. 1983) (same))); see also Pub. Citizen v. Dep't of State, 787 F. Supp. 12, 13, 15 (D.D.C. 1992) (holding that the FOIA plaintiff did not "meet [the] requirement that it show that [the ambassador's] testimony was 'as specific as' the documents it [sought] in this case, or that [the ambassador's] testimony 'matche[d]' the information contained in the documents").

¹²⁴ Fitzgibbon, 911 F.2d at 765-66; see, e.g., Leopold v. CIA, 2021 WL 446152, at *4 (holding that President's tweet did not constitute an official acknowledgment because it "is subject to several plausible interpretations" and did not "point to specific information that matches the information sought – the existence of Agency records"); N.Y. Times v. CIA, 965 F.3d at 116 (holding that "a general acknowledgement of the existence of a program alone does not wholesale waive an agency's ability to assert *Glomar* where certain aspects of the program remain undisclosed," and finding no waiver where statements by President left "lingering doubts" about existence of records, and where court would be required to "draw inferences" to find official acknowledgment of existence of records); Osen LLC v. U.S. Cent. Command, 375 F. Supp. 3d 409, 423 (S.D.N.Y. 2019) (finding requested information on Explosively Formed Penetrator (EFP) size was "as specific" as prior disclosures and had been officially acknowledged but prior disclosure of certain EFP strike photographs did not constitute waiver as to any and all EFP photographs); ACLU v. DOD, 322 F. Supp. 3d at 480-81 (holding that although CIA's broader *Glomar* was not justified as a result of official disclosure, court would give CIA opportunity to "assess whether a more targeted *Glomar* submission may viably be made" because several of ACLU's requests "seek much more specific (and comprehensive) data and records than [the broad information officially disclosed]"); Elec. Frontier Found. v. DOJ, 532 F. Supp. 2d 22, 24 (D.D.C. 2008) (ruling against waiver because information in public domain is not as specific as information requested); see also Elec. Priv. Info. Ctr. v. DOJ, 584 F. Supp. 2d 65, 71 (D.D.C. 2008) (rejecting contention that public availability of some information about classified Terrorist Surveillance Program diminishes government's argument for classifying remaining information); Whalen v. U.S. Marine Corps, 407 F. Supp. 2d 54, 57 (D.D.C. 2005) (holding that the defendant agency's prior disclosures on a subject did not constitute a waiver of all information on that subject, and noting that "it seems equally as likely that the government's prior voluminous disclosures indicate diligent respect by the coordinate

that these elements present a "high hurdle for a FOIA plaintiff to clear" because of the government's "vital interest in information relating to the national security and foreign affairs."¹²⁵

The D.C. Circuit reasoned that to hold otherwise in a situation where the government had affirmatively disclosed some information about a classified matter would, in the court's view, give the agency "a strong disincentive ever to provide its citizenry with briefings of any kind on sensitive topics."¹²⁶ Indeed, in an opinion following this D.C. Circuit decision, the Court of Appeals for the Seventh Circuit reasoned that the public "is better off under a system that permits [the agency] to reveal some things without revealing everything."¹²⁷

Official Disclosure Prong

The third element of the Fitzgibbon test requires that the requested information "already have been made public through an official and documented disclosure."¹²⁸ Courts have carefully distinguished between a bona fide declassification action or official release on the one hand and an unsubstantiated speculation lacking official confirmation on the other,¹²⁹ refusing to consider classified information to be in the public domain

agencies to Executive Order 12,958 and bolster the defendant's position that it has withheld only that information which it must under the applicable exemptions").

¹²⁵ Pub. Citizen v. Dep't of State, 11 F.3d 198, 203 (D.C. Cir. 1993).

¹²⁶ Id.

¹²⁷ Bassiouni v. CIA, 392 F.3d 244, 247 (7th Cir. 2004) (explaining that "if even a smidgen of disclosure required [the agency] to open its files, there would be no smidgens"); see also Fitzgibbon, 911 F.2d at 765-66 (holding that information published in congressional report did not constitute "official acknowledgment" of purported location of CIA station because information sought related to earlier time period than that discussed in report); Rosenberg, 342 F. Supp. at 85 (holding that similar statistics from previous time period – outside scope of request – are not a "match"); ACLU v. DOD, 584 F. Supp. 2d at 25-26 (holding that general public comment by agency officials on same topic did not waive Exemption 1 protection for more specific information on this topic); N.Y. Times v. DOD, 499 F. Supp. 2d 501, 512-14 (S.D.N.Y. 2007) (affirming agency classification of Terrorist Surveillance Program information despite official acknowledgment that program exists).

¹²⁸ Fitzgibbon, 911 F.2d at 765-66.

¹²⁹ See Leopold v. CIA, 2021 WL 446152, at *4 (recounting that "official acknowledgement cannot be based on mere public speculation no matter how widespread" (quoting Wolf, 473 F.3d at 378)); N.Y. Times v. CIA, 965 F.3d at 122-23 (holding that [d]eclassification cannot occur unless designated officials follow specified procedures," and where "no declassification procedures had been followed with respect to any documents" no declassification had occurred "[b]ecause declassification, even by the President, must follow established procedures"); James Madison Project v. DOJ, No. 17-0597, 2019 WL 3430728, at *7 (D.D.C.

unless it has been officially disclosed.¹³⁰ Courts have also rejected the view that the availability of information on the internet or widespread reports in the media about the general subject matter of the FOIA request are sufficient to overcome an agency's Exemption 1 claim for related records.¹³¹

July 30, 2019) (finding no clear intention to declassify where White House press release stated President directed DOJ to declassify documents but subsequent statements by President and DOJ made his intentions unclear, yet also reiterating agency's burden to establish proper classification, especially in light of ambiguity); ACLU v. Dep't of State, 878 F. Supp. 2d 215, 224 (D.D.C. 2012) (refusing to categorize "generalized and sweeping comments" made by an Executive official as official acknowledgment of authenticity of WikiLeaks disclosures).

¹³⁰ See, e.g., Frugone v. CIA, 169 F.3d 772, 775 (D.C. Cir. 1999) (holding that letter from OPM advising plaintiff that his employment records were in CIA custody is not "tantamount to an official statement of the CIA"); Pub. Citizen, 11 F.3d at 201 (holding that "an agency official does not waive FOIA exemption 1 by publicly discussing the general subject matter of documents which are otherwise properly exempt from disclosure under that exemption"); Abbotts v. NRC, 766 F.2d 604, 607 (D.C. Cir. 1985) (reasoning that even if the withheld data were the same as an estimate in the public domain, that is not the same as knowing the NRC's official policy as to the "proper level of threat a nuclear facility should guard against"); Afshar, 702 F.2d at 1130-31 (observing that a foreign government can ignore "[u]nofficial leaks and public surmise . . . but official acknowledgment may force a government to retaliate"); ACLU v. DOJ, 808 F. Supp. 2d 280, 300 n.6 (D.D.C. 2011) (declaring that "unauthorized disclosure of classified facts does not officially disclose those facts"), aff'd, 640 F. App'x 9 (D.C. Cir. 2016); Hiken v. DOD, 521 F. Supp. 2d 1047, 1059 (N.D. Cal. 2007) (ruling that agency not required to give "official confirmation" that information in public domain is classified); Edmonds v. FBI, 272 F. Supp. 2d 35, 49 (D.D.C. 2003) (holding that anonymous leak of information concerning FBI counterterrorism activities did not prevent agency from invoking exemption because disclosures in tandem would amount to official confirmation of authenticity); Rubin v. CIA, No. 01-2274, 2001 WL 1537706, at *5 (S.D.N.Y. Dec. 3, 2001) (finding that plaintiff's mere showing that some private publication alleged that CIA maintained files on subject was not evidence of official disclosure and, therefore, agency's Glomar position was not defeated); Schlesinger v. CIA, 591 F. Supp. 60, 66 (D.D.C. 1984) (rejecting contention that CIA prepublication review of former employees' books and articles serves as an official disclosure); cf. Hudson River Sloop Clearwater, Inc. v. Dep't of the Navy, 891 F.2d 414, 422 (2d Cir. 1989) (commenting that retired senior naval officer who was "no longer serving with an executive branch department cannot continue to disclose official agency policy" and "cannot establish what is agency policy").

¹³¹ See N.Y. Times v. CIA, 965 F.3d at 116 (cautioning that the courts will "not infer official disclosure of information classified by the CIA from [] widespread public discussion of a classified matter" (quoting Wilson v. CIA, 586 F.3d at 186-87); Am. Ctr. for L. & Just. v. U.S. Dep't of State, 354 F. Supp. 3d 1, 12 (D.D.C. 2018) (holding that existence of related or similar information on internet does not constitute official acknowledgement, and warning that "[i]f Exemption 1 were considered waived every time a controversial issue was discussed on the Internet, then even the most sensitive information would be subject to disclosure"); Azmy v. DOD, 562 F. Supp. 2d 590, 598-99 (S.D.N.Y. 2008) (finding that although much may now be known by the public about former detainee, there has been no indication that this specific

For purposes of the Fitzgibbon test, an official acknowledgement made by the President or by a subordinate acting at the direction of the President would be attributable to Executive Branch agencies.¹³² Further, official acknowledgements made by another component within the same Executive Branch agency may be attributable to the agency as a whole.¹³³ At the same time, courts have held that statements made by a different agency may not constitute an official acknowledgment attributable to the Executive Branch agency defending its assertion of Exemption 1.¹³⁴

Statements made by former officials after they have left service "do not constitute official statements and, therefore, cannot be treated as an official acknowledgement of the existence of a record."¹³⁵ Further, such statements will not be considered as

information has been officially disclosed); Elec. Frontier Found., 532 F. Supp. 2d at 24 (holding that newspaper article generally referring to existence of records on subject is not specific enough to waive exemptions).

¹³² ACLU v. CIA, 710 F.3d 422, 429 n.7 (D.C. Cir. 2013) (holding that the President's counterterrorism advisor acting as "instructed" by the President did officially acknowledge information by disclosing such information, and that this was attributable to the CIA); James Madison Project, 302 F. Supp. 3d at 24 ("The D.C. Circuit has recognized that '[a] disclosure made by the President, or by [an] advisor acting as "instructed" by the president,' is attributable to executive branch agencies for purposes of the official acknowledgement doctrine." (citing ACLU v. CIA, 710 F.3d at 429 n.7)).

¹³³ See, e.g., Marino v. CIA, 685 F.3d 1076, 1082 (D.C. Cir. 2012) (finding that "a federal prosecutor's decision to release information at trial is enough to trigger the public domain exception where the FOIA request is directed to [a different] component within the Department of Justice"); Davis v. DOJ, 968 F.2d 1276, 1279-82 (D.C. Cir. 1992) (disallowing Glomar response by different DOJ component where U.S. Attorney's Office released documents regarding subject of request); Osen LLC v. U.S. Cent. Command, 375 F. Supp. 3d at 422-23 (holding that disclosure of information by a component within same Executive Branch agency constituted official acknowledgement on behalf of entire agency and waived CENTCOM's ability to withhold matching information).

¹³⁴ See, e.g., N.Y. Times v. CIA, 2020 WL 3863087, at *7 (holding that "high-ranking officer in the Department of Defense[] was not authorized to speak for the CIA," and thus his statements did not constitute official disclosure by CIA); Mobley, 806 F.3d at 583 (holding that district court did not err in ruling there had been no official acknowledgment of the document because "[d]isclosure by one federal agency does not waive another agency's right to assert a FOIA exemption" (citing Frugone, 169 F.3d at 774-75)); Nat'l Sec. Couns. v. CIA, 898 F. Supp. 2d 233, 289 (D.D.C. 2012) (same); Valfells v. CIA, 717 F. Supp. 2d 110, 118 (D.D.C. 2010) (determining that disclosure by another agency does not constitute official acknowledgment).

¹³⁵ James Madison Project, 302 F. Supp. 3d at 27; see, e.g., Afshar, 702 F.2d at 1133-34 (holding that disclosures in books authored by former CIA officials – screened and approved by the CIA – are not "tantamount to official executive acknowledgments");

"supplemental" evidence because "statements from a non-authoritative source cannot possibly bolster or undermine statements from an authoritative source."¹³⁶ In addition, one court held that documents disclosed to plaintiff's counsel under seal during a criminal trial "do[] not entitle the public to broad access to classified documents now."¹³⁷

The D.C. Circuit has held that an accidental disclosure through "a simple clerical mistake" does not result in an "official and documented" disclosure.¹³⁸ Finally, the D.C. Circuit has also determined that congressional publications do not constitute "official acknowledgment" for purposes of the FOIA.¹³⁹

Waiver in the Glomar Context

The principles of waiver also apply in the Glomar context, where an agency loses the ability to assert a Glomar because the "agency has already disclosed the fact of the existence (or nonexistence) of responsive records."¹⁴⁰ The District Court for the District

Hudson River Sloop Clearwater, Inc., 891 F.2d at 421-22 (concluding that affidavit of retired naval officer "cannot effect an official disclosure of information" on behalf of the Navy).

¹³⁶ James Madison Project, 302 F. Supp. 3d at 28.

¹³⁷ Darui v. Dep't of State, 798 F. Supp. 2d 32, 42 (D.D.C. 2011).

¹³⁸ Mobley, 806 F.3d at 584.

¹³⁹ See, e.g., Salisbury v. United States, 690 F.2d 966, 971 (D.C. Cir. 1982) (holding that inclusion of information in Senate report "cannot be equated with disclosure by the agency itself"); Mil. Audit Project v. Casey, 656 F.2d 724, 744 (D.C. Cir. 1981) (finding that publication of Senate report does not constitute official release of agency information); Earth Pledge Found. v. CIA, 988 F. Supp. 623, 628 (S.D.N.Y. 1996) (same), aff'd per curiam, 128 F.3d 788 (2d Cir. 1997).

¹⁴⁰ ACLU v. CIA, 710 F.3d 422 at 432 (finding that "it strains credulity to suggest that an agency charged with gathering intelligence affecting the national security does not have an 'intelligence interest' in drone strikes, even if that agency does not operate the drones itself" and concluding that such a program had been implicitly acknowledged); see, e.g., ACLU v. DOD, 322 F. Supp. 3d at 478 (rejecting use of Glomar – which sought to prevent revealing whether CIA had intelligence interest in matter or whether certain individuals had decision-making authority on matter – because White House press secretary made public statements that "clearly disclosed the CIA's intelligence interest in the matter, . . . explicitly acknowledged that the U.S. participated, . . . and that the Director of the [CIA] (explicitly referred to by his title) was in the room when the matter was decided"); Nat'l Sec. Archive, No. 99-1160, slip op. at 15-16 (D.D.C. July 31, 2000) (ordering CIA to disclose fact that it kept biographies on seven former East European heads of state because Glomar response was waived by CIA's 1994 admission that it kept biographies on all "heads of state" – a "clear and narrowly defined term that is not subject to multiple interpretations"). But see Mobley, 806 F.3d at 584 (finding that acknowledgment by foreign government or due to "a simple clerical mistake in FOIA processing" cannot waive Glomar response).

of Columbia has explained how the three prongs of the Fitzgibbon test work in the Glomar context:

The D.C. Circuit consistently has applied Fitzgibbon's three prongs to evaluate a claim of "official acknowledgment" in the *Glomar* context. That said, the three prongs of the Fitzgibbon test are not as differentiated in the *Glomar* context as they are with respect to a withheld document's contents. As the court explained in Wolf v. CIA: "In the *Glomar* context . . . if the prior disclosure establishes the *existence* (or not) of records responsive to the FOIA request, the prior disclosure necessarily matches both the information at issue – the existence of records – and the specific request for that information." In other words, in the *Glomar* context, the first and second prongs of Fitzgibbon merge into one and the third prong continues to operate independently. Ultimately, then, to overcome an agency's *Glomar* response when relying on an official acknowledgement, "the requesting plaintiff must *pinpoint* an agency record that both matches the plaintiff's request and has been publicly and officially acknowledged by the agency."¹⁴¹

The Court of Appeals for the District of Columbia Circuit has held that "[o]fficial acknowledgment ends all doubt[,]"¹⁴² meaning that any such disclosure in this context "must leave no doubt that the agency possesses the requested records."¹⁴³ The court

¹⁴¹ James Madison Project, 302 F. Supp. 3d at 21 (internal citations omitted); see also Leopold v. CIA, 2021 WL 446152, at *3 (quoting Wolf and finding that "[t]o establish official acknowledgment our precedents require certainty, not assumptions of this sort"); Smith v. CIA, 393 F. Supp. 3d 72, 79 (D.D.C. 2019) (acknowledging that "[a]n official acknowledgement inquiry in the *Glomar* context is not identical to a situation where an agency does acknowledge the existence of a record and invokes a FOIA exemption" and describing this distinction); James Madison Project, 302 F. Supp. 3d at 20 (stating that plaintiff "bears burden of pointing to specific public statements that officially acknowledge records subject to a *Glomar* response"); see, e.g., N.Y. Times v. CIA, 314 F. Supp. 3d 519, 529-30 (S.D.N.Y. 2018) (holding that (1) President's "tweet does not confirm the existence of records being requested let alone the program"; (2) President's "statements [to a media outlet] are similarly ambiguous and lack the requisite specificity to be considered an official acknowledgment"; and (3) even if President's "statements officially acknowledge the existence of a covert program to arm and train Syrian rebels, . . . a general acknowledgment of the existence of a program alone does not wholesale waive an agency's ability to invoke *Glomar* where certain aspects of the program remain undisclosed").

¹⁴² Leopold v. CIA, 2021 WL 446152, at *4 (quoting Gardels v. CIA, 689 F.2d 1100, 1105 (D.C. Cir. 1982)).

¹⁴³ James Madison Project, 302 F. Supp. 3d at 22, 29-30 (internal quotation marks omitted) (further noting that the D.C. Circuit "has provided guidance on this issue in two types of cases: (1) where the existence of responsive records is plain on the face of the official statement, . . . and (2) where the substance of an official statement and the context in which it is made permits the inescapable inference that the requested records in fact exist . . .).

further opined that "[t]he official acknowledgement standard is not [a] 'surely the agency must have it' standard."¹⁴⁴

In certain instances, where the "totality of collective acknowledgments . . . 'are tantamount to an acknowledgment that the [Agency] has documents on the subject [of a FOIA request]," it may be "'neither logical nor plausible' for the Agency to deny an interest in [the subject]."¹⁴⁵ Under these circumstances, the requirement remains that the collective acknowledgements, taken together, "remove all doubt as to their meaning."¹⁴⁶ For example, in ACLU v. CIA, based on a series of public statements made by the President, his counterterrorism advisor, and the then-Director of the CIA, the Court of Appeals for the District of Columbia Circuit rejected a Glomar intended to shield whether the CIA had an intelligence interest in drone strikes.¹⁴⁷ The government had not explicitly confirmed the CIA's intelligence interest in drone strikes in any of these public statements, but taken together, the court found that as a result of these statements it was no longer logical or plausible for the CIA to deny such an interest in drone strikes.¹⁴⁸

Conversely, in two appellate decisions regarding a tweet by the President and other public statements concerning alleged payments to Syrian rebels, the Courts of Appeals for the District of Columbia Circuit and the Second Circuit each found that doubts regarding the existence of responsive records meant that the agency's Exemption 1 Glomar responses were not waived.¹⁴⁹ In Leopold v. CIA, the D.C. Circuit determined that a tweet "subject to several plausible interpretations" created doubt about the tweet's meaning and, therefore, did not officially acknowledge the existence of a program to fund Syrian

¹⁴⁴ Id. at 29, 35 (holding that "none of [the President's] statements or tweets acknowledge the existence of the Synopsis, let alone that he received a copy of it from the FBI" and that "it does not follow that just because a tweet is an 'official' statement of the President that its substance is necessarily grounded in information contained in government records").

¹⁴⁵ Leopold v. CIA, 2021 WL 446152, at *4 (quoting ACLU v. CIA, 710 F.3d at 431).

¹⁴⁶ N.Y. Times v. CIA, 965 F.3d at 112; see also Leopold v. CIA, 2021 WL 446152, at *4 ("Official acknowledgement ends all doubt . . ." (quoting Gardels, 689 F.2d at 1105); and, where it is both plausible that tweet reveals program and that it does not, "therein lies a problem" for plaintiff).

¹⁴⁷ 710 F.3d at 430-32.

¹⁴⁸ Id. (noting that the President, his counterterrorism advisor, and the then-Director of the CIA "publicly acknowledged that the United States uses drone strikes against al Qaeda" and further noting additional statements made by the then-CIA Director regarding his knowledge of drone strikes and their precision, which the Court said "could [not] have made [the CIA's] knowledge of – and therefore 'interest' in – drone strikes any clearer").

¹⁴⁹ See Leopold v. CIA, 2021 WL 446152, at *4; N.Y. Times v. CIA, 965 F.3d at 112.

rebels.¹⁵⁰ The court further determined that "[e]ven if the [] tweet revealed *some* program, it did not reveal the existence of Agency records about that alleged program."¹⁵¹ The court distinguished this tweet from the circumstances in ACLU v. CIA and found that "[w]hereas [the court in] ACLU relied on specific statements revealing the Agency's interest," the district court in Leopold simply assumed that "it seems wildly unlikely" that responsive records did not exist."¹⁵² The court explained that "[t]o establish official acknowledgment our precedents require certainty, not assumptions of this sort."¹⁵³ In New York Times vs. CIA, the Second Circuit determined that the same tweet by the President and another statement made by the President in a news article concerning alleged payments to Syrian rebels did not "remove *all* doubt as to their meaning," and thus did not allow the Court to find an inescapable inference that records existed.¹⁵⁴ As in Leopold, the court distinguished these statements from those in ACLU v. CIA, which "were far more precise, thorough, and numerous" and which "were detailed enough to 'leave no doubt that some U.S. agency' operates drones."¹⁵⁵ The court rejected plaintiff's assertion that the President's statements "would be revealing nothing more than" the CIA's interest in the subject matter of the request because the CIA did not merely assert that it needed to conceal such an interest, but rather articulated much more specific harms that would be caused by the disclosure of the existence of records.¹⁵⁶

¹⁵⁰ 2021 WL 446152, at *4.

¹⁵¹ Id. (analyzing President's tweet regarding news story about President ending program, where it was not clear whether President's statement affirmatively confirmed that he ended program or whether it merely provided "editorial interpretations" regarding news story's assertion and, in any event, President's tweet made no connection between agency and program).

¹⁵² Id. at *5.

¹⁵³ Id.

¹⁵⁴ 965 F.3d at 112 (analyzing President's tweet and his statement that matter "was 'not something that [he] was involved in' and that the decision was 'made by people, not me,'" and holding that no waiver occurred where statements made by President left "lingering doubts" about existence of records and where court would be required to "draw inferences" to find official acknowledgment of existence of records).

¹⁵⁵ Id. at 120; see also Leopold v. CIA, 2021 WL 446152, at *4 (quoting portions of N.Y. Times v. CIA, 965 F.3d at 120).

¹⁵⁶ Id. (noting that the CIA's affiant attested that "acknowledging the existence of responsive documents would: (1) 'confirm the existence and the focus of a sensitive Agency activity that is by definition kept hidden to protect U.S. Government foreign policy objectives'; (2) 'reveal whether or not the United States Government exercised extraordinary legal authorities to covertly influence the political, economic, and/or military conditions in Syria,' which could, 'in turn, either compromise a specific foreign policy goal . . . or serve as confirmation for U.S. adversaries that there was no such objective'; and 'require the disclosure of an intelligence source or method'").

Consistent with these principles, where an agency has already officially disclosed information that would sufficiently undermine the agency's basis for asserting that acknowledging the existence or non-existence of responsive records would harm national security, a Glomar response would not be appropriate.¹⁵⁷

Separately, the Second Circuit has found that although a sister agency's disclosure does not constitute an official acknowledgment by the non-disclosing agency, the sister agency's disclosures could "bear on the [non-disclosing agency's] position that the mere acknowledgment that it does or does not have possession of documents . . . would harm the national security."¹⁵⁸

Exclusion Considerations

Finally, the FOIA statute excludes from the requirements of the FOIA those records maintained by the FBI which concern "foreign intelligence or counterintelligence, or international terrorism," where the existence of such records is classified for "as long as the existence of the records remains classified information."¹⁵⁹ (For a further discussion of this provision, see Exclusions)

¹⁵⁷ N.Y. Times v. DOJ, 756 F.3d at 122 (holding that CIA's argument for use of Glomar "evaporates," once CIA identified by former CIA Director as having "had an operational role in targeted drone killings."); ACLU v. DOD, 322 F. Supp. 3d at 479 (holding that "where an agency's official acknowledgements make untenable the basis of its Glomar response – i.e., where agency statements have exposed as fallacious the basis for claiming that revealing the existence of records would cause the harm underlying a FOIA exemption – the agency's Glomar response may be rejected in toto").

¹⁵⁸ Florez v. CIA, 829 F.3d 178, 186 (2d Cir. 2016) (remanding to District Court where case subsequently settled); see also N.Y. Times v. DOJ, 965 F.3d at 121-22 (holding that "there are times when other agency disclosures can be 'relevant evidence' regarding the 'sufficiency of the justifications set forth by the [agency] in support of its *Glomar* response," but declining to find that certain ambiguous statements by officials at another agency were sufficient in that case to constitute official acknowledgment).

¹⁵⁹ 5 U.S.C. § 552(c)(3) (2018); see also OIP Guidance: [Implementing FOIA's Statutory Exclusion Provisions](#) (advising agencies that "given the unusual nature of the exclusion provisions, the limited circumstances in which they apply, and the relative infrequency with which they are employed, any agency considering whether to invoke an exclusion should consult first with the Office of Information Policy" to "help ensure that all aspects of the request and possible excludable records are reviewed and analyzed before determining whether use of an exclusion is warranted") (posted 9/14/2012).