

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF NEW YORK

LESLIE JAMES PICKERING,)	
)	
Plaintiff,)	
)	
v.)	Case No. 1:24-cv-81-GWC
)	
CENTRAL INTELLIGENCE AGENCY,)	
)	
Defendant.)	

**ORDER ON MOTION FOR SUMMARY JUDGMENT
(Doc. 11)**

Plaintiff Leslie James Pickering—self-described “environmentalist, free speech advocate, and a proprietor of Burning Books,” a Buffalo bookstore—filed this Freedom of Information Act (“FOIA”) case in January 2024, challenging the Central Intelligence Agency’s (“CIA”) alleged failure to comply with his FOIA request for copies of all records pertaining to himself. (Doc. 1.) The CIA answered, asserting defenses, including that Mr. Pickering “is not entitled to any relief that is not provided for in 5 U.S.C. § 552(a)(4)(B)” and that he “is not entitled to compel the production of responsive records protected from disclosure by one or more of the exemptions or exclusions to FOIA, 5 U.S.C. § 552, or the Privacy Act, 5 U.S.C. § 552a.” (Doc. 6 at 1.) Currently pending is the CIA’s Motion for Summary Judgment. (Doc. 11.)

Background

The following facts are undisputed except where noted. They are drawn from the parties’ Rule 56 statements and the court’s review of the record.

Mr. Pickering is a proprietor of Burning Books, a Buffalo bookstore “specializing in social justice struggles and state repression.” (Doc. 15-1 ¶ 3.) He has used the Freedom of Information Act (FOIA) in the past to obtain records from federal agencies such as the Federal

Bureau of Investigation (FBI). (*Id.* ¶ 4.) He asserts that he “first came under scrutiny by various federal, state, and local law enforcement and intelligence agencies in 1997 as a result of a public speech I made in support of Earth Liberation Front (ELF).” (*Id.* ¶ 5.) According to Mr. Pickering, “[t]his harassment and surveillance continued well into the late 2000s.” (*Id.*) The FBI’s Joint Terrorism Task Force conducted raids at Mr. Pickering’s residence in January 2001 and April 2002. (*Id.*)

Mr. Pickering states that “[t]he FBI and several other federal and state law enforcement bodies have targeted me in over three dozen investigations throughout the last 20 years because of my First Amendment protected activities.” (*Id.* ¶ 6.) He further states that he was the subject of a “federal eco-terrorism conspiracy investigation” from January 2012 through January 2014. (*Id.*) That investigation included “a United States Postal Inspection Service (USPIS) mail cover, a cross-country FBI interview with a former personal acquaintance, Secondary Security Screening Selection designation with the Transportation Security Administration (TSA), Spot Check Surveillance, physical surveillance, [and] a federal grand jury subpoena for my personal and business banking records.” (*Id.* ¶ 7.)

In a FOIA request dated November 11, 2022, attorney Michael Kuzma asked the CIA for copies of all CIA records pertaining to his client, “Leslie James Pickering.” (Doc. 1 ¶ 5; *see also* Doc. 11-2 at 1.) Included with that request was “a copy of Form FD-302 dated July 17, 2001, which Mr. Pickering secured from the FBI under FOIA.” (Doc. 11-2 at 2, 5.)¹ The copy of that

¹ As explained in the previous FOIA case in which Mr. Pickering obtained a copy of the Form FD-302:

FD-302s are internal FBI forms in which evidence is often documented, usually the results of FBI interviews. Such evidence and/or interview information may later be used as testimony or evidence in court proceedings/trials. Additionally, these evidence/interview forms are often incorporated in other FBI documents which

document refers to an “Investigation on 07/17/2001 at Portland, Oregon” and the body of the document appears as follows:

Date of transcription 07/17/2001

Pursuant to a court order [redacted] to CIA [redacted]

[redacted]

[redacted] maintained in

[redacted]

OTHER Sealed Pursuant to Court Order
b3 -1
b6 -3
b7c -3
b7E -3,4,5

(Doc. 11-2 at 5 (redactions in original).)

By letter dated November 17, 2022, the CIA acknowledged receipt of Mr. Pickering’s FOIA request and assigned reference number P-2023-00114 to the matter. (Doc. 1 ¶ 6; *see also* Williams Decl., Doc. 11-1 ¶ 8; Doc. 11-2 at 8.) By letter dated May 1, 2023, the CIA provided a “final response” to the November 2022 request. (Doc. 11-2 at 10.) The letter stated that “[a]fter conducting a search reasonably calculated to uncover all relevant documents, we did not locate any responsive records that would reveal a publicly acknowledged affiliation with the CIA.”

disseminate intelligence/investigative information, and can be utilized to set leads in furtherance of the FBI’s investigative efforts.

Pickering v. U.S. Dep’t of Just., No. 14-CV-330, 2023 WL 7690818, at *26 n.27 (W.D.N.Y. Sept. 29, 2023), *report and recommendation adopted in part and rejected in part*, 2024 WL 2149035 (W.D.N.Y. May 14, 2024).

(*Id.*) The letter further stated: “To the extent your request also seeks records that would reveal a classified association between the CIA and your client, we can neither confirm nor deny having such records, pursuant to Section 3.6(a) of Executive Order 13526, as amended.” (*Id.*) The letter advised that “[y]ou may consider this finding a denial of this portion of your request pursuant to [Privacy Act] exemptions (j)(1) and (k)(1) and FOIA exemptions (b)(1) and (b)(3).” (*Id.*)

Attorney Kuzma appealed that denial in a letter addressed to the CIA dated May 23, 2023. (Doc. 11-2 at 13.) The CIA received that administrative appeal but did not respond with a letter acknowledging receipt. (Doc. 11-1 ¶ 11.) Attorney Kuzma sent another letter to the CIA dated October 23, 2023, inquiring as to the status of the May 2023 appeal and asserting: “If a determination is not made on Mr. Pickering’s appeal by December 1, 2023, a lawsuit will be commenced . . . to compel disclosure of the sought-after records.” (Doc. 11-2 at 16.)

Mr. Pickering filed this federal suit on January 23, 2024. (Doc. 1.) He asserts that he “has a right of prompt access to the requested records under 5 USC § 552(a)(3)(A) and the CIA failed to conduct an adequate search for responsive records and has wrongfully withheld the sought-after information from plaintiff.” (*Id.* ¶ 13.) For relief, he seeks an order requiring the CIA “to conduct a search for any and all responsive records to plaintiff’s request and demonstrate that it employed search methods likely to lead to the discovery of records responsive to the request.” (*Id.* at 2.) He also requests an order requiring the CIA “to produce, by a date certain, any and all non-exempt records responsive to plaintiff’s request and a Vaughn index of any responsive records withheld under claim of exemption.” (*Id.* at 3.)

Summary Judgment Standard

Summary judgment may be granted only “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). When reviewing a motion for summary judgment, a court must construe all facts in the light most favorable to the non-moving party and draw all reasonable inferences in its favor. *See Davis-Garett v. Urban Outfitters, Inc.*, 921 F.3d 30, 45 (2d Cir. 2019). The role of the trial judge at the summary judgment stage is not to resolve issues of material fact, but rather to determine whether such issues exist to be decided at trial. *See id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)).

“Summary judgment represents a common mechanism for resolving a FOIA action.” *Pickering v. U.S. Dep’t of Just.*, No. 14-CV-330, 2024 WL 2149035, at *4 (W.D.N.Y. May 14, 2024). “In order to prevail on a motion for summary judgment in a FOIA case, the defending agency has the burden of showing that its search was adequate and that any withheld documents fall within an exemption to the FOIA.” *Pickering v. U.S. Dep’t of Just.*, No. 19-CV-001, 2021 WL 5810396, at *7 (W.D.N.Y. Dec. 7, 2021) (quoting *Carney v. U.S. Dep’t of Just.*, 19 F.3d 807, 812 (2d Cir. 1994)). FOIA’s nine exemptions “are explicitly made exclusive, and must be narrowly construed.” *Open Soc’y Just. Initiative v. CIA*, 505 F. Supp. 3d 234, 243 (S.D.N.Y. 2020) (quoting *Milner v. Dep’t of Navy*, 562 U.S. 562, 565 (2011)). “Courts review the adequacy of the agency’s justifications *de novo*.” *Id.* “Summary judgment is warranted on the basis of agency affidavits when the affidavits describe the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.” *Id.* (quoting *Wilner v. NSA*, 592 F.3d 60, 73 (2d Cir. 2009)).

Analysis

The CIA seeks summary judgment, arguing that it “conducted a thorough search that was reasonably calculated to locate records that would reflect an unclassified or otherwise openly acknowledged affiliation between the CIA and Plaintiff” and that “[n]o responsive records were found.” (Doc. 11-3 at 1.) And “[f]or records that would reveal a classified connection between the CIA and Plaintiff, the CIA has determined that the existence or nonexistence of such records is itself a currently and properly classified fact” and that, as a result, a so-called *Glomar* response² is the only appropriate response—i.e., the CIA “neither confirm[s] nor den[ies] the existence of such records under 5 U.S.C. §§ 552(b)(1) and (b)(3) (FOIA ‘Exemptions 1 and 3’), and 5 U.S.C. §§ 552a(j)(1) and (k)(1) (‘Privacy Act Exemptions (j)(1) and (k)(1)’).” (*Id.*) Based on these arguments, the CIA seeks summary judgment on all of Mr. Pickering’s claims.

“The Freedom of Information Act adopts as its most basic premise a policy strongly favoring public disclosure of information in the possession of federal agencies.” *Halpern v. F.B.I.*, 181 F.3d 279, 286 (2d Cir. 1999). “As noted by the Supreme Court, under FOIA, federal jurisdiction is dependent on a showing that an agency has (1) improperly (2) withheld (3) agency records.” *Grand Cent. P’ship, Inc. v. Cuomo*, 166 F.3d 473, 478 (2d Cir. 1999) (internal

² A *Glomar* response is a response “whereby a party neither acknowledges the existence or non-existence of certain categories of responsive records so as to avoid admitting certain responsive records exist.” *Pickering v. U.S. Dep’t of Just.*, No. 14-CV-330, 2024 WL 2149035, at *3 (W.D.N.Y. May 14, 2024). “The term ‘arises from the CIA’s successful defense of its refusal to confirm or deny the existence of records regarding a ship named the Hughes Glomar Explorer in *Phillippi v. Cent. Intelligence Agency*, 546 F.2d 1009, 1011 (D.C. Cir. 1976)” *Florez v. Cent. Intel. Agency*, 829 F.3d 178, 181 n.2 (2d Cir. 2016) (quoting *Conti v. Dep’t of Homeland Sec.*, No. 12-cv-5827, 2014 WL 1274517, at *3 n.2 (S.D.N.Y. Mar. 24, 2014)); see also *Am. Civil Liberties Union v. Dep’t of Def.*, 322 F. Supp. 3d 464, 473–74 (S.D.N.Y. 2018) (discussing origins of the “*Glomar* doctrine”).

quotation marks omitted); *see also* 5 U.S.C. § 552(a)(4)(B).³ “Only when each of these criteria is met may a district court ‘force an agency to comply with the FOIA’s disclosure requirements.’” *Grand Cent. P’ship*, 166 F.3d at 478 (quoting *U.S. Dep’t of Just. v. Tax Analysts*, 492 U.S. 136, 142 (1989)). The court reviews the CIA’s response after briefly addressing Mr. Pickering’s assertion regarding the CIA’s failure to respond to his administrative appeal.

I. Procedure: Failure to Respond to Administrative Appeal

Mr. Pickering claims that the CIA “failed to make a determination on his administrative appeal as required by 5 USC § 552(a)(6)(A)(ii).” (Doc. 15 at 1.)⁴ The undisputed facts establish

³ Section 552(a)(4)(B) provides:

On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency’s determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

⁴ The same assertion appears in Mr. Pickering’s Rule 56 statement under the title “Plaintiff’s Statement of Undisputed Facts.” (Doc. 15-2 at 1.) It is unusual for a party opposing summary judgment to seek to establish *undisputed* facts. *See, e.g., High Mountain Corp. v. MVP Health Care, Inc.*, 592 F. Supp. 3d 325, 333 (D. Vt. 2022) (“[T]he nonmoving party’s ability to withstand summary judgment ‘depends on the existence of disputed facts, not undisputed ones’; there is no need for the nonmoving party to establish undisputed facts at the summary judgment stage.” (quoting *Chaney v. Stewart*, No. 13-cv-246, 2015 WL 1538021, at *1 (D. Vt. Apr. 7, 2015))). In any case, the CIA challenges the assertion about § 552(a)(6)(A)(ii) as a conclusion of law to which it has no obligation to respond. (Doc. 16 at 1 & n.1.) The court agrees that legal arguments should be asserted in briefs, not in Rule 56 statements. *See, e.g., Stepniak v. United Materials, LLC*, No. 03-CV-569, 2009 WL 3077888, at *4 (W.D.N.Y. Sept. 24, 2009); *see also* Loc. R. Civ. P. 56(a)(2) (party opposing summary judgment should provide a response to the

that the CIA received but did not respond to Attorney Kuzma's administrative appeal letter dated May 23, 2023. That failure, however, does not support denying the CIA's motion. Instead, the agency's failure to make a timely determination on an administrative appeal results in deeming the requestor "to have exhausted his administrative remedies with respect to such request."

5 U.S.C. § 552(a)(6)(C)(i). Here, the CIA's motion for summary judgment does not rely on an exhaustion theory, so the failure to respond to the administrative appeal is immaterial.

II. Substance: Adequacy of the CIA's Search and its *Glomar* Response

A. Adequacy of the (Limited) Search

The CIA "has the initial burden to show it conducted an adequate search for responsive records." *Pickering v. U.S. Dep't of Just.*, No. 19-CV-001, 2021 WL 5810396, at *6 (W.D.N.Y. Dec. 7, 2021) (citing *Carney v. U.S. Dep't of Just.*, 19 F.3d 807, 812 (2d Cir. 1994)). "A search is considered adequate if it was reasonably calculated to uncover all relevant documents, yet reasonableness does not demand perfection, and a reasonable search need not uncover every document extant." *Id.* "Affidavits submitted by an agency are accorded a presumption of good faith; accordingly, discovery relating to the agency's search and the exemptions it claims for withholding records generally is unnecessary if the agency's submissions are adequate on their face." *Id.* (quoting *Nat. Res. Def. Council, Inc. v. U.S. Dep't of Interior*, 36 F. Supp. 3d 384, 398 (S.D.N.Y. 2014)).

Here, the CIA has submitted the declaration of its Litigation Information Review Officer, Mary C. Williams. (Doc. 11-1.) Ms. Williams has offered a narrative description of the CIA's

facts in the moving party's statement and, as necessary, a statement of additional material *facts*). Here, Mr. Pickering has asserted this argument in both his Rule 56 statement and his memorandum of law. The court concludes that it is fairly raised as a legal argument and analyzes it here.

search for records in response to Mr. Pickering's FOIA request. (*Id.* ¶¶ 14–19.) She explains that the search “was limited to records that would reveal an open, unclassified, or officially acknowledged affiliation or relationship between the CIA and Plaintiff.” (*Id.* ¶ 14.) And she describes the individuals who conducted the search as “management professionals who . . . have access to pertinent records; are knowledgeable about the Agency's records systems and are qualified to search those records systems; and regularly search those records systems in the course of their professional duties.” (*Id.*)⁵

Ms. Williams further states that “[t]he CIA information management professionals who processed Plaintiff's request conducted a thorough and diligent search of the relevant systems of records that was reasonably calculated to locate responsive records that might reflect an unclassified or otherwise openly acknowledged relationship between the CIA and Plaintiff.” (*Id.* ¶ 15.) She elaborates:

Given the age and type of records requested, the Agency employees searched for responsive documents in several records systems that were deemed reasonably likely to contain responsive records, should those records exist. Those systems include: (1) a system containing electronic versions of all Agency records that have been reviewed and/or compiled for potential public release; (2) multiple systems containing information regarding personnel affiliated with the CIA; and (3) a system containing security records.

⁵ As to these statements and several others made by Ms. Williams, Mr. Pickering asserts that he “lacks information sufficient to form a belief as to the accuracy of Defendant's statement and therefore disputes it.” (*See, e.g.*, Doc. 15-2 ¶ 8.) Mr. Pickering's assertions as to lack of information are insufficient to raise a dispute of fact. *See Lockwood v. Dunkirk City Sch. Dist.*, No. 21-CV-941, 2024 WL 4347339, at *1 n.3 (W.D.N.Y. Sept. 30, 2024) (party opposing summary judgment “cannot raise a disputed fact simply by saying that she lacks personal knowledge” (citing *Chapman v. Finnegan*, 950 F. Supp. 2d 285, 291 n.3 (D. Mass. 2013))).

(*Id.*) And according to Ms. Williams, the search included the term “Leslie Pickering,”⁶ in addition to “biographical data provided by Plaintiff . . . , including his social security number.”

(*Id.* ¶ 16.) The search “did not yield any responsive records that would reveal a publicly acknowledged affiliation between the CIA and Plaintiff.” (*Id.* ¶ 16.)

In light of the presumption of good faith to which Ms. Williams’s declaration is entitled, the court concludes that the CIA has met its burden to show that it conducted an adequate search for responsive records that would reveal a publicly acknowledged affiliation between the CIA and Plaintiff. It remains to consider the sufficiency of the CIA’s *Glomar* response as to “any records responsive to Plaintiff’s FOIA request that would reveal a classified or unacknowledged connection to the CIA.” (*Id.* ¶ 19.) If the agency’s *Glomar* response is justified, then the limited search described above is more than sufficient. *See People for the Ethical Treatment of Animals v. Nat’l Inst. of Health, Dep’t of Health & Hum. Servs.*, 745 F.3d 535, 540 (D.C. Cir. 2014) (“[T]o the extent the circumstances justify a *Glomar* response, the agency need not conduct any search for responsive documents or perform any analysis to identify segregable portions of such documents.”).

B. *Glomar* Response

The Second Circuit has held that “an agency may refuse to confirm or deny the existence of records where to answer the FOIA inquiry would cause harm cognizable under a [] FOIA exception.” *Wilner v. Nat’l Sec. Agency*, 592 F.3d 60, 68 (2d Cir. 2009) (alteration in original; quoting *Gardels v. CIA*, 689 F.2d 1100, 1103 (D.C. Cir. 1982)); *see also Am. Civil Liberties*

⁶ Mr. Pickering asserts that he actually requested that the CIA conduct a search for records pertaining to “Leslie James Pickering.” (Doc. 15-2 ¶ 10.) The court concludes, however, that any dispute on this point is not material.

Union v. Dep't of Def., 389 F. Supp. 2d 547, 562 (S.D.N.Y. 2005) (Hellerstein, J.) (“[T]he courts generally respect the CIA’s right to make a Glomar response.”).⁷

To properly employ the *Glomar* response to a FOIA request, an agency must “tether” its refusal to respond to one of the nine FOIA exemptions—in other words, a government agency may refuse to confirm or deny the existence of certain records if the FOIA exemption would itself preclude the *acknowledgment* of such documents.

Wilner, 592 F.3d at 68 (cleaned up). “An agency ‘resisting disclosure’ of the requested records ‘has the burden of proving the applicability of an exemption.’” *Id.* (quoting *Minier v. CIA*, 88 F.3d 796, 800 (9th Cir. 1996)). “The agency may meet its burden by submitting a detailed affidavit showing that the information logically falls within the claimed exemptions.” *Id.* (quoting *Minier*, 88 F.3d at 800). “In evaluating an agency’s *Glomar* response, a court must accord substantial weight to the agency’s affidavits, provided that the justifications for nondisclosure are not controverted by contrary evidence in the record or by evidence of bad faith.” *Id.* (cleaned up).

Here, the CIA has tethered its response to four exemptions: FOIA Exemptions 1 and 3, and Privacy Act Exemptions (j)(1) and (k)(1). (See Doc. 11-3 at 8–17; Doc. 11-1 ¶¶ 22–45.) Mr. Pickering invokes a general exception to an agency’s ability to rely on the *Glomar* response: “[W]hen an agency has officially acknowledged otherwise exempt information through prior disclosure, the agency has waived its right to claim an exemption with respect to that information.” *N.Y. Times v. CIA*, 965 F.3d 109, 115–16 (2d Cir. 2020) (alteration in original;

⁷ Mr. Pickering quotes the portion of Judge Hellerstein’s decision recognizing that “[t]he danger of Glomar responses is that they encourage an unfortunate tendency of government officials to over-classify information, frequently keeping secret that which the public already knows, or that which is more embarrassing than revelatory of intelligence sources or methods.” *Id.* at 561. That danger is mitigated to some extent by the availability of de novo, independent judicial review, as in this case and others cited here.

quoting *Am. Civil Liberties Union v. CIA*, 710 F.3d 422, 426 (D.C. Cir. 2013)); see also *Wilner*, 592 F.3d at 70 (“An agency is . . . precluded from making a *Glomar* response if the existence or nonexistence of the specific records sought by the FOIA request has been the subject of an official public acknowledgment.”).

1. Official-Acknowledgment Exception

Mr. Pickering asserts that the Form FD-302 released by the FBI triggers this “official-acknowledgment exception to the *Glomar* doctrine.” (Doc. 15 at 2.)⁸ The CIA recognizes the “official disclosure” exception but argues that it does not apply because the Form FD-302 “does not constitute an official acknowledgement on behalf of the CIA” and because it “does not contain the specific information being sought by Plaintiff.” (Doc. 16 at 3.) The court agrees with the defense that the Form FD-302 is not a basis for the official-acknowledgment exception.

The Second Circuit applies a “precise and strict test for claims of official disclosure.” *N.Y. Times*, 965 F.3d at 116. “Classified information that a party seeks to obtain or publish is deemed to have been officially disclosed only if it (1) is as specific as the information previously released, (2) matches the information previously disclosed, and (3) was made public through an official and documented disclosure.” *Id.* (cleaned up). “[C]ourts will ‘not infer official disclosure of information classified by the CIA from (1) widespread public discussion of a classified matter, (2) statements made by a person not authorized to speak for the Agency, or (3) release of information by another agency, or even by Congress.’” *Id.* (quoting *Wilson v. CIA*,

⁸ Confusingly, although Mr. Pickering describes this as “[t]he limited issue currently before this Court,” he concedes on the next page of his brief that the FBI’s disclosure of the Form FD-302 “does not preclude the CIA from asserting a *Glomar* response.” (Doc. 15 at 3.) Instead of a limited analysis of the official-acknowledgment exception, Mr. Pickering asks the court to evaluate the Form FD-302 as “relevant evidence” in assessing each of the four exemptions that the CIA has asserted. (*Id.*)

586 F.3d 171, 186–87 (2d Cir. 2009)). Here, the Form FD-302 at issue is information released by the FBI, not by the CIA. For that reason alone, it is not a candidate for inferring any official disclosure by the CIA. With that conclusion in mind, the court considers the sufficiency of the CIA’s reliance upon FOIA Exemptions (b)(1) and (b)(3), and Privacy Act Exemptions (j)(1) and (k)(1). The court begins with the Privacy Act exemptions.

2. Privacy Act Exemption (j)(1)

The Privacy Act includes a general provision requiring that “[e]ach agency that maintains a system of records” must:

[U]pon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him

5 U.S.C. § 552a(d)(1). This requirement, however, is subject to exemptions, including an exemption providing that “[t]he head of any agency may promulgate rules . . . to exempt any system of records within the agency from any part of this section except [certain provisions]⁹ . . . if the system of records is . . . maintained by the Central Intelligence Agency.” *Id.* § 552a(j)(1).

As Ms. Williams has explained (Doc. 11-1 ¶ 40), the CIA Director has exercised authority under Exemption (j) to exempt from access by individuals under § 552a(d) the portions of CIA systems and records that “[c]onsist of, pertain to, or would otherwise reveal intelligence sources and methods.” 32 C.F.R. § 1901.62(d). The CIA Director has also exercised this authority to exempt “from judicial review under section (g) of the Act all determinations to deny

⁹ Most of the provisions that agency heads lack authority to exempt are not relevant here. Notably, however, agency heads retain authority to exempt systems of agency records from subsection (d) (quoted above), and from subsection (g), which provides for civil remedies in federal district court.

access under section (d).” *Id.* § 1901.62(e). These decisions support application of Privacy Act Exemption (j)(1).

Although prior cases have asked whether a Privacy Act exemption is a “withholding statute” within the meaning of FOIA Exemption (b)(3), *see U.S. Dep’t of Just. v. Provenzano*, 469 U.S. 14 (1984) (per curiam), the Privacy Act, as amended, provides that the CIA cannot rely on a FOIA exemption to withhold records that are otherwise accessible under the Privacy Act. 5 U.S.C. § 552a(t)(1). Similarly, the CIA cannot rely on a Privacy Act exemption to withhold a record that is otherwise accessible under FOIA. *Id.* § 552a(t)(2). Thus, as Ms. Williams states, it is necessary to process Mr. Pickering’s request under both the Privacy Act and under FOIA. (Doc. 11-1 ¶ 39.) The court’s conclusion as to the applicability of Privacy Act Exemption (j)(1) does not end the analysis because it is still necessary to consider the FOIA exemptions.

3. Privacy Act Exemption (k)(1)

Privacy Act Exemption (k)(1) imports the provisions of FOIA Exemption (b)(1). *See* 5 U.S.C. § 552a(k)(1). The court reviews FOIA Exemption (b)(1) below. But first the court must consider FOIA Exemption (b)(3).

4. FOIA Exemption (b)(3)

Exemption (b)(3) protects matters that are “specifically exempted from disclosure by statute” if the statute:

(A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

5 U.S.C. § 552(b)(3). The CIA asserts that the National Security Act of 1947 and the CIA Act of 1949 are both withholding statutes within the meaning of FOIA Exemption (b)(3), and that both of those statutes justify a *Glomar* response in this case. (Doc. 11-3 at 14.) The National Security Act protects “intelligence sources and methods” from unauthorized disclosure. *Open Soc’y Just. Initiative v. CIA*, 505 F. Supp. 3d 234, 253 (S.D.N.Y. 2020) (quoting 50 U.S.C. § 3024(i)(1)). The CIA Act protects “the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency.” *Id.* (quoting 50 U.S.C. § 3507).

To withhold materials under FOIA Exemption (b)(3), “the Agency must show specifically and clearly that the requested materials fall into the category of the exemption.” *Id.* (quoting *Hayden v. Nat’l Sec. Agency/Central Sec. Serv.*, 608 F.2d 1381, (D.C. Cir. 1979)). “When reviewing an agency’s withholding pursuant to Exemption 3, two questions must be considered including: (1) whether the statute in question is a ‘withholding statute,’ and, if so, (2) whether the withheld material qualifies under that statute.” *Pickering*, 2021 WL 5810396, at *12 (footnote omitted). Here, as noted in the 2021 *Pickering* decision, the National Security Act is a “withholding statute” for purposes of FOIA. *Id.*; *see also* 50 U.S.C. § 3024(i)(1) (“The Director of National Intelligence shall protect, and shall establish and enforce policies to protect, intelligence sources and methods from unauthorized disclosure.”). So is the relevant portion of the CIA Act. *See Johnson v. CIA*, No. 17 Civ. 1928, 2018 WL 833940, at *3 (S.D.N.Y. Jan. 30, 2018) (citing 50 U.S.C. § 403g (current version at 50 U.S.C. § 3507)).

Ms. Williams asserts that “[a]cknowledging or denying the existence or nonexistence of records reflecting a classified or otherwise unacknowledged connection between the CIA and Plaintiff would reveal information that concerns intelligence sources and methods—information

protected under the National Security Act.” (Doc. 11-1 ¶ 35.) She further asserts that the protection of “functions” under 50 U.S.C. § 3507 applies because:

[C]onfirming the existence or nonexistence of records on a particular individual, like Plaintiff, could reveal how CIA collects (or does not collect) certain information on particular subjects or individuals and/or could reveal information about the methods by which the Agency does (or does not) effectuate such collection, both of which pertain to intelligence collection—a function of the Agency.

(*Id.* ¶ 36.) The court must afford “substantial weight” to Ms. Williams’s statements on these points. *Pickering*, 2021 WL 5810396, at *12 (quoting *ACLU v. Dep’t of Just.*, 681 F.3d 61, 69 (2d Cir. 2012)).

At the same time, the court recognizes that “unauthorized or illegal investigative tactics may not be shielded from the public by use of FOIA exemptions.” *Kuzma v. IRS*, 775 F.2d 66, 69 (2d Cir. 1985) (per curiam). Here, Mr. Pickering contends that “the CIA is attempting to prevent or delay the release of sought-after records to avoid public embarrassment for engaging in domestic political surveillance of an American citizen whose only crime was to assert rights guaranteed to him by the United States Constitution.” (Doc. 15 at 3.) On this point, the court considers the Form FD-302 upon which Mr. Pickering relies. For the reasons discussed below, the court elects to exercise its discretion under 5 U.S.C. § 552(a)(4)(B) and to order Defendant to produce an unredacted copy of the Form FD-302 for in camera inspection.

5. FOIA Exemption (b)(1)

Exemption (b)(1) protects matters that are “(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to [an] Executive order.” 5 U.S.C. § 552(b)(1). The CIA relies upon Executive Order 13,526, which states in part that an agency responding to a FOIA request “may refuse to confirm or deny the existence or nonexistence of

requested records whenever the fact of their existence or nonexistence is itself classified under this order or its predecessors.” Exec. Order No. 13,526, § 3.6(a) (Dec. 29, 2009). Regarding classification standards, the Executive Order states:

Information may be originally classified under the terms of this order only if all of the following conditions are met:

- (1) an original classification authority is classifying the information;
- (2) the information is owned by, produced by or for, or is under the control of the United States Government;
- (3) the information falls within one or more of the categories of information listed in section 1.4 of this order; 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.

Id. § 1.1(a). Here, there appears to be no dispute that the first two requirements are met.

Regarding the second two requirements, § 1.4 of the Executive Order permits classification of information when “its unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security” and when it pertains to, among other things, “intelligence activities (including covert action), intelligence sources or methods, or cryptology.” *Id.* § 1.4(c). Ms. Wilson asserts that she has determined “that the existence or nonexistence of the requested records in Plaintiff’s request is a currently and properly classified fact that concerns ‘intelligence activities (including covert action), [or] intelligence sources or methods’ under section 1.4(c).” (Doc. 11-1 ¶ 24 (alteration in original).) She further asserts that “the unauthorized disclosure of this information reasonably could be expected to result in damage to national security.” (*Id.*)

Courts in this circuit “consistently defer[] to executive affidavits predicting harm to the national security, and have found it unwise to undertake searching judicial review” as to such

predictive judgments. *ACLU v. Dep't of Just.*, 681 F.3d 61, 70 (2d Cir. 2012) (quoting *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Just.*, 331 F.3d 918, 927 (D.C. Cir. 2003)). Here, Ms. Williams's affidavit states in pertinent part:

An acknowledgment confirming or denying the existence or nonexistence of such records would reveal classified intelligence information and jeopardize the clandestine nature of the Agency's intelligence activities and/or disclose information about CIA's sources and methods. For example, if the CIA were to confirm the existence of responsive records, such response could reveal that the CIA had some time of involvement in, affiliation with, connection to, or intelligence interest in a particular individual—Plaintiff in this case—or a group, subject matter, or activity related to Plaintiff. On the other hand, if the CIA denied having records responsive to Plaintiff's request, that response could reveal that the CIA did not have any type of involvement in, affiliation with, connection to, or intelligence in Plaintiff or a group, subject matter, or activity related to Plaintiff.

(*Id.* ¶ 30.) “In either case, confirmation or denial of the existence or nonexistence of such records would implicate sensitive information about the CIA's intelligence activities and sources and methods in a manner that would be reasonably expected to cause damage to national security.” (*Id.* ¶ 31.) Ms. Williams's detailed affidavit supports the conclusion that the existence or non-existence of the information that Mr. Pickering seeks logically falls within FOIA Exemption (b)(1).

The analysis does not end here, however, because § 1.7 of Executive Order 13,526 includes certain limitations, including the following: “In no case shall information be classified, continue to be maintained as classified, or fail to be declassified in order to . . . conceal violations of law, inefficiency, or administrative error [or] prevent embarrassment to a person, organization, or agency.” Exec. Order No. 13,526, § 1.7(a) (Dec. 29, 2009); *see also Kuzma*, 775 F.2d at 69 (“[U]nauthorized or illegal investigative tactics may not be shielded from the public by use of FOIA exemptions.”). Invoking that limitation, Mr. Pickering contends that “the CIA is attempting to prevent or delay the release of sought-after records to avoid public embarrassment

for engaging in domestic political surveillance of an American citizen whose only crime was to assert rights guaranteed to him by the United States Constitution.” (Doc. 15 at 3.)

The court elects to exercise its discretion under 5 U.S.C. § 552(a)(4)(B) and to order Defendant to produce an unredacted copy of the Form FD-302 for in camera inspection. If the court’s review of that document reveals no basis for application of the limitations in § 1.7(a) or any support for Mr. Pickering’s contention that the CIA engaged in the unauthorized or illegal investigative activities, then the court will conclude that the CIA has met its burden to prove the applicability of FOIA Exemption (b)(1) (and also (b)(3), discussed above). If the court’s review of the Form FD-302 supports Mr. Pickering’s contention, then the CIA will not be entitled to summary judgment. In either case, in camera review will facilitate the court’s de novo review and will support confidence in whatever result is ultimately reached.

Conclusion

The court elects to exercise its discretion under 5 U.S.C. § 552(a)(4)(B) and to order Defendant to produce within 30 days an unredacted copy of the Form FD-302 dated July 17, 2001, for in camera inspection. The court RESERVES judgment on the Central Intelligence Agency’s Motion for Summary Judgment (Doc. 11) pending completion of the in camera review.

Dated this 15th day of January, 2026.


Geoffrey W. Crawford, Judge
United States District Court