

1 In the
2 **United States Court of Appeals**
3 **For the Second Circuit**

4 August Term, 2015
5 No. 15-1055-cv

6 SERGIO FLOREZ,
7 *Plaintiff-Appellant,*

8 *v.*

9 CENTRAL INTELLIGENCE AGENCY,
10 *Defendant-Appellee.*

11 Appeal from the United States District Court
12 for the Southern District of New York.
13 No. 1:14-cv-01002 — Sidney H. Stein, *Judge.*

14 ARGUED: JANUARY 11, 2016
15 DECIDED: JULY 14, 2016

16 Before: STRAUB, LIVINGSTON and CHIN, *Circuit Judges.*

1 Appeal from the entry of summary judgment by the United
2 States District Court for the Southern District of New York (Sidney
3 H. Stein, *Judge*), in favor of Defendant-Appellee Central Intelligence
4 Agency, in an action by Plaintiff-Appellant Sergio Florez challenging
5 the Agency's *Glomar* response to a Freedom of Information Act
6 request. During the pendency of this appeal, the Federal Bureau of
7 Investigation released certain documents concerning the subject of
8 Mr. Florez's request. Because we find those disclosures relevant to
9 the merits of Mr. Florez's challenge, we **REMAND** for the District
10 Court to pass on the import of those documents in the first instance.

11
12 Judge LIVINGSTON dissents in a separate opinion.

13 DAVID E. MCCRAW, (Jeremy A. Kutner, *on the*
14 *brief*), New York, NY, *for* Sergio Florez.

15 JESSICA JEAN HU (Christopher Connolly, *on the*
16 *brief*), Assistant United States Attorneys, *for* Preet
17 Bharara, United States Attorney for the Southern
18 District of New York, New York, NY.

19 STRAUB, *Circuit Judge*:

20 This appeal arises from a request submitted to Defendant-
21 Appellee Central Intelligence Agency ("CIA") by Plaintiff-Appellant
22 Sergio Florez ("Mr. Florez"), pursuant to the Freedom of
23 Information Act ("FOIA"). *See* 5 U.S.C. § 552 *et seq.* Mr. Florez's

1 request, dated November 3, 2013, sought “the disclosure and release
2 of any and all records between 1958 and 1990 related to and or
3 mentioning [his] father, Armando J. Florez” (“Dr. Florez”). Joint
4 App’x at 62. During the 1960s, Dr. Florez served in several high-
5 level diplomatic roles on behalf of the Republic of Cuba, including
6 as *chargé d’affaires*¹ in Washington, D.C. He defected to the United
7 States in 1968, became an American citizen in 1979, and died in
8 October 2013.

9 On November 20, 2013, the CIA answered Mr. Florez’s request
10 with a so-called *Glomar* response,² stating that it “can neither

¹ A *chargé d’affaires* is “[a]n officer in charge of an embassy who is not an ambassador, (as when, for example, the level of relations between two states has been lowered to below the ambassadorial level) and who is accredited to the minister of foreign affairs, rather than to the chief of state.” Chas. W. Freeman, Jr., *The Diplomat’s Dictionary* 29 (2d ed. 2010).

² The term “*Glomar* response” refers to “a response that neither confirms nor denies the existence of documents responsive to the request.” *Ctr. for Constitutional Rights v. CIA*, 765 F.3d 161, 164 n.5 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 1530 (2015). 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),” *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).

1 confirm nor deny the existence or nonexistence of records
2 responsive to [Mr. Florez's] request." *Id.* at 70. It asserted that the
3 existence or nonexistence of such records "is currently and properly
4 classified and is intelligence sources and methods information" that
5 is exempt from disclosure under FOIA. *Id.* On December 4, 2013,
6 Mr. Florez timely filed an administrative appeal with the CIA's
7 Agency Release Panel.³

8 On February 18, 2014, while Mr. Florez's administrative
9 appeal was pending, Mr. Florez timely filed the underlying action.⁴
10 The CIA and Mr. Florez filed cross-motions for summary judgment.
11 On April 22, 2014, while the motions underwent briefing, the
12 Agency Release Panel denied Mr. Florez's administrative appeal.

³ The CIA's Agency Release Panel is composed of various CIA officials and is tasked with, *inter alia*, rendering "final Agency decisions from appeals of initial adverse decisions under the Freedom of Information Act." 32 C.F.R. § 1900.41(c).

⁴ "The exhaustion of administrative remedies by plaintiff is not at issue here. Since the CIA did not respond to plaintiff's appeal within 20 days, he is 'deemed to have exhausted his administrative remedies with respect to such request,' 5 U.S.C. § 552(a)(6)(C)(i), and may file suit pursuant to 5 U.S.C. § 552(a)(4)(B)." *Florez v. CIA*, No. 14-cv-1002, 2015 WL 728190, at *2 n.3 (S.D.N.Y. Feb. 19, 2015); *see also Oglesby v. Dep't of Army*, 920 F.2d 57, 62 (D.C. Cir. 1990).

1 On February 19, 2015, the United States District Court for the
2 Southern District of New York (Sidney H. Stein, *Judge*) granted
3 summary judgment in favor of the CIA and denied Mr. Florez's
4 cross-motion for summary judgment, holding that "the CIA's *Glomar*
5 response was justified and the existence of any records is exempt
6 from disclosure under FOIA Exemption 1 (for classified national
7 defense or foreign policy secrets) and Exemption 3 (for matters
8 specifically exempted from disclosure by statute)." *Florez v. CIA*,
9 No. 14-cv-1002, 2015 WL 728190, at *1 (S.D.N.Y. Feb. 19, 2015). This
10 timely appeal followed.

11 During the pendency of this appeal, pursuant to a separate
12 FOIA request, the Federal Bureau of Investigation ("FBI") released
13 several declassified documents pertaining to Dr. Florez on June 23,
14 2015, and one additional such document on July 24, 2015
15 (collectively, "FBI Disclosures"). Mr. Florez requested that the CIA
16 revise its response to his FOIA request in light of the FBI

1 Disclosures. The CIA reviewed the FBI Disclosures, but declined to
2 alter its position that a *Glomar* response is supportable in these
3 circumstances. *See* Letter from Preet Bharara, United States
4 Attorney for the Southern District of New York, to Catherine
5 O'Hagan Wolfe, Clerk of Court at 1, *Florez v. CIA*, No. 15-1055-cv (2d
6 Cir. Dec. 18, 2015), ECF No. 57-1 [hereinafter "CIA Ltr."].

7 DISCUSSION

8 Mr. Florez challenges the CIA's *Glomar* response as
9 inadequate under the FOIA, but we do not reach the merits of his
10 challenge at this time. Because we find the FBI Disclosures relevant
11 to the issues presented, we remand for the District Court to pass on
12 the import of those documents in the first instance.

13 I. Standard of Review

14 By statute, a district court must review *de novo* an agency's
15 determination to withhold information requested under the FOIA,
16 *see* 5 U.S.C. § 552(a)(4)(B); *Main St. Legal Servs., Inc. v. Nat'l Sec.*
17 *Council*, 811 F.3d 542, , 542 (2d Cir. 2016), and we subsequently

1 review *de novo* the district court's ruling, see *Ctr. for Constitutional*
2 *Rights v. CIA*, 765 F.3d 161, 166 (2d Cir. 2014), *cert. denied*, 135 S. Ct.
3 1530 (2015). "The government bears the burden of demonstrating
4 that an exemption applies to each item of information it seeks to
5 withhold, and all doubts as to the applicability of the exemption
6 must be resolved in favor of disclosure." *Ctr. For Constitutional*
7 *Rights*, 765 F.3d at 166 (internal citations and quotation marks
8 omitted). Such "[e]xceptions to FOIA's general principle of broad
9 disclosure of Government records have consistently been given a
10 narrow compass." *Id.* (internal quotation marks and ellipsis
11 omitted).

12 "An agency may carry its burden by submitting declarations
13 giving reasonably detailed explanations why any withheld
14 documents fall within an exemption, and such declarations are
15 accorded a presumption of good faith." *Id.* (internal quotation
16 marks omitted). We find a *Glomar* response justified only in

1 “unusual circumstances, and only by a particularly persuasive
2 affidavit.” *N.Y. Times Co. v. Dep’t of Justice*, 756 F.3d 100, 122 (2d Cir.
3 2014) (internal quotation marks omitted); *see also Halpern v. FBI*, 181
4 F.3d 279, 295 (2d Cir. 1999) (“[T]he good faith presumption that
5 attaches to agency affidavits only applies when accompanied by
6 reasonably detailed explanations of why material was withheld.
7 Absent a sufficiently specific explanation from an agency, a court’s
8 *de novo* review is not possible and the adversary process envisioned
9 in FOIA litigation cannot function.”).

10 **II. FOIA Exemptions 1 and 3**

11 On the merits, which we do not reach in this opinion, this
12 appeal presents an ordinary *Glomar* inquiry: whether the existence
13 or nonexistence of documents, within the CIA’s possession and
14 responsive to Mr. Florez’s request, is itself a fact exempt from
15 disclosure under one of two FOIA exemptions. Because the
16 relevancy of the FBI Disclosures is determined by the scope of the

1 claimed exemptions, we briefly describe the two exemptions at
2 issue.

3 The CIA relies upon FOIA Exemptions 1 and 3 to support its
4 *Glomar* response. FOIA Exemption 1 “exempts from disclosure
5 records that are ‘specifically authorized under criteria established by
6 an Executive order to be kept secret in the interest of national
7 defense or foreign policy,’ and ‘are in fact properly classified
8 pursuant to such Executive order.’” *Ctr. for Constitutional Rights*, 765
9 F.3d at 164 (quoting 5 U.S.C. § 552(b)(1)). The agency asserts that the
10 existence or nonexistence of responsive records is information
11 properly classified pursuant to § 1.1(4) of Executive Order 13,526,
12 which permits classification of information that, if disclosed,
13 “reasonably could be expected to result in damage to the national
14 security, which includes defense against transnational terrorism,

1 and the original classification authority is able to identify or describe
2 the damage.” 75 Fed. Reg. 707, 707 (Dec. 29, 2009).⁵

3 FOIA Exemption 3 “permits the Government to withhold
4 information from public disclosure provided that: (1) the
5 information is ‘specifically exempted from disclosure by statute’;
6 and (2) the exemption statute ‘requires that the matters be withheld
7 from the public in such a manner as to leave no discretion on the
8 issue’ or ‘establishes particular criteria for withholding or refers to
9 particular types of matters to be withheld.’” *ACLU v. Dep’t of Justice*,
10 681 F.3d 61, 72 (2d Cir. 2012) (quoting 5 U.S.C. § 552(b)(3)). Here, the
11 CIA invokes Section 6 of the CIA Act of 1949, 50 U.S.C. § 3507
12 (exempting the CIA from any law that “require[s] the publication or

⁵ This excerpt states one of the four requirements for classification pursuant to Executive Order 13,526. Mr. Florez does not dispute that the other three requirements for classification 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,” 75 Fed. Reg. 707, 707 (Dec. 29, 2009), one of which is the “intelligence activities (including covert action) [and] intelligence sources or methods” category, *id.* at 709.

1 disclosure of the organization, functions, names, official titles,
2 salaries, or numbers of personnel employed by the Agency”), and
3 Section 102A(i)(1) of the National Security Act of 1947, 50 U.S.C.
4 § 3024(i)(1) (protecting “intelligence sources and methods from
5 unauthorized disclosure”).

6 **III. FBI Disclosures**

7 During the pendency of this appeal, the FBI Disclosures were
8 brought to our attention by Mr. Florez and submitted to us by the
9 CIA. Our threshold inquiry in this appeal is whether the FBI
10 Disclosures should be considered in adjudicating this case.
11 Mr. Florez, on one hand, urges us to consider the documents
12 ourselves and conclude that “the FBI release thoroughly
13 undermine[s] the CIA’s position.” Letter from David E. McCraw,
14 Attorney for Sergio Florez, to Catherine O’Hagan Wolfe, Clerk of
15 Court at 1, *Florez v. CIA*, No 15-1055-cv (2d Cir. Dec. 18, 2015), ECF
16 No. 53. The CIA, on the other hand, urges us to evaluate its

1 response to Mr. Florez’s FOIA request “as of the time it was made
2 and not at the time of [our] review,” CIA Ltr. at 1 (internal quotation
3 marks omitted), and therefore ignore the FBI Disclosures in our
4 analysis of the merits. If, however, we “determine that the FBI
5 disclosures are relevant to the issues on appeal, the CIA respectfully
6 requests that this case be remanded to the district court to allow the
7 CIA to submit additional declarations addressing the FBI
8 disclosures.” *Id.* at 3 n.2. Accordingly, we first address whether the
9 FBI Disclosures are relevant to the case. Answering that question in
10 the affirmative, we next consider whether we should ignore the
11 disclosures—resolving the merits based on the record as it existed at
12 the time of Mr. Florez’s FOIA request—or remand the case to allow
13 the District Court to weigh the significance of the documents in the
14 first instance. Our precedent, judicial efficiency, and common sense
15 all militate towards the latter and we therefore remand the case to
16 the District Court.

1 **A. Relevance**

2 Due to issues of timing, the District Court below never had
3 the opportunity to weigh the significance of the FBI Disclosures and,
4 accordingly, on appeal, “we lack the benefit of an evaluation of this
5 issue by the district court.” *Official Comm. of Unsecured Creditors of*
6 *WorldCom, Inc. v. SEC*, 467 F.3d 73, 79 (2d Cir. 2006) (Sotomayor, J.).
7 We therefore limit our inquiry at this juncture to whether the
8 documents are relevant to the merits of this appeal, such that we
9 need consider whether to accord the District Court the opportunity
10 to assess them in the first instance. *See Eric M. Berman, P.C. v. City of*
11 *New York*, 796 F.3d 171, 175 (2d Cir. 2015) (per curiam) (“[I]t is this
12 Court’s usual practice to allow the district court to address
13 arguments in the first instance.” (internal quotation marks omitted));
14 *see also, e.g., United States v. Salameh*, 152 F.3d 88, 159 (2d Cir. 1998)
15 (per curiam) (concluding that the “best solution” for evaluating
16 “newly discovered evidence” was for such evidence to “be

1 addressed . . . by the district court first”), *cert. denied*, 526 U.S. 1044
2 (1999).

3 “Evidence is relevant if: (a) it has any tendency to make a fact
4 more or less probable than it would be without the evidence; and (b)
5 the fact is of consequence in determining the action.” Fed. R. Evid.
6 401. *See also United States v. Certified Envtl. Servs., Inc.*, 753 F.3d 72, 90
7 (2d Cir. 2014) (“[T]he definition of relevance under Fed. R. Evid. 401
8 is very broad.”). More briefly stated, evidence is relevant if it has
9 “appreciable probative value.” *Relevant*, Black’s Law Dictionary
10 (10th ed. 2014); *see also United States v. Litvak*, 808 F.3d 160, 179–80
11 (2d Cir. 2015). “Relevance is a legal determination.” *United States v.*
12 *Staniforth*, 971 F.2d 1355, 1358 (7th Cir. 1992) (Posner, J.) *abrogated on*
13 *other grounds by United States v. Wells*, 519 U.S. 482 (1997).

14 Conversely, it is “the province of the finder of fact to determine
15 what weight to accord” such relevant evidence. *Jim Beam Brands Co.*
16 *v. Beamish & Crawford Ltd.*, 937 F.2d 729, 736 (2d Cir. 1991). *Accord*

1 *Barefoot v. Estelle*, 463 U.S. 880, 898 (1983) (“[T]he rules
2 of evidence generally extant at the federal and state levels anticipate
3 that relevant, unprivileged evidence should be admitted and its
4 weight left to the factfinder, who would have the benefit of cross-
5 examination and contrary evidence by the opposing party.”).

6 We conclude that the FBI Disclosures are relevant to the
7 present *Glomar* inquiry. At minimum, the FBI Disclosures are
8 germane to the CIA’s asserted rationale for asserting a *Glomar*
9 response, which is that confirming the existence or non-existence of
10 responsive records would confirm either the Agency’s interest or
11 disinterest in Dr. Florez as an intelligence asset. Specifically, the
12 documents appear to include the following revelations: (1) the FBI
13 investigated Dr. Florez’s background and tracked his career
14 development, official activities, and international relocations, *see*,
15 *e.g.*, CIA Ltr., Ex. A at 13, 27, 32, 36, 45–46; *id.*, Ex. B at 1; (2) the FBI
16 cultivated informants in order to obtain information concerning

1 Dr. Florez, including material which pertained to both his
2 professional and personal conduct, *see, e.g., id.*, Ex. A at 6, 16–17, 19,
3 21, 23, 29, 35, 45–46; and (3) several other government departments
4 and agencies provided to or received from the FBI information
5 concerning Dr. Florez, *see, e.g., id.*, Ex. A at 25 (Department of State;
6 Immigration & Naturalization Service (“INS”)), 27–28 (Department
7 of State), 34–35 (Department of State; Navy’s Office of Naval
8 Intelligence (“ONI”); Air Force’s Office of Special Investigations
9 (“OSI”); Army’s Chief of Staff for Intelligence (“ACSI”)), 47 (same);
10 *id.*, Ex. B at 1 (INS).

11 These public disclosures have appreciable probative value in
12 determining, under “the record as a whole,” “whether the
13 justifications set forth in the [CIA’s] declaration are logical and
14 plausible in this case.” *Ctr. for Constitutional Rights*, 765 F.3d at 168.
15 The CIA’s declaration relies heavily on the import of masking the
16 government’s intelligence interest (if any) in Dr. Florez and in

1 maintaining complete secrecy as to whether any intelligence
2 activities were focused on him. Though the FBI Disclosures do not
3 reveal the CIA's activities or involvement, they appear to suggest
4 that multiple government departments and agencies were
5 investigating, monitoring, and had an intelligence interest in
6 Dr. Florez, and that the FBI cultivated informants to gather
7 information about him. This now-public information may bear on
8 the CIA's position that the mere acknowledgement that it does or
9 does not have possession of documents that reference Dr. Florez
10 would harm the national security, or otherwise disclose Agency
11 methods, functions, or sources.⁶

⁶ Although the release of information from a third party agency may more directly bear upon whether another agency's revelation of the existence or nonexistence of records "reasonably could be expected to result in damage to the national security," 75 Fed. Reg. 707, 707 (Dec. 29, 2009), the determinative consideration under Exemption 1, there is no obvious reason why such third party disclosures cannot, in certain instances, likewise permit an inference contradicting an asserting agency's *Glomar* response under Exemption 3. Indeed, in this case, beyond a separate boilerplate recitation of the Exemption 3 framework, *see* Joint App'x at 54-56, the CIA has proffered a single general rationale with respect to both Exemptions. *See* Joint App'x at 43-46. We leave it to the District Court, in the first instance, to assess "on the whole record"

1 The Dissent disagrees that the FBI Disclosures even *might* bear
2 on the sufficiency of the CIA's *Glomar* response and therefore
3 concludes that we should deem those disclosures irrelevant. *See*
4 Dissent at 3-11. With respect to our dissenting colleague, we simply
5 diverge on this point. Whereas the Dissent casually dismisses the
6 FBI Disclosures as "disclos[ing] little regarding Dr. Florez," *see*
7 Dissent at 5, we believe the documents contain disclosures that bear
8 upon whether the CIA is able to carry its burden in this case, to wit,
9 "whether on the whole record the Agency's judgment objectively
10 survives the test of reasonableness, good faith, specificity, and
11 plausibility." *Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982).

12 The Dissent attempts to downplay the scope of the FBI
13 Disclosures at every turn, shrugging them off as revealing nothing
14 more than "that the FBI maintained some interest in Dr. Florez for
15 some period of time." *See* Dissent at 11. But to be clear, the

whether, in light of the recent FBI Disclosures, this rationale "objectively survives the test of reasonableness, good faith, specificity, and plausibility." *Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982).

1 disclosures in fact reveal a wealth of information, including that the
2 FBI maintained an active interest in Dr. Florez for well over a
3 decade, tracking the development of his career, including his foreign
4 deployments and travel on behalf of the Cuban government in
5 Europe, documenting his familial affiliations and personal affairs,
6 and taking a particular interest in the fact he had grown
7 disillusioned with the communist regime in Cuba and contemplated
8 defection to the United States. These findings were shared with a
9 myriad of other agencies, including, *inter alia*, the Department of
10 State, the Navy's Office of Naval Intelligence, the Army's Chief of
11 Staff for Intelligence, and the Air Force's Office of Special
12 Investigations, in addition to being circulated to the FBI's Foreign
13 Liaison Desk and FBI legal attachés in Madrid and Paris.⁷ We
14 believe this information would be probative to a reasonable finder of

⁷ The FBI Disclosures sometimes refer to these legal attachés as "legats." *See*, *e.g.*, FBI Disclosures at 40.

1 fact attempting to discern the “reasonableness, good faith,
2 specificity, and plausibility” of the CIA’s current *Glomar* response.

3 Rather than grapple with the full scope of the disclosures, the
4 Dissent fixates on the fact that the disclosures emanate from the FBI,
5 rather than the CIA. Although apparently hesitant to plainly say as
6 much, the Dissent essentially argues that, under the official
7 acknowledgment doctrine, the disclosures of other federal
8 agencies—regardless of the extent to which they bear on the validity
9 of another agency’s *Glomar* rationale—are never relevant and must
10 be wholly disregarded. *See* Dissent at 12-15 & n.7. This conclusion
11 confuses the act of waiver—which we uniformly recognize as a
12 privilege reserved to the agency asserting a *Glomar* response—with
13 an agency’s independent obligation to “carry its burden by
14 submitting declarations giving reasonably detailed explanations
15 why any withheld documents fall within an exemption,” *Ctr. For*
16 *Constitutional Rights*, 765 F.3d at 166 (internal quotation marks

1 omitted), a burden which can only be carried when the agency's
2 declarations "are not called into question by contradictory evidence
3 in the record." *Elec. Privacy Info. Ctr. v. Nat'l Sec. Agency*, 678 F.3d
4 926, 931 (D.C. Cir. 2012). In other words, a third party agency's
5 disclosures cannot waive the asserting agency's right to a *Glomar*
6 response, but such disclosures may well shift the factual
7 groundwork upon which a district court assesses the merits of such
8 a response.⁸

⁸ Indeed, the Dissent appears to recognize as much, repeatedly explaining why these *particular* disclosures supposedly do not bear upon the CIA's *Glomar* rationale. For instance, the Dissent touts the fact that the FBI Disclosures "do not even mention the CIA," Dissent at 3, or "even discuss the CIA or its activities," Dissent at 8. Accordingly, the "documents here . . . are simply not helpful in assessing the logic and plausibility" of the *Glomar* response at issue. Dissent at 5. See also Dissent at 11-12 ("[T]hese documents . . . are simply not relevant to the question whether the CIA's justification for its *Glomar* response *in this case* is plausible and makes sense" (emphasis in original)). This tacit acknowledgment that *certain* disclosures from a third party agency might weigh on the validity of a *Glomar* response (*i.e.*, those expressly referring to the asserting agency or its activities) makes all the more puzzling both the Dissent's refusal to allow the District Court to weigh the facts in the first instance (as the Dissent itself has plainly done) and its insistence on propagating a *per se* rule barring consideration of third party disclosures on the sufficiency of an agency's *Glomar* response.

1 The official acknowledgment doctrine prohibits agencies from
2 “provid[ing] a *Glomar* response when the existence or nonexistence
3 of the particular records covered by the *Glomar* response has been
4 officially and publicly disclosed.” *Wilner*, 592 F.3d at 70. This
5 waiver is limited only to official and public disclosures made by the
6 same agency providing the *Glomar* response, and therefore does not
7 “requir[e] [the agency] to break its silence” as a result of “statements
8 made by another agency.” *Frugone v. CIA*, 169 F.3d 772, 775 (D.C.
9 Cir. 1999) (refusing to “treat the statements of the [Office of
10 Personnel Management] . . . as tantamount to an official statement of
11 the CIA”).

12 But we do *not* impute the FBI’s decision to disclose
13 information about Dr. Florez to the CIA, or suggest that the FBI
14 Disclosures necessarily preclude the CIA’s right to assert a *Glomar*
15 response. *See Wilson v. CIA*, 586 F.3d 171, 187 (2d Cir. 2009)
16 (declining to “infer official disclosure of information classified by the

1 CIA from . . . [the] release of information by another agency”).
2 Rather, we simply conclude that the FBI Disclosures are relevant
3 evidence—unavailable to the District Court at the time of its initial
4 decision—bearing upon the sufficiency of the justifications set forth
5 by the CIA in support of its *Glomar* response. Put simply, the official
6 acknowledgment doctrine has no impact on our opinion in this case.
7 The Dissent’s exclusive reliance on the official acknowledgement
8 doctrine, to create out of whole cloth a rule limiting the evidence a
9 district court may consider in a *Glomar* inquiry, only serves to
10 demonstrate that it is promoting a solution of no applicability to this
11 case.⁹

⁹ The Dissent attempts to extrapolate this limitation from the “animating principles” of the official acknowledgment doctrine, which, it contends, bar the “‘anomalous result’ that disclosures by one agency could open the door to compelled disclosure by another.” See Dissent at 15 n.7 (quoting *Frugone*, 169 F.3d at 775). Suffice to say, we do not believe that allusion to the “animating principles” of an inapplicable doctrine serves to vindicate the Dissent’s proposed rule. Moreover, as already explained, this categorical limitation is at odds with the Dissent’s own acknowledgment that *certain* agency disclosures might, in some hypothetical instances, lead to disclosure by another agency. See, e.g., Dissent at 13.

1 Rather than place an arbitrary limitation on the range of
2 evidence a district court may consider in assessing the sufficiency of
3 an agency affidavit filed in support of a *Glomar* response, our cases
4 instruct that we accord “substantial weight” to such affidavits, but
5 only “provided [that] the justifications for nondisclosure are not
6 controverted by contrary evidence in the record” *Wilner*, 592
7 F.3d at 68 (citation omitted). *See also Elec. Privacy Info. Ctr.*, 678 F.3d
8 at 931 (district courts, in *Glomar* case, may grant summary judgment
9 on the basis of agency affidavits “if they are not called into question
10 by contradictory evidence in the record”). Indeed, categorically
11 excluding public documents as evidence when reviewing a *Glomar*
12 response flies in the face of our own instruction that “[i]n evaluating
13 an agency’s *Glomar* response . . . [t]he court should attempt to create
14 as complete a public record as is possible.” *Wilner*, 592 F.3d at 68
15 (internal quotation marks omitted). It defies reason to instruct a
16 district court to deliberately bury its head in the sand to relevant and

1 contradictory record evidence solely because that evidence does not
2 come from the very same agency seeking to assert a *Glomar* response
3 in order to avoid the strictures of FOIA. *See Gardels*, 689 F.2d at 1105
4 (“The test is not whether the court personally agrees in full with the
5 CIA’s evaluation of the danger—rather, *the issue is whether on the*
6 *whole record* the Agency’s judgment objectively survives the test of
7 reasonableness, good faith, specificity, and plausibility in this field
8 of foreign intelligence in which the CIA is expert and given by
9 Congress a special role.” (emphasis added)).

10 Having determined that the FBI Disclosures are relevant to the
11 merits of this case, we briefly address why remand is appropriate in
12 this instance.

13 **B. Remand**

14 Although we conclude that the FBI documents are relevant to
15 this case, our precedent nonetheless permits us to set aside the FBI
16 Disclosures by adhering to the so-called “general rule” that “a FOIA

1 decision is evaluated as of the time it was made and not at the time
2 of a court's review," *N.Y. Times*, 756 F.3d at 110 n.8. In our view,
3 however, departure from that practice is warranted in this instance.
4 Indeed, having now found the FBI Disclosures relevant to the
5 sufficiency of the asserted *Glomar* rationale, the CIA asks us to
6 proceed in this precise manner. *See* CIA Ltr. at 3 n.2.¹⁰

7 First, the policy underpinning the general rule does not apply
8 here. As one of our sister circuits has explained, "[t]o require an
9 agency to adjust or modify its FOIA response based on post-
10 response occurrences could create an endless cycle of judicially
11 mandated reprocessing each time some circumstance changes."
12 *Bonner v. Dep't of State*, 928 F.2d 1148, 1152 (D.C. Cir. 1991). This
13 case features no such judicially mandated reprocessing, as

¹⁰ The agency unambiguously stated that if we "were to determine that the FBI disclosures are relevant to the issues on appeal," it would "request[] that this case be remanded to the district court to allow the CIA to submit additional declarations addressing the FBI disclosures." *See* CIA Ltr. at 3 n.2. Having so determined, and for the additional reasons detailed herein, we accede to the agency's request.

1 Mr. Florez, not the courts, requested that the CIA modify its FOIA
2 response in light of the FBI Disclosures. Without being directed to
3 do so, the CIA then reviewed those documents and determined not
4 to alter its response to Mr. Florez’s FOIA request after due
5 consideration. *See* CIA Ltr. at 1 (“The CIA has reviewed [the FBI
6 Disclosures] and informed [Mr.] Florez’s counsel that they do not
7 alter . . . the CIA’s response . . .”). Thus, the CIA has already
8 voluntarily undertaken and completed any “reprocessing” that
9 could arise from remanding the case to allow the District Court to
10 consider the FBI Disclosures.¹¹

11 Second, consideration of the FBI Disclosures is “the most
12 sensible approach” in this case. *N.Y. Times*, 756 F.3d at 110 n.8

¹¹ Indeed, that is likely why the agency itself asks us to remand the case to the District Court, if we find the FBI Disclosures relevant to the issues on appeal. *See* CIA Ltr. at 3 n.2. Although the CIA has indicated that it may wish to submit additional declarations in support of its *Glomar* response on remand, such litigation is distinct from an agency’s often-lengthy processing of FOIA requests. *See* Adam Cohen, *The Media That Need Citizens: The First Amendment and the Fifth Estate*, 85 S. Cal. L. Rev. 1, 64 (2011) (describing agencies’ “generally lengthy processing delays” of FOIA requests).

1 (rejecting the government’s argument “that we cannot consider any
2 official disclosures made after the District Court’s opinion,” and
3 concluding that “[t]aking judicial notice” of “ongoing disclosures by
4 the Government made in the midst of FOIA litigation” is “the most
5 sensible approach”); *accord ACLU v. CIA*, 710 F.3d 422, 431 (D.C. Cir.
6 2013) (taking notice of statements post-dating district court’s grant
7 of summary judgment). If we were to proceed to the merits, and
8 therefore potentially affirm the decision of the District Court,
9 without considering the FBI Disclosures, we would accomplish little
10 more than consign Mr. Florez to filing a fresh FOIA request,
11 beginning the process anew with the FBI Disclosures in hand. Such
12 an outcome makes little sense and would merely set in motion a
13 multi-year chain of events leading inexorably back to a new panel of
14 this Court considering the precise question presented here, perhaps
15 in about two-and-a-half years (Mr. Florez’s FOIA request was
16 submitted in November 2013). This delay would not serve the

1 purposes of FOIA or the interests of justice, and it is inefficient to
2 send Mr. Florez back to the end of the line.¹² Because the CIA has
3 already reviewed the FBI documents and reaffirmed its *Glomar*
4 response, we know how the CIA would respond to Mr. Florez’s
5 renewed request, and there is no reason we should not take into
6 account the reality in which this action proceeds.¹³

7 Third, remanding the case is in keeping with our general
8 policy that the trial court should consider arguments—and weigh
9 relevant evidence—in the first instance. *See Quinones on Behalf of*
10 *Quinones v. Chater*, 117 F.3d 29, 36 (2d Cir. 1997) (“As the [factfinder]
11 did not address this evidence, we think it best to remand the case so
12 that he can consider in the first instance what weight to accord it.”);

¹² See Staff of H. Comm. on Oversight and Gov’t Reform, 114th Cong., FOIA Is Broken: A Report 36 (2016) (“Delays waste time and taxpayer money.”); Michael E. Tankersley, *How the Electronic Freedom of Information Act Amendments of 1996 Update Public Access for the Information Age*, 50 Admin. L. Rev. 421, 425 (1998) (“Despite the intention of the FOIA, the public’s access to government information is inefficient, ineffective, and costly.” (internal quotation marks omitted)).

¹³ Cf. Andrew Christy, *The ACLU’s Hollow FOIA Victory Over Drone Strikes*, 21 Geo. Mason L. Rev. 1, 8 (2013) (noting a “startling disconnect between reality and the law in Glomar cases”).

1 *Eric. M. Berman, P.C.*, 796 F.3d at 175; *Salameh*, 152 F.3d at 159; *accord*
2 *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 387 (2008)
3 (“Rather than assess the relevance of the evidence itself and conduct
4 its own balancing of its probative value and potential prejudicial
5 effect, the Court of Appeals should have allowed the District Court
6 to make these determinations in the first instance, explicitly and on
7 the record.”); *Pullman-Standard v. Swint*, 456 U.S. 273, 293 (1982)
8 (chastising the Court of Appeals for “fail[ing] to remand for further
9 proceedings” after determining that “the District Court had failed to
10 consider relevant evidence” and instead making “its own
11 determinations”).

12 In sum, proceeding to decision while willfully ignoring
13 relevant materials would breed judicial inefficiency and produce an
14 outcome contrary to that which might result from consideration of
15 additional materials that—through no fault of Mr. Florez’s—were
16 unavailable to him at the time the FOIA request was made.

1 **C. *Jacobson* Remand**

2 In the interests of judicial economy and orderly resolution of
3 this matter, we find prudent a limited remand to the District Court
4 pursuant to our practice under *United States v. Jacobson*, 15 F.3d 19,
5 22 (2d Cir. 1994). The remand permits the District Court to
6 reconsider its prior conclusion in light of the FBI Disclosures, and
7 any additional materials it permits the parties to submit, *see* N.Y.
8 *Times*, 756 F.3d at 110 n.8 (explaining that the panel granted “the
9 Government’s request for an opportunity to submit new material
10 concerning public disclosures made after the District Court’s
11 decision”), and then return its determination to us for consideration
12 without the need for a new notice of appeal, briefing schedule, and
13 reassignment to a new panel unfamiliar with the case. *See, e.g.,* N.Y.
14 *State Citizens’ Coal. for Children v. Velez*, 629 F. App’x 92, 94 (2d Cir.
15 2015) (summary order) (remanding pursuant to *Jacobson* “[b]ecause
16 th[e] issue was not raised in the district court,” and “we conclude

1 that it should be addressed in the first instance there”); *United States*
2 *v. Persad*, 607 F. App’x 83, 84 (2d Cir. 2015) (summary order)
3 (remanding pursuant to *Jacobson* “to address the disputed issue of
4 Vermont law and practice in the first instance, and to conduct any
5 further fact-finding that may be required”); *Weifang Xinli Plastic*
6 *Prods. Co. v. JBM Trading Inc.*, 553 F. App’x 42, 44 (2d Cir. 2014)
7 (summary order) (remanding pursuant to *Jacobson* “for the district
8 court to supplement the record”).

9 Accordingly, we remand to the District Court with
10 instructions to enter an order stating whether its prior conclusion
11 that the CIA adequately justified its *Glomar* response must be
12 revised in light of the FBI Disclosures and any post-remand

1 submissions.¹⁴ Within thirty days after such entry, either party may
2 restore jurisdiction to this panel by filing a letter with the Clerk of
3 this Court; this letter, not to exceed twenty double-spaced pages,
4 should set forth the grounds for claiming error in the District Court's
5 decision and attach a copy of the order. Upon the filing of such a
6 letter, the opposing party may file a response of the same maximum
7 length within fourteen days. Oral argument will be scheduled at the
8 panel's discretion. If neither party files an initial letter within thirty
9 days of the order's entry, appellate jurisdiction will be restored
10 automatically, and an order affirming the District Court will issue
11 immediately.

¹⁴ To be clear, we unequivocally pass no judgment on the sufficiency of the agency's rationale at this juncture. Nor do we presume to tell the District Court what weight or significance it must attach to the FBI Disclosures. Further, we note that Congress has recently passed—and the President signed into law—the FOIA Improvement Act of 2016. *See* FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538 (2016). We express no view as to the effect, if any, of that Act upon FOIA law generally or the CIA's *Glomar* response in this case. We leave these issues to the District Court, equipped with the relevant facts, in the first instance.

1 DEBRA ANN LIVINGSTON, *Circuit Judge*, dissenting:

2 I respectfully dissent because the majority's decision is, in my view, both
3 legally erroneous and likely to mislead other courts in future Freedom of
4 Information Act ("FOIA") litigation. The majority does not reach the merits of
5 this appeal, which arises from a FOIA request by Sergio Florez, who seeks
6 records from the Central Intelligence Agency ("CIA") concerning his deceased
7 father, Dr. Armando J. Florez ("Dr. Florez"), a Cold War-era Cuban diplomat
8 who ultimately defected to the United States. Instead, it determines that
9 declassified documents concerning Dr. Florez that were released by the Federal
10 Bureau of Investigation ("FBI") during the pendency of this appeal are relevant
11 to the CIA's position (reaffirmed after review of the FBI documents) that the
12 existence or nonexistence of responsive records in the CIA's possession
13 constitutes information exempt from disclosure pursuant to FOIA, rendering a
14 *Glomar* response appropriate.¹ Maj. Op. at 15-17. The majority remands to the

¹ This Circuit joined the D.C., First, Seventh, and Ninth Circuits in recognizing the propriety of a *Glomar* response in 2009. As this Court then noted, "[t]he *Glomar* doctrine is well settled as a proper response to a FOIA request because it is the only way in which an agency may assert that a particular FOIA statutory exemption covers the 'existence or nonexistence of the requested records' in a case in which a plaintiff seeks such records." *Wilner v. N.S.A.*, 592 F.3d 60, 68 (2d Cir. 2009) (quoting *Phillippi v. C.I.A.*, 546 F.2d 1009, 1012 (D.C. Cir. 1976)). The Court "join[ed] our sister Circuits in holding that 'an agency may refuse to confirm or deny the existence of records where to

1 district court for that court to consider, in the first instance, whether these FBI
2 disclosures affect its conclusion that the CIA's explanation for invoking FOIA
3 Exemptions (b)(1) and (b)(3) and declining to confirm or deny the existence of
4 responsive records appears "logical and plausible" and is thus sufficient. *Id.* at
5 15 (quoting *Ctr. for Constitutional Rights v. C.I.A.*, 765 F.3d 161, 168 (2d Cir. 2014));
6 see *Wilner*, 592 F.3d at 69-70, 73 (noting that in evaluating an agency's *Glomar*
7 response, agency affidavits are to be afforded "substantial weight" and are
8 sufficient when those affidavits describe the justifications for nondisclosure with
9 "reasonably specific detail" and the basis for invoking an exemption "appears
10 logical or plausible").

11 Respectfully, it is the legal determination that the FBI disclosures are
12 relevant to the disposition of this matter with which I disagree. I conclude that
13 the Government is correct in its contention that the FBI disclosures "do not bear
14 on this Court's consideration of the issues raised on appeal," Gov't Letter Br. 3,
15 so that there is no basis in FOIA or the cases construing it for the remand that the

answer the FOIA inquiry would cause harm cognizable under a[] FOIA exception.'" *Id.*
(second alteration in original) (quoting *Gardels v. CIA*, 689 F.2d 1100, 1103 (D.C. Cir.
1982)).

majority directs.² Accordingly (and unlike the majority) I would reach the merits and would affirm the judgment of the district court.

* * *

At the start, the FBI disclosures at issue, made pursuant to a separate FOIA request by Florez to the FBI, do not even mention the CIA, much less the existence or nonexistence of a classified relationship between Dr. Florez and the CIA, or the existence or nonexistence of Agency records regarding him. In such circumstances, it is difficult to discern (to say the least) how these FBI documents could affect, in any way, the adequacy of the CIA's showing (supported by declaration) that its *Glomar* response to Florez's FOIA request was appropriate — that information regarding the existence or nonexistence of records in the CIA's possession is exempt from disclosure under two separate FOIA exemptions.

The majority principally asserts that the FBI disclosures may call into question whether revealing the existence or nonexistence of records in the CIA's

² In remanding to the district court, the majority suggests that it is proceeding "in [the] precise manner" requested by the CIA. Maj. Op. at 26. This is incorrect. The CIA has asserted that the FBI's disclosures "do not affect the disposition of this case," that the FBI's decision to release information regarding Dr. Florez "does not cast doubt on the propriety of the CIA's claimed exemptions," and that, accordingly, the FBI documents "do not bear on this Court's consideration of the issues raised on appeal." Gov't Letter Br. 2-3. The Government requests remand only in a footnote, *id.* at 3 n.2, and only in the event that this Court rejects, as it has, the CIA's position that the FBI disclosures lack "any bearing on this Court's consideration of the issues raised in this appeal," *id.* at 1.

1 possession relevant to Dr. Florez reasonably could be expected to result in harm
2 to the national security.³ Maj. Op. at 17 & n.6. The FBI records, however, neither
3 address nor cast light on the national security harms that the CIA relied on
4 before the district court in asserting its entitlement to FOIA Exemption (b)(1):
5 *inter alia*, that confirmation of the existence or nonexistence of responsive records
6 reasonably could be expected to cause damage to the national security by
7 disclosing “whether or not the CIA has or had an intelligence interest in [Dr.]
8 Florez or his associates,” “whether or not the CIA engaged in intelligence
9 operations involving him, and the location of those operations,” and whether
10 “the CIA maintained any human intelligence sources related to an interest in
11 [Dr.] Florez” — the public revelation of which could jeopardize both human
12 intelligence sources and the Agency’s credibility in maintaining them. *See* J.A.
13 49-52 (emphases added).

14 These are significant national security concerns. As the D.C. Circuit has
15 repeatedly noted, sources abroad, fearing retaliation against themselves or family
16 and friends, “often refuse to aid the CIA absent assurances of confidentiality”

³ As pertinent here, FOIA Exemption (b)(1), *see* 5 U.S.C. § 552(b)(1), one of the two separate exemptions on which the CIA’s *Glomar* response was based, requires a showing that confirming or denying the existence of responsive records “reasonably could be expected to result in damage to the national security,” Exec. Order No. 13526, 75 Fed. Reg. 707, 707 (Dec. 29, 2009).

1 that logically must be honored “even decades after the death of the foreign
2 national,” lest the Government’s substantial interest in the effective operation of
3 its foreign intelligence service be thwarted. *Wolf v. C.I.A.*, 473 F.3d 370, 376-77
4 (D.C. Cir. 2007); *see also Fitzgibbon v. C.I.A.*, 911 F.2d 755, 761 (D.C. Cir. 1990)
5 (noting that “[i]f potentially valuable intelligence sources come to think that the
6 Agency will be unable to maintain the confidentiality of its relationship to them,
7 many could well refuse to supply information to the Agency in the first place”
8 (emphasis omitted) (quoting *Sims v. C.I.A.*, 471 U.S. 159, 175 (1985))). The FBI
9 documents here — which, notwithstanding the majority’s claim to the contrary,
10 disclose little regarding Dr. Florez and say *nothing at all* about any connection to
11 the CIA — are simply not helpful in assessing the logic and plausibility of such
12 concerns in the present case. Indeed, the majority’s claim to the contrary hinges
13 on reframing the CIA’s asserted national security interest as involving a
14 generalized concern with “masking the *government’s* intelligence interest (if any)
15 in Dr. Florez” — a reframing that, however subtle, simply gainsays the
16 significant national security concerns associated with and peculiar to the
17 effective operation of this country’s foreign intelligence service. Maj. Op. at 17
18 (emphasis added).

1 At any rate, all this is somewhat beside the point. For as it turns out, only
2 one of the two exemptions on which the district court based its decision (each of
3 which provides a separate and independent basis for a *Glomar* response) even
4 requires a showing that confirming or denying the existence of responsive
5 records reasonably could be expected to result in damage to the national
6 security. *See* 5 U.S.C. § 552(b)(1); *see also* Exec. Order No. 13526, 75 Fed. Reg. 707,
7 707 (Dec. 29, 2009). The other, FOIA Exemption (b)(3), provides simply that
8 FOIA's disclosure requirements do not apply to matters "specifically exempted
9 from disclosure by statute." 5 U.S.C. § 552(b)(3). As the Supreme Court has
10 stated, this exemption "applies to records that any other statute exempts from
11 disclosure, thus offering Congress an established, streamlined method to
12 authorize the withholding of specific records that FOIA would not otherwise
13 protect." *Milner v. Dep't of Navy*, 131 S. Ct. 1259, 1271 (2011) (citation omitted).
14 The sole issue for decision regarding the applicability of FOIA Exemption (b)(3),
15 moreover, as we have noted, "is the existence of a relevant statute and the
16 inclusion of withheld material within the statute's coverage." *Wilner*, 592 F.3d at
17 72 (quoting *Ass'n of Retired R.R. Workers, Inc. v. U.S. R.R. Ret. Bd.*, 830 F.2d 331,
18 336 (D.C. Cir. 1987)).

1 Both statutory provisions on which the district court relied — Section
2 102(A)(i)(1) of the National Security Act of 1947, as amended, 50 U.S.C. §
3 3024(i)(1), pursuant to which the Director of National Intelligence “shall protect
4 intelligence sources and methods from unauthorized disclosure,” and Section 6
5 of the Central Intelligence Agency Act of 1949, as amended, 50 U.S.C. § 3507,
6 exempting the CIA specifically from the provisions of any law requiring the
7 disclosure of the functions of Agency personnel — qualify as statutes of
8 exemption (a point Florez does not dispute on appeal). In such circumstances,
9 our inquiry is limited to the simple question whether the withheld information
10 “falls within the statute.”⁴ *Larson*, 565 F.3d at 868; *accord Wilner*, 592 F.3d at 72.

⁴ The majority seriously downplays the significance of the CIA’s reliance on FOIA Exemption (b)(3), contending that “the CIA has proffered a single general rationale with respect to both Exemptions.” Maj. Op. 18 n.6. This is incorrect. The CIA’s Exemption (b)(3) rationale focuses on the specific statutory provision at issue and the materials it protects — not on the potential effects of disclosure on the national security. The declaration of Martha M. Lutz, Chief of the CIA’s Litigation Support Unit, states specifically regarding the claimed exemption under the National Security Act, for instance, that “acknowledging the existence or nonexistence of records reflecting a classified connection to the CIA would reveal information that concerns intelligence sources and methods, which the National Security Act is designed to protect.” J.A. 55. Once the National Security Act has been invoked pursuant to FOIA Exemption (b)(3), our inquiry focuses narrowly on the question “whether the withheld material relates to intelligence sources and methods.” *Larson v. Dep’t of State*, 565 F.3d 857, 865 (D.C. Cir. 2009); *see also Fitzgibbon*, 911 F.2d at 761 (noting that Exemption (b)(3) “differs from other FOIA exemptions in that its applicability depends less on the detailed factual contents of specific documents; the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within the statute’s coverage” (quoting

1 Moreover, regarding the National Security Act exemption, in particular, the
2 Supreme Court has recognized that its plain language (requiring the Director to
3 protect intelligence sources and methods from unauthorized disclosure) “may
4 not be squared with any limiting definition” such as one protecting “only
5 confidential or nonpublic intelligence sources.” *Sims*, 471 U.S. at 169-70, 173
6 (noting that Congress intended National Security Act exemption “to protect the
7 secrecy and integrity of the intelligence process” and that this Act commits broad
8 power to the Director “to control the disclosure of intelligence sources”).⁵ Given
9 that the FBI disclosures here do not even discuss the CIA or its activities, it is
10 hard to fathom how these disclosures could possibly impact the logic and
11 plausibility of the CIA’s representation that a *Glomar* response is appropriate
12 pursuant to FOIA Exemption (b)(3) — that “acknowledging the existence or
13 nonexistence of [CIA] records . . . would reveal information” likely to lead to
14 unauthorized disclosures regarding *its* sources and methods and *its* clandestine

Ass’n of Retired R.R. Workers, 830 F.2d at 336)). The majority simply elides this distinction between Exemptions (b)(1) and (b)(3).

⁵ See also *Wolf*, 473 F.3d at 378 (noting in the context of FOIA Exemption (b)(3) that the Supreme Court “gives even greater deference to CIA assertions of harm to intelligence sources and methods under the National Security Act” then in the context of the (b)(1) exemption); *Students Against Genocide v. Dep’t of State*, 257 F.3d 828, 835 (D.C. Cir. 2001) (same); *Fitzgibbon*, 911 F.2d at 766 (same).

1 intelligence activities. J.A. 55; *see also Gardels*, 689 F.2d at 1105 (regarding
2 Exemption (b)(3), “[t]he test is not whether the court personally agrees in full
3 with the CIA’s evaluation of the danger — rather, the issue is whether on the
4 whole record the Agency’s judgment objectively survives the test of
5 reasonableness, good faith, specificity, and plausibility in this field of foreign
6 intelligence in which the CIA is expert and given by Congress a special role.”).
7 The majority does not plumb the mystery of how these documents could be
8 relevant to the CIA’s Exemption (b)(3) showing, or even attempt to do so.⁶

⁶ The majority contends that the FBI documents reflect that “the FBI maintained an active interest in Dr. Florez for well over a decade.” Maj. Op. at 19. Even if this were the case, it in no way undercuts the CIA’s assertion that information as to the existence or nonexistence of documents in *its* possession reflecting a classified connection *to the CIA* constitutes information concerning intelligence sources and methods that is exempt from FOIA disclosure by the National Security Act — an assertion to which this Court owes deference. *See Wolf*, 473 F.3d at 378; *Students Against Genocide*, 257 F.3d at 836.

At any rate, after careful review, not the “casual[]” one the majority inexplicably charges me with, *see* Maj. Op. at 18, I read the FBI disclosures very differently. Far from establishing the FBI’s “active” interest in Dr. Florez and providing a “wealth of information” about him, *see* Maj. Op. at 19, these documents, which total under 60 pages amassed over ten years, offer precious little insight into Dr. Florez beyond basic biographical information and speculation about his personal life. Nearly half of the documents divulge no information about him whatsoever. Some of the more reliable information concerning him, moreover, appears to come from two newspaper clippings among the documents, one announcing his appointment as *chargé d’affaires* in Washington, D.C. and the other his defection from the Castro regime.

To be sure, the FBI maintained a file on Dr. Florez and copied certain agencies (not including, of course, the CIA) on certain documents. Bureau offices on occasion

1 The FBI documents say nothing about the CIA’s interest or lack of interest
2 in Dr. Florez, nor do they address Agency sources and methods or the functions
3 of Agency personnel — the very matters protected from disclosure by the
4 exemptions that the CIA has asserted. I thus cannot agree that these records
5 even potentially affect the conclusion, already drawn by the district court, that
6 the CIA has adequately shown that the claimed exemptions apply by providing
7 “explanations of potential harm to national security” that are “both ‘logical’ and
8 ‘plausible’” and by demonstrating that “acknowledging the existence or
9 nonexistence of the records [Florez] seeks could reasonably be expected to lead to
10 the unauthorized disclosure of intelligence sources and methods as well as

exchanged whatever information they had about him, particularly (and unsurprisingly, given the FBI’s domestic counterintelligence orientation) when Dr. Florez was stationed in Washington, D.C. and, years later, when he decided to defect to the United States. The fact that the Bureau periodically communicated the scant information it had concerning Dr. Florez internally and with specified external agencies, however, hardly reveals the kind of defined, concrete interest that could even conceivably be of “appreciable probative value” in assessing whether the CIA, a separate agency with interests, sources, and methods of its own, met its burden in justifying its *Glomar* response. *Id.* at 16.

The majority does not even endeavor to set out the string of logical inferences that are necessary to establish the relevance of this material to the CIA’s assertion of FOIA Exemptions (b)(1) and (b)(3). It cannot, and for a simple reason. The mere fact that the FBI maintained some interest in a foreign diplomat who was stationed in this country for a period and who eventually defected here — the only non-conjectural conclusion that one may reach from these documents — is simply not germane to the question whether the CIA’s invocation of FOIA Exemptions (b)(1) and (b)(3) is adequately supported.

1 clandestine intelligence activities,” which are at the core of the functions of
2 Agency personnel. *Florez v. C.I.A.*, 2015 WL 728190, *6, *8 (S.D.N.Y. Feb. 19, 2015)
3 (quoting *Wilner*, 592 F.3d at 73).

4 * * *

5 The majority cannot explain how these FBI documents, which do not even
6 mention the CIA, much less any relationship between the CIA and Dr. Florez, are
7 relevant to assessing the logic and plausibility of the Agency’s justification for its
8 *Glomar* response. Faced with this difficulty, the majority faults me for even
9 *pointing out* that the FBI documents do not mention the CIA, asserting that to do
10 so is inconsistent with my *real* position that the disclosures of one federal agency
11 “are *never* relevant and must be wholly disregarded” in assessing the propriety
12 of another agency’s *Glomar* response. Maj. Op. 20 (emphasis added). I take no
13 such position, however, as to hypothetical cases not presently before this panel,
14 nor do I pronounce, as the majority repeatedly charges, “a rule limiting the
15 evidence a district court may consider in a *Glomar* inquiry.” *Id.* at 23. I do no
16 more than conclude (contrary to the majority) that these FBI documents,
17 suggesting (albeit without particulars, and to a limited degree) that the FBI
18 maintained some interest in Dr. Florez for some period of time, are simply not

1 relevant to the question whether the CIA's justification for its *Glomar* response in
2 *this case* is plausible and makes sense.

3 The majority also charges me with "exclusive reliance on the official
4 acknowledgment doctrine," *id.* at 23, which it says I use to "propagat[e] a *per se*
5 rule barring consideration of third party disclosures on the sufficiency of an
6 agency's *Glomar* response," *id.* at 22 n.8. Again, I urge no such rule. That said,
7 however, I cannot agree that this doctrine is not properly considered in assessing
8 the question whether these FBI documents are relevant to the CIA's rationale for
9 its *Glomar* response. Indeed, my conclusion that they are not is only reinforced
10 through more general consideration of the FOIA statute and *Glomar* doctrine
11 itself.

12 The FOIA statute recognizes different agencies' divergent missions,
13 interests, and methods, *see* 5 U.S.C. § 552 (requiring disclosure on an agency-by-
14 agency basis), and it is well established that the disclosure of material by one
15 agency will not be attributed to another, so as to forestall the second agency's
16 recourse to appropriate FOIA exemptions. *See Wilson v. C.I.A.*, 586 F.3d 171, 186
17 (2d Cir. 2009) ("[T]he law will not infer official disclosure of information
18 classified by the CIA from . . . release of information by another agency, or even

1 by Congress.”); *see also Moore v. C.I.A.*, 666 F.3d 1330, 1333 n.4 (D.C. Cir. 2011)
2 (release of a document “by the FBI” cannot constitute “an official
3 acknowledgment by the CIA”); *Frugone*, 169 F.3d at 774-75 (upholding the CIA’s
4 ability to make a *Glomar* response despite official disclosure of the same
5 information by the Office of Personnel Management). In the *Glomar* context
6 specifically, moreover, courts have long recognized the danger in “requiring [an
7 agency] to break its silence” as a result of “statements made by another agency.”
8 *Frugone*, 169 F.3d at 775. Agencies have different missions. “[I]t is logical to
9 conclude” regarding a foreign intelligence service like the CIA, for instance, “that
10 the need to assure confidentiality” to human intelligence sources and to foster
11 confidence in such assurances vis-à-vis past, present, and future sources may
12 require “neither confirming nor denying the existence of records” regarding
13 foreign nationals — whether or not they be subjects of interest or persons with
14 whom the Agency maintained a relation — for many years. *Wolf*, 473 F.3d at 377;
15 *see also Fitzgibbon*, 911 F.2d at 763-64 (noting “compelling interest” in protecting
16 both national security information and “the appearance of confidentiality so
17 essential to the effective operation of our foreign intelligence service” (quoting

1 *Sims*, 471 U.S. at 175)). Other agencies may not share this concern at all, or to the
2 same degree.

3 The majority acknowledges that, provided an agency has established a
4 proper basis for a *Glomar* response, an agency is not required to break its silence
5 “as a result of ‘statements made by another agency.’” Maj. Op. at 22 (quoting
6 *Frugone*, 169 F.3d at 775). The majority asserts that this precedent is inapplicable
7 here, however, because the majority is not “imput[ing] the FBI’s decision to
8 disclose information about Dr. Florez to the CIA, or suggest[ing] that the FBI
9 Disclosures necessarily preclude the CIA’s right to assert a *Glomar* response.”
10 Maj. Op. at 22-23. Instead, the majority asserts, “we simply conclude that the FBI
11 Disclosures are relevant evidence — unavailable to the District Court at the time
12 of its initial decision — bearing upon the sufficiency of the justifications set forth
13 by the CIA in support of its *Glomar* response.” Maj. Op. at 23.

14 But how can these documents be relevant, given that they do not even
15 mention the CIA, when the declarations supporting the CIA’s claimed
16 exemptions are centrally concerned with harms associated with revealing the
17 existence or nonexistence of documents reflecting a classified connection *to the*
18 *CIA*, in its role as the United States’ foreign intelligence service? With respect,

1 the majority is cavalier, I conclude, in its dismissal of the official
2 acknowledgement doctrine's relevance to this case. If, on remand, the district
3 court were to determine that the FBI documents render illogical or implausible
4 the CIA's affidavits (how the district court could reach such a conclusion, given
5 the FBI disclosures themselves, I cannot say), that conclusion *would* produce the
6 "anomalous result" of one agency's revelations obligating disclosure of classified
7 material by another. *Frugone*, 169 F.3d at 775. The majority's error in deeming
8 these irrelevant documents germane thus appears to invite by the back door
9 what the official acknowledgement doctrine prohibits at the front.⁷

⁷ The "official acknowledgment" case law, as I read it, has two animating principles. The cases ordering disclosure on the basis of official acknowledgment tend to emphasize the first of these: that an agency, having already disclosed certain classified information, cannot later refuse to confirm or deny the existence or nonexistence of that information. *See, e.g., N.Y. Times Co. v. Dep't of Justice*, 756 F.3d 100, 122 (2d Cir. 2014); *Wolf*, 473 F.3d at 379. The cases rejecting arguments of official acknowledgment, however, at least when those arguments rely on disclosures by a third party (often another agency), point to the harm of using one agency's disclosures as a "FOIA backdoor" to obligate another agency to reveal classified information. *See, e.g., Wilson*, 586 F.3d at 186; *Frugone*, 169 F.3d at 775.

To be sure, these courts did not address the novel theory of relevance before us here. Nevertheless, they uniformly resisted any temptation to reconsider the responding agency's justification for its *Glomar* response in light of third party disclosures. As the D.C. Circuit put it in *Frugone*, in discussing the National Security Act exemption, "[c]ommon sense suggests that [those charged with the protection of intelligence sources and methods] must have authority to maintain secrecy commensurate with [this statutory] responsibility," notwithstanding another agency's disclosures. 169 F.3d at 775. Here, although styled as an evidentiary matter distinct

1 With respect, I simply cannot see the basis on which these FBI documents
2 are relevant to the *Glomar* inquiry that the district court has already undertaken.
3 As we have said, “[i]n evaluating an agency’s *Glomar* response, a court must
4 accord ‘substantial weight’ to the agency’s affidavits, ‘provided [that] the
5 justifications for nondisclosure are not controverted by contrary evidence in the
6 record or by evidence of . . . bad faith.’” *Wilner*, 592 F.3d at 68 (quoting *Minier v.*
7 *C.I.A.*, 88 F.3d 796, 800 (9th Cir. 1996)); *see also* *Wolf*, 473 F.3d at 234 (noting that
8 courts “conducting *de novo* review in the context of national security concerns . . .
9 ‘must accord *substantial weight* to an agency’s affidavit concerning the details of
10 the classified status of the disputed record’” (quoting *Miller v. Casey*, 730 F.2d
11 773, 776 (D.C. Cir. 1984))). There is no evidence of bad faith here, and the FBI
12 documents are in no way contrary to the justifications for nondisclosure already
13 proffered by the CIA. In such circumstances, a court “should not conduct a more
14 detailed inquiry to test the agency’s judgment and expertise or to evaluate
15 whether the court agrees with the agency’s opinions.” *Larson*, 565 F.3d at 865;
16 *accord* *Wilner*, 592 F.3d at 76; *see also* *Students Against Genocide*, 257 F.3d at 835

from the “official acknowledgment” doctrine, the majority’s theory of relevance implicates the same concern: that Congress could not have intended the “anomalous result” that disclosures by one agency could open the door to compelled disclosure by another. *See id.*

1 (noting that “the assessment of harm to intelligence sources and methods is
2 entrusted to the Director of Central Intelligence, not to the courts”). To rely on
3 these documents as a basis for remand is to “second-guess the predictive
4 judgments made by the government’s intelligence agencies” in precisely the
5 manner we have in the past eschewed. *Wilner*, 592 F.3d at 76 (quoting *Larson*, 565
6 F.3d at 865).

7 I conclude, for substantially the reasons set out in the district court’s
8 careful and thorough opinion, that the CIA met its burden in justifying its *Glomar*
9 response. Because I can discern no basis on which the FBI disclosures draw into
10 question the CIA’s explanations as to why information regarding the existence or
11 nonexistence of records in its possession is exempted from disclosure by FOIA, I
12 respectfully dissent from the majority’s decision to remand and would, instead,
13 affirm.