**Committee To Protect Journalists v. CIA**

**Closed**

**Contracts Expression**

**Region and Country**: United States, North America

**Judicial Body**: Appellate Court

**Type of Law**: Civil Law, Administrative Law

**Themes**: Access to Public Information

**Tags**: Freedom of Information Act (“FOIA”), Intelligence Agencies, National Security

**Mode of Expression**: Documents

**Date of Decision**: August 27, 2021

**Outcome**: Access to Information Denied

**Case Number**: 20-5045

**Summary and outcome**

The U.S. Court of Appeals for the District of Columbia Circuit held that responses made by intelligence agencies to a FOIA (Freedom of Information Act) request, invoking the *Glomar* doctrine, in which they argued that confirming the existence or nonexistence of records would compromise national security, were valid under Exemption 1 of the FOIA. Both the Knight First Amendment Institute at Columbia and the Committee to Protect Journalists filed FOIA requests to five federal agencies seeking records about the duty, under Intelligence Community Directive 191, to warn a person when a known threat against them is identified by an intelligence community agency. In this case, the request inquired about records related to the duty to warn Saudi national and journalist Jamal Khashoggi about a potential threat to his life. Khashoggi was murdered inside the Saudi consulate in Istanbul on October 2, 12018. Each of the agencies, apart from the State Department, made *Glomar* responses, neither confirming nor denying the existence of documents responsive to the request. The Court opined that the intelligence agencies justified in a sufficient manner that confirming or denying the existence of such records could compromise national security and/or foreign policy, because both confirmation or denial could be of interest to “foreign adversaries” and be telling enough of the type and reach of the intelligence deployed by federal agencies.

**Facts**

On October 2, 2018, Jamal Khashoggi, a Saudi-Arabian journalist that “prominently criticized the Saudi Government” [p. 4], was murdered inside the Saudi consulate in Istanbul. Both the CIA and the United Nations investigated the murder. “On December 4, 2018, the CIA briefed Senate leaders. Shortly thereafter, Congress passed a joint resolution stating its belief that the Saudi Crown Prince had ordered the murder.” [p. 4].

On October 10, 2018, a reporter asked a State Department spokesman, at a press conference, whether the U.S. or the administration, had any prior knowledge there was a threat to Jamal Khashoggi. The spokesman responded by stating they had no advanced knowledge of Khashoggi’s death.

On October 19, 2018, the Knight First Amendment Institute at Columbia submitted FOIA requests to the Department of State and several intelligence-community agencies, which included the CIA, the NSA, the FBI, and the Office of the Director of National Intelligence (ODNI). Knight requested records concerning the duty imposed upon the intelligence community, under Directive 191 § E.1, to warn a person about a known threat, “as it relates to Jamal Khashoggi.” [p. 6]. The Committee to Protect Journalists (CPJ) filed the same request. Neither organization received a response, which prompted Knight and CPJ to sue.

During litigation, all the agencies, except the State Department, issued *Glomar* responses, which basically assert that acknowledging “the existence or nonexistence of responsive records is classified information protected by Exemption 1.” [p. 6] of the FOIA. Exemption 1 authorizes agencies not to disclose records “specifically authorized under criteria established by an Executive order to be kept in secret in the interest of national defense or foreign policy”, 5 U.S.C. § 552(b)(1).

The Knight Institute voluntarily dismissed all of it claims, while CPJ dismissed the ones against the State Department. CPJ and the four remaining agencies cross-moved to summary judgement. The United States District Court for the District of Columbia upheld the *Glomar* responses issued by the agencies, thus denying the requests made by Knight and CPJ.

CPJ appealed the decision arguing that the State Department had already officially “acknowledged that no responsive records exist, thus precluding the intelligence agencies from making a *Glomar* Response” [p. 7]. It also argued that “Exemption 1 does not cover the existence or nonexistence of responsive records.” [p. 7].

**Decision Overview**

Circuit Judge Katsas delivered the opinion for the U.S. Court of Appeals for the District of Columbia Circuit. The main issue for the Court was to determine if 1) the *Glomar* responses given by the intelligence agencies —neither confirming nor denying the existence of responsive records related to the prior knowledge of an existing threat to Jamal Khashoggi— were justified considering the State Department had already acknowledged having no such records, and 2) whether *Glomar* responses, is this case, are covered under Exemption 1.

Regarding the first issue, the Court, following the precedent stablished by *ACLU v. CIA*, 710 F.3d 422 (D.C. Cir. 2013), acknowledged that “an agency waives any right to make a *Glomar* response by disclosing whether responsive records exist”. [p. 7]. In order to determine if there has been an official acknowledgement, the Court described the criteria set out in *Fitzgibbon v. CIA*, 911 F.2d 755 (D.C. Cir. 1990): “To establish official acknowledgment, a plaintiff must identify information in the public domain that (1) matches the information requested, (2) is as specific, and (3) has ‘been made public through an official and documented disclosure.’” [p. 7].

For the sake of argument, the Court assumed that the State Department’s assertion about their lack of knowledge regarding an impending threat to Khashoggi matches an assertion “that the intelligence agencies have no responsive records” [p. 7]. The Court also assumed that statements made in the context of a press conference are formal enough as to be considered “‘official’ acknowledgment[s] by the agency making the statements.” [p. 8].

Despite that, the Court argued that the intelligence agencies have not waived their right to a *Glomar* response. Following *Frugone v. CIA* F.3d 772 (D.C. Cir. 1999), official disclosure can’t be “made by someone other than the agency from which the information is being sought.”. In the context of foreign relationships, the Court opined, confirmation or denial, when it comes from within one agency could have different effects, for example: “the CIA’s own authoritative statements would cause greater diplomatic perils than statements by another agency on the same matter.” [p. 9]. Considering these reasons, the Court followed the general rule set out in *Mobley v. CIA*, 806 F.3d 568 (D.C. Cir. 2015): “[D]isclosure by one federal agency does not waive another agency’s right to assert a FOIA exemption.”

This rule, the Court shows, has been applied in several cases. *Moore v. CIA*, 666 F.3d 1330 (D.C. Cir. 2011), for example, determined that “the FBI lacked the authority to make an official acknowledgment on behalf of the CIA.”. Likewise, *Military Audit Project v. Casey*, 656 F.2d 724 (D.C. Cir. 1981) “held that disclosures by the National Science Foundation about the *Glomar Explorer* did not bar the CIA from invoking Exemption 1 to withhold documents about the vessel.” [p. 9].

The Court noted that there’s one exception to this rule. *ACLU* established that if a public disclosure is “made by an authorized representative of the agency’s parent,” it is binding and considered “official” to the subordinate agency. For example, “the President, as the “head” of the entire Executive Branch, […] may make official acknowledgments binding on its agencies.” [p. 10].

For the Court, the aforementioned exception didn’t apply to the present case, since the FBI, CIA, NSA, or the ODNI, are not subordinate agencies of the State Department. In the opinion of the Court, even when it is true that the “State Department is authorized to act for the President” [p. 10] since “it wield[s] executive power on his behalf,” *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020), “the same can be said of all executive agencies.” [p. 10].

According to the Court, CPJ argued for a new approach, in which a statement made by an agency that’s a member of the intelligence community could bind the entire community. According to Exec. Order 13,470 § 1.7, 73 Fed. Reg. 45,325, the “intelligence community is an integrated group of agencies that ‘relies heavily on collaboration’” [p. 10-11]. For the Court such theory contradicted precedent. In *Moore*, even when “[b]oth agencies were members of the intelligence community […] we agreed with the district court that ‘the FBI lacked authority to make an official acknowledgment on behalf of the CIA’” [p. 11].

There was little basis, according to the Court, for allowing any agency in the intelligence community to make “official acknowledgments across large swaths of the entire Executive Branch” [p. 12], especially when several Departments have intelligence-community components, such as “Defense, Energy, Homeland Security, Justice, Treasury, and State.” [p. 12].

It was for those reasons, that the Court held that the statements from the State Department didn’t bind the other intelligence agencies and didn’t foreclose said agencies “from asserting their *Glomar* responses.” [p. 13].

When considering the second core issue of the decision —whether Glomar responses, in this case, are covered under Exemption 1 —, the Court opined that under Exemption 1 agencies can withhold classified information, “which includes information pertaining to intelligence activities, sources or methods if disclosure ‘could reasonably be expected’ to harm national security” [p. 13].

Following *Oglesby v. U.S. Dep’t of Army*, 79 F.3d 1172 (D.C. Cir. 1996), the Court explained that “[a]gencies may carry their burden of proof through declarations explaining why a FOIA exemption applies” [p. 13], and that, according to *Wolf v. CIA*, 473 F.3d 370 (D.C. Cir. 2011) “courts must accord *substantial weight* to an agency’s affidavit concerning the details of the classified status of the disputed record.”. The declaration of an agency, by its nature, will always be “speculative to some extent, in the sense that it describes a potential future harm so the agency’s justification for invoking a FOIA exemption is sufficient if it appears logical or plausible” ((Id.)).

The Court then argued that the intelligence agencies met this standard, since they explained in a sufficiently logical or plausible way why confirming “the existence or nonexistence of responsive records is classified information.” [p. 14]. According to the Court, confirming the existence of records could be revealing enough as to allow foreign adversaries to infer on “whom and how surveillance might have been conducted.” [p. 14]. Although CPJ argued that the sole confirmation of the existence of responsive records didn’t present a tactical advantage for foreign adversaries, the Court was unpersuaded.

“[T]he mere fact”, explained the Court, “that an intelligence agency was monitoring threats to specific individuals by specific governments at specific times would be useful information for foreign adversaries” [p. 15-16]. Furthermore, the Court mentioned that confirmation of existence of records by one agency such as the NSA, in charge of collecting signal intelligence, could “reveal something about the collection of signals of intelligence” [p. 16], which could be telling enough for foreign adversaries.

On the other hand, the confirmation of nonexistence of records “would show a ‘blind spot’ in United States Intelligence” [p. 14], proving a deficiency present in the intelligence information. Either response, said the Court, could compromise national security.

Even though CPJ argued that the declarations made by the intelligence agencies were not “specific enough to support *Glomar* responses” [p. 17], the Court disagreed by arguing that they did not require such specificity as to, based on *Military Audit Project*, “compromise intelligence methods and sources.”

Accordingly, the Court upheld the decision made by the lower court and reaffirmed the validity under Exemption 1 of the *Glomar* responses given by the different intelligence agencies.

**Decision Direction**

**Contracts Expression**

The decision made by the Court limits access to information, which is an essential right for the effective exercise of Freedom of Expression in a robust democracy, in which institutions must be transparent and can be held accountable by the press or the public. In this decision, the Court reaffirms the validity of *Glomar* responses made by the intelligence agencies under Exemption 1—even when other agencies already confirmed or denied the information—, arguing that potential or hypothetical risks to national security or foreign relationships are enough to justify the classification of records. In doing so, it also narrowed access to information in matters that demand constant scrutiny. This erodes the field of action of both journalists and concerned citizens for conducting meaningful research in matters of public relevance.

**Global Perspective**

**National perspective**

**Table of authorities**

**Related International and/or regional laws**

U.N.H.R.C., Annex to the Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions: Investigation into the unlawful death of Mr. Jamal Khashoggi, A/HRC/41/CRP.1

**National Standards, law or jurisprudence**

U.S., Executive Order 13,470, 2008, § 1.7, 73 Fed. Reg. 45,325

U.S., Freedom of Information Act, 2016, § 552(b)(1)

U.S., Intelligence Community Directive 191, 2015, § E.1

U.S., ACLU v. CIA, 710 F.3d 422 (D.C. Cir. 2013)

U.S., Fitzgibbon v. CIA, 911 F.2d 755 (D.C. Cir. 1990)

U.S., Frugone v. CIA F.3d 772 (D.C. Cir. 1999)

U.S., Mobley v. CIA, 806 F.3d 568 (D.C. Cir. 2015)

U.S., Military Audit Project v. Casey, 656 F.2d 724 (D.C. Cir. 1981)

U.S., Moore v. CIA, 666 F.3d 1330 (D.C. Cir. 2011)

U.S., Oglesby v. U.S. Dep’t of Army, 79 F.3d 1172 (D.C. Cir. 1996)

U.S., Seila Law LLC v. CFPB, 140 S. Ct. 2183 (2020)

U.S., Wolf v. CIA, 473 F.3d 370 (D.C. Cir. 2011)

**Case Significance**

**Precedential effect**

The decision establishes a binding or persuasive precedent within its jurisdiction.