**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

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| HARRY T. CASON,<br><br>Plaintiff,<br><br>v.<br><br>CENTRAL INTELLIGENCE AGENCY,<br><br>Defendant. | ) | Case Number: 1:11-cv-00001 (DAB) |

**PLAINTIFF'S OBJECTIONS**
**TO MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION**

Pursuant to Federal Rule of Civil Procedure 72(b) and Local Rule 72.1, plaintiff Harry Cason objects to the Magistrate Judge's report and recommendation (R&R) (Doc. 38) filed February 28, 2012. The Magistrate Judge erred in recommending that the Court deny Cason's motion for partial summary judgment (Doc. 23) and grant defendant Central Intelligence Agency's (CIA) motion for summary judgment (Doc. 15), by:

- Disregarding the legal standard used to determine when the Freedom of Information Act (FOIA) permits a categorical rule of withholding (*see* R&R at 18-20);
- Crediting the CIA's briefing position, instead of the agency's declaration to the contrary, with respect to the scope of the CIA's categorical *Glomar* policy (R&R at 20);
- Concluding that the existence or nonexistence of old records on Opus Dei is a classified fact that is not subject to automatic declassification (R&R at 22-24); and

- Determining, without any analysis of the CIA's specific rationales, that the agency plausibly explained how disclosure of the existence or nonexistence of records on Opus Dei could be expected to harm national security (R&R at 24-25).

Accordingly, the Court should decline to adopt the R&R. Instead, it should sustain Cason's objections and grant Cason's motion for partial summary judgment.

## ARGUMENT

### I. The Magistrate Judge Disregarded the Applicable Legal Standard for Determining Whether a Categorical Withholding Rule Is Permissible Under FOIA.

In his motion for partial summary judgment, Cason argued that under *Landano v. United States*, 508 U.S. 165 (1993), and *Nation Magazine v. U.S. Customs Service*, 71 F.3d 885 (D.C. Cir. 1995), the CIA's categorical *Glomar* policy with regard to requests for information about foreign organizations is overbroad and violates FOIA. *See* Doc. 24 at 4. As the D.C. Circuit explained in *Nation Magazine*, "[o]nly when the range of circumstances included in the category 'characteristically supports an inference' that the statutory requirements for exemption are satisfied is . . . a [categorical] rule appropriate." *Nation Magazine*, 71 F.3d at 893 (quoting *Landano*, 508 U.S. at 177) (alterations omitted). Under its *Glomar* policy, however, the CIA refuses to confirm or deny the existence of any records on a foreign organization. The policy admits no exception, even if, as here, (1) the CIA has already released some records concerning an organization, (2) the records concern an organization that was operating in a foreign country whose government regime is no longer in power, and (3) the records sought, if in existence, are so old that they would be subject to automatic declassification. *See* Doc. 24 at 5-6. As explained in more detail in Cason's motion for partial summary judgment, the range of circumstances covered by the CIA's categorical *Glomar* policy does not characteristically support an inference that Exemptions 1 and 3 apply, so the CIA's policy is impermissibly overbroad. *See id.* at 4-6.

The Magistrate Judge failed to recognize and apply the governing legal standard to determine whether the CIA's categorical *Glomar* policy is permissible. She dispensed with *Nation Magazine* and *Landano* by stating that these cases do not "involve[] the CIA, Exemptions 1 or 3, or issues of national security." R&R 18. She did not explain why the standard used to determine the permissibility of categorical rules under FOIA, as set forth in those cases, is inapplicable here. Because the Magistrate Judge failed to recognize the applicable legal standard or distinguish in any meaningful way the cases that established it, the Court should reject the R&R's conclusion that the CIA's categorical rule is not overbroad.

## II. The Magistrate Judge Erred by Crediting the CIA's Briefing Position Instead of the Agency's Declaration with Respect to the Scope of the CIA's *Glomar* Policy.

As noted above, Cason contends that the CIA's *Glomar* policy, as applied to the requested records, is overbroad and violates FOIA. The agency's declaration from Karen Pratzner (Pratzner Declaration) makes clear that the CIA refuses to confirm or deny the existence of documents on any "foreign organization," without exception. *See* Doc. 17 at 7 ("This particular request by the Plaintiff—for information about a foreign organization—is the type of request where CIA must refuse to confirm or deny the existence or non-existence of responsive records."); *id.* at 9 (stating that "a request for whether CIA maintains records on a particular foreign organization must be handled by neither confirming nor denying the existence of such records"); *id.* at 9-10 ("CIA must respond to requests for records on foreign organizations in a consistent manner, regardless of the apparent nature or relative benignity of the foreign organization."); *id.* at 10 ("CIA must use [a *Glomar* response] with every requester seeking records on any foreign organization, including in those instances in which CIA does not actually hold records on the subject organization.").

The Magistrate Judge ignored these portions of the Pratzner Declaration, instead crediting the CIA's "retreat[] [in its reply papers] . . . from the [Declaration's] broad statements" about the CIA's *Glomar* policy. R&R at 20. She accepted the CIA's argument in its reply "that it 'issued a Glomar response because (1) Plaintiff had requested records on a foreign organization for which the CIA had previously officially acknowledged possessing only two records; and (2) the CIA determined that under the circumstances of this case, to disclose whether it possesses additional responsive records reasonably could be expected to result in harm that is cognizable under [Exemptions 1 and 3].'" *Id.* (quoting Doc. 29 at 13-14). The Magistrate Judge concluded that "[o]n these narrower grounds the CIA does not purport to advocate a categorical rule." *Id.*[1]

The Magistrate Judge erred by crediting the CIA's argument in reply instead of the agency's declaration with respect to the scope of the CIA's *Glomar* policy. The Pratzner Declaration leaves no doubt that the agency has a blanket policy of invoking the *Glomar* doctrine for requests that seek records on any foreign organization, and the Magistrate Judge's conclusion to the contrary should be rejected.

## III. The Magistrate Judge Incorrectly Concluded That the CIA's *Glomar* Response Was Proper Under Exemption 1.

To rely on a *Glomar* response, the CIA "must tether its refusal" to one of FOIA's exemptions. *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 68 (2d Cir. 2009) (internal quotation marks omitted). The agency must show that the withheld information, in this case the fact of the

[1] This portion of the Magistrate Judge's analysis appears at the end of the R&R section in which she rejected Cason's argument that the CIA's *Glomar* policy is impermissibly overbroad. However, her conclusion that the CIA's policy is narrower than indicated by the Pratzner Declaration permeates Part II.A.3.a of the R&R. *See* R&R at 19 (stating that CIA's need for "uniform and consistent *Glomar* responses" "would apply to FOIA requests concerning a *number* of organizations" (emphasis added)); *id.* (stating that CIA's *Glomar* rule "would apply to FOIA requests concerning all such organizations, *under similar circumstances*" (emphasis added)).

existence or nonexistence of additional responsive materials on Opus Dei, "logically falls within the claimed exemption[]." *Id.* (internal quotation marks omitted).

The Magistrate Judge determined that the CIA's *Glomar* response was justified under Exemption 1, which protects records 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 Magistrate Judge rejected on two grounds Cason's argument that the existence or nonexistence of records on Opus Dei is not properly classified. First, after assuming that the underlying records, if they exist, could be subject to mandatory declassification because of their age, she concluded that the records—and the fact of their existence or nonexistence—fall into one of the exceptions to mandatory declassification. She determined that confirmation of additional records could be expected to disclose (1) a source, (2) application of a source or method, or (3) information that would seriously and demonstrably impair the United States' relationship with a foreign government, all exceptions to mandatory declassification. She did not address whether the first and second exceptions also require a showing that disclosure could be expected to clearly and demonstrably damage national security, a point of contention between Cason and the CIA. *See* Doc. 24 at 14; Doc. 31 at 12 n.6. Second, the Magistrate Judge concluded that the existence or nonexistence of Opus Dei records also satisfied the standard for initial classification, which requires a showing that the release of information could be expected to harm national security. She determined that the CIA's explanation of anticipated harm to national security at the time of classification was plausible. The Magistrate Judge erred in both respects.

**A. The Magistrate Judge incorrectly determined that exceptions to automatic declassification apply here.**

The Magistrate Judge determined that the existence or nonexistence of old documents on Opus Dei is a fact that falls within one of the exceptions to automatic declassification under Executive Order 12,958, as amended. R&R at 21 (citing 68 Fed. Reg. 15,315 (2003)).[2] She primarily relied on Section 3.3(b) of that order, which exempts from automatic declassification any records that could be expected to (1) reveal the identity of an intelligence source; (2) reveal the application of an intelligence source or method; or (3) reveal information that would seriously and demonstrably impair the United States' relationship with a foreign country. *Id.* at 22-23. The Magistrate Judge erred because the existence or nonexistence of records on Opus Dei does not logically fall within any of these exceptions.

First, there is no reason to believe that disclosing whether the CIA has additional responsive records on Opus Dei could be expected to reveal an intelligence source. *See id.* at 22. The CIA reasoned that disclosure of this information "could prompt Opus Dei or a foreign intelligence service to undertake an effort to identify and neutralize CIA sources." Doc. 33, Pratzner Supp. Decl. ¶ 6. But Cason's request seeks records on a well-known transnational organization during an extended time period, not just records, for example, about Opus Dei associates acting as intelligence sources or records that identify sources for the material contained in them. The CIA might reasonably withhold individual responsive records or portions thereof if their release could be expected to lead to the identification of a source. It might also reasonably submit a *Vaughn* index that is less detailed than typically required so as to

[2] Cason maintains that Executive Order 13,526 (2010) is the appropriate one under which to consider whether records are currently subject to automatic declassification. *See* Doc. 34 at 9. Because the Magistrate Judge's conclusion is wrong even under Executive Order 12,958, as amended, Cason focuses only on this earlier order.

protect, for example, the date of a record or the geographic area that it covers if those facts alone could lead to disclosure of a source. But confirming or denying the mere existence of any documents on Opus Dei, without more, cannot be anticipated to reveal an intelligence source.

The Magistrate Judge also erred by concluding that disclosure of the existence or nonexistence of additional records could be expected to reveal information about the application of an intelligence source or method. *See* R&R at 23. The CIA argues that "if the CIA has and disclose[s] that it has additional responsive records, such a disclosure would reveal that the CIA has been able to apply sources and methods successfully to gather additional information on Opus Dei." Doc. 33, Pratzner Supp. Decl. ¶ 7. On the other hand, "if the CIA does not have, and were to disclose that it does not have, any additional responsive records, such a disclosure would reveal either that it lacked an investigative interest in Opus Dei, or that it was unable to successfully apply sources and methods to gather additional information on Opus Dei." *Id.* But mere confirmation that the CIA has "information or records on" Opus Dei, as Cason's request specified, *see* Doc. 17, Ex. A, could not be expected to confirm the application of any particular sources or methods, or even that any sources or methods were applied to obtain that information, which may not be investigatory in nature. Moreover, the agency has already disclosed two documents on Opus Dei. Therefore, under the CIA's theory, the CIA has already confirmed its interest in Opus Dei and the general application of sources and methods through prior disclosures.

Finally, the Magistrate Judge unjustifiably credited the CIA's contention that disclosing whether the agency has additional responsive records could be expected to reveal information "that would seriously and demonstrably impair relations between the United States and a foreign government." R&R at 23 (quoting Doc. 33, Pratzner Supp. Decl. at ¶ 8). The CIA reasons that

by disclosing the existence of additional responsive documents on Opus Dei, "the governments of those countries where Opus Dei operates could construe that to mean that the CIA has collected information on, or recruited, one or more of their citizens (or that it has continued to engage in such practices)." *Id.* (quoting Doc. 33, Pratzner Supp. Decl. at ¶ 8). But as the CIA itself acknowledges, Opus Dei operates in many countries, and Cason's FOIA request is not geographically limited in scope. *See* Doc. 31 at 5 n.4. It is, therefore, implausible to contend, as the CIA does, that the mere acknowledgment of additional responsive records could be expected to lead any particular country to conclude that the CIA has collected information on or recruited its citizens to contribute to CIA investigations. Doc. 33, Pratzner Supp. Decl. at ¶ 8. Rather, a foreign country would at most know of the CIA's interest in Opus Dei generally, which itself could not plausibly harm foreign relations, much less "seriously and demonstrably" so, as required by Executive Order 12,958, as amended. In any event, the CIA has already released two documents relating to Opus Dei in Spain. On its own theory then, the CIA has already revealed information that might lead Spain to believe that the CIA has collected information on, or recruited, a Spanish citizen, yet the CIA does not point to any harm to our foreign relations with that country, much less serious and demonstrable harm as required by the executive order.

In sum, the thrust of the Magistrate Judge's R&R with respect to Cason's argument regarding automatic declassification is that the fact of the existence or nonexistence of additional responsive documents on Opus Dei falls within one of several exceptions to automatic declassification. As described above, this conclusion is implausible.

**B. The Magistrate Judge did not analyze with specificity each of the CIA's assertions of harm to national security before determining their plausibility.**

In his motion for partial summary judgment, Cason also argued that the existence or nonexistence of half-century-old records on Opus Dei is not properly classified because, at the

time of its classification between 2003 and 2010, *see* Doc. 31 at n.5, the CIA's conclusion that disclosure could harm national security was implausible. Doc. 24 at 8. To be considered for classification under Executive Order 12,958, as amended, information must pertain to one or more of seven enumerated categories of information, Exec. Order 12,958, § 1.4, some of which overlap with the exceptions to automatic declassification, *id.* § 3.3(b). The information's release must also be "expected to cause damage to the national security that the original classification authority is able to identify or describe." *Id.* § 1.2(a)(3). Cason argued that the disclosure of the existence of records was not reasonably likely at the time of classification to cause identifiable or describable damage to the national security. Doc. 24 at 19-22; Doc. 34 at 5-8.

The Magistrate Judge rejected Cason's argument without specifically analyzing the CIA's assertions of harm to national security. *See* R&R at 24-25. She concluded only that the agency's declaration in support of its motion for summary judgment "provides a plausible assertion that the withheld information was properly classified under EO 12,958, and shows that the withheld information logically falls within exemption 1." *Id.* at 25 (internal citations and quotation marks omitted). But she did not address in that section the CIA's specific rationales demonstrating anticipated harm to national security, which she had described but did not analyze in an opening portion of the R&R. *See id.* at 15-17.

Rather, the Magistrate Judge cited *Larson v. Department of State*, 565 F.3d 857, 862 (D.C. Cir. 2009), for the proposition that "[m]inor details of intelligence information may reveal more information than their apparent insignificance suggests because, much like a piece of jigsaw puzzle, each detail may aid in piecing together other bits of information even when the individual piece is not of obvious importance in itself." R&R at 24 (quoting *Larson*, 565 F.3d at 864). She also relied on language in *Amnesty International USA v. CIA*, 728 F. Supp. 2d 479,

504 (S.D.N.Y. 2010), disapproving any judicial "second-guessing" of the CIA's determination that disclosure of information would harm national security. R&R at 25.

Neither of the cases cited by the Magistrate Judge justifies her cursory review of the CIA's assertions of harm to national security. The quoted passage of *Larson*, when read in context, makes plain the CIA's overreach in this case. In the portion of *Larson* relied on by the Magistrate Judge, the court concluded that the CIA had properly withheld records under Exemptions 1 and 3 where it revealed that it had four responsive cables to a FOIA request but "sufficiently detailed the classified information in the withheld cables, why that information was classified, and why it logically must remain classified in the interest of national security." *Id.* at 864. The CIA explained that "[o]nly certain people would have been in a position to know the information contained in the cable" and that "[t]his information, when combined with the time period and information outside the cable, could provide enough clues to allow some individuals to determine who provided the information to the CIA." *Id.* at 863. The facts of this case are thus far removed from the context of *Larson*. The CIA has refused to reveal whether or not it has additional responsive records at all, much less specific facts about those documents that might, in conjunction with other information, be anticipated to harm national security.[3]

Likewise, in the portion of *Amnesty International* cited by the Magistrate Judge, the court considered the lawfulness of an agency's reliance on Exemption 3 to withhold records on the

[3] *Larson*, in a portion of the opinion not cited by the Magistrate Judge, approved a *Glomar* response to a request for records on the abduction and disappearance of a family in Guatemala. 565 F.3d at 861. The agency's argument that disclosing the existence of documents would "reveal vulnerabilities of communications systems, the success or lack of success in collecting information, and projects or plans relating to national security" was deemed plausible in the context of this tailored request for information about a specific crime and family. *Id.* at 866-67. In contrast, Cason's request seeks any information on Opus Dei until 1980; the CIA's response that it has additional records, without more, could not plausibly be expected to reveal sources or methods.

CIA's secret detention and interrogation programs. 728 F. Supp. 2d at 504. The plaintiff had argued that because the President prohibited the use of "enhanced interrogation techniques" (EITs) and "black site" detention centers, information about these programs could not be considered sources or methods information protected from disclosure. *Id.* The court disagreed, relying on CIA testimony that disclosure of records on EITs and detention centers would reveal not only historical practices but also current interrogation strategies. *Id.* Thus, in the portion of *Amnesty International* cited by the Magistrate Judge, the CIA sought to protect from disclosure certain identifiable documents, admittedly in existence and specifically alleged to contain information about current agency methods.[4] In that context, the court determined that it would not second-guess the agency's determination regarding likely harm to national security. Here, the CIA has argued that disclosing whether it has additional responsive records on Opus Dei, without more, could be expected to harm national security, but its rationale is far more speculative than in *Amnesty International*. It is entirely appropriate for this Court to scrutinize the illogical predictions of harm to national security on which the CIA's categorical *Glomar* policy is based.

## IV. The CIA Cannot Invoke the *Glomar* Doctrine Based on Exemption 3.

The Magistrate Judge determined that the CIA properly invoked the *Glomar* doctrine under Exemption l, so she did not reach the CIA's alternative argument based on Exemption 3.

[4] Elsewhere in *Amnesty International*, the court approved the CIA's use of a *Glomar* response to other portions of the plaintiff's FOIA request. *See* 728 F. Supp. 2d at 510-14. But those portions of the request, unlike Cason's request here, clearly sought information that would reveal the CIA's sources and methods. *See, e.g.*, *id.* at 511 (approving *Glomar* response to request seeking cables "discussing and/or approving the use of a slap" on a detainee); *id.* at 513 (approving *Glomar* response to request seeking documents exchanged between the U.S. Government and the Government of Yemen about the transfer of a detainee).

As argued in Cason's summary judgment papers, Exemption 3 also fails to justify the agency's *Glomar* response. *See* Doc. 24 at 11-15; Doc. 34 at 11-12.

**CONCLUSION**

For the foregoing reasons, the Court should reject the Magistrate Judge's Report and Recommendation (Doc. 38), deny the CIA's motion for summary judgment, and grant Cason's motion for partial summary judgment. This Court should also order the CIA either to disclose responsive records or to explain why those records or parts of those records are exempt from FOIA's disclosure requirements.

Dated: March 26, 2012

Respectfully submitted,

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