

To: Caroline A. Smith
Office of Information Policy
U.S. Department of Justice
1425 New York Avenue, Suite 11050
Washington, DC 20530-0001

From: American Civil Liberties Union
Citizens for Responsibility and Ethics in Washington (CREW)
OpenTheGovernment.org

October 19, 2011

Re: Docket No. OAG 140; AG Order No. 3259-2011; RIN 1105-AB27

Dear Ms. Smith:

The American Civil Liberties Union (ACLU), Citizens for Responsibility and Ethics in Washington (CREW), and OpenTheGovernment.org submit these comments in opposition to a provision of the proposed rule which would amend the Department of Justice's (DoJ) Freedom of Information Act (FOIA) Regulations by creating a new section 16.6(f)(2). (See Docket No. OAG 140; AG Order No. 3259-2011, published in the Federal Register on March 21, 2011).¹ This provision of the proposed rule would amend the FOIA regulations to allow agencies responding to a FOIA request to falsely state that no records exist whenever agencies determine that the requested documents they hold fit within exclusions under 5 U.S.C. section 552(c).² Authorizing government agencies to lie to FOIA requesters by affirmatively denying the existence of agency records when they actually exist undermines the purpose of FOIA, obstructs judicial review of agency FOIA decisions, and destroys integrity in government.

The ACLU is a national non-partisan organization with over half a million members and 53 affiliates nationwide dedicated to defending and preserving the individual rights and freedoms guaranteed in the Constitution and the laws of the United States. CREW is a nonprofit organization dedicated to promoting ethics and accountability in government and public life. OpenTheGovernment.org is a coalition of organizations and groups united to make the federal government a more open place in order to make us safer, strengthen public trust through government accountability, and support our democratic principles. Together we urge DoJ to amend the proposed section 16.6(f)(2) so that it does not authorize a government agency to actively mislead a requester in response to their FOIA request, or to abandon its effort to adopt it by permanently withdrawing that portion of the proposed rule.

The ACLU, CREW and OpenTheGovernment.org Oppose the Proposed Rule to Amend the DoJ FOIA Regulation by Creating a New Section 16.6(f)(2)

5 U.S.C. section 552(c), enacted as an amendment to FOIA in 1986, authorizes the government to “treat records as not subject to the requirements of” FOIA in three limited circumstances: first, where the request concerns an ongoing criminal investigation against the requester when there is reason to believe the requester is not aware of its pendency and premature disclosure would impair the investigation; second, where a FOIA request seeks records regarding a specific informant and the individual’s status as an informant has not been previously disclosed by the government; and third, where the FOIA request seeks “Federal Bureau of Investigation [records] pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information.”³ The provision was adopted to thwart attempts by criminals, terrorists, and hostile foreign nations to exploit FOIA to expose investigations against them, identify informants, or reveal classified information. The provision is intended to permit the government to avoid confirming the existence of responsive documents under FOIA requests when the mere confirmation that such records exist would damage ongoing investigations or reveal sensitive information the government is lawfully entitled to keep secret under FOIA. The current regulation, section 16.6(c), requires agencies to notify FOIA requesters of a denial of the request and the reasons for the denial, and to provide notice that the denial may be appealed. It does not authorize issuance of a misleading response stating that no records exist when, in fact, such records do exist but can lawfully be excluded from a response. However, recent litigation has made clear that, despite the regulation, the FBI is currently providing FOIA requesters with false statements denying that records exist.⁴ The proposed rule would authorize responding agencies to wholly mislead FOIA requesters by falsely denying that records exist.

The ACLU, CREW and OpenTheGovernment.org oppose this provision of the proposed rule because it is inconsistent with FOIA’s purpose of compelling government accountability through public access to information, it will impede the judicial review that ensures government agencies are properly interpreting exemptions in the FOIA statute, and it will dramatically undermine government integrity by allowing a law designed to provide public access to government information to be twisted to permit federal law enforcement agencies to actively lie to the American people. Moreover, the proposed rule is unnecessary, because the government can craft a response to FOIA requests for records that fall within section 552(c) exclusions that is truthful and informative, yet does not confirm whether excludable records exist. We suggest that when DoJ determines that a requester is trying to obtain information excluded from FOIA under section 552(c), the agency should simply respond that “we interpret all or part of your request as a request for records which, if they exist, would not be subject to the disclosure requirements of FOIA pursuant to section 552(c), and we therefore will not process that portion of your request.” This response requires no change to the current FOIA regulation.

FOIA was enacted to ensure government accountability by establishing a mechanism to compel public access to information held by the government, in recognition of James Madison’s famous admonition that “[a] popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both.”⁵ The 1965 Senate Report on FOIA described the prevailing reason for enacting the legislation:

Although the theory of an informed electorate is vital to the proper operation of a democracy, there is nowhere in our present law a statute which affirmatively provides for [an information policy of full disclosure]... It is the purpose of the present bill...to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language and to provide a court procedure by which citizens and the press may obtain information wrongfully withheld.⁶

The House of Representatives' report on the legislation makes clear that the statute is intended to provide a remedy for requesters who believe the government improperly withheld information under FOIA's exemptions through judicial review of agency decisions.⁷ The proposed rule would dramatically undermine FOIA's judicial review provisions.

If the proposed section 16.6(f)(2) works as intended and government agencies successfully mislead FOIA requesters by falsely responding that no documents exist, the proposed rule will thwart the judicial review of agency withholding decisions contemplated in the statute. Few reasonable requesters would litigate FOIA denials where their requests were denied on the grounds that no documents exist, because as far as they would know there would be nothing for a court to compel the government to disclose.

But implementation of the proposed rule may also likely have the perverse effect of significantly increasing FOIA litigation by parties who regularly file FOIA requests. Once it becomes well-known that agency "no records" responses to FOIA requests do not necessarily mean that there are no records, requesters will be compelled to litigate to determine whether the government's response is truthful, or instead is merely a false response issued pursuant to this proposed rule. For experienced institutional requesters like the ACLU or news organizations, litigation of many "no records" responses will become necessary to determine if records do in fact exist, and to ensure that any claimed exemptions or exclusions are properly applied.

Because the new rule is antithetical to the transparency goals of FOIA, because it authorizes actual false public statements by the government, and because it will distort the judicial review process, we oppose section 16.6(f)(2) of the proposed rule, and urge the DoJ not to adopt this provision.

The Proposed Rule's New Section 16.6(f)(2) is not supported by the Judicial Decisions Regarding FOIA Litigation

Court decisions leading up to and following the 1986 FOIA amendments that created the section 552(c) exclusions make clear that courts never intended to allow intelligence agencies to lie to requesters or the courts about the existence of records. Courts expected that judicial review would always be available as a remedy for any requester who believed that the government had improperly withheld records pursuant to FOIA. The courts further made clear that, while it is sometimes necessary to keep the existence or non-existence of certain government records secret, it is unacceptable to mislead a requester or the court, as the proposed rule would allow.

In *Phillippi v. CIA*, the D.C. Circuit Court of Appeals upheld the Central Intelligence Agency's use of what thereafter became known as a "Glomar response," in which a federal agency responding to a FOIA request "neither confirms nor denies" that responsive records exist.⁸ But while the Court of Appeals upheld the legality of a Glomar response, it required that the CIA provide a public affidavit explaining in as much detail as possible the basis for its claim that it could not confirm or deny the existence of the records. The court imposed that requirement because it was necessary to allow the requester to meaningfully assess and, if necessary, litigate the sufficiency of the government's claims that it could not confirm or deny even the existence of responsive records.⁹

Since the passage of the 1986 FOIA amendments, federal courts have on several occasions made clear that, even in national security cases where a Glomar response may be appropriate, the federal agency must provide enough information to permit effective judicial review of agency decisions to take place.¹⁰ In *Weiner v. FBI*, the Ninth Circuit Court of Appeals held that an FBI affidavit provided insufficient information "to enable the FOIA requester to challenge the FBI's conclusion that the documents withheld fell within [the claimed exemption]," and later that a CIA affidavit was inadequate to support the exemption claimed because it "fail[ed] to discuss the facts or reasoning upon which [the declarant] based his conclusion, and thus afford[ed] [the plaintiff] no opportunity to contest that conclusion."¹¹ This rule applies even to the most sensitive national security subjects. In *Berman v. CIA*, the Ninth Circuit re-affirmed that government agencies bear the burden of proving that FOIA exemptions are properly applied and that government affidavits justifying the exemptions must provide enough information to allow "plaintiff the opportunity to contest the CIA's conclusions," even for extremely sensitive classified "Presidential Daily Briefings."¹² A system that permits agencies to actively mislead requesters as to the existence of responsive documents is inconsistent with this principle.

In a rare case in which a false "no record" response to section 552(c) was specifically addressed, the D.C. Circuit Court of appeals in *Benavides v. Drug Enforcement Agency* originally held that, "we conclude from the text and legislative history that Congress intended subsection (c)(2) to provide express legislative authorization for a Glomar response, in which the agency neither confirms nor denies the existence of records, unless an informant's status has been officially confirmed."¹³ But this opinion was replaced with a supplemental opinion that withdrew this conclusion as unnecessary to the determination of the case.¹⁴

Most recently, in a case brought by the ACLU of Southern California, a District Court Judge expressed grave concerns over the FBI misleading the court as to the existence of documents through use of a response that would be authorized under the proposed rule. In *Islamic Shura Council of Southern California, et al. v. FBI*, the FBI lied to the plaintiffs by falsely denying the existence of documents requested under FOIA, but when the plaintiffs sued the FBI on other grounds, the court discovered that responsive documents did indeed exist.¹⁵ In the process of litigation, the FBI had also failed to disclose the existence of these responsive records to the court, and only revealed their existence when the court convened *ex parte, in camera* proceedings. The court issued a stern warning as to how detrimental such a "blatantly false" response could be, stating:

“The Government’s *in camera* submission raised a very disturbing issue... The Government asserts that it had to mislead the Court regarding the Government’s response to Plaintiff’s FOIA request to avoid compromising national security. The Government’s argument is untenable. The Government cannot, under any circumstance, affirmatively mislead the Court. The United States Constitution entrusts the Judiciary with the power to determine compliance with the law. It is impossible for the court to determine compliance with the law and to protect the public from Government misconduct if the Government misleads the Court. The Court simply cannot perform its constitutional function if the Government does not tell the truth.”¹⁶

The court went on to cite *United States v. Nixon* in cautioning that “the Executive Branch’s refusal to comply with judicial processes and procedures” would undermine the balance of powers between our branches of government and wholly undermine the courts in all matters of law.¹⁷

The Text and Legislative History of Section 552(c) Do Not Support the Position that Congress Intended to Allow Agencies to Falsely Deny Records Exist

The plain text of section 552(c) provides very little reason to suggest agencies may falsely deny the existence of responsive records. The FOIA statute contains two lists of exempt information, one in section 552(b) and another in section 552(c). The information described in section 552(b) is exempt through language that states “This section does not apply to matters that are...” and then lists the categories of exempted information in several provisions that follow. Section 552(c) authorizes the government to withhold three further categories of information, which it says agencies may treat as “not subject to the requirements of this section.” By its terms, the language creating the exemptions in 552(c) is not materially distinguishable from the language of section 552(b), yet no agency has claimed the government can give false responses pursuant to section 552(b).

Nonetheless, section 552(c)’s context strongly suggests that it does at least something more than merely reiterate the authority in section 552(b). Of the three groups of information exempt in section 552(c), at least two are themselves subsets of information already exempt in section 552(b).¹⁸ However, this is entirely consistent with the view that section 552(c) authorizes federal agencies to issue a Glomar response when a requester seeks documents that fall within its narrow categories.

Likewise, the legislative history of the 1986 amendments to FOIA that established the exclusions under 5 U.S.C. section 552(c) does not support the conclusion that Congress intended to provide the federal agencies the authority to respond to a FOIA request by falsely stating that no responsive records exist. The legislative history shows that such a tactic was proposed and rejected in favor of a Glomar-type response through which the government neither confirms nor denies that records exist. It also reveals that several members of Congress provided suggestions of possible responses that would neither actively mislead a requester nor definitively admit the existence of an exempted document. Furthermore, it is clear from the legislative history that Congress intended to provide requesters receiving an unfavorable response with an opportunity

for judicial review of the government's decision to withhold information under section 552(c). Thus, to adopt this proposed rule would not only undermine the intent of government openness and accountability that FOIA was originally passed to promote and protect, it would also contradict the intent of the very amendments the new rule would purportedly implement. Allowing federal law enforcement agencies to lie about the existence of documents to a FOIA requester is simply untenable as a solution to the government's need to protect the information described in section 552(c) from disclosure.

S. 774: The Freedom of Information Reform Act – Predecessor to 1986 Amendments

In 1986, Congress updated FOIA and added the exclusions in subsection 552(c), which were developed from language contained in a predecessor bill, S. 774, the Freedom of Information Reform Act. Section 10 of S. 774 provided the language for the version of the bill that ultimately passed in 1986 as part of the Anti-Drug Abuse Act of 1986.¹⁹

A House sponsor of the bill, Representative Glenn English affirmed that a Glomar response would be the appropriate response when an agency withheld information pursuant to section 552(c) exclusions: "I can't think of a single case where a good deal of the difficulty couldn't be eliminated by the use of a so-called Glomar response."²⁰ At one point he suggested that an agency "can say 'Either we are covered by an exemption under the FOIA or we don't have any information available,' that takes care of the problems... I can't think of a single thing that wouldn't be covered with that type of a response."²¹ Rep. English opposed allowing a false "no records" response and said a proposal by FBI Director William Webster that the agency say, "[we] don't have any records, and if we did they would be exempt," might be "lying." Rep. English suggested the more truthful and appropriate response would be "we don't have records or they are exempt."²²

Director Webster made comments during the hearing that alluded to earlier suggestions the FBI "should be allowed to lie about these things," but he ultimately said in a letter to Congress clarifying his testimony that the FBI was asking Congress to enact section 552(c) to allow Glomar responses. He stated unambiguously, "the FBI seeks statutory authority to use the 'Glomarization type' response to avoid any confusion and to be in full compliance with the letter and the spirit of the FOIA."²³

1986 FOIA Amendments – Senate Floor Debate

S. 774 stalled in the House during the 98th Congress, but the language pertaining to law enforcement responses to FOIA requests was included in an omnibus drug control bill enacted during the 99th Congress. In both the 98th and 99th Congresses, the amendments were consistently referred to by members of Congress and the officials from the Department of Justice as narrow and modest.

In floor statements in the Senate, the amendment's co-sponsors, Senators Patrick Leahy and Orrin Hatch referenced Glomar and re-affirmed the importance of judicial review, implying that the requestors would receive some notice records have been withheld, though not necessarily under what exclusion. Senator Hatch said that:

“while the effect of these provisions will be somewhat analogous to the situation in which an agency neither confirms nor denies the existence of responsive records – colloquially known as glomarization – their operation, both administratively and in court, will of necessity be different. An agency invoking one of these special exclusions will necessarily do so without the specific knowledge of the requester – because anything else would defeat the very intention of the exclusion – and any requester who wishes to challenge an agency’s possible application of an exclusion can expect the agency to defend against such a challenge with the automatic filing of an in camera affidavit, regardless of whether the exclusion was in fact employed in that case.”²⁴

Sen. Leahy described the provision as “a narrow and specific statutory authority for criminal law enforcement agencies to act on the principle that ‘an agency may refuse to confirm or deny the existence of records where to answer the FOIA inquiry would cause harm cognizable under a FOIA exemption.”²⁵

1986 FOIA Amendments – House Floor Debate

House co-sponsor Rep. Thomas Kindness’ floor statement made clear that he expected a Glomar response by an agency as a result of the 1986 amendments to be contestable by requesters, explaining that:

“...when the Agency’s position is that it can neither confirm nor deny the existence of the requested records, there are no relevant documents for the court to examine other than the affidavits which explain the Agency’s refusal. Therefore, to fulfill its congressionally imposed obligation to make a de novo determination of the propriety of a refusal to provide information in response to an FOIA request, the district court may have to examine classified affidavits in camera and without participation by plaintiff’s counsel. Before adopting such a procedure, however, the district court should attempt to create as complete a public record as is possible.”²⁶

Finally, Rep. English also made a floor statement where he referred to the three exclusions provided for in the amendments as the “so-called Glomar exclusions” that create an expansion that is “slight, precisely defined, and fully justified.”²⁷

Congressional Report: A Citizen’s Guide on Using the Freedom of Information Act and the Privacy Act of 1974 to Request Government Records

In the decades since the amendments have been implemented, the intent of Congress to allow agencies to use a Glomar-like response to protect ongoing investigations and classified information has not changed. Congress has published several editions of the report “A Citizen’s Guide on Using the Freedom of Information Act and the Privacy Act of 1974 to Request Government Records.” In each of these editions, the most recent having been published in 2005, the report states:

The exclusions allow an agency to treat certain exempt records as if the records were not subject to the FOIA. An agency is not required to confirm the existence of three specific categories of records. If these records are requested, the agency may respond that there are no disclosable records responsive to the request. However, these exclusions do not broaden the authority of any agency to withhold documents from the public. The exclusions are only applicable to information that is otherwise exempt from disclosure.²⁸

This response leaves open the possibility that responsive records exist, but that if they do they are not disclosable under FOIA. Additionally, the report concludes the section by stating that: “In enacting these exclusions, congressional sponsors stated that it was their intent that agencies must inform FOIA requesters that these [section 552(c)] exclusions are available for agency use. Requesters who believe that records were improperly withheld because of the exclusions can seek judicial review.”²⁹

So, from the passage of the 1986 amendments to present, Congress has continually reaffirmed its intent to allow for an agency to refuse to confirm or deny the existence of a document by using a Glomar-like response to a FOIA request. This was articulated in the hearings and floor statements that preceded the passage of the 1986 amendments, and has been confirmed in every Congressional report on the use of FOIA that has followed. Congress continues to assert its expectation that requesters be notified of an agency’s right to Glomarize its response, and of the requesters’ right to contest the agency’s refusal to confirm the existence of a document.

If the DoJ adopts section 16.6(f)(2) of the proposed rule, it will be authorizing the FBI and other agencies to act in direct contravention of Congress’ intent when it passed the 1986 FOIA amendments on which this rule is based. It will authorize the FBI to lie to the public about the existence of records – an idea that was proposed and rejected as unworkable during the debates that preceded the passage of the amendments. It will also undermine the ability of requesters to know when they are entitled to seek judicial review of an adverse determination, thus allowing the government to circumvent that level of accountability almost entirely. It is untenable to adopt a rule that so unambiguously flouts the intent of Congress and threatens to undermine the integrity of our government.

Proponents of the rule may argue that section 16.6(f)(1) of the proposed rule creates safeguards that would prevent abuse. That provision requires that an agency denying the existence of documents pursuant to section 16.6(f)(2) “confer with the Office of Information Policy (OIP) to obtain approval to apply the exclusion.”³⁰ While such direct oversight of the use of section 552(c) exclusions is critical and should be retained, ultimately any such internal oversight is insufficient to prevent abuse. As Congress foresaw, the opportunity for independent judicial review serves as a critical check to ensure the legality of any agency decision to withhold documents from a requester pursuant to a FOIA exemption. Internal oversight is not and cannot be as truly independent and impartial as judicial review and, as such, it cannot be substituted with any confidence that it will prevent abuse. Because the proposed section 16.6(f)(2) would undermine such judicial review by misleading requesters as to the existence of documents requested, it is unsustainable.

Alternative Responses Must Not Subvert FOIA or Interfere with Judicial Review

As shown above, congressional sponsors of the 1986 amendments suggested a number of possible Glomar-like responses to FOIA requests for records excluded under section 552(c) that do not require agencies to lie to the public, including the suggestion in the Citizen's Guide of a response stating that "there are no disclosable records responsive to this request." The ACLU, CREW and OpenTheGovernment.org would find a Glomar declaration in response to FOIA requests for records excludable under section 552(c) preferable to a false "no records" response. But a concern with allowing agencies to issue a Glomar response to a request for records that are excludable from FOIA under section 552(c) is that the agencies may be inclined to issue Glomar responses in other situations, such as when no responsive records actually exist or where other exemptions apply, so as to mask when section 552(c) exclusions are being applied. Such a result would deny those FOIA requesters who are not seeking exempt information under section 552(c) from the definitive and clear response they are entitled to under the statute, and would further undermine the FOIA statute's goal of creating greater government transparency.

Moreover, the use of Glomar responses outside of section 552(c) would increase litigation where records did not in fact exist because requesters would tend to challenge such a needlessly ambiguous response. Section 552(c) was enacted to thwart a narrow problem of defeating malicious efforts to confirm that a criminal investigation is taking place, identify an informant or verify the existence of classified programs. Providing such requesters with a refusal to confirm or deny that information exists could never be reasonably interpreted as a confirmation it exists. Obscuring FOIA responses for the vast majority of honest and appropriate requesters would be an inappropriate way of handling a tiny minority of requests from malicious actors, and the ACLU, CREW and OpenTheGovernment.org oppose the expanded use of Glomar responses to requests not excludable under section 552(c).

A Suggested Response Which is Both Truthful and Informative and Requires No Amendment to the Current Regulation

The ACLU, CREW and OpenTheGovernment.org suggest another response to FOIA requests for records excludable under section 552(c) that is both truthful and informative, yet does not confirm the existence of exempted documents or require changes to the existing DoJ FOIA regulation. Where DoJ determines that the requester is trying to obtain information excluded from FOIA under section 552(c), the agency could simply respond that "we interpret all or part of your request as a request for records which, if they exist, would not be subject to the disclosure requirements of FOIA pursuant to section 552(c), and we therefore will not process that portion of your request." Any request for information excludable under 552(c) could receive this response, regardless of whether the documents sought actually exist. The advantage of this response is that it is a clear expression of the government's reasoning for not processing the request, and therefore would allow the requester to challenge the government's interpretation of the request, yet it provides the requester with no confirmation of the existence of any documents.

Conclusion

Section 16.6(f)(2) of the DoJ's proposed rule is untenable because it would authorize the FBI to actively mislead a FOIA requester about the existence of documents. Such a rule would contradict the open government goals of FOIA, and cannot be reconciled either with judicial decisions concerning FOIA or the intentions of Congress when it passed the 1986 FOIA amendments that created section 552(c).

As explained above, alternative responses are available that would protect information that ought to remain secret under section 552(c) while not undermining the integrity of our government by explicitly sanctioning false responses to members of the public seeking information through FOIA. The ACLU, CREW and OpenTheGovernment.org suggest agencies respond to requests for information excludable under section 552(c) by saying, "we interpret all or part of your request as a request for records which, if they exist, would not be subject to the disclosure requirements of FOIA pursuant to section 552(c), and we therefore will not process that portion of your request."

The Court in *Islamic Shura Council v. FBI* rightly closed its analysis of the Government's actions in misleading the Court by stating "Deception perverts justice. Truth always promotes it."³¹ If adopted, section 16.6(f)(2) of the proposed rule would surely undermine the goals of FOIA and lead to a perversion of justice.

In light of the foregoing concerns, the ACLU, CREW and OpenTheGovernment.org oppose the provision of the proposed rule that would allow agencies to falsely deny the existence of responsive records, and urges DoJ to amend section 16.6(f)(2) so that it does not authorize a government agency to actively mislead a requester in response to their FOIA request, or to abandon its effort to adopt it by permanently withdrawing that portion of the notice.

Thank you for your consideration of this important matter. If you have questions or comments, please contact Michael German at 202-544-1681.

Sincerely,

American Civil Liberties Union

Citizens for Responsibility and Ethics in Washington

OpenTheGovernment.org

¹ Freedom of Information Act Regulations, 76 Fed. Reg. 15,236 (Mar. 21, 2011) (to be codified at 28 C.F.R. pt. 16).

² *Id.* at 15,239.

³ 5 U.S.C. § 552(c) (1986).

⁴ *Islamic Shura Council v. FBI*, No. SACV07-1088-CJC(ANx) (C.D.Cal.-S.D. filed Apr. 27, 2011).

⁵ Letter from James Madison to W.T. Barry (Aug. 4, 1822), available at http://www.constitution.org/jm/18220804_barry.htm.

⁶ S. REP. NO. 89-813, at 38 (1965).

⁷ H. REP. NO. 89-1497, at 30 (1966).

⁸ *Phillippe v. Central Intelligence Agency*, 546 F.2d 1009, 1012 (D.C. Cir., 1976). Note: the Glomar Response is named for the ship, the Glomar Explorer, that was at the center of the FOIA request. *See also* *Gardels v. Central Intelligence Agency*, 689 F.2d 1100, 1103 (DC Cir., 1982) (In *Gardels v. CIA*, the Court also held that a Glomar Response was appropriate “where to answer the FOIA inquiry would cause harm cognizable under an FOIA exception. *See Phillippi v. Central Intelligence Agency*, 546 F.2d 1009, 1012 (D.C.Cir.1976); *Phillippi v. Central Intelligence Agency*, 655 F.2d 1325, 1330 (D.C.Cir.1981). The proper standard to determine whether section 403(d)(3) applies to such a situation is whether the CIA demonstrates that an answer to the query “can reasonably be expected to lead to unauthorized disclosure of intelligence sources and methods.” *Halperin v. Central Intelligence Agency*, *supra*, 629 F.2d at 147.”).

⁹ *Phillippe v. Central Intelligence Agency* *supra* note 8, at 1013.

¹⁰ *See Wiener v. FBI*, 943 F.2d 972, 982, 983 (9th Cir. 1991).

¹¹ *Id.*

¹² *Berman v. CIA*, 501 F.3d 1136, 1141 (9th Cir. 2007).

¹³ *Benavides v. Drug Enforcement Admin.*, 968 F.2d 1243, 1246 (D.C. Cir.)(1992).

¹⁴ *Benavides v. Drug Enforcement Admin.*, 976 F.2d 751 (D.C. Cir.)(1992).

¹⁵ *Islamic Shura Council v. FBI* *supra* note 4.

¹⁶ *Id.* at 3.

¹⁷ *Id.* at 9. *See also* *United States v. Nixon*, 418 U.S. 683, 707 (1974).

¹⁸ *See* 5 U.S.C. 552(c)(1), exempting a subset of information already described in subsection 552(b)(7)(A); and 5 U.S.C. 552(c)(3), exempting information already described in subsection 552(b)(1).

¹⁹ Pub. L. No. 99-570, §§ 1801-04, 100 Stat. 3207-48 to 50 (1986).

²⁰ S. 774: Hearing before the House Committee on Government Operations Subcommittee on Government Information, Justice, and Agriculture, 98th Cong. 823, at 887 (1983).

²¹ *Id.* at 888.

²² *Id.* at 896.

²³ *Id.* at 909.

²⁴ Cong. Rec. S16505 (daily ed. Oct. 15, 1986) (statement of Sen. Hatch).

²⁵ Cong. Rec. S14297 (daily ed. Sept. 30, 1986) (statement of Sen. Leahy).

²⁶ Cong. Rec. H9467 (daily ed. Oct. 8, 1986) (statement of Rep. Kindness).

²⁷ Cong. Rec. H9463 (daily ed. Oct. 8, 1986) (statement of Rep. English).

²⁸ H. Rep. 226, 109th Cong., 1st Sess. 19 (2005).

²⁹ *Id.*

³⁰ 76 F.Reg. 15,236 *supra* note 1, at 15,239.

³¹ *Islamic Shura Council v. FBI* *supra* note 4, at 17.