IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

THE TRANSPARENCY PROJECT,

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF JUSTICE, et al.,

Defendants

Case No. 4:20-cv-467-SDJ

MOTION TO EXPEDITE RULING ON MAGISTRATE REPORT and MOTION FOR LEAVE TO FILE SUPPLEMENTAL EVIDENCE

NOW COMES the Plaintiff, moving the Court to expedite its ruling on Plaintiff's Objection to Report and Recommendation of United States Magistrate Judge ("Plaintiff's Objection")(Dkt. #68) and further moving the Court to grant leave to file supplemental evidence in support of the Objection:

Background Facts

On February 13, 2024, journalists Matt Taibbi, Michael Shellenberger, and Alex Guttentag reported that CIA officials initiated the "Russian collusion" hoax in bad faith, namely by inciting foreign intelligence services to spy on 26 individuals affiliated with the Trump campaign. *See* "CIA Had Foreign Allies Spy On Trump Team, Triggering Russia Collusion Hoax, Sources Say," *Public*. https://public.substack.com/p/cia-had-foreign-allies-spy-on-trump (Exhibit 1). The report suggests that the CIA was a very active player in domestic, partisan politics, and the article understandably attracted attention from other media outlets. *See, e.g.*, Victor Nava, "CIA and foreign intelligence agencies illegally targeted 26 Trump associates

before 2016 Russia collusion claims: report," February 13, 2024 *New York Post*, https://nypost.com/2024/02/13/news/cia-and-foreign-intelligence-agencies-illegally-targeted-26-trump-associates-before-2016-russia-collusion-claims-report/ (Exhibit 2). The following day, Mr. Taibbi, Mr. Shellenberger, and Ms. Guttentag wrote about a missing binder of declassified intelligence information about the origins of the Russian collusion hoax. *See* "U.S. Government Is Hiding Documents That Incriminate Intelligence Community For Illegal Spying And Election Interference, Say Sources," *Public*, https://public.substack.com/p/us-government-is-hiding-documents (Exhibit 3). That article also attracted broader media interest. *See, e.g.,* Susan Ferrechio, "Missing binder at center of new claim that CIA drummed up spy operation on Trump's 2016 campaign," https://www.washingtontimes.com/news/2024/feb/14/missing-binder-at-center-of-new-claim-that-cia-dru/ (Exhibit 4). The existence of the binder is acutely relevant here because it would be covered by one of the Plaintiff's requests for records:

> Former CIA Director John Brennan testified that in the summer of 2016, he convened a task force / working group involving the CIA, NSA and FBI to investigate intelligence showing contact between Russian officials and Trump affiliates. I wish to view all documents, records, and/or communications that (1) identify the name and agency affiliation of each member of the task force / working group as well as (2) the dates that each such person began and ceased working with the group. I also wish to view all documents, records, and/or communications indicating whether the task force / working group fabricated or attempted to fabricate evidence of collusion between Donald Trump (or his presidential campaign) and Russian officials. If, for example, individuals from the task force tried to create the false impression that Trump campaign officials were acting at the behest of Russian officials, any and all evidence of that should be produced.

First Amended Complaint ("FAC")(Dkt. #5) ¶11(c) (emphasis added). The Plaintiff argued in its objection to the magistrate report that the Defendants' *Glomar* response, *i.e.*, that the CIA could neither confirm nor deny the existence of responsive records, was improper in light of Exec. Order 13,526 §1.7, namely because any responsive documents could not properly be classified. Plaintiff's Objection 11-12. After the foregoing reports by Mr. Taibbi, et al. were published, the

Plaintiff learned that the binder had, in fact, been declassified. *See* January 19, 2021 Memorandum on Declassification of Certain Materials Related to the FBI's Crossfire Hurricane Investigation, https://trumpwhitehouse.archives.gov/presidential-actions/memorandum-declassification-certain-materials-related-fbis-crossfire-hurricane-investigation/ (Exhibit 5).

Motion to expedite

This case has been pending for almost four years. The Plaintiff's Objection was filed on September 26, 2022, almost seventeen months ago. The foregoing reports reflect a heightened public interest in whether the CIA conspired to frame a Presidential candidate and, subsequently, a sitting President. Furthermore, a federal election is approaching in November, and the public has an acute interest in learning whether the CIA previously attempted to frame one of the leading candidates, *i.e.*, former President Donald J. Trump. Time is of the essence.

> "The value of [FOIA] information is partly a function of time." *Fiduccia v. D.O.J.*, 185 F.3d 1035, 1041 (9th Cir. 1999)… "Telling the requester 'You'll get the documents 15, or eight, years from now' amounts as a practical matter in most cases to saying 'regardless of whether you are entitled to the documents, we will not give them to you.' " *Fiduccia*, 185 F.3d at 1041.

American Civil Liberties Union Foundation of Southern California v. United States Immigration and Customs Enforcement ("*ACLU*"), 2023 WL 8539484, at *10 (C.D. Cal., Dec. 8, 2023, No. 2:22-CV-04760-SB-AFM). "[T]he Court must ensure that the fullest possible disclosure of the information sought is timely provided—as 'stale information is of little value.'" *Pub. Health & Med. Professionals for Transparency v. Food & Drug Admin*., No. 4:22-CV-0915-P, 2023 WL 3335071, at *2 (N.D. Tex. May 9, 2023), quoting *Payne Enters., Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988). In light of the heightened public interest, the Plaintiff respectfully moves the Court to expedite its ruling on Plaintiff's Objection.

The Plaintiff further moves the Court to expedite the production of any responsive documents. In *ACLU*, the court noted that the plaintiff filed its FOIA request some 19 months before, and it ordered the Government to produce records at the rate of 3,000 pages per month. 2023 WL 8539484, at *10 (citing other cases). In this case, the Plaintiff filed its request almost four years ago. In *Public Health & Med. Professionals for Transparency v. Food & Drug Admin.*, no delays were alleged against the Government, yet the court ordered the FDA to produce documents at a rate of 55,000 pages per month given the records' importance to the public. No. 4:21-CV-1058-P, 2022 WL 90237, at *2 (N.D. Tex. Jan. 6, 2022). In a related case, the Northern District of Texas ordered the FDA to compress its proposed production period from 23.5 years to 26 months. *Pub. Health & Med. Professionals for Transparency v. Food & Drug Admin.*, No. 4:22-CV-0915-P, 2023 WL 3335071, at *2 (N.D. Tex. May 9, 2023). The delay in this case has been considerable, and the level of public interest is extraordinarily high. In fact, the public interest here is considerably higher than it was in the *Pub. Health & Med. Professionals for Transparency* cases. In order to obtain the relevant documents prior to the election, the Plaintiff proposes a production rate of 50,000 pages per month.[1] That production rate is high, but once *Glomar* is out of the way, the Defendants undoubtedly will seek to withhold responsive documents on the basis of other exemptions, and that process could take months.

[1] The information requested in Paragraph 11(a) of the FAC is closely related to the information sought in Paragraph 11(c). The Plaintiff requests that the production of records responsive to Paragraph 11(a) be prioritized because (1) that information likely could be processed more quickly and (2) so far as the Plaintiff is aware, no other FOIA requestor has sought that specific information.

Motion for Leave to File Supplemental Evidence

The Plaintiff provides the foregoing evidence for a second reason, namely because it is relevant to the arguments found on pages 4-13 of Plaintiff's Objection. When deciding whether to consider supplemental evidence in support of an objection, courts consider the following criteria:

> (1) the moving party's reasons for not originally submitting the evidence; (2) the importance of the omitted evidence to the moving party's case; (3) whether the evidence was previously available to the non-moving party when it responded to the summary judgment motion; and (4) the likelihood of unfair prejudice to the non-moving party if the evidence is accepted.

Performance Autoplex II Ltd. v. Mid-Continent Cas. Co., 322 F.3d 847, 862 (5th Cir. 2003). The news articles referenced above obviously were not available before last week, therefore the Plaintiff could not have cited them in its objection. Furthermore, the news articles create no unfair prejudice to the defendants. The Plaintiff did not cite the declassification memo previously because, frankly, the Plaintiff was not aware of it until after the articles by Mr. Taibbi, *et al*. were published last week.[2]

The declassification memo is acutely relevant to the Plaintiff's case because it establishes conclusively that the CIA's *Glomar* response was improper. One agency generally cannot waive *Glomar* for another, but there is an important exception that is relevant here. *In American Center for Law & Justice v. U.S. Nat'l Sec. Agency*, the court opined that the State Department could not assert a *Glomar* response because the acting director of national intelligence had acknowledged relevant documents in a declassification memo. 474 F. Supp. 3d 109, 123 (D.D.C. 2020). The

[2] As witnessed by his electronic signature below, Ty Clevenger declares under penalty of perjury under the laws of the United States that (1) the factual misrepresentations in this motion are true; (2) the Plaintiff relied on him to develop the facts in this case, and he was not previously aware of the declassification memo; and (3) the exhibits to this motion are true and correct copies of the documents that he represents them to be.

American Center court noted that the acting director had authority to declassify that exceeded that of the State Department. *Id*. at n.10. In this case, the President had authority to declassify that exceeded that of anyone else. *See New York Times Co. v. Cent. Intelligence Agency*, 314 F. Supp. 3d 519, 526 (S.D.N.Y. 2018) (President has ultimate declassification authority), *aff'd sub nom. New York Times v. Cent. Intelligence* Agency, 965 F.3d 109 (2d Cir. 2020), citing *Dep't of Navy v. Egan*, 484 U.S. 518, 527, 108 S.Ct. 818, 98 L.Ed.2d 918 (1988). The CIA may well cringe at the declassification memo because it proves that the agency asserted *Glomar* in bad faith, but that hardly constitutes a "likelihood of unfair prejudice" that would warrant exclusion of the evidence. On the contrary, the CIA's bad faith weighs in favor of admitting the evidence. The average FOIA requestor is at a severe disadvantage when seeking national-security documents from the Government. *See, generally, Project for Privacy & Surveillance Accountability, Inc. v. United States Dep't of Justice*, 633 F. Supp. 3d 108, 115–16 (D.D.C. 2022). Given the inherent inequities, the Government should be held accountable when it asserts exemptions or offers *Glomar* responses improperly, thus the declassification memorandum should be considered by the Court.

Request for Hearing

The Plaintiff requests a hearing on his objection to the magistrate report and all other outstanding matters.

Conclusion

The records sought by the Plaintiff are matters of exceptional national importance, and time is of the essence. The new evidence should be considered by the Court because most of it was unavailable previously, and none of it prejudices the Defendants. The Defendants should be ordered to produce responsive documents at an expedited rate.

Respectfully submitted,

/s/ Ty Clevenger
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Counsel for Plaintiff

Certificate of Service

On February 21, 2024, I conferred with Asst. U.S. Attorney James Gillingham via telephone, and he indicated that the Defendants would oppose this motion.

/s/ Ty Clevenger
Ty Clevenger

Certificate of Service

On February 21, 2024, I filed a copy of this response with the Court's ECF system, which should result in automatic notification via email to Asst. U.S. Attorney James Gillingham, Counsel for the Defendants, at james.gillingham@usdoj.gov.

/s/ Ty Clevenger
Ty Clevenger