

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LESLIE G. KINNEY,)	
)	
Plaintiff,)	
)	
v.)	Civil Action 3:16-cv-5777 (BHS)
)	
Central Intelligence Agency,)	
)	
Defendant.)	
_____)	

DECLARATION OF ANTOINETTE B. SHINER
INFORMATION REVIEW OFFICER
FOR THE LITIGATION INFORMATION REVIEW OFFICE
CENTRAL INTELLIGENCE AGENCY

I, ANTOINETTE B. SHINER, hereby declare and state:

I. INTRODUCTION

1. I currently serve as the Information Review Officer ("IRO") for the Litigation Information Review Office ("LIRO") at the Central Intelligence Agency ("CIA" or "Agency"). I assumed this position in January 2016.

2. Prior to becoming the IRO for LIRO, I served as the IRO for the Directorate of Support for over sixteen months. In that capacity, I was responsible for making classification and release determinations for information originating within the Directorate of Support. Prior to serving in the Directorate of Support, I was the Deputy IRO for the Director's Area of the CIA ("DIR Area") for over three years. In that role, I was

responsible for making classification and release determinations for information originating within the DIR Area, which included, among other offices, the Office of the Director of the CIA, the Office of Congressional Affairs, the Office of Public Affairs, and the Office of General Counsel. I have held other administrative and professional positions within the CIA since 1986, and have worked in the review and release field since 2000.

3. I am a senior CIA official and hold original classification authority at the TOP SECRET level under written delegation of authority pursuant to section 1.3(c) of Executive Order 13526, 75 Fed. Reg. 707 (Jan. 5, 2010). This means that I am authorized to assess the current, proper classification of CIA information, up to and including TOP SECRET information, based on the classification criteria of Executive Order 13526 and applicable regulations.

4. Among other things, I am responsible for the classification review of CIA documents and information that may be the subject of court proceedings or public requests for information under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the Privacy Act of 1974, 5 U.S.C. § 552a.

5. Through the exercise of my official duties, I have become familiar with this civil action and the underlying FOIA request. I make the following statements based upon my personal

knowledge and information made available to me in my official capacity. The purpose of this declaration is to explain and justify, to the greatest extent possible on the public record, the CIA's actions in responding to Plaintiff's FOIA request.

II. PLAINTIFF'S FOIA REQUEST

6. By letter dated 3 August 2015, the Plaintiff, Leslie Kinney, submitted a FOIA request to the CIA seeking "the personnel file, and any and all other documents related to James Harold Nichols." Plaintiff states that James Harold Nichols, "worked for the Office of Strategic Services (OSS)¹ during World War II." The Agency received the request on 18 August 2015. A copy of the letter is attached as Exhibit A.

7. By letter dated 3 September 2015, the CIA provided a final response to Plaintiff's request. The Agency processed the request, searching for records that would reveal an openly acknowledged, unclassified affiliation between the subject of the request and the Agency. The CIA did not find any responsive records as a result of that search. With respect to records that would reveal a classified connection to the Agency, the CIA issued a "Glomar" response,² indicating that the CIA could

¹ The OSS was the predecessor organization to the Central Intelligence Agency. The OSS was abolished in 1945.

² The origins of the Glomar response date back to the D.C. Circuit's decision in Phillippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1976), which affirmed the CIA's use of the "neither confirm nor deny" response to a FOIA request for records concerning the CIA's reported contacts with the media regarding Howard Hughes' ship the Hughes' Glomar Explorer.

neither confirm nor deny the existence or nonexistence of records responsive to the request, as the fact of the existence or nonexistence of records was properly classified and protected from disclosure under FOIA exemptions (b)(1) and (b)(3). The letter also stated that CIA maintains a copy of the roster of OSS personnel and Mr. Nichols' name did not appear on the list. A copy of the letter is attached as Exhibit B.

8. On 15 September 2015, Plaintiff filed an administrative appeal requesting clarification of CIA's final response; specifically, whether a conclusive search of both CIA and OSS records was conducted and the results from that search were negative. A copy of the letter is attached as Exhibit C.

9. By letter dated 21 April 2016, CIA's Agency Release Panel (ARP) issued a final response to Plaintiff's appeal, denying it in full. The ARP determined a reasonable search had been conducted to "uncover material responsive to the request and was unable to locate any responsive records." In addition, the ARP upheld the Agency's initial action to neither confirm nor deny the existence or nonexistence of other records that might reveal a classified connection to the CIA. A copy of the letter is attached as Exhibit D.

10. On 12 September 2016, Plaintiff filed the instant complaint.

III. CIA'S SEARCH FOR UNCLASSIFIED RECORDS

11. The CIA's search was limited to records that would reveal an open or acknowledged relationship between James Harold Nichols and the CIA. Given that plaintiff indicated that he believed that the subject of his request, James Harold Nichols, worked for the OSS, the Agency looked to its historical holdings. The CIA has transferred all of its OSS personnel records to the National Archives and Records Administration (NARA), but maintains a copy of the OSS personnel list. The CIA reviewed the OSS list and confirmed that Mr. Nichols' name did not appear.

12. The CIA also conducted a search of records that would indicate that Mr. Nichols maintained an unclassified association with the Agency. The CIA employees who performed the necessary searches have access to the pertinent records, are qualified to search those records and regularly search those records in the course of their professional duties.

13. First, the Agency searched for any previously released records on Mr. Nichols and found no responsive records. Second, based upon this search, and analysis of the subject matter of the request, the Agency determined the Directorate of Operations (DO)³ and the Director of the CIA's Area (DIR)⁴ were

³ The DO is the organization within the CIA responsible for the clandestine collection of foreign intelligence from human sources.

the directorates most likely to maintain records responsive to the request because they were the most likely to maintain records reflecting an overt employment or contractual relationship between Mr. Nichols and the CIA.

14. The search was conducted using the name "James Harold Nichols", "James H. Nichols," and "James Nichols" as search terms, but, ultimately, no responsive records were found. However, with regard to any records responsive to Plaintiff's FOIA request that would reveal a classified connection to the CIA, the Agency invoked the Glomar response, refusing to confirm or deny the existence or nonexistence of such records. As discussed in more detail below, the existence or nonexistence of records revealing a classified connection to the CIA is itself a properly and currently classified fact that could reveal clandestine CIA intelligence activities, sources and methods.

IV. EXEMPTIONS CLAIMED

15. As explained below, the CIA can neither confirm nor deny the existence or nonexistence of records responsive to Plaintiff's FOIA request pursuant to FOIA Exemptions (b) (1) and (b) (3).

⁴ The DIR area is a cluster of offices under the Director of the CIA, such as the Office of General Counsel, the Office of Public Affairs and the Office of Inspector General.

A. FOIA Exemption (b) (1)

16. Exemption (b) (1) provides that FOIA does not require the production of 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 such Executive order." 5 U.S.C. § 552(b) (1). Here, Executive Order 13526 is the operative executive order that governs classification.

17. Pursuant to a written delegation of authority in accordance with Executive Order 13526, I hold original classification authority at the TOP SECRET level. Therefore, I am authorized to conduct classification reviews and to make original classification decisions. Consistent with section 1.1(a) and 3.6(a) of Executive Order 13526,⁵ and as described below, I have determined that the fact of the existence or nonexistence of the requested records is currently and properly classified.

18. I further note that the Agency's response in this matter has not been made to conceal violations of law, inefficiency, or administrative error; to prevent embarrassment

⁵ Section 1.1(a) sets forth procedural standards for classification, which have been satisfied in this case. Section 3.6(a) provides that, "[a]n agency may refuse to confirm or deny the existence or nonexistence of requested records whenever the fact of their existence or nonexistence is itself classified under this order or its predecessors."

to a person, organization, or agency; to restrain competition; or to prevent or delay the release of information that does not require protection in the interests of national security.

19. As explained below, the Agency refuses to confirm or deny maintaining records that would show a classified association with the CIA in conjunction with Exemptions 1 and 3,⁶ because disclosing that fact would tend to reveal "intelligence activities (including covert action), [or] intelligence sources or methods" within the meaning of section 1.4(c) and "foreign relations or foreign activities of the United States" of the Executive Order.

20. In the normal course, upon receiving a FOIA request, federal agencies conduct searches for responsive documents in their holdings and provide the requester with any non-exempt information contained in those records. However, given the CIA's mandate to collect and analyze foreign intelligence and to conduct counterintelligence, there are many instances where the Agency cannot reveal whether or not it possesses responsive records -- particularly where responding to a request would show the CIA's intelligence interest in, or clandestine connection to, a particular individual or activity. A defining characteristic of the CIA's intelligence activities is that they

⁶ Exemption 3 protects information whose disclosure is specifically exempted by statute. The CIA's assertion of the Glomar response in connection with the National Security Act is discussed below.

are typically carried out through clandestine means, and therefore they must remain secret in order to be effective. Responding to the substance of the request could jeopardize the clandestine nature of the Agency's intelligence activities or otherwise reveal previously undisclosed information about CIA sources, capabilities, authorities, interests, relationships with domestic or foreign entities, strengths, weaknesses, and/or resources.

21. A primary function of the CIA is to gather intelligence from around the world that can be used by the President and other Government officials in making important decisions. To fulfill this responsibility, the Agency depends upon human sources to collect intelligence, identify or provide access to others who may have intelligence information, and support CIA intelligence-gathering activities. Conversely, the CIA also targets certain individuals as part of its foreign intelligence collection efforts. Revealing the identity of a confidential source or a target of collection could cause the exposure of Agency tradecraft, other human sources, specific intelligences interests and activities. Human sources can be expected to furnish information to the CIA only when they are confident that the CIA can and will do everything in its power to prevent the public disclosure of their cooperation. In the case of a person who has been cooperating with the CIA, official

confirmation of that cooperation could cause the targets to take retaliatory action against that person or against his family or friends. It also places in jeopardy every individual with whom the individual has had contact. Thus, the indiscretion of one source in a chain of intelligence sources can ravage an entire spectrum of sources. As such, confirming or denying the existence of records on a particular individual, like Mr. Nichols, reasonably could be expected to cause serious damage to U.S. national security by indicating whether or not CIA maintained any human intelligence sources related to an interest in the subject of the request.

22. I note that Plaintiff's request indicates that Mr. Nichols lived from 1899 until 1960. Despite the fact that any records about him would likely be older than 50 years old, the harms outlined above still hold true. Although Executive Order 13526 requires the automatic declassification of certain records due to age, in recognition of the sensitivity of sources, Section 3.3(h)(1) explicitly exempts information that would "clearly and demonstrably be expected to reveal . . . the identity of a confidential human source or a human intelligence source" from the 50-year declassification provision. Consistent with Section 3.3(h), I have determined that, in this instance, any responsive records that contain information which would reveal a classified connection with the Agency are exempt

from automatic declassification and the Glomar response must be asserted.

B. FOIA Exemption (b) (3)

23. FOIA exemption (b) (3) provides that FOIA does not apply to matters that are:

Specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld. . .

5 U.S.C. § 552(b) (3).

24. Section 102A(i) (1) of the National Security Act of 1947, as amended, 50 U.S.C. § 3024(i) (1) (the "National Security Act"), provides that the Director of National Intelligence ("DNI"), "shall protect intelligence sources and methods from unauthorized disclosure." Accordingly, the National Security Act constitutes a federal statute which, "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue." 5 U.S.C. §552(b) (3). Under the direction of the DNI pursuant to section 102A, and consistent with section 1.6(d) of Executive Order 12333, the CIA is authorized to protect CIA sources and methods from unauthorized disclosure. Acknowledging the existence or nonexistence of records reflecting a classified connection to the CIA in this matter would reveal information that concerns intelligence

sources and methods, which the National Security Act is designed to protect.

25. Therefore, the fact of the existence or nonexistence of records that would reflect a classified connection to the CIA is exempt from disclosure under FOIA exemption (b)(3) pursuant to the National Security Act. In contrast to Exemption (b)(1), this statute does not require the CIA to identify and describe the damage to the national security that reasonably could be expected to result should the CIA confirm or deny the existence or nonexistence of the records. Nonetheless, I refer the Court to the paragraphs above for a description of the damage to the national security should anything other than a Glomar response be required of the CIA in this case. FOIA exemptions (b)(1) and (b)(3) thus apply independently and co-extensively to the aspect of plaintiff's request that would show a classified association with the Agency.

V. CONCLUSION

26. In this case, the CIA conducted a thorough search for responsive records reflecting an open or otherwise unclassified connection to the subject of Plaintiff's request, Mr. Nichols, and no records were found. For records that would reveal a classified connection between Mr. Nichols and the CIA, the fact of the existence or nonexistence of such records is itself a properly classified fact and, as explained above, is intertwined

with intelligence activities, sources, and methods such that this fact is, and must remain, classified and protected by statute. Accordingly, I have determined the only appropriate response is for the CIA to neither confirm nor deny the existence or nonexistence of the requested records under FOIA exemptions (b)(1) and (b)(3).

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed this 1st day of March 2017.

Antoinette B Shiner

Antoinette B. Shiner,
Information Review Officer,
Litigation Information Review Office,
Central Intelligence Agency