UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 22-0412 (RBW)
	)	
CENTRAL INTELLIGENCE AGENCY,	)	
	)	
Defendant.	)	
	)	

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S CROSS-MOTION

Plaintiff Judicial Watch, Inc., by counsel and pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Civil Rule 7(h), respectfully submits this memorandum of points and authorities in opposition to Defendant's motion for summary judgment and in support of Plaintiff's cross-motion for summary judgment.

MEMORANDUM OF POINTS AND AUTHORITIES

I. The Search.

Defendant acknowledges that it did not search for records in response to Plaintiff's request but instead relied on a search it conducted for Special Counsel John Durham. Def's Stmt. at para. 3. Defendant does not say when it conducted the search for the Special Counsel, but Durham was appointed on October 19, 2020, more than a year before Plaintiff's October 21, 2021 request. Def's Stmt. at paras. 2 and 6. The Special Counsel indicted Perkins Coie attorney Michael Sussmann on September 16, 2021, more than a month before Plaintiff submitted its request, for allegedly making a false statement to the FBI. Def's Stmt. at para. 4. Presumably, the search Defendant conducted for Special Counsel Durham was conducted sometime before

the indictment – likely well before it. Relying on the Special Counsel search would have caused Defendant to miss responsive records created or obtained after that search. Defendant also does not identify the time frame of the Special Counsel search. Plaintiff's request specifically asked for records from "January 1, 2015 to the present." Def's Stmt. at para. 6. Without basic information about when Defendant undertook the search for Special Counsel Durham and the time frame of the records for which it searched, Defendant's assertion that the Special Counsel search "covered materially the same period as Plaintiff's request" is too conclusory to satisfy Defendant's burden of proving that its search was adequate. *See*, *e.g.*, *Oglesby v. Dep't of the Army*, 920 F.2d 57, 60 (D.C. Cir. 1990).

Defendant's corollary argument is that it did not even need to search. Def's Mem. at 8. Contrary to Defendant's claim, a *Glomar* response is not the same as a "no number, no list" response. For a *Glomar* response, it is the disclosure of the existence of requested records that is the concern, not disclosure of the number and nature of those records. *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007) (A *Glomar* response allows an agency to "refuse to confirm or deny the existence of records where to answer the FOIA inquiry would cause harm cognizable under an FOIA exception."). A *Glomar* response "is conceptually different from conceding (or being compelled by the court to concede) that the agency has some documents, but nonetheless arguing that any description of those documents would effectively disclose validly exemption information." *ACLU v. CIA*, 710 F.3d 422, 433 (D.C. Cir. 2013). "There may be cases where the agency cannot plausibly make the former (*Glomar*) argument with a straight face, but where it can legitimately make the latter." *Id.*

Defendant's corollary "no search" argument fails to explain how an agency could even know whether it had records that potentially raise the concern addressed by a "no number, no

list" response if it did not first search for the records. Defendant also cites no case in which an agency was found to have made a proper "no number, no list" without even having searched for responsive records. And just because there may be a sensitivity about disclosing the number and nature of *some* responsive records in an agency's possession does not mean that the same concern exists with respect to *all* responsive records in the agency's possession. It is impossible to know the answer to that question without searching.

II. Exhibit 809.

Plaintiff does not dispute Defendant's Exemption 6 claims or, with one exception, Defendant's Exemptions 1 and 3 claims. Among the four records produced to Plaintiff by Defendant is a memorandum of a conversation between Sussmann and an individual who had his own small private consulting firm, Mark P. Chadason, on January 31, 2017. Plf's Stmt. at para. 1; Def's Stmt. at para. 11. Chadason testified at Sussmann's criminal trial that he and Sussmann met for breakfast on that date at a Northern Virginia hotel because Sussmann believed, accurately it turned out, that Chadason could arrange for Sussmann to meet with CIA officials.[1] Plf's Stmt. at para. 2. After the ninety-minute meeting, Chadason prepared a memorandum of his conversation with Sussman, then sent the memorandum to one of Defendant's senior officers. Plf's Stmt. at para. 4. Chadason's memorandum is part of a chain of what appears to be ten emails exchanged between Chadason and an unknown number of CIA officials, including Kevin P., between January 31, 2017 and February 9, 2017, the date Sussman met with Kevin P. and Steven M, another of Defendant's employees, at Defendant's offices. Plf's Stmt. at paras. 5 and 9. Chadason's memorandum and the email chain were introduced as Exhibit 809 at Sussman's

[1] Sussmann told Chadason he was reaching out to Defendant on behalf of a client, not in his own capacity. Plf's Stmt. at para. 3.

criminal trial, as were three other government exhibits, Exhibits 812, 814, and 817. Plf's Stmt. at para. 6; *see also* Def's Stmt. at para. 11.

The memorandum is Chadason's work product, not the CIA's work product. Defendant's invocation of Exemption 1 over substantial portions of the memorandum fails to explain how disclosure of a record prepared by a private individual about a conversation with another private individual could properly be classified or otherwise said to contain information about "intelligence activities and intelligence methods" the disclosure of which "could reasonably be expected to cause serious damage to the national security." Nor does Defendant explain how or even why the two private parties to the conversation would be discussing or even know about Defendant's then-current methods of communication or intelligence gathering capabilities or the travel destinations of Defendant's officer or areas of interest for intelligence collection.[2] Defendant does not answer these obvious questions but instead offers only an inadequate, boilerplate invocation of Exemption 1. *Pinson v. U.S. Dep't of Justice*, 160 F. Supp.3d 285, 300 (D.D.C. 2016) (Contreras, J.). Defendant also does not tell the Court that Chadason was a private individual, not a CIA official, a material omission or misunderstanding.

Defendant also invokes Exemption 3 and the National Security Act over these same, substantial portions of Chadason's memorandum.[3] Defendant offers the following with respect to these redactions:

> The agency also applied FOIA Exemption (b)(3) in conjunction with the National Security Act to protect classified intelligence sources and methods. The

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[2] There is a suggestion in the emails included in Exhibit 809 that Sussmann, not any of Defendant's officers, was traveling to Amsterdam. Plf's Stmt. at para. 5.

[3] To be clear, Plaintiff does not seek the disclosure of the "full names, official titles, agency identification number, email addresses, or telephone numbers" of CIA personnel. Plaintiff also does not seek the disclosure of classification and dissemination control markings or methods of communication or the travel destinations of Defendant's officers.

> redactions include classification and dissemination control markings, as well as methods of communication, all of which are properly considered methods of the practice of intelligence.

Plf's Stmt. at para. 18. Based on the context in which they appear, the redacted sections of the memorandum would seem to describe information Sussmann (or his client) sought to bring to Defendant's attention, not classification and dissemination control markings or methods of communication used by Defendant. Nor does it make sense that Chadason would include such information in the memorandum or even have a current basis in knowledge to do so. Defendant also does not explain how or why, if the information in Chadason's memorandum is of such a sensitive nature, it was transmitted to Defendant by email. If Chadason had access to an email system over which he could send classified information, Defendant does not say so.

"Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears 'logical or 'plausible.'" *Larson v. U.S. Dep't of State*, 565 F.3d 857, 862 (D.C. Cir. 2009). Defendant's justifications for its redactions to private-party Chadason's memorandum describing his meeting with private-party Sussmann are neither logical nor plausible. At a minimum, Defendant has failed to meet its burden of proof with respect to these redactions.

III. Known, Missing Records.

Certain obvious categories of known, responsive records are missing from Defendant's response. First and foremost, the transcript from Sussmann's criminal trial demonstrates that additional responsive records were introduced into evidence or at least referenced at the trial. These include defense exhibits 600 and 806. Exhibit 600 is an email received by Kevin P. at 12:59 p.m. on January 31, 2017. Plf's Stmt. at para. 7. Based on Kevin P.'s trial testimony, the email concerns Chadason's January 31, 2017 meeting with Sussmann and Chadason's memorandum memorializing that meeting. *Id.* Similarly, Exhibit 806 is an email chain between

Chadason and "various CIA employees" on January 31, 2017, regarding Sussmann. Plf's Stmt. at para. 8. Chadason received this particular email at 4:40 p.m. and forwarded it to other CIA employees at 5:00 p.m. *Id.* Neither is among the four emails Defendant produced to Plaintiff – Exhibits 809, 812, 814, and 817 – yet it would appear obvious that the emails originated with Defendant and were produced to Sussmann by the government during Sussmann's criminal case. Def's Stmt. at para. 11. At a minimum, the two defense exhibits should have been produced.[4]

Kevin P. also testified that Sussmann provided him with various materials at the February 9, 2017 meeting, including "[s]ome documents, papers, and some thumb drives," which Kevin P. gave to "our technical folks to take a look at." Plf's Stmt. at paras. 9 and 11. He testified further that he prepared notes of his February 9, 2017 meeting with Sussmann. Plf's Stmt. at para. 12. Neither Defendant's response to the request nor its motion mentions these publicly identified materials.

In addition, CIA employee Kevin P. testified that Defendant referred the matter Sussmann brought to its attention to the FBI. Plf's Stmt. at para. 13. Kevin P. testified further that Sussman told him he reached out to Defendant's Office of General Counsel and Counterintelligence Misson Center about the matter before contacting Sussmann. Plf's Stmt. at para. 14. Defendant also readily admits that it searched for and provided records about Sussmann to Special Counsel Durham. Def's Mem. at 6-7. It is not the least bit speculative to assert that Defendant likely has records about its referral of the Sussmann matter to the FBI, Sussman's earlier attempts to contact Defendant, the Special Counsel's request for records about Sussman, and the search for and production of records about Sussmann to Special Counsel Durham. Again, neither

[4] Kevin P also testified generally that, before his February 9, 2017 meeting with Sussmann, he "was on emails" about Sussmann. Plf's Stmt. at para. 10.

Defendant's response to Plaintiff's request nor Defendant's motion even references any such records.

IV. "No Number, No List."

Plaintiff recognizes that the missing records identified in Section III may be among the responsive records subject to Defendant's "no number, no list" response. Little precedent exists regarding "no number, no list" responses. Most significantly, the Court in *ACLU* expressed substantial caution about their use: "[A] no number, no list" response might be viewed as a kind of *Vaughn* index, albeit a radically minimalist one. Such a response would only be justified in unusual circumstances, and only by a particularly persuasive affidavit." *ACLU*, 730 F.3d at 433. The Court continued: "[O]nce an agency acknowledges that it has some responsive documents, there are a variety of forms that subsequent filings in the district court may take. A pure 'no number, no list' response is at one end of the continuum; a traditional *Vaughn* index is at the other. Not quite as minimalist as a pure 'no number, no list' response might be a 'no number, no list' response . . . with respect to a limited category of documents, coupled with a *Vaughn* index for the remainder." *Id.* at 433-34.

Defendant's justification for its pure "no number, no list" response falls short of the high standard set by the Court in *ACLU*. Notwithstanding Defendant's assertion that a traditional *Vaughn* index would reveal information about matters such as the amount of information Defendant obtained, when it gathered or obtained the information, its assessment of that information, and the amount of resources it expended in connection with the information provided by Sussmann in particular and "walk-ins" in general, much of that information is already available. It was made public at the Sussmann trial and, in particular, through the introduction into evidence of the memoranda Chadason and Kevin P. prepared memorializing

their respective meetings with Sussmann on January 31, 2017 and February 9, 2017. Plf's Stmt. at paras. 1, 4, and 15. Additional information was made available in the "Durham Report," prepared by Special Counsel Durham and published on May 23, 2023. According to the Durham Report:

> Two CIA employees ("CIA Employee-2" and "CIA Employee-3") prepared a memorandum summarizing the meeting they had with Sussmann in February 2017. The final version included Sussmann's representation that he was not representing any "particular client." In their interviews with the Office, both CIA employees specifically recalled Sussmann stating he was not representing a particular client.
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> During the meeting, Sussmann provided two thumb drives and four paper documents that, according to Sussmann, supported the allegations. The CIA analyzed the allegations and data that Sussmann provided and prepared a report to reflect its findings. The report explained that the analysis was done to examine whether the materials provided demonstrated "technical plausibility" of the following: "do linkages exist to any Russian foreign intelligence service; do linkages exist to Alpha [sic] Bank; are the provided documents/data based upon open source [] tools/activities; and is the provided information/data technically conceivable." The CIA ultimately concluded that the materials that Sussmann provided were neither "technically plausible" nor did they "withstand technical scrutiny" and further, that none of the materials showed any linkages between the Trump campaign or Trump Organization and any Russian foreign intelligence service or Alfa Bank. The report also noted that one of the thumb drives contained hidden data, which included Tech Company-2 Executive-1's name and email address.

Plf's Stmt. at para. 16.[5, 6] Under the circumstances, Defendant's generalized assertions are plainly insufficient. *ACLU*, 710 F.3d at 433. Nor does Defendant even attempt to explain why only a pure "no number, no list" response would suffice to protect purported interests.

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[5] Based on Kevin P.'s trial testimony, it is likely that these employees of Defendant are Kevin P. and Steven M. Plf's Stmt. at para. 17.

[6] Defendant's report analyzing Summann's two thumb drives and four paper documents is yet another known, missing record. Defendant should have identified the record and produced all nonexempt portions of it in response to Plaintiff's request.

Bassiouni v. CIA, 392 F.2d 244 (7th Cir. 2004), which Defendant also cites, confirms Plaintiff's position that Defendant's pure "no number, no list" response is not warranted here. In *Bassiouni*, which concerned a requester's FOIA request to Defendant for records about himself, the Court found that listing responsive records withheld under claim of exemption could reveal when and from whom Defendant received information about the requester. *Bassiouni*, 392 F.3d at 245. Even that portion of the decision was only *dicta*, however. The requester in *Bassiouni* only argued that Defendant waived its right to make a *Glomar* response, an argument that the Court rejected. *Bassiouni*, 392 F.3d at 246. Here, not only are answers to the questions about when, what, and from whom Defendant obtained information already known, but Defendant makes no *Glomar* claim.

New York Times v. Dep't of Justice, 756 F.3d 100 (2d Cir. 2014) does not aid Defendant either. At issue in *New York Times* were FOIA requests to multiple agencies for legal memoranda justifying the targeted killing abroad of terrorists who are U.S. citizens. Multiple defendant agencies declined to list or identify the number of any such records, asserting that the volume of the records might reveal the government's intention (or lack thereof) to carry out a military operation. *New York Times*, 756 F.3d at 122-23. The Court agreed with *ACLU* that "no number, no list" responses may "only be justified in unusual circumstances, and only by a particularly persuasive affidavit." *Id.* at 122 (quoting *ACLU*, 710 F.3d at 433). It then rejected the government's "no number, no list" response and ordered the agency defendants, including the CIA, to submit classified *Vaughn* indexes to the district court *in camera* on remand. *Id.* at 123.

Hayden v. Nat'l Sec. Agency, 608 F.2d 1381 (D.C. Cir. 1979), which Defendant also cites, is also inapposite. Far from affirming a "no number, no list" response, the Court in *Hayden* upheld the trial court's decision to review affidavits describing the withheld materials *in camera*.

Hayden, 608 F.2d at 1384-86. Like *New York Times*, the case does not stand for the proposition that an agency need not even provide a reviewing court with sufficient particularized information about withheld records to assess claimed withholdings.

Even if the Court were to find that something less than a traditional *Vaughn* index was appropriate, Defendant does not explain why it cannot categorize whatever additional records it possesses and describe them in a *Vaughn* index that does not reveal their number or volume. Nor does Defendant explain why it cannot submit a more detailed classified affidavit or *Vaughn* index *in camera*, as in *New York Times* or *Hayden*. Defendant's failure to do so only further demonstrates the substantial shortcomings of its response to Plaintiff's request.

V. Conclusion.

Defendant's response to Plaintiff's request was woefully inadequate. Defendant admits it did not even search for records responsive to the request but instead relied on an earlier search based on undisclosed parameters and produced only a handful of redacted exhibits introduced into evidence by the government at Sussmann's criminal trial. Its "no number, no list" response ignores the substantial information already made public at Sussmann's criminal trial and in the Durham Report and is not supported by Defendant's conclusory declaration. Defendant's redactions to the Chadason memorandum are neither logical nor plausible nor supported by Defendant's declaration, especially because the memorandum memorializes a meeting between two private individuals. Defendant's motion for summary judgment should be denied and Plaintiff's cross-motion should be granted. Defendant should be ordered to conduct a proper search, provide a *Vaughn* index of any additional, responsive records located during that search, and produce an unredacted version of the Chadason memorandum consistent with Plaintiff's arguments herein.

Dated: September 7, 2023

Respectfully submitted,

/s/ Paul J. Orfanedes
Paul J. Orfanedes
D.C. Bar No. 429716
JUDICIAL WATCH, INC.
425 Third Street SW, Suite 800
Washington, DC 2024
Tel: (202) 646-5172
Email: porfanedes@judicialwatch.org

Counsel for Plaintiff