UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *Plaintiff*, v. FEDERAL BUREAU OF INVESTIGATION, *et al.*, *Defendants*. | Case 1:17-cv-01701-RC |

**MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT**

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Pursuant to Fed. R. Civ. P. 56 and Local Rules 7(a), 7(b), 7(h), & 56.1, Plaintiff Reporters Committee for Freedom of the Press ("Reporters Committee" or "RCFP"), by and through its undersigned counsel, hereby submits this Memorandum in Opposition to the Motion for Partial Summary Judgment filed by Defendants Federal Bureau of Investigation ("FBI") and U.S. Department of Justice ("DOJ") (collectively, "Defendants" or "Government") and in support of its Cross-Motion for Partial Summary Judgment. For the reasons set forth herein, this Court should deny Defendants' Motion and enter partial summary judgment in Plaintiff's favor.

## INTRODUCTION

This case concerns a request under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA" or the "Act") for information pertaining to the FBI's practice of impersonating members of the media—specifically, documentary filmmakers—in criminal investigations. The Reporters Committee submitted the FOIA request at issue on April 12, 2017, shortly after an FBI agent testified in open court that the FBI had invented a phony documentary film company called "Longbow Productions," and that FBI agents had posed as a documentary film crew to lure suspects into giving videotaped interviews. The portion of RCFP's FOIA request presently at issue seeks records concerning all other incidents of FBI impersonation of documentary filmmakers since 2010. The FBI has responded to that portion of RCFP's FOIA request with a so-called *Glomar* response, refusing to confirm the existence *vel non* of responsive records.

Defendants' position is untenable. The FBI's assertion of a *Glomar* response is improper first and foremost because impersonation of journalists—including, specifically, documentary filmmakers—is a law enforcement "investigative technique" well known to the public. Because the FBI's practice of impersonating journalists, including documentary filmmakers, in criminal investigations is neither "secret" nor "obscure," the FBI cannot, as a matter of law, rely on

Exemption 7(E) to justify its *Glomar* response. Put simply, though it is possible that the FBI may be able to properly assert an exemption to withhold individual records or specific portions thereof in response to RCFP's FOIA request, the FBI cannot refuse to confirm the existence of those records on the ground that doing so would disclose a secret law enforcement technique used by the FBI, *see* FBI Mot. at 11, as the FBI's use of that technique has already been publicly disclosed, including by the FBI itself. FOIA requires the FBI to search for and process the records requested by the Reporters Committee; it should be ordered to do so.

The meritless nature of the FBI's reliance on Exemption 7(E) as the basis for its *Glomar* position is underscored by the harm the FBI claims would result if it were to admit the existence *vel non* of records pertaining to its practice of impersonating documentary filmmakers. According to the FBI, confirming the existence of those records would prompt FBI targets to "avoid any contacts with documentary film crews, rendering the investigative technique ineffective." FBI Mot. at 12. But, as detailed herein, the FBI's use of this investigative technique is already publicly known and has already caused sources and subjects to avoid contacts with actual documentary filmmakers.[1] By the FBI's lights, this investigative technique has already been "rendered ineffective" by public disclosure.

Moreover, that the chilling effect purportedly feared by the FBI is already being felt by real documentary filmmakers is more reason to reject the FBI's invocation of the *Glomar* doctrine in this case. The FBI's refusal to confirm the existence of records that would shed light on its well-known practice of impersonating members of the media is demonstrably damaging to the exercise of First Amendment rights. As the FBI itself acknowledges, the specter of FBI impersonation chills speech to legitimate documentary filmmakers. In determining whether the

[1] *See* Declaration of Abby Ellis ("Ellis Decl.") at ¶¶ 7–11.

*Glomar* doctrine applies, this Court need not ignore the constitutional harm inflicted by the FBI's selective secrecy concerning its tactic of impersonating documentary filmmakers. To the contrary, given the Court's obligation to avoid construing FOIA in a manner that creates constitutional problems, it must consider the First Amendment interests at stake.

Finally, even if the FBI established that it could properly invoke the *Glomar* doctrine pursuant to Exemption 7(E)—which it has not—the FBI has waived its right to assert a *Glomar* response through its own official acknowledgements regarding its use of that practice.

For all the reasons set forth herein, Plaintiff respectfully requests that the Court deny Defendants' Motion for Partial Summary Judgment and grant Plaintiff's Cross-Motion for Partial Summary Judgment.

## BACKGROUND

### A. The FBI's practice of impersonating members of the media, including documentary filmmakers, in criminal investigations

In March 2017, FBI Special Agent Charles Johnson[2] testified in federal district court in Nevada about the FBI's impersonation of a documentary film crew in connection with a 2014 criminal investigation of Cliven D. Bundy ("Bundy"). SMF ¶ 24; *see also United States v. Bundy*, No. 2:16-CR-46 (D. Nev.) ("*Bundy*"); *United States v. Burleson*, No. 2:16-CR-46 (D. Nev.) ("*Burleson*").[3] On the stand, Johnson confirmed that FBI agents had posed as documentary filmmakers in order to elicit incriminating recorded statements from Bundy, Gregory Burleson ("Burleson"), and others, SMF ¶ 25, a fact that was also reflected in court filings, SMF ¶ 26 (stating that Bundy "spoke with undercover agents … in a hotel room under

[2] The name "Charles Johnson" is a pseudonym—the agent's real name was not revealed at trial.
[3] Plaintiff respectfully requests that the Court take judicial notice of all news media articles, books, films, and television shows cited herein and attached to the Declarations of Katie Townsend and David G. Byars pursuant to Fed. R. Civ. P. 201.

circumstances designed to make Bundy believe that he was participating in [a] documentary by recounting his experiences surrounding the [case].”). To ensure that the FBI’s investigative targets would trust “Longbow Productions”—the FBI’s fake film company—agents crafted “professional credentials, websites and business cards” to lend it the appearance of authenticity. *Id.* The FBI’s impersonation of documentary filmmakers and its use of “Longbow Productions” footage in the *Bundy* and *Burleson* cases was covered extensively in the press, with some news outlets airing portions of the fake documentary footage shot by the FBI. SMF ¶ 25.[4]

The Bundy investigation was not the first time that federal agents had impersonated a member of the news media. The practice dates back decades, with a number of such incidents taking place in the 1960s and 70s. *See Surveillance and Espionage in a Free Society* 140–41 (Richard H. Blum ed., 1972). SMF ¶ 45. For example, the 1972 report lists a number of “[v]erified examples” of media impersonation by federal agents, including, in 1967, army intelligence agents obtaining press credentials from the New York City Police Department to investigate activists H. Rap Brown and Stokely Carmichael. *Id*. (concluding that “journalists’ access [to political dissenters] would quickly disappear” if “target groups began to identify the press as instruments of the government”).

Though use of this law enforcement tactic has not been limited to the FBI,[5] there are a number of known examples of its use by the FBI, specifically, prior to the Bundy investigation.

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[4] *See* Jenny Wilson, *Bundy defendants interviewed in undercover FBI operation*, Las Vegas Review-Journal, Mar. 22, 2017, *available at* https://perma.cc/469Y-QWRW; Andrew Blake, *FBI posed as documentary filmmakers to conduct interviews with Bundy Ranch supporters*, The Wash. Times, Mar. 24, 2017, https://perma.cc/KNK9-DW74; Ryan Devereaux, Trevor Aaronson, *America Reloaded: The Bizarre Story Behind the FBI’s Fake Documentary About the Bundy Family*, The Intercept, May 16, 2017, https://perma.cc/MR57-BNY4.

[5] For example, in a 2001 police standoff in Texas, a detective took a press photographer’s camera and notepad to impersonate a journalist in order to talk to a murder suspect who had requested to speak to a reporter. SMF ¶ 43. In 2000, police in Newark, New Jersey commandeered a

In 1996, an FBI informant impersonated a newspaper reporter during an FBI sting operation in Washington state. SMF ¶ 31. The informant, posing as a reporter for the Spokane Valley Herald, conducted a series of interviews with James Marks, who was being investigated by the FBI. *Id.* Additionally, during a civil trial in Idaho in 2000, seven FBI agents posed as courtroom news photographers in order to observe the trial, only ceasing their activity when real journalists covering the trial complained to the local sheriff's department. SMF ¶ 43.

More recently, in June 2007, the FBI created a fake news article attributed to The Associated Press ("AP") and impersonated an AP journalist during the course of its investigation of a 15-year-old student suspected of sending bomb threats to administrators at his high school—Timberline High School—outside Seattle, Washington. SMF ¶¶ 32–33, 36–38. The undercover FBI agent sent the student a link to a fake AP news article and photographs in order to deliver surveillance malware to the suspect's computer. SMF ¶ 41. The suspect did not immediately respond to the agent's communications; it was only after the agent told the suspect that journalists "are not allowed to reveal their sources" that the suspect clicked the link, downloading the malware and revealing his location to the FBI. *Id.*

When the FBI's impersonation of the AP in the Timberline investigation came to light in 2014, it sparked an outcry from members of the press and the public. SMF ¶ 33, 38–39. AP General Counsel Karen Kaiser sent a letter to DOJ protesting the FBI's actions; she wrote that the FBI's impersonation "created a situation where [the AP's] credibility could have been undermined on a large scale" and that it is "improper and inconsistent with a free press for government personnel to masquerade as The Associated Press or any other news organization."

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television news crew's video camera and impersonated broadcast journalists after an alleged hostage-taker demanded that he be interviewed on television. SMF ¶ 44.

SMF ¶ 33. The incident also prompted inquiries from high ranking members of Congress. SMF ¶ 34–35. On November 6, 2014, in response to the public outcry, *The New York Times* published a letter to the editor from then-FBI Director James Comey that acknowledged and defended the FBI's use of media impersonation as an investigative technique. SMF ¶ 40. In particular, then-Director Comey stated that the FBI's impersonation of an AP journalist in the Timberline case "was proper and appropriate under Justice Department and FBI guidelines at the time" and that impersonation of journalists is a "lawful and, in a rare case, appropriate" FBI practice. *Id.*

The Timberline incident prompted an investigation by the Office of the Inspector General for the Department of Justice ("OIG"). SMF ¶ 41. Its September 2016 report revealed that in June 2016 the FBI issued new interim guidelines, referred to as Policy Notice ("PN") 0907N, for impersonating member of the news media or a documentary film crew. *Id.* These new guidelines instruct agents on new procedures they must follow before posing as members of the news media or documentary filmmakers in connection with an investigation. *Id*.

In August 2015, the Reporters Committee and AP filed a lawsuit against the FBI and DOJ after the agencies failed to comply with FOIA requests and release records regarding the Timberline incident and the FBI's practice of impersonating members of the media generally. *See Reporters Comm. for Freedom of the Press v. Federal Bureau of Investigation, et al.*, Case No. 15-cv-1392 (D.D.C.); *see also Reporters Comm. for Freedom of the Press v. Federal Bureau of Investigation, et al.*, Case No. 18-cv-345 (D.D.C.); *Reporters Comm. for Freedom of Press v. Fed. Bureau of Investigation*, 877 F.3d 399 (D.C. Cir. 2017). Since the filing of these lawsuits, the FBI has released records detailing the FBI's use of media impersonation—including impersonation of documentary filmmakers—as an investigative tactic, as well as guidelines and policies addressing impersonation of members of the news media, including documentary

filmmakers. SMF ¶ 46–47. These policies, *inter alia*, instruct agents on the procedures they must follow before posing as members of the news media or documentary filmmakers in connection with an investigation. *Id.* Other records released to the Reporters Committee and AP, *inter alia*, refer to the FBI's use of documentary film crew "scenario[s]" in undercover investigations. SMF ¶ 47.

**B. The Reporters Committee's FOIA request**

On April 12, 2017, the Reporters Committee submitted a FOIA request (hereinafter the "Request") to the FBI seeking essentially three categories of records: (1) records related to "Longbow Productions" and the FBI's impersonation of a documentary film crew to investigate Bundy; (2) records concerning other instances where the FBI has impersonated a documentary filmmaker or crew; and (3) guidelines and policies governing the FBI's impersonation of documentary filmmakers. FBI SMF ¶ 1. Specifically, the Request sought:

> 1) All records that mention 'Longbow' or 'Longbow Productions' since January 1, 2010, including but not limited to email communications, case files, training materials, and contracts;
>
> 2) All records, including but not limited to email communications, concerning or referencing the impersonation of a documentary filmmaker and/or a documentary film crew by the FBI in connection with any criminal investigation related to *United States v. Burleson*, No. 216-CR-00046 (PAL) (GMN) (D. Nev.);
>
> 3) The October 2014 video recording of Mr. Burleson made by FBI agents posing as a documentary film crew;
>
> 4) All records, including but not limited to email communications, concerning or referencing the impersonation of a documentary filmmaker and/or a documentary film crew by the FBI in connection with any criminal investigation related to *United States v. Bundy*, No. 2:16-CR-00046 (PAL) (GMN) (D. Nev.);
>
> 5) The 'release form' referenced on Page 2 of the Government's Motion to Strike in United States v. Bundy, No. 2:16-CR-00046 (PAL) (GMN), ECF. No. 926 (D. Nev. Nov. 2, 2016);
>
> 6) All records, including but not limited to email communications, concerning or referencing any other instances of impersonation of a documentary filmmaker

> and/or a documentary film crew by the FBI in connection with any criminal investigation since January 1, 2010;
>
> 7) Records of any 'professional credentials, websites and business cards' used by FBI agents in connection with the impersonation of a documentary filmmaker and/or a documentary film crew since January 1, 2010; and
>
> 8) All records of the FBI's policies and practices concerning the impersonation of documentary filmmakers and/or documentary film crews since January 1, 2010, including records of any changes to those policies and practices.

*Id.* (underlining added).

By six letters—five dated April 27, 2017, and one dated May 18, 2017—David M. Hardy responded to the Request on behalf of the FBI; he informed RCFP that the FBI had split the Request into four groups. SMF ¶ 65. Relevant to the present cross-motions for partial summary judgment, the FBI separated out items (6) and (7) of the Request, underlined above, and categorized it as "Request No. NFP-71761, concerning 'All Records Referencing Any Other Instances of FBI Impersonation of Documentary Filmmaker and/or Film Crew (January 1, 2010 to Present).'" SMF ¶ 7. By letter dated April 27, 2017, the FBI stated that the portion of RCFP's Request categorized as NFP-71761 "does not contain enough descriptive information to permit a search of our records" and requested "more specific information" to process the Request. SMF ¶ 7. On June 5, 2017, RCFP submitted a timely administrative appeal challenging the FBI's response to that portion of its Request, arguing, *inter alia*, that items (6) and (7) "reasonably described" the records sought pursuant to 5 U.S.C. § 552(a)(3)(A). SMF ¶ 66. RCFP received no further communication from Defendants concerning items (6) or (7) of the Request prior to the filing of this lawsuit. SMF ¶ 67. No records were produced to RCFP prior to the filing of this lawsuit. SMF ¶ 68.

**C. The Reporters Committee's lawsuit and the parties' pending cross-motions**

The Reporters Committee filed its Complaint in the above-captioned action on August 21, 2017. ECF No. 1. Defendants filed an answer on September 25, 2017. ECF No. 8. On February 6, 2018, Defendants released 28 pages of responsive records to RCFP responsive to item (8) of the Request, consisting of a number of internal policies governing the FBI's impersonation of members of the news media, including documentary filmmakers. SMF ¶ 46.

During meet and confer discussions, counsel for the Government indicated that the FBI was changing its position as to items (6) and (7) of the Request. SMF ¶ 11. The FBI withdrew its original determination that those portions of RCFP's Request "[did] not contain enough descriptive information to permit a search of [the FBI's] records" and instead asserted a *Glomar* response pursuant to Exemption 7(E). *Id.*

On April 17, 2018, the parties submitted a status report in which they jointly agreed to bifurcate the issues in this litigation and to first brief the propriety of the FBI's assertion of a *Glomar* response pursuant to Exemption 7(E) to items (6) and (7) of the Request. ECF No. 16. The Court adopted that proposal on April 24, 2018. *See* Minute Order.

## LEGAL STANDARDS

FOIA's central purpose is "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). It "was designed to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Citizens for Responsibility & Ethics in Washington ("CREW") v. Department of Justice*, 746 F.3d 1082, 1088 (D.C. Cir. 2014) (quotation marks omitted); *see also Rural Housing Alliance v. United States Dep't of Agriculture*, 498 F.2d 73, 76 (D.C. Cir. 1974) (explaining that FOIA "ensure[s] public access to a wide range of government reports and

information"). "[D]isclosure, not secrecy," is the Act's "dominant objective." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976).

To that end, FOIA requires that agency records be made "promptly available" upon request unless they fall within one of nine enumerated categories of information that may be withheld. 5 U.S.C. § 552(a)(3), (b). These exemptions "have been consistently given a narrow compass." *United States Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989); *FBI v. Abramson*, 456 U.S. 615, 630 (1982) ("FOIA exemptions are to be narrowly construed[.]"). In addition, the Act mandates that any "reasonably segregable portion of a record" be released even if other parts are exempt from disclosure. 5 U.S.C. § 552(b). Thus, an agency "may not sweep a document under a general allegation of exemption, even if that general allegation is correct with regard to part of the information." *Vaughn v. Rosen*, 484 F.2d 820, 825 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

FOIA cases are frequently decided on motions for summary judgment. *See Defenders of Wildlife v. U.S. Border Patrol*, 623 F.Supp.2d 83, 87 (D.D.C. 2009); *Bigwood v. United States Agency for Int'l Dev.*, 484 F.Supp.2d 68, 73 (D.D.C. 2007). Generally speaking, summary judgment may be granted if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). An agency is entitled to summary judgment in a FOIA action only if it establishes that it has "fully discharged" its statutory obligations to search for and disclose responsive documents. *Weisberg v. Dep't of Justice*, 705 F.2d 1344, 1350 (D.C. Cir. 1983). The agency's actions are reviewed by the district court *de novo*. 5 U.S.C. § 552(a)(4)(B).

In limited circumstances, an agency may issue what is commonly referred to as a *Glomar* response, refusing altogether to respond to a FOIA request where a "FOIA exemption would

itself preclude . . . *acknowledgment*" that the agency possesses or does not possess responsive records. *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 68 (2d Cir. 2009) (quoting *Minier v. Cent. Intelligence Agency*, 88 F.3d 796, 800 (9th Cir. 1996)) (emphasis in original). The agency bears the burden of demonstrating "that the information" it asserts is exempt "logically falls within the claimed exemption[]." *Id.* (quoting *Minier*, 88 F.3d at 800). Conclusory, vague, and sweeping justifications will not suffice. *Id.*

**ARGUMENT**

The D.C. Circuit has recognized two ways in which an agency's invocation of the *Glomar* doctrine may be overcome. First, a plaintiff may challenge the agency's assertion that confirming or denying the existence of responsive records would result in a cognizable harm under a FOIA exemption; "[t]he agency bears the burden of proving that the withheld information falls within the exemption it invokes." *Elec. Privacy Info. Ctr. v. Nat'l Sec. Agency*, 678 F.3d 926, 932 (D.C. Cir. 2012); *see also People for the Ethical Treatment of Animals v. Nat'l Institutes of Health*, 745 F.3d 535, 540 (D.C. Cir. 2014); *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007). To determine whether the existence *vel non* of agency records "fits a FOIA exemption, courts apply the general exemption review standards established in non-*Glomar* cases." *Wolf*, 473 F.3d at 374; *see also Am. Civ. Liberties Union v. CIA*, 710 F.3d 422, 426 (D.C. Cir. 2013) (hereinafter "*ACLU/CIA*") (same).

Alternatively, a plaintiff may overcome a *Glomar* response by "showing that the agency has already disclosed the fact of the existence (or nonexistence) of responsive records," because "[w]hen an agency has officially acknowledged otherwise exempt information through prior disclosure, the agency has waived its right to claim an exemption with respect to that

information." *ACLU/CIA*, 710 F.3d at 426–27; *see also Moore v. CIA*, 666 F. 3d 1330, 1333 (D.C. Cir. 2011); *Wolf*, 473 F.3d at 374–75.

The FBI's assertion of a *Glomar* response in this case fails both of these tests.

## I. The FBI does not—and cannot—establish that the existence *vel non* of records responsive to the Request falls within Exemption 7(E).

### A. A *Glomar* response pursuant to Exemption 7(E) cannot, as a matter of law, be used to shield the FBI's use of a technique already known to the public.

To establish that its assertion of a *Glomar* response pursuant to Exemption 7(E) is proper, the FBI must demonstrate that the records sought by the Request were (1) "compiled for law enforcement purposes," and (2) that confirming or denying their existence "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law[.]" 5 U.S.C. § 552(b)(7)(E). The FBI must also show "logically" how the release of the requested information will "risk circumvention of the law." *Blackwell v. FBI*, 646 F.3d 37, 42 (D.C. Cir. 2011) (citations omitted).

Here, the FBI's *Glomar* response fails to satisfy a fundamental requirement of Exemption 7(E), which only allows the government to withhold "material which describes *secret* investigative techniques and procedures." *Jaffe v. CIA*, 573 F. Supp. 377, 387 (D.D.C. 1983) (emphasis added). Exemption 7(E) "extends to information regarding *obscure* or *secret* techniques," and protects "documents which assertedly relate to law enforcement procedures *not known to the public*." *Id.* (emphasis added); *see also Smith v. BATF*, 977 F. Supp. 496, 501 (D.D.C. 1997) (requiring agency to "provide greater detail as to why the release of the information … would compromise law enforcement by revealing information about investigatory techniques that are not widely known to the general public").

Decisions evaluating Exemption 7(E) claims in this Circuit make clear that the FBI cannot assert Exemption 7(E) to shield its use of an investigative tactic that is known to the public. As the court in *Albuquerque Publishing Co. v. Department of Justice*, 726 F. Supp. 851 (D.D.C. 1989), explained "[a]s construed in the [legislative history] and case law in this Circuit, [Exemption 7(E)] pertains to investigative techniques and procedures generally *unknown to the public*." *Id.* at 857 (citations omitted) (emphasis added). The court went on to emphasize that it:

> saw nothing exceptional or secret about the techniques [the agency] described—namely, the use of wired informants and 'bugs' secretly placed in rooms that are under surveillance. Anyone who is familiar with the media, both television and print, is aware that the police use these and similar techniques in the course of criminal investigations. DEA's position in this respect disregards reality. Therefore, the government should avoid burdening the Court with an *in camera* inspection of information pertaining to techniques that are commonly described or depicted in movies, popular novels, stories or magazines, or on television. These would include, it would seem to us, techniques such as eavesdropping, wiretapping, and surreptitious tape recording and photographing. Instead, the government should release such information to plaintiff voluntarily.

*Id.* at 857–58.[6]

Similarly, in *Campbell v. Department of Justice*, 1996 WL 554511 (D.D.C. Sept. 19, 1996), *rev'd on other grounds*, 164 F.3d 20 (D.C. Cir. 1999), the FBI attempted to assert Exemption 7(E) to withhold information regarding "commonly known procedures such as pretext telephone calls." *Id.* at *10. The court rejected the FBI's Exemption 7(E) claims, finding

[6] Impersonation of members of the media by federal agents has also been depicted in popular movies and on television. For example, in 1979, the Central Intelligence Agency created a fake Hollywood production company—"Studio Six"—to assist in the undercover rescue of six Americans during the Iran hostage crisis; the incident was dramatically depicted in the Oscar-winning 2012 film *Argo*. *See* Joshuah Bearman, *How the CIA Used a Fake Sci-Fi Flick to Rescue Americans from Tehran*, Wired, Apr. 24, 2007, *available at* https://perma.cc/BA5F-6DQ3. *See also Archer*, *Sea Tunt: Part II* (FX, March 11, 2014) (episode of comedic animated television show depicting members of a fictional "International Secret Intelligence Service" that worked closely with the U.S. government impersonating investigative journalists and a film crew to infiltrate an occupied underwater laboratory).

that "[t]he technique information at issue . . . does not directly comport with the general class of information protected under Exemption 7 as 'obscure or secret.'" *Id.*[7]

Here, the FBI claims that "[t]he records sought by RCFP (assuming they exist) would disclose details of an undercover law-enforcement technique purportedly used by the FBI." FBI Mot. at 11. As in *Albuquerque Pub. Co.*, 726 F. Supp. at 857, the agency's argument "disregards reality." It is clear from the FBI's own public statements that there is nothing "purported" about the FBI's acknowledged practice of impersonating journalists, including documentary filmmakers, in criminal investigations. As detailed above, *supra* pp. 4–6, media impersonation as a law enforcement investigative technique dates back decades. The FBI's use of that technique was the subject of intense public scrutiny after the Timberline incident came to light in 2014, *supra* p. 5–6, prompting two inquiries from members of Congress, an official response from then-FBI Director Comey, and an OIG investigation. Now, even more recently, the FBI has testified, in open court, about its impersonation of a documentary film crew in connection with the Bundy investigation, *see supra* p. 3–4, which garnered significant media attention. *Id.*; *see also FRONTLINE*, *American Patriot*, at 32:55 (PBS 2017).[8]

The FBI has also released four versions of its policy for impersonating members of the media, including, specifically, documentary filmmakers, in criminal investigations to the Reporters Committee in response to this lawsuit—documents that further confirm that the FBI

[7] In neither case did the agency attempt to take the more extreme position asserted by the FBI here: that merely confirming the existence of records related to the commonly known investigative techniques at issue would result in a cognizable harm under Exemption 7(E). In each case, the agency had searched for and processed responsive records, asserting Exemption 7(E) only as a ground for withholding responsive information. *Albuquerque Pub. Co.*, 726 F. Supp. at 857; *Campbell*, 1996 WL 554511 at *10.

[8] *Available at* https://www.pbs.org/wgbh/frontline/film/american-patriot-inside-the-armed-uprising-against-the-federal-government/.

engages in this supposedly secret "tactic". SMF ¶ 46 & Townsend Decl. ¶ 10 & Ex. I. The FBI's policy governing documentary film crew impersonation sets forth, *inter alia*, how field offices should seek permission to engage in this practice, the role of the FBI Director and Deputy Attorney General in reviewing such requests, the procedures for "emergency interim authorization" to impersonate a documentary film crew, and the requirements for approval if FBI agents are expected to engage in fewer than "five, separate, substantive contacts" when impersonating documentary filmmakers. *Id.*; *see also* SMF ¶ 41 & Townsend Decl. ¶ 7 & Ex. F. These procedures make clear that the FBI's "technique" of impersonating documentary filmmakers is neither secret nor obscure.

Despite its public record of impersonating members of the media, including documentary filmmakers, the FBI nonetheless seeks to defend its invocation of the *Glomar* doctrine in this case by asking the Court to distinguish between "Longbow Productions" and its impersonation of a documentary film crew for the Bundy investigation, on the one hand, and other instances of documentary filmmaker impersonation, on the other. FBI Mot. at 11. Yet this argument misapprehends the nature of the inquiry that is now before this Court. The FBI does not—and could not—demonstrate that merely *confirming the existence of records* related to other instances of documentary filmmaker impersonation by the agency would reveal a "secret," "obscure" investigative technique that is "not known to the public." *Jaffe*, F. Supp. at 387. Any concern on the part of the FBI regarding the disclosure of a specific investigation in which the FBI has or is currently impersonating documentary filmmakers can and should be addressed, as the Act requires, through the redaction of specific responsive records—not through a *Glomar* response.[9]

[9] Defendants' reliance on *Myrick v. Johnson*, 199 F. Supp. 3d 120, 125 (D.D.C. 2016), is unavailing. *Myrick*, which concerned the assertion of a *Glomar* response to a FOIA request seeking information regarding a single, ongoing undercover operation, is inapposite.

In sum, there is nothing "obscure or secret" about the FBI's tactic of impersonating members of the news media, including documentary filmmakers. For that reason alone, the FBI's *Glomar* response pursuant to Exemption 7(E) must be rejected, and the FBI required to search for and process records responsive to the Request.

**B. The FBI has not—and cannot—demonstrate that confirming the existence *vel non* of records responsive to the Request would "risk circumvention of the law"; the purported "harms" identified by the FBI highlight why the *Glomar* doctrine is inapplicable here.**

In addition to failing to demonstrate that the "investigative technique" at issue is "secret," *Jaffe*, 573 F. Supp. at 387, the FBI also fails to satisfy its burden to "demonstrate logically" how merely confirming or denying the existence of records responsive to the Reporters Committee's Request would "risk circumvention of the law." *Blackwell*, 646 F.3d at 42.[10] According to the FBI, acknowledging the existence of records relating to its impersonation of documentary filmmakers in investigations other than the Bundy matter would purportedly enable "criminals to reasonably discern whether or not the FBI has employed this technique to investigate their own criminal activities." FBI Mot. at 11–12. Far from logical, this assertion is nonsensical. The mere *existence* of such records says nothing, whatsoever, about any specific criminal

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Defendants' reliance on *Soghoian v. U.S. Dep't of Justice*, 885 F.Supp.2d 62, 75 (D.D.C. 2012), and *Durrani v. U.S. Dep't of Justice*, 607 F.Supp.2d 77, 91 (D.D.C. 2009) is similarly misplaced. In both cases, the agency searched for and withheld records pursuant to Exemption 7(E); in *Soghoian*, the agency's 7(E) claim was upheld as to specific records only after *in camera* review. Neither case supports Defendants' assertion of a *Glomar* response in this case.

[10] Contrary to the Government's argument, the D.C. Circuit has applied the final clause of Exemption 7(E), requiring an agency to demonstrate a "risk of circumvention of the law," to exemption claims predicated on law enforcement "techniques and procedures." *Id*.; *see also PHE, Inc. v. DOJ*, 983 F.2d 248, 250 (D.C. Cir. 1993); *Piper v. DOJ*, 294 F. Supp. 2d 16, 30 (D.D.C. 2003), *aff'd per curiam*, 222 F. App'x 1 (D.C. Cir. 2007); *Billington v. DOJ*, 69 F. Supp. 2d 128, 140 (D.D.C. 1999) (finding that Exemption 7(E) analysis "requires defendant to show that disclosure would frustrate enforcement of the law"), *aff'd in pertinent part, vacated in part & remanded on other grounds*, 233 F.3d 581 (D.C. Cir. 2000).

investigation where the FBI may have used this tactic. The notion that—"[a]rmed" *only* "with [the] knowledge" that the FBI *possesses records* relating to its acknowledged practice of impersonating documentary filmmakers—"criminals" would be able to "predict FBI investigative efforts targeting their activities," and be able to "pre-emptively destroy or tamper with valuable evidence, intimidate or eliminate potential witnesses, and create false alibis to thwart FBI efforts to enforce the law" is implausible to say the least. *Id*. at 12.

The FBI's contention that confirming the existence of the records sought by the Reporters Committee would prompt FBI targets to "avoid any contacts with documentary film crews, rendering the investigative technique ineffective," FBI Mot. at 12, in particular, highlights the ridiculous nature of the FBI's *Glomar* position. According to the FBI, it is concerned that public knowledge of its use of this "investigative technique" will chill speech to documentary filmmakers. In reality, the FBI's use of this "investigative technique" is already publicly known, as detailed above, and it is already having a chilling effect felt by documentary filmmakers.

Award-winning independent documentary filmmaker Abby Ellis ("Ellis") has first-hand knowledge of that chilling effect. From September 2016 to May 2017, Ellis worked on a documentary film for *FRONTLINE*—the weekly documentary series that airs on PBS—about the 2014 standoff at Bundy's ranch in Bunkerville, Nevada, and the 41-day occupation of Oregon's Malheur National Wildlife Refuge in 2016. Declaration of Abby Ellis ("Ellis Decl."), ¶ 2. While working on that documentary, entitled *American Patriot: Inside the Armed Uprising Against the Federal Government* (hereinafter, "*American Patriot*"), Ellis became aware of "rumors" that the FBI had posed as a documentary film crew.[11] Ellis was "asked by militia

[11] It was not until "[t]oward the end of filming for *American Patriot*," that Ellis learned that "the rumors regarding 'Longbow Productions' were true." *Id*., ¶ 6.

members and those connected to them whether [she] was an FBI agent," and was told by certain individuals she interviewed for the film that they believed she was. *Id*., ¶ 7. Indeed, some individuals Ellis attempted to speak to for the documentary would not communicate with her "because they thought [she] was an undercover FBI agent." *Id*. ("I speak with people often in my line of work who do not immediately trust documentary filmmakers, but it was clear to me that at least some of the individuals I spoke to while working on *American Patriot* did not trust that I was who I said I was, and were suspicious that I was an undercover FBI agent.")

The experience of documentary filmmaker David Byars ("Byars")—whose award-winning film *No Man's Land* documents the occupation of Oregon's Malheur National Wildlife Refuge—also highlights the real-world effect of FBI's acknowledged tactic of impersonating documentary filmmakers.[12] Declaration of David Byars ("Byars Decl."), ¶¶ 2–3. To make *No Man's Land*, Byars was granted "significant access by the occupiers" during the Oregon standoff, including being "allowed to film with them in the occupied headquarters." *Id*., ¶ 4. According to Byars, had the subjects of his film "known at the time of the occupation" in January 2016 "what they now know" about the FBI's impersonation of documentary filmmakers, he "would not have been given the same access to them that [he] was given to make *No Man's Land*." *Id*., ¶ 9 ("I don't know if *No Man's Land* would have been made; it certainly would have been a different film.") Since *No Man's Land* premiered, Byars has even been asked whether "FBI Undercover agents help[ed] with [his] film[.]" *Id*., ¶ 11, Ex. A.

In sum, there is widespread public knowledge that the FBI impersonates journalists and, specifically, documentary filmmakers. Public knowledge of the FBI's use of that "investigative

[12] Plaintiff is lodging a DVD copy of the film *No Man's Land* with the Court and providing a copy to Government's counsel. Townsend Decl. ¶ 9, Ex. H.

technique" has spurred distrust of documentary filmmakers, and led their potential sources and subjects to avoid contacts with them. If, as the FBI argues, the chilling effect that flows from public knowledge that FBI agents impersonate documentary filmmakers in criminal investigations "render[s]" that investigative technique "ineffective," it has already been rendered ineffective by the FBI's own actions. FBI Mot. at 12. The FBI's attempt to rely on that concern as purported justification for asserting a *Glomar* response in this case fails.

## II. In evaluating the propriety of the FBI's *Glomar* response, the Court should consider the First Amendment interests at stake.

The FBI's refusal to confirm the existence *vel non* of records that would shed light on its acknowledged practice of impersonating members of the media, including documentary filmmakers, is damaging to the exercise of First Amendment rights. The specter of FBI impersonation that now hangs over interactions between legitimate documentary filmmakers and their sources and subjects chills speech, and places real documentary filmmakers at risk. This Court need not ignore this demonstrable constitutional harm in determining whether the *Glomar* doctrine is applicable here. To the contrary, in cases that touch upon First Amendment interests, courts must ensure that those constitutional rights are properly safeguarded. *See*, *e.g.*, *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) (stating a rule of appellate review that requires special scrutiny "in cases raising First Amendment issues," observing that the Court has "repeatedly held" that appellate courts have "an obligation" to "make sure that the judgment does not constitute a forbidden intrusion on the field of free expression" (internal quotations and citations omitted)).

### A. Interpreting the scope of the *Glomar* doctrine to include the records sought by the Reporters Committee would raise serious constitutional problems.

Documentary filmmaking is a form of journalism protected by the First Amendment. *See*, *e.g.*, *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 436 (10th Cir. 1977) (holding that a

documentary filmmaker was entitled to invoke the reporter's privilege). Indeed, the FBI's own 2016 Domestic Investigations and Operations Guide ("DIOG") recognizes that the First Amendment "covers such matters as . . . the making of documentaries[.]" 2016 DIOG, § 4.2.3, *archived at* https://perma.cc/TYR5-8RPQ.

Like other forms of investigative journalism, documentary filmmaking relies on information gathered from sources and subjects, including on- and off-camera interviews. Such constitutionally protected newsgathering,[13] in turn, is often only possible through concerted efforts by journalists to develop relationships of trust with their sources and subjects. *See*, *e.g.*, *On Gaining Trust with the Subjects of Call Me Kuchu*, (Dec. 16, 2013), https://www.youtube.com/watch?v=6XZGMgv2MJs (interview with filmmakers discussing their process regarding their film on LGBT rights in Uganda); Alyssa Rosenberg, *Unburying the Vietnam War*, Washington Post (Sep. 18, 2017), http://wapo.st/makingofvietnam (describing efforts taken by the filmmakers to secure interviews with former American and North and South Vietnamese soldiers for their documentary *The Vietnam War: A Film by Ken Burns and Lynn Novick* (PBS, 2017)). For example, Byars describes obtaining access to the occupiers of Oregon's Malheur National Wildlife Refuge to shoot his film *No Man's Land* as a "time consuming and difficult process" because "the occupiers tended to be mistrustful of the media in general." Byars Decl. ¶ 5. According to Byars, he "spent a lot of time with the occupiers both on and off camera, to help them understand that I was genuinely interested in telling the story of

[13] As the D.C. Circuit has explicitly recognized, "the press' function as a vital source of information is weakened whenever the ability of journalists to gather news is impaired." *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981); *see also Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) (noting that "without some protection for seeking out the news, freedom of the press could be eviscerated."); *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 520 (4th Cir. 1999) (recognizing "First Amendment interests in newsgathering" (citation omitted)).

how the occupation unfolded and the motivations for it." *Id*. Similarly, Ellis typically "spend[s] months conducting extensive off-the-record interviews before [she] even start[s] filming, to ensure that [she is] getting a fair and accurate view of who [her] subjects are[,]"; as she explains, "[u]nburdened access to interview subjects is necessary to make powerful, investigative documentary films." Ellis Decl. ¶ 3.

FBI impersonation of members of the media, including documentary filmmakers, causes cognizable First Amendment harm by undermining trust and chilling speech between real journalists and their sources and subjects. *Cf. Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449 (1958) (holding unconstitutional Alabama's efforts to force disclosure of membership of NAACP because doing so would chill First Amendment-protected activities); *Smith v. People of the State of California*, 361 U.S. 147 (1959) (collecting and describing cases standing for the principle that government action is unconstitutional where it has the "collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it"). As detailed above—and, as the FBI itself admits, FBI Mot. at 12—the public's knowledge that FBI agents impersonate documentary filmmakers has a chilling effect. *See* Ellis Decl. ¶¶10–11; Byars Decl., ¶¶ 12–13. As Byars explains, "if an individual cannot be certain if they are speaking with a legitimate documentary filmmaker—as opposed to an undercover FBI agent—they are less likely to speak candidly, and more likely to refuse to speak at all." Byars Decl. ¶ 12; *see also id*. (observing that the FBI's actions "will have longstanding, detrimental effects on the ability of real documentary filmmakers," like him "to obtain access to subjects and to get them to appear on camera."); Ellis Decl. ¶ 10 ("In my experience, individuals will be less likely to speak to me, and especially on-camera, if they think that I could be an undercover FBI agent."). This chilling effect will be "particularly felt by

independent journalists and documentary filmmakers . . . who are not affiliated with a large, well-known media entity." Byars Decl. ¶ 13; *see also* Ellis Decl. ¶ 11.

In addition to chilling speech, the FBI's acknowledged practice of impersonating members of the news media also jeopardizes the physical safety and security of real journalists. As one columnist wrote in an opinion piece in *The Washington Post*:

> grave risks that can grow from situations that allow people to confuse intelligence or law enforcement officials with journalists. Like those officials, journalists go into dangerous environments, investigate controversial and illegal doings, and question unsavory characters. Being mistaken for an officer, while not having the same resources for protection — a gun and backup assistance, for example — can be hazardous to a reporter's life.

Joe Davidson, *FBI impersonation of journalists can be hazardous to their health*, Wash. Post (Dec. 21, 2016), *archived at* https://perma.cc/4EQP-8CL3.

This is particularly true of journalists, like many independent documentary filmmakers, who "often meet interview subjects alone in remote locations that [they] may have never visited before." Ellis Decl. ¶ 9. For instance, to make *No Man's Land*, Byars was on the ground, in Malheur National Wildlife Refuge, in the midst of the standoff between armed occupiers and federal authorities. Byars Decl. ¶ 3–4; *see also No Man's Land* at 40:50–42:30 (showing occupiers armed with weapons and firing rifles); Frontline, *American Patriot*, at 32:55 (PBS 2017)[14] (FBI Special Agent Greg Bretzing describing a group of "Pacific Patriots" that went to the Malheur refuge as "always armed"). Indeed, in one of the fake "interviews" conducted by FBI agents from "Longbow Productions" in connection with the Bundy investigation, an FBI agent asked Burleson what the result would have been had federal agents returned to the 2014 standoff, to which he replied: "Dead bodies. Literally." *American Patriot* at 49:08. According

[14] *Available at* https://www.pbs.org/wgbh/frontline/film/american-patriot-inside-the-armed-uprising-against-the-federal-government/.

to Byars, "if individuals involved in or connected to the occupation of the Malheur National Wildlife Refuge in 2016 had believed that I was an undercover FBI operative only pretending to be a documentary filmmaker, it could have put me in physical danger." Byars Decl. ¶ 10.

The FBI's attempt to assert a *Glomar* response under Exemption 7(E) to shield the very existence of records concerning its acknowledged practice of impersonating documentary filmmakers furthers the harm to First Amendment interests. As things currently stand, there is widespread public knowledge of the FBI's use of media impersonation as an "investigative technique," *see supra* Section I, yet little other public information about it. Such selective secrecy on the part of the FBI leads, as the FBI itself has recognized, to a general distrust of documentary filmmakers, and chills the exercise of First Amendment rights. That this chilling effect may be an unintended consequence of the FBI's actions with respect to this particular "investigative technique" is irrelevant. As the Supreme Court has explained,

> In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action.

*NAACP*, 357 U.S. at 461. This Court need not and should not ignore the serious, demonstrable effects of the FBI's actions on the exercise of First Amendment rights in determining whether the *Glomar* doctrine applies in this case.

### B. The Court should interpret the *Glomar* doctrine to avoid these serious constitutional problems.

The *Glomar* doctrine "is not described in [FOIA] or its legislative history[.]" *Shapiro v. U.S. Dep't of Justice*, 153 F. Supp. 3d 253, 273 (D.D.C. 2016) (internal quotations and citation omitted). It is "in large measure a judicial construct[.]" *ACLU/CIA*, 710 F.3d at 431. Though an agency must tether a *Glomar* response to one of the Act's enumerated exemptions, as the D.C. Circuit has explained, application of the doctrine arises out of a judicial "interpretation of FOIA

exemptions that flows from their purpose rather than their express language." *Id*. Because the doctrine itself is largely a judicial construct, its contours are left to the courts, who have previously recognized limits on its application. *See id.* at 427 (explaining that a FOIA plaintiff may "rebut a *Glomar* response by establishing official acknowledgement."); *Elec. Privacy Info. Ctr.*, 678 F.3d at 931 (stating that evidence of agency "bad faith" can preclude summary judgment in favor of an agency in *Glomar* cases).

Under the doctrine of constitutional avoidance, where there is statutory ambiguity and "an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress[.]" *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Homeland Sec.*, 527 F. Supp. 2d 76, 98–99 (D.D.C. 2007) (hereinafter "*CREW*") (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council,* 485 U.S. 568, 575 (1988)). In other words, if there are multiple "plausible" interpretations of a statute, "a court must consider the necessary consequences of its choice. If one of them would raise constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court." *Clark v. Martinez*, 543 U.S. 371, 380–81 (2005). In light of the "constitutional problems" raised by the FBI's assertion of a *Glomar* response in this case, and the Court's obligation to consider the First Amendment interests at stake, the Court should avoid an "interpretation" of FOIA that permits application of the *Glomar* doctrine here.

With respect to the *Glomar* doctrine, there is undoubtedly statutory ambiguity; the doctrine "is not described in the statute or its legislative history[.]" *Shapiro*, 153 F. Supp. 3d at 273 (internal quotations and citation omitted); *cf. CREW*, 527 F. Supp. 2d at 98–99 (finding

constitutional avoidance doctrine predicated on a separation of powers argument inapplicable to interpretation of "agency records" under FOIA because, *inter alia*, government failed to identify ambiguity in the statute). The doctrine flows entirely from judicial interpretations of the "purpose" of the Act's exemptions "rather than their express language." *ACLU/CIA*, 710 F.3d at 431. An interpretation of the *Glomar* doctrine that permits the FBI to refuse to either confirm or deny the existence of the records at issue here would raise serious constitutional problems, without any indication from Congress that it intended such a result.[15]

Here, the Court "must consider the necessary consequences" for the exercise of First Amendment rights in determining whether to adopt an interpretation of FOIA that permits the FBI to refuse to confirm the existence *vel non* of records concerning its impersonation of journalists, specifically, documentary filmmakers. *See Clark*, 543 U.S. at 380–81. Given the serious—indeed, severe—long-term chilling effects that flow from the FBI's actions, the Court should avoid an interpretation of the *Glomar* doctrine that would permit the FBI to shield the mere existence of records responsive to RCFP's Request from disclosure.

## III. Through official acknowledgment, the FBI has waived its ability to assert a *Glomar* response in this case.

Even if the FBI established that it has properly invoked Exemption 7(E) in its refusal to confirm or deny the existence of records related to its practice of impersonating documentary

[15] FOIA's exemptions arise out of Congress's recognition that "legitimate governmental and private interests could be harmed by release of certain types of information . . . ." *FBI v. Abramson*, 456 U.S. 615, 621 (1982). The scope of Exemption 7 was substantially curtailed by Congress in the 1974 amendments to FOIA. In his floor statement in support of Congress's override of President Ford's veto, Senator Kennedy specifically pointed to records withheld by the FBI as a reason for reform: "[N]ot even the FBI should be placed beyond the law, the [FOIA]. Watergate has shown us that unreviewability and unaccountability in Government breeds irresponsibility of Government officials." Senate Action and Vote on Presidential Veto, Nov. 21, 1974, *reprinted in* Freedom of Information Act and Amendments of 1974 Source Book: Legislative History, Texts, and Other Documents (1975) at 440 (statement of Senator Kennedy).

filmmakers—which it has not—the FBI's official acknowledgements regarding its use of that practice and the existence of records responsive to RCFP's Request would override its claim.

"[W]hen an agency has officially acknowledged otherwise exempt information through prior disclosure, the agency has waived its right to claim an exemption with respect to that information." *ACLU/CIA*, 710 F.3d at 426. "[I]n the context of a *Glomar* response, the public domain exception is triggered when 'the prior disclosure establishes the *existence* (or not) of records responsive to the FOIA request,' regardless whether the contents of the records have been disclosed." *Marino v. DEA*, 685 F.2d 1076, 1081 (D.C. Cir. 2012) (citations omitted) (emphasis in original). This is because, "[i]n the *Glomar* context, the 'specific information' at issue is not the contents of a particular record, but rather 'the existence *vel non*' of any records responsive to the FOIA request." *ACLU/CIA*, 710 F.3d at 427 (quoting *Wolf*, 473 F.3d at 379 (emphasis omitted)). "Accordingly, the plaintiff can overcome a *Glomar* response by showing that the agency has already disclosed the fact of the existence (or nonexistence) of responsive records, since that is the purportedly exempt information that a *Glomar* response is designed to protect." *Id.*

Here, the portion of the Request at issue seeks records related to incidents of FBI impersonation of documentary filmmakers in criminal investigations since 2010, other than the Bundy investigation. FBI SMF ¶ 1. Documents recently released to the Reporters Committee by the FBI in other pending FOIA litigation, *see supra* p. 6–7, officially acknowledge that the FBI has such records.[16] One such recently released document is a February 8, 2016 e-mail from an FBI employee questioning whether the agency's new policies regarding impersonation of

[16] The FBI did not assert a *Glomar* response to any portion of the plaintiffs' requests for documents related to its practice of media impersonation in these other pending FOIA cases.

members of the news media, including documentary filmmakers, "appl[ies] only to future [undercover operations], or … appl[ies] retroactively to *ongoing UCOs* [undercover operations] that have already been approved with the documentary film crew scenario?" Townsend Decl. at ¶ 11 & Ex. J (emphasis added). The statements in this e-mail are an unequivocal official acknowledgement that in February 2016—a time period covered by the Request—the FBI had multiple "ongoing" undercover operations involving a "documentary film crew scenario," and therefore that records responsive to the relevant portions of the Reporters Committee's Request at issue here exist. Similarly, another e-mail released by the FBI, dated June 7, 2016, notes the existence of "a number of communications to HQ components and the field in 2016 regarding the use of 'documentary' and similar type scenarios in undercover operations," Townsend Decl. at ¶ 11 & Ex. J. Other records recently released by the FBI refer generally to the practice of impersonating documentary filmmakers in such operations as the so-called "Documentary Scenario" and the "Documentary Film Crew scenario." *Id*.

In addition, records released by the FBI in this case, *see supra* p. 9, reflect the FBI's policies and procedures applicable to agents' impersonation of members of the news media, including documentary filmmakers. Townsend Decl. at ¶ 10 & Ex. I. These official FBI policies detail the specific procedures that FBI agents must follow before impersonating documentary filmmakers in a criminal investigation, and foreclose any assertion that the FBI "has not acknowledged the use" of documentary filmmaker impersonation as a practice. FBI Mot. at 11. As noted above, these detailed policies have been updated over time, and it is wildly implausible that the FBI would create and revise an entire policy requiring, among other things, the involvement of the FBI Director and the Deputy Attorney General, and create a generic "scenario," for a single instance of impersonation of a documentary film crew. The FBI's policy

is thus yet another official acknowledgement that forecloses the FBI's *Glomar* response. *See ACLU/CIA*, 710 F.3d at 431 (concluding that because CIA admitted it had an interest in drone strikes, it "beggars belief that it does not also have documents relating to the subject").

Finally, the FBI has repeatedly acknowledged publicly that it impersonates members of the media, including documentary filmmakers, as an investigative tactic. Even before FBI Special Agent Charles Johnson testified about the FBI's "Longbow Productions" undercover operation in open court, the FBI's practice of impersonating members of the media was publicly discussed by the agency. In November 2014, in response to public outcry regarding the FBI's impersonation of an AP journalist in the 2007 Timberline incident, *The New York Times* published a letter to the editor from then-FBI Director James Comey that officially acknowledged the FBI's practice of impersonating members of the media. Comey wrote that "[the FBI's impersonation of an AP editor in the Timberline case] was proper and appropriate under Justice Department and FBI guidelines at the time" and he defended the practice as "lawful and, in a rare case, appropriate." SMF ¶ 40. FBI special agent Frank Montoya Jr. was similarly quoted in a media report defending the practice and stating that FBI impersonation of the media "happens in very rare circumstances," SMF ¶ 36. A spokesperson for the FBI's Seattle Bureau provided on-the-record comments related to the FBI's impersonation of the AP in the Timberline investigation and, when asked how many times the FBI had impersonated journalists, reportedly replied: "That's something you'd have to FOIA[.]" SMF ¶ 37.

Given these disclosures, the facts at issue in this case bear a striking resemblance to those presented in *ACLU/CIA*, in which the D.C. Circuit held that the CIA could not issue a *Glomar* response to refuse to confirm the existence *vel non* of records related to the government's drone-strike program after speeches by then-President Barack Obama, then-Assistant to the President

for Homeland Security and Counterterrorism John Brennan, and then-CIA Director Leon Panetta had all confirmed the program's existence. 710 F.3d at 431 (stating that the CIA had "asked the courts to stretch [the *Glomar*] doctrine too far … to give their imprimatur to a fiction of deniability that no reasonable person would regard as plausible"). Here, following public acknowledgement by FBI officials, as well as the release of FBI documents that acknowledge the FBI's practice of media impersonation and the existence of records responsive to the portions of the Reporters Committee's Request at issue, "it [is] neither 'logical' nor 'plausible' to maintain" that the FBI "does not have any documents relating to" the impersonation of documentary filmmakers other than in the Bundy investigation. *Id.* at 431. To the contrary, the FBI's official acknowledgments "establish[] the existence . . . of records responsive to the FOIA request." *Wolf*, 473 F.3d at 379 (emphasis omitted). Accordingly, for this reason too, the FBI's *Glomar* claim must fail. *See Marino*, 685 F.3d at 1081 (official acknowledgment doctrine triggered by public disclosure of the existence of responsive records "regardless whether the contents of the records have been disclosed").

## CONCLUSION

For the foregoing reasons, Defendants' Motion for Partial Summary Judgment should be denied and Plaintiff's Cross-Motion for Partial Summary Judgment granted.

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Respectfully submitted,

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