

1 DEBRA ANN LIVINGSTON, *Circuit Judge*, dissenting:

2 I respectfully dissent because the majority's decision is, in my view, both  
3 legally erroneous and likely to mislead other courts in future Freedom of  
4 Information Act ("FOIA") litigation. The majority does not reach the merits of  
5 this appeal, which arises from a FOIA request by Sergio Florez, who seeks  
6 records from the Central Intelligence Agency ("CIA") concerning his deceased  
7 father, Dr. Armando J. Florez ("Dr. Florez"), a Cold War-era Cuban diplomat  
8 who ultimately defected to the United States. Instead, it determines that  
9 declassified documents concerning Dr. Florez that were released by the Federal  
10 Bureau of Investigation ("FBI") during the pendency of this appeal are relevant  
11 to the CIA's position (reaffirmed after review of the FBI documents) that the  
12 existence or nonexistence of responsive records in the CIA's possession  
13 constitutes information exempt from disclosure pursuant to FOIA, rendering a  
14 *Glomar* response appropriate.<sup>1</sup> Maj. Op. at 15-17. The majority remands to the

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<sup>1</sup> This Circuit joined the D.C., First, Seventh, and Ninth Circuits in recognizing the propriety of a *Glomar* response in 2009. As this Court then noted, "[t]he *Glomar* doctrine is well settled as a proper response to a FOIA request because it is the only way in which an agency may assert that a particular FOIA statutory exemption covers the 'existence or nonexistence of the requested records' in a case in which a plaintiff seeks such records." *Wilner v. N.S.A.*, 592 F.3d 60, 68 (2d Cir. 2009) (quoting *Phillippi v. C.I.A.*, 546 F.2d 1009, 1012 (D.C. Cir. 1976)). The Court "join[ed] our sister Circuits in holding that 'an agency may refuse to confirm or deny the existence of records where to

1 district court for that court to consider, in the first instance, whether these FBI  
2 disclosures affect its conclusion that the CIA's explanation for invoking FOIA  
3 Exemptions (b)(1) and (b)(3) and declining to confirm or deny the existence of  
4 responsive records appears "logical and plausible" and is thus sufficient. *Id.* at  
5 15 (quoting *Ctr. for Constitutional Rights v. C.I.A.*, 765 F.3d 161, 168 (2d Cir. 2014));  
6 *see Wilner*, 592 F.3d at 69-70, 73 (noting that in evaluating an agency's *Glomar*  
7 response, agency affidavits are to be afforded "substantial weight" and are  
8 sufficient when those affidavits describe the justifications for nondisclosure with  
9 "reasonably specific detail" and the basis for invoking an exemption "appears  
10 logical or plausible").

11       Respectfully, it is the legal determination that the FBI disclosures are  
12 relevant to the disposition of this matter with which I disagree. I conclude that  
13 the Government is correct in its contention that the FBI disclosures "do not bear  
14 on this Court's consideration of the issues raised on appeal," Gov't Letter Br. 3,  
15 so that there is no basis in FOIA or the cases construing it for the remand that the

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answer the FOIA inquiry would cause harm cognizable under a[ ] FOIA exception.'" *Id.*  
(second alteration in original) (quoting *Gardels v. CIA*, 689 F.2d 1100, 1103 (D.C. Cir.  
1982)).

1 majority directs.<sup>2</sup> Accordingly (and unlike the majority) I would reach the merits  
2 and would affirm the judgment of the district court.

3 \* \* \*

4 At the start, the FBI disclosures at issue, made pursuant to a separate FOIA  
5 request by Florez to the FBI, do not even mention the CIA, much less the  
6 existence or nonexistence of a classified relationship between Dr. Florez and the  
7 CIA, or the existence or nonexistence of Agency records regarding him. In such  
8 circumstances, it is difficult to discern (to say the least) how these FBI documents  
9 could affect, in any way, the adequacy of the CIA's showing (supported by  
10 declaration) that its *Glomar* response to Florez's FOIA request was appropriate —  
11 that information regarding the existence or nonexistence of records in the CIA's  
12 possession is exempt from disclosure under two separate FOIA exemptions.

13 The majority principally asserts that the FBI disclosures may call into  
14 question whether revealing the existence or nonexistence of records in the CIA's

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<sup>2</sup> In remanding to the district court, the majority suggests that it is proceeding "in [the] precise manner" requested by the CIA. Maj. Op. at 26. This is incorrect. The CIA has asserted that the FBI's disclosures "do not affect the disposition of this case," that the FBI's decision to release information regarding Dr. Florez "does not cast doubt on the propriety of the CIA's claimed exemptions," and that, accordingly, the FBI documents "do not bear on this Court's consideration of the issues raised on appeal." Gov't Letter Br. 2-3. The Government requests remand only in a footnote, *id.* at 3 n.2, and only in the event that this Court rejects, as it has, the CIA's position that the FBI disclosures lack "any bearing on this Court's consideration of the issues raised in this appeal," *id.* at 1.

1 possession relevant to Dr. Florez reasonably could be expected to result in harm  
2 to the national security.<sup>3</sup> Maj. Op. at 17 & n.6. The FBI records, however, neither  
3 address nor cast light on the national security harms that the CIA relied on  
4 before the district court in asserting its entitlement to FOIA Exemption (b)(1):  
5 *inter alia*, that confirmation of the existence or nonexistence of responsive records  
6 reasonably could be expected to cause damage to the national security by  
7 disclosing “whether or not the CIA has or had an intelligence interest in [Dr.]  
8 Florez or his associates,” “whether or not the CIA engaged in intelligence  
9 operations involving him, and the location of those operations,” and whether  
10 “the CIA maintained any human intelligence sources related to an interest in  
11 [Dr.] Florez” — the public revelation of which could jeopardize both human  
12 intelligence sources and the Agency’s credibility in maintaining them. *See* J.A.  
13 49-52 (emphases added).

14 These are significant national security concerns. As the D.C. Circuit has  
15 repeatedly noted, sources abroad, fearing retaliation against themselves or family  
16 and friends, “often refuse to aid the CIA absent assurances of confidentiality”

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<sup>3</sup> As pertinent here, FOIA Exemption (b)(1), *see* 5 U.S.C. § 552(b)(1), one of the two separate exemptions on which the CIA’s *Glomar* response was based, requires a showing that confirming or denying the existence of responsive records “reasonably could be expected to result in damage to the national security,” Exec. Order No. 13526, 75 Fed. Reg. 707, 707 (Dec. 29, 2009).

1 that logically must be honored “even decades after the death of the foreign  
2 national,” lest the Government’s substantial interest in the effective operation of  
3 its foreign intelligence service be thwarted. *Wolf v. C.I.A.*, 473 F.3d 370, 376-77  
4 (D.C. Cir. 2007); *see also Fitzgibbon v. C.I.A.*, 911 F.2d 755, 761 (D.C. Cir. 1990)  
5 (noting that “[i]f potentially valuable intelligence sources come to think that the  
6 Agency will be unable to maintain the confidentiality of its relationship to them,  
7 many could well refuse to supply information to the Agency in the first place”  
8 (emphasis omitted) (quoting *Sims v. C.I.A.*, 471 U.S. 159, 175 (1985))). The FBI  
9 documents here — which, notwithstanding the majority’s claim to the contrary,  
10 disclose little regarding Dr. Florez and say *nothing at all* about any connection to  
11 the CIA — are simply not helpful in assessing the logic and plausibility of such  
12 concerns in the present case. Indeed, the majority’s claim to the contrary hinges  
13 on reframing the CIA’s asserted national security interest as involving a  
14 generalized concern with “masking the *government’s* intelligence interest (if any)  
15 in Dr. Florez” — a reframing that, however subtle, simply gainsays the  
16 significant national security concerns associated with and peculiar to the  
17 effective operation of this country’s foreign intelligence service. Maj. Op. at 17  
18 (emphasis added).

1           At any rate, all this is somewhat beside the point. For as it turns out, only  
2 one of the two exemptions on which the district court based its decision (each of  
3 which provides a separate and independent basis for a *Glomar* response) even  
4 requires a showing that confirming or denying the existence of responsive  
5 records reasonably could be expected to result in damage to the national  
6 security. See 5 U.S.C. § 552(b)(1); see also Exec. Order No. 13526, 75 Fed. Reg. 707,  
7 707 (Dec. 29, 2009). The other, FOIA Exemption (b)(3), provides simply that  
8 FOIA's disclosure requirements do not apply to matters "specifically exempted  
9 from disclosure by statute." 5 U.S.C. § 552(b)(3). As the Supreme Court has  
10 stated, this exemption "applies to records that any other statute exempts from  
11 disclosure, thus offering Congress an established, streamlined method to  
12 authorize the withholding of specific records that FOIA would not otherwise  
13 protect." *Milner v. Dep't of Navy*, 131 S. Ct. 1259, 1271 (2011) (citation omitted).  
14 The sole issue for decision regarding the applicability of FOIA Exemption (b)(3),  
15 moreover, as we have noted, "is the existence of a relevant statute and the  
16 inclusion of withheld material within the statute's coverage." *Wilner*, 592 F.3d at  
17 72 (quoting *Ass'n of Retired R.R. Workers, Inc. v. U.S. R.R. Ret. Bd.*, 830 F.2d 331,  
18 336 (D.C. Cir. 1987)).

1 Both statutory provisions on which the district court relied — Section  
2 102(A)(i)(1) of the National Security Act of 1947, as amended, 50 U.S.C. §  
3 3024(i)(1), pursuant to which the Director of National Intelligence “shall protect  
4 intelligence sources and methods from unauthorized disclosure,” and Section 6  
5 of the Central Intelligence Agency Act of 1949, as amended, 50 U.S.C. § 3507,  
6 exempting the CIA specifically from the provisions of any law requiring the  
7 disclosure of the functions of Agency personnel — qualify as statutes of  
8 exemption (a point Florez does not dispute on appeal). In such circumstances,  
9 our inquiry is limited to the simple question whether the withheld information  
10 “falls within the statute.”<sup>4</sup> *Larson*, 565 F.3d at 868; *accord Wilner*, 592 F.3d at 72.

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<sup>4</sup> The majority seriously downplays the significance of the CIA’s reliance on FOIA Exemption (b)(3), contending that “the CIA has proffered a single general rationale with respect to both Exemptions.” Maj. Op. 18 n.6. This is incorrect. The CIA’s Exemption (b)(3) rationale focuses on the specific statutory provision at issue and the materials it protects — not on the potential effects of disclosure on the national security. The declaration of Martha M. Lutz, Chief of the CIA’s Litigation Support Unit, states specifically regarding the claimed exemption under the National Security Act, for instance, that “acknowledging the existence or nonexistence of records reflecting a classified connection to the CIA would reveal information that concerns intelligence sources and methods, which the National Security Act is designed to protect.” J.A. 55. Once the National Security Act has been invoked pursuant to FOIA Exemption (b)(3), our inquiry focuses narrowly on the question “whether the withheld material relates to intelligence sources and methods.” *Larson v. Dep’t of State*, 565 F.3d 857, 865 (D.C. Cir. 2009); *see also Fitzgibbon*, 911 F.2d at 761 (noting that Exemption (b)(3) “differs from other FOIA exemptions in that its applicability depends less on the detailed factual contents of specific documents; the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within the statute’s coverage” (quoting

1 Moreover, regarding the National Security Act exemption, in particular, the  
2 Supreme Court has recognized that its plain language (requiring the Director to  
3 protect intelligence sources and methods from unauthorized disclosure) “may  
4 not be squared with any limiting definition” such as one protecting “only  
5 confidential or nonpublic intelligence sources.” *Sims*, 471 U.S. at 169-70, 173  
6 (noting that Congress intended National Security Act exemption “to protect the  
7 secrecy and integrity of the intelligence process” and that this Act commits broad  
8 power to the Director “to control the disclosure of intelligence sources”).<sup>5</sup> Given  
9 that the FBI disclosures here do not even discuss the CIA or its activities, it is  
10 hard to fathom how these disclosures could possibly impact the logic and  
11 plausibility of the CIA’s representation that a *Glomar* response is appropriate  
12 pursuant to FOIA Exemption (b)(3) — that “acknowledging the existence or  
13 nonexistence of [CIA] records . . . would reveal information” likely to lead to  
14 unauthorized disclosures regarding *its* sources and methods and *its* clandestine

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*Ass’n of Retired R.R. Workers*, 830 F.2d at 336)). The majority simply elides this distinction between Exemptions (b)(1) and (b)(3).

<sup>5</sup> See also *Wolf*, 473 F.3d at 378 (noting in the context of FOIA Exemption (b)(3) that the Supreme Court “gives even greater deference to CIA assertions of harm to intelligence sources and methods under the National Security Act” then in the context of the (b)(1) exemption); *Students Against Genocide v. Dep’t of State*, 257 F.3d 828, 835 (D.C. Cir. 2001) (same); *Fitzgibbon*, 911 F.2d at 766 (same).

1 intelligence activities. J.A. 55; *see also Gardels*, 689 F.2d at 1105 (regarding  
2 Exemption (b)(3), “[t]he test is not whether the court personally agrees in full  
3 with the CIA’s evaluation of the danger — rather, the issue is whether on the  
4 whole record the Agency’s judgment objectively survives the test of  
5 reasonableness, good faith, specificity, and plausibility in this field of foreign  
6 intelligence in which the CIA is expert and given by Congress a special role.”).  
7 The majority does not plumb the mystery of how these documents could be  
8 relevant to the CIA’s Exemption (b)(3) showing, or even attempt to do so.<sup>6</sup>

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<sup>6</sup> The majority contends that the FBI documents reflect that “the FBI maintained an active interest in Dr. Florez for well over a decade.” Maj. Op. at 19. Even if this were the case, it in no way undercuts the CIA’s assertion that information as to the existence or nonexistence of documents in *its* possession reflecting a classified connection *to the CIA* constitutes information concerning intelligence sources and methods that is exempt from FOIA disclosure by the National Security Act — an assertion to which this Court owes deference. *See Wolf*, 473 F.3d at 378; *Students Against Genocide*, 257 F.3d at 836.

At any rate, after careful review, not the “casual[.]” one the majority inexplicably charges me with, *see* Maj. Op. at 18, I read the FBI disclosures very differently. Far from establishing the FBI’s “active” interest in Dr. Florez and providing a “wealth of information” about him, *see* Maj. Op. at 19, these documents, which total under 60 pages amassed over ten years, offer precious little insight into Dr. Florez beyond basic biographical information and speculation about his personal life. Nearly half of the documents divulge no information about him whatsoever. Some of the more reliable information concerning him, moreover, appears to come from two newspaper clippings among the documents, one announcing his appointment as *chargé d’affaires* in Washington, D.C. and the other his defection from the Castro regime.

To be sure, the FBI maintained a file on Dr. Florez and copied certain agencies (not including, of course, the CIA) on certain documents. Bureau offices on occasion

1           The FBI documents say nothing about the CIA’s interest or lack of interest  
2 in Dr. Florez, nor do they address Agency sources and methods or the functions  
3 of Agency personnel — the very matters protected from disclosure by the  
4 exemptions that the CIA has asserted. I thus cannot agree that these records  
5 even potentially affect the conclusion, already drawn by the district court, that  
6 the CIA has adequately shown that the claimed exemptions apply by providing  
7 “explanations of potential harm to national security” that are “both ‘logical’ and  
8 ‘plausible’” and by demonstrating that “acknowledging the existence or  
9 nonexistence of the records [Florez] seeks could reasonably be expected to lead to  
10 the unauthorized disclosure of intelligence sources and methods as well as

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exchanged whatever information they had about him, particularly (and unsurprisingly, given the FBI’s domestic counterintelligence orientation) when Dr. Florez was stationed in Washington, D.C. and, years later, when he decided to defect to the United States. The fact that the Bureau periodically communicated the scant information it had concerning Dr. Florez internally and with specified external agencies, however, hardly reveals the kind of defined, concrete interest that could even conceivably be of “appreciable probative value” in assessing whether the CIA, a separate agency with interests, sources, and methods of its own, met its burden in justifying its *Glomar* response. *Id.* at 16.

The majority does not even endeavor to set out the string of logical inferences that are necessary to establish the relevance of this material to the CIA’s assertion of FOIA Exemptions (b)(1) and (b)(3). It cannot, and for a simple reason. The mere fact that the FBI maintained some interest in a foreign diplomat who was stationed in this country for a period and who eventually defected here — the only non-conjectural conclusion that one may reach from these documents — is simply not germane to the question whether the CIA’s invocation of FOIA Exemptions (b)(1) and (b)(3) is adequately supported.

1 clandestine intelligence activities,” which are at the core of the functions of  
2 Agency personnel. *Florez v. C.I.A.*, 2015 WL 728190, \*6, \*8 (S.D.N.Y. Feb. 19, 2015)  
3 (quoting *Wilner*, 592 F.3d at 73).

4 \* \* \*

5 The majority cannot explain how these FBI documents, which do not even  
6 mention the CIA, much less any relationship between the CIA and Dr. Florez, are  
7 relevant to assessing the logic and plausibility of the Agency’s justification for its  
8 *Glomar* response. Faced with this difficulty, the majority faults me for even  
9 *pointing out* that the FBI documents do not mention the CIA, asserting that to do  
10 so is inconsistent with my *real* position that the disclosures of one federal agency  
11 “are *never* relevant and must be wholly disregarded” in assessing the propriety  
12 of another agency’s *Glomar* response. Maj. Op. 20 (emphasis added). I take no  
13 such position, however, as to hypothetical cases not presently before this panel,  
14 nor do I pronounce, as the majority repeatedly charges, “a rule limiting the  
15 evidence a district court may consider in a *Glomar* inquiry.” *Id.* at 23. I do no  
16 more than conclude (contrary to the majority) that these FBI documents,  
17 suggesting (albeit without particulars, and to a limited degree) that the FBI  
18 maintained some interest in Dr. Florez for some period of time, are simply not

1 relevant to the question whether the CIA's justification for its *Glomar* response in  
2 *this case* is plausible and makes sense.

3 The majority also charges me with "exclusive reliance on the official  
4 acknowledgment doctrine," *id.* at 23, which it says I use to "propagat[e] a *per se*  
5 rule barring consideration of third party disclosures on the sufficiency of an  
6 agency's *Glomar* response," *id.* at 22 n.8. Again, I urge no such rule. That said,  
7 however, I cannot agree that this doctrine is not properly considered in assessing  
8 the question whether these FBI documents are relevant to the CIA's rationale for  
9 its *Glomar* response. Indeed, my conclusion that they are not is only reinforced  
10 through more general consideration of the FOIA statute and *Glomar* doctrine  
11 itself.

12 The FOIA statute recognizes different agencies' divergent missions,  
13 interests, and methods, *see* 5 U.S.C. § 552 (requiring disclosure on an agency-by-  
14 agency basis), and it is well established that the disclosure of material by one  
15 agency will not be attributed to another, so as to forestall the second agency's  
16 recourse to appropriate FOIA exemptions. *See Wilson v. C.I.A.*, 586 F.3d 171, 186  
17 (2d Cir. 2009) ("[T]he law will not infer official disclosure of information  
18 classified by the CIA from . . . release of information by another agency, or even

1 by Congress.”); *see also Moore v. C.I.A.*, 666 F.3d 1330, 1333 n.4 (D.C. Cir. 2011)  
2 (release of a document “by the FBI” cannot constitute “an official  
3 acknowledgment by the CIA”); *Frugone*, 169 F.3d at 774-75 (upholding the CIA’s  
4 ability to make a *Glomar* response despite official disclosure of the same  
5 information by the Office of Personnel Management). In the *Glomar* context  
6 specifically, moreover, courts have long recognized the danger in “requiring [an  
7 agency] to break its silence” as a result of “statements made by another agency.”  
8 *Frugone*, 169 F.3d at 775. Agencies have different missions. “[I]t is logical to  
9 conclude” regarding a foreign intelligence service like the CIA, for instance, “that  
10 the need to assure confidentiality” to human intelligence sources and to foster  
11 confidence in such assurances vis-à-vis past, present, and future sources may  
12 require “neither confirming nor denying the existence of records” regarding  
13 foreign nationals — whether or not they be subjects of interest or persons with  
14 whom the Agency maintained a relation — for many years. *Wolf*, 473 F.3d at 377;  
15 *see also Fitzgibbon*, 911 F.2d at 763-64 (noting “compelling interest” in protecting  
16 both national security information and “the appearance of confidentiality so  
17 essential to the effective operation of our foreign intelligence service” (quoting

1 *Sims*, 471 U.S. at 175)). Other agencies may not share this concern at all, or to the  
2 same degree.

3 The majority acknowledges that, provided an agency has established a  
4 proper basis for a *Glomar* response, an agency is not required to break its silence  
5 “as a result of ‘statements made by another agency.’” Maj. Op. at 22 (quoting  
6 *Frugone*, 169 F.3d at 775). The majority asserts that this precedent is inapplicable  
7 here, however, because the majority is not “imput[ing] the FBI’s decision to  
8 disclose information about Dr. Florez to the CIA, or suggest[ing] that the FBI  
9 Disclosures necessarily preclude the CIA’s right to assert a *Glomar* response.”  
10 Maj. Op. at 22-23. Instead, the majority asserts, “we simply conclude that the FBI  
11 Disclosures are relevant evidence — unavailable to the District Court at the time  
12 of its initial decision — bearing upon the sufficiency of the justifications set forth  
13 by the CIA in support of its *Glomar* response.” Maj. Op. at 23.

14 But how can these documents be relevant, given that they do not even  
15 mention the CIA, when the declarations supporting the CIA’s claimed  
16 exemptions are centrally concerned with harms associated with revealing the  
17 existence or nonexistence of documents reflecting a classified connection *to the*  
18 *CIA*, in its role as the United States’ foreign intelligence service? With respect,

1 the majority is cavalier, I conclude, in its dismissal of the official  
2 acknowledgement doctrine's relevance to this case. If, on remand, the district  
3 court were to determine that the FBI documents render illogical or implausible  
4 the CIA's affidavits (how the district court could reach such a conclusion, given  
5 the FBI disclosures themselves, I cannot say), that conclusion *would* produce the  
6 "anomalous result" of one agency's revelations obligating disclosure of classified  
7 material by another. *Frugone*, 169 F.3d at 775. The majority's error in deeming  
8 these irrelevant documents germane thus appears to invite by the back door  
9 what the official acknowledgement doctrine prohibits at the front.<sup>7</sup>

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<sup>7</sup> The "official acknowledgment" case law, as I read it, has two animating principles. The cases ordering disclosure on the basis of official acknowledgment tend to emphasize the first of these: that an agency, having already disclosed certain classified information, cannot later refuse to confirm or deny the existence or nonexistence of that information. *See, e.g., N.Y. Times Co. v. Dep't of Justice*, 756 F.3d 100, 122 (2d Cir. 2014); *Wolf*, 473 F.3d at 379. The cases rejecting arguments of official acknowledgment, however, at least when those arguments rely on disclosures by a third party (often another agency), point to the harm of using one agency's disclosures as a "FOIA backdoor" to obligate another agency to reveal classified information. *See, e.g., Wilson*, 586 F.3d at 186; *Frugone*, 169 F.3d at 775.

To be sure, these courts did not address the novel theory of relevance before us here. Nevertheless, they uniformly resisted any temptation to reconsider the responding agency's justification for its *Glomar* response in light of third party disclosures. As the D.C. Circuit put it in *Frugone*, in discussing the National Security Act exemption, "[c]ommon sense suggests that [those charged with the protection of intelligence sources and methods] must have authority to maintain secrecy commensurate with [this statutory] responsibility," notwithstanding another agency's disclosures. 169 F.3d at 775. Here, although styled as an evidentiary matter distinct

1           With respect, I simply cannot see the basis on which these FBI documents  
2 are relevant to the *Glomar* inquiry that the district court has already undertaken.  
3 As we have said, “[i]n evaluating an agency’s *Glomar* response, a court must  
4 accord ‘substantial weight’ to the agency’s affidavits, ‘provided [that] the  
5 justifications for nondisclosure are not controverted by contrary evidence in the  
6 record or by evidence of . . . bad faith.’” *Wilner*, 592 F.3d at 68 (quoting *Minier v.*  
7 *C.I.A.*, 88 F.3d 796, 800 (9th Cir. 1996)); *see also* *Wolf*, 473 F.3d at 234 (noting that  
8 courts “conducting *de novo* review in the context of national security concerns . . .  
9 ‘must accord *substantial weight* to an agency’s affidavit concerning the details of  
10 the classified status of the disputed record’” (quoting *Miller v. Casey*, 730 F.2d  
11 773, 776 (D.C. Cir. 1984))). There is no evidence of bad faith here, and the FBI  
12 documents are in no way contrary to the justifications for nondisclosure already  
13 proffered by the CIA. In such circumstances, a court “should not conduct a more  
14 detailed inquiry to test the agency’s judgment and expertise or to evaluate  
15 whether the court agrees with the agency’s opinions.” *Larson*, 565 F.3d at 865;  
16 *accord* *Wilner*, 592 F.3d at 76; *see also* *Students Against Genocide*, 257 F.3d at 835

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from the “official acknowledgment” doctrine, the majority’s theory of relevance implicates the same concern: that Congress could not have intended the “anomalous result” that disclosures by one agency could open the door to compelled disclosure by another. *See id.*

1 (noting that “the assessment of harm to intelligence sources and methods is  
2 entrusted to the Director of Central Intelligence, not to the courts”). To rely on  
3 these documents as a basis for remand is to “second-guess the predictive  
4 judgments made by the government’s intelligence agencies” in precisely the  
5 manner we have in the past eschewed. *Wilner*, 592 F.3d at 76 (quoting *Larson*, 565  
6 F.3d at 865).

7 I conclude, for substantially the reasons set out in the district court’s  
8 careful and thorough opinion, that the CIA met its burden in justifying its *Glomar*  
9 response. Because I can discern no basis on which the FBI disclosures draw into  
10 question the CIA’s explanations as to why information regarding the existence or  
11 nonexistence of records in its possession is exempted from disclosure by FOIA, I  
12 respectfully dissent from the majority’s decision to remand and would, instead,  
13 affirm.