

EXHIBIT P



October 9, 2020

By Electronic and Overnight Mail
NSA/CSS FOIA/PA Appeal Authority (P132)
National Security Agency
9800 Savage Road STE 6932
Fort George G. Meade, MD 20755-6932

RE: Freedom of Information Act Appeal – Case Number 110225

To Whom It May Concern:

On behalf of the Project for Privacy and Surveillance Accountability, Inc. (“PPSA”), I write to appeal the NSA’s denial of the above-captioned FOIA request (the “Request”).¹

The Request seeks two categories of information:

1. Information regarding whether the names of certain listed individuals—current and past Senators and Congressmen—were unmasked; and
2. Information regarding whether those same individuals’ names were upstreamed.

By response dated September 1, 2020 (the “Response”), the agency indicated that it would not process the Request.² The Response claimed that the agency had fully complied with its FOIA obligation when responding to a similar request PPSA made by letter dated January 28, 2020 (the “Prior Request”).³ Assigning case number 108990 to PPSA’s Prior Request, the NSA’s response dated February 12, 2020 (the “Prior Response”)⁴ gave no indication that the agency had initiated any searches before making its so-called *Glomar* response, instead denying all requests under FOIA Exemptions 1 and 3.

The agency’s refusal to process the current Request is inappropriate and unlawful. Contrary to the agency’s claim that the Prior Response fully satisfied both past and present FOIA obligations, its cursory denial of the Prior Request demonstrated a failure to even initiate an adequate search for responsive records, and so cannot satisfy the agency’s statutory obligation to do so now. More pointedly—and as we expressly note in our current Request—since the issuance of the Prior Response in February 2020, subsequent actions and statements by both the Office of the Director of National Intelligence and the NSA itself show that the NSA’s reliance on Exemptions 1 and 3 to avoid its disclosure obligations were, and continue to be, ill-founded. Because neither of those exemptions justifies

¹ See Letter from G. Schaerr to NSA FOIA Officer, Aug. 20, 2020 (Attachment A).

² See Letter from Sharon C. Linkous to G. Schaerr, Sept. 1, 2020 (Attachment B).

³ See Letter from G. Schaerr to NSA FOIA Officer, Jan. 28, 2020 (Attachment C).

⁴ See Letter from John R. Chapman to G. Schaerr, Feb. 12, 2020 (Attachment D).



complete nondisclosure, both the NSA's previous blanket denial and its current refusal to take further action are unwarranted. In the alternative, unique public interests justify waiving those exemptions even if they were to apply.

I. The Prior Response's claimed exemptions do not justify withholding responsive documents.

A. Exemption 1 does not apply, as the documents cannot be reasonably expected to result in damage to national security.

The Prior Response vaguely suggested that the documents requested are national security documents and thus exempt under Exemption 1. Such an assertion would be incorrect. Exemption 1 exempts from disclosure materials that are (1) "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" and (2) "are in fact properly classified pursuant to such Executive order." 5 U.S.C. 552(b)(1)(a). The Prior Response relied solely on Executive Order 13526.

However, for a document to be classified under that order, the agency must show (among other things) that its disclosure could "reasonably [] be expected to result in damage to the national security[.]" Executive Order 13526 § 1.1(a)(4) (Dec. 29, 2009). The NSA made no such showing either then or now. Moreover, no classification is permanent: "[i]nformation shall be declassified *as soon as* it no longer meets the standards for classification under this order." *Id.* at ¶ 3.1(a) (emphasis added). Thus, the Prior Response cannot eliminate an obligation to fully respond to the current Request because, if documents responsive to that Request are not properly classified *as of today*, Exemption 1 does not shield them from disclosure. There is nothing in the NSAs' Prior Response or current Response indicating that it searched for responsive records at all, much less determined whether any of those records had been or should be declassified.

Setting aside the fact that the documents may no longer be classified (or need to be classified), the agency's brief citation of Exemption 1 is, at best, a red herring: First, nothing about either the Prior Request or the current Request would require the NSA to risk "damage to the national security." From the very beginning, we have encouraged the agency to redact names and other identifying information before records are produced if it would "render a responsive but exempt material nonexempt."⁵ Doing so would enable the agency to comply with the requirements of FOIA without divulging the agency's interest or non-interest in any specific individual.

Second, the agency provided no support for a claim that the unmasking documents relate to national security in any way. As the D.C. Circuit has observed, the agency "must provide detailed and specific information demonstrating that material withheld is logically within the domain of the exemption claimed." *Campbell v. U.S. Dep't of Justice*, 164 F.3d

⁵ Attachment A at 3; Attachment C at 3.



20, 30 (D.C. Cir. 1998), as amended (Mar. 3, 1999) (internal quotations omitted). The Prior Response did not even attempt to justify its nondisclosure with any such explanation, nor does the current Response do so.

But even if the documents did relate to national security, if they were also political targeting documents, a *Glomar* response is still inappropriate and unlawful. The agency cannot use legitimate national security concerns as an excuse to avoid revealing political targeting. Indeed, when a government agency commits misconduct, documents regarding that misconduct typically must be acknowledged. See, e.g., *Parker v. U.S. Dep't of Justice*, 214 F. Supp. 3d 79 (D.D.C. 2016); *Samahon v. FBI*, 40 F. Supp. 3d 498, 502–03 (E.D. Pa. 2014).

To be sure, particular documents generated by the search *may* (but not necessarily will) reveal information that cannot be revealed even with redactions. And in such circumstances, *those* documents could be withheld under Exemption 1 in whole or in part. But the agency's continuing refusal to even search for responsive documents, especially in light of its failure to show that disclosure would risk damage to national security, is inappropriate and unlawful.

B. Exemption 3 does not justify the NSA's total refusal to search for and disclose responsive records.

So too with respect to Exemption 3. That exemption permits non-disclosure when the documents in question are “specifically exempted from disclosure by statute.” 5 U.S.C. 552(b)(3). The Prior Response cited three statutes that allegedly exempt responsive materials from disclosure,⁶ but none of them justified the NSA's blanket denial then nor its refusal to respond now. The first statute, 18 U.S.C. § 798, only prohibits disclosure of “classified information,” meaning information classified “at the time of” any prohibited disclosure. 18 U.S.C. § 798(a) and (b). Accordingly, as with the agency's arguments under Exemption 1, the Prior Response does not eliminate the agency's obligation to search for responsive records and then determine whether any are properly classified *as of today*.

Likewise, the second statute, 50 U.S.C. § 3024(i), does not excuse the agency from fully complying with its FOIA obligations because that statute also instructs the Director of National Intelligence to prepare “intelligence products in such a way that source information is removed to allow for dissemination ... in declassified form to the extent practicable.” 50 U.S.C. § 3024(i)(2)(C). The agency has not demonstrated that declassified versions of responsive documents—versions that protect sources and methods—cannot be prepared under § 3024(i)(2)(C). Even for documents that contain some classified information, the agency must consider redaction as well. 5 U.S.C. § 552(a)(8), (b); *see also Krikorian v. Dep't of State*, 984 F.2d 461, 466 (D.C. Cir. 1993) (noting requirement to redact applies to all FOIA exemptions). Thus, whenever declassified or redacted versions of

⁶ Attachment D at 1.



responsive documents can be produced, the agency must do so. The agency has offered no explanation why it cannot do that here.

Finally, under the third statute, 50 U.S.C. § 3605, the NSA can avail itself of Exemption 3 only to the extent it can “demonstrate that the withheld information relates to the organization of the NSA or any function or activities of the agency.” *Larson v. Dep’t of State*, 565 F.3d 857, 868 (D.C. Cir. 2009). But the scope of the NSA’s FOIA obligations is much broader than that limitation, encompassing not just information relating to the NSA’s organization and functions, but any records “create[d] or obtain[ed]” by the NSA and “in the agency’s control at the time the request is made.” *U.S. Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 144-46 (1989). Because 50 U.S.C. § 3605 does not prohibit disclosure—with appropriate redaction—of all responsive documents in the NSA’s possession, Exemption 3 does not justify the NSA’s ongoing refusal to search for and disclose responsive, non-exempt records.

C. Recent actions by the Office of the Director of National Intelligence and the NSA show that neither of Exemptions 1 nor 3 justifies nondisclosure.

As explained above, the agency’s denial of PPSA’s FOIA Request is unwarranted under Exemption 1 if disclosure of a responsive document could not “reasonably [] be expected to result in damage to the national security[.]” Executive Order 13526 § 1.1(a)(4). Likewise, denial is unwarranted under Exemption 3 where disclosure would not jeopardize any of the intelligence community’s “sources [or] methods,” 50 U.S.C. 3024(i)(1), nor reveal information about the NSA’s organization, function, or activities, 50 U.S.C. § 3605. The recent disclosure by the Office of the Director of National Intelligence (ODNI) of documents related to the unmasking of former national security advisor Michael Flynn demonstrates the ODNI’s express determination that disclosure of records related to unmasking or upstreaming—including NSA records—would neither damage national security, nor threaten intelligence sources and methods, nor reveal protected information about the NSA’s organization.

As widely reported in the media, several Republican senators wrote to Acting Director of National Intelligence Richard Grenell and Attorney General William Barr requesting that they release information about the Obama administration’s efforts to unmask U.S. citizens subject to government surveillance. Only one day later, on or about May 13, 2020, Grenell responded to that request by disclosing a redacted list of individuals who might have been involved in Flynn’s unmasking.⁷ The redacted list itself, along with an internal memorandum from the Director of the NSA, was then made available to the

⁷ See, e.g., Andrew Desiderio and Betsy Woodruff Swan, *Intel chief releases info on ‘unmasking’ of Flynn to Capitol Hill*, Politico (May 13, 2020), available at <https://www.politico.com/news/2020/05/13/republican-senators-michael-flynn-254726>.



public at large.⁸ Strikethrough annotations indicate that both the list and the NSA memorandum were originally marked “secret” and “classified” before subsequently becoming declassified.

Though the ODNI’s actions speak for themselves, Grenell expressly confirmed that the unmasking-related disclosures pose no threat to national security. In a May 25, 2020 letter to Senator Mark Warner, he unambiguously stated that “the decision to declassify the names of individuals who sought to unmask the identity of General Flynn poses *absolutely no risk of compromise of either sources or methods.*”⁹ He also reiterated that Section 1.7 of Executive Order 13526 forbids maintaining information as classified “to conceal violations of law” or to “prevent embarrassment to a person, organization, or agency.”¹⁰

The disclosure of these unmasking documents, and the ODNI’s own rationale for disclosure, forecloses any argument that the NSA cannot comply with PPSA’s unmasking and upstreaming Request without harming national security interests, endangering the intelligence community’s sources and methods, or revealing the NSA’s organization and functions. Even if documents responsive to that Request were to contain sensitive information, the NSA and ODNI’s actions in the Flynn matter demonstrate that disclosure with appropriate redaction is both possible and obligatory. Clearly, it is possible to release records responsive to the Request, redacted if necessary, without creating any of the risks cursorily invoked by the NSA.

D. The agency’s Glomar response was and is misplaced.

Instead of considering redaction or production of responsive, non-classified documents, the Prior Response issued a Glomar response as to both Nos. 1 and 2 of the Prior Request. The agency thus refused to produce any documents in those categories, or to admit or deny the existence of any responsive documents. But a Glomar response is appropriate only when “the fact of [documents]’ existence or nonexistence is itself classified.” Executive Order 13526 § 3.6(a). Here no national security interest justifies classifying the mere existence of these documents.

The agency is no doubt concerned about the potential for *political* embarrassment if it becomes widely known that many members of Congress were themselves subject to surveillance. But political concerns do not become national security concerns simply because they are held by the NSA. The agency’s Glomar response is inappropriate, misplaced and unlawful for that reason alone.

⁸ See, e.g., [https://www.hsgac.senate.gov/imo/media/doc/2020-05-13%20ODNI%20to%20CEG%20RHJ%20\(Unmasking\).pdf](https://www.hsgac.senate.gov/imo/media/doc/2020-05-13%20ODNI%20to%20CEG%20RHJ%20(Unmasking).pdf).

⁹ See Letter from Richard Grenell to Mark Warner, May 25, 2020 (Attachment E) (emphasis added).

¹⁰ *Id.* (internal quotations omitted).



Finally, even if there were legitimate concerns about releasing the names of the individual members of Congress who were unmasked or upstreamed, those names could be redacted from the records provided in response to our request. As noted earlier, we have been clear that we would prefer records with information redacted over a simple denial of our request as to any category of records.

In short, contrary to the agency's concerns, it could have reasonably responded to the Prior Request—and can reasonably respond to the current Request—without needing to respond in other circumstances that do raise the concerns it identifies.

II. In the alternative, important public interests justify waiving any exemption that has been properly invoked.

Even if one of the invoked exemptions were to *permit* the NSA to deny this FOIA request, it would not *require* denial. Assuming any exemption is properly invoked here, it should be waived.

One important consideration strongly supporting a waiver is that this Request concerns whether government agencies (including the NSA) abused foreign intelligence surveillance powers against American citizens charged with oversight of those same agencies. Much of the unmasking may well have been intended to serve agencies' own institutional purposes rather than legitimate national security interests.¹¹ Violating the privacy of American citizens for political reasons, particularly to shield agencies from legitimate congressional oversight, undermines our democratic processes and violates the law. 50 U.S.C. §§ 1809(a)(1), 1810; 18 U.S.C. § 2712.

In that unique setting, it is difficult to imagine any national security interest that justifies concealing whether unmasking—a tool developed for national security—has been weaponized for political purposes. Yet without access to the requested documents, members of Congress and the general public cannot know whether such violations occurred. This FOIA request, then, is one of the only pathways to vindicate the legal rights and public interest values that the agency may have violated.

In short, even if some responsive materials could technically be withheld, the agency should exercise its discretion to disclose those materials for three reasons:

- First, withholding reports about potential agency misconduct puts a shadow on the NSA and other involved agencies. If documents remain secret—or if the NSA covers up a political operation to undermine congressional oversight—that hurts the NSA and any other agencies involved in such an operation. Everyone would be helped by a full airing.

¹¹ See, e.g., Mark Mazzetti and Carl Hulse, *Inquiry by CIA Affirms it Spied on Senate Panel*, The New York Times (July 31, 2014), available at <https://www.nytimes.com/2014/08/01/world/senate-intelligence-committee-cia-interrogation-report.html>.



- Second, current and past congressional members have other legal recourses against the NSA and its officials, including civil litigation. 50 U.S.C. § 1810; 18 U.S.C. § 2712. In such a suit, the plaintiffs could likely obtain these same documents through civil discovery. *See* 50 U.S.C. § 1806(f). The agency should prefer to provide responsive documents under FOIA rather than in adversarial litigation, which is far more expensive for all concerned.
- Last, the agency’s categorical denial raises serious Fourth Amendment and Due Process considerations. Without the ability to discover whether or not his or her name was unmasked for political gain, a person is “deprived ... of liberty”—freedom of speech and freedom from unreasonable searches and seizures—without due process of law. *See* U.S. Const. Amend. V, IV.

If the agency is nonetheless cautious about full disclosure, we would be willing consider access to the documents pursuant to confidentiality agreements or other mutually satisfactory arrangements. Federal courts have acknowledged that agencies could enter into confidentiality agreements with private parties in analogous circumstances. *Cf., e.g., Salomon Bros. Treasury Litig. v. Steinhardt Partners, L.P. (In re Steinhardt Partners, L.P.)*, 9 F.3d 230, 236 (2d Cir. 1993).

For all these reasons, this appeal should be granted, and the NSA should immediately conduct a search, declassify documents as needed, and begin producing them. Thank you for your prompt attention to this important matter.

Sincerely,
Gene C. Schaerr
PPSA, Inc.
General Counsel



August 20, 2020

National Security Agency
ATTN: FOIA/PA Office
9800 Savage Road, STE 6932
Ft. George G. Meade, MD 20755-6932

Dear FOIA Officer:

This is a request under the Freedom of Information Act, 5 U.S.C. § 552, regarding the electronic surveillance of members of Congress conducted by the National Security Agency under the Foreign Intelligence Surveillance Act of 1978, P.L. 95-511, 92 Stat. 1783 (“FISA”), as amended by the FISA Amendments Act of 2008, P.L. 110-261, 122 Stat. 2436. This request is filed on behalf of the Project for Privacy and Surveillance Accountability, Inc. (“PPSA”).

Specifically, this request concerns circumstances where the identities of United States Senators or Congressmen whose communications were collected by FISA surveillance may have been “unmasked” —that is, their identities were revealed when the products of FISA surveillance were disseminated within the government. *See, e.g.*, National Security Agency, United States Signals Intelligence Directive 18, § 7 (January 25, 2011); Federal Bureau of Investigation, *Minimization Procedures Used by the Federal Bureau of Investigation in Connection with Acquisition of Foreign Intelligence Information* at 9, 19–20, 31 (July 10, 2015). A broad variety of governmental appointees are apparently authorized to request unmasking of names masked in intelligence reports. This request also concerns “upstreaming” — that is, the process of extracting certain data from the electronic sources for analysis. *See, e.g.*, National Security Agency, *NSA Stops Certain Section 702 “Upstream” Activities* (press release April 28, 2017). In the past, the intelligence community has been unwilling to disclose—even to individual Senators or Congressmen themselves—whether their identities had been unmasked or upstreamed.¹ That lack of disclosure is especially troubling because federal intelligence agencies have already demonstrated a willingness to abuse their surveillance powers against American citizens charged with overseeing those same agencies.²

¹ *See, e.g.* Katie Bo Williams, *Graham Gets Frustrated in Public ‘Unmasking’ Debate*, The Hill (June 27, 2017), <https://thehill.com/policy/national-security/339670-graham-gets-emotional-in-public-unmasking-debate>.

² *See, e.g.*, Mark Mazzetti and Carl Hulse, *Inquiry by CIA Affirms it Spied on Senate Panel*, The New York Times (July 31, 2014), *available at* <https://www.nytimes.com/2014/08/01/world/senate-intelligence-committee-cia-interrogation-report.html>.



Using these understandings of the relevant terms, we respectfully request that you produce:

1. All documents, reports, memoranda, or communications regarding the unmasking—including all unmasking requests—of any person listed below from January 1, 2008 to January 15, 2020:

- a. Rep. Adam Schiff
- b. Rep. Jim Himes
- c. Rep. Terri Sewell
- d. Rep. Andre Carson
- e. Rep. Jackie Speier
- f. Rep. Mike Quigley
- g. Rep. Eric Swalwell
- h. Rep. Joaquin Castro
- i. Rep. Denny Heck
- j. Rep. Peter Welch
- k. Rep. Sean Patrick Maloney
- l. Rep. Val Demings
- m. Rep. Raj Krishnamoorthi
- n. Rep. Devin Nunes
- o. Rep. Mike Conaway
- p. Rep. Michael Turner
- q. Rep. Brad Wenstrup
- r. Rep. Chris Stewart
- s. Rep. Rick Crawford
- t. Rep. Elise Stefanik
- u. Rep. Will Hurd
- v. Rep. John Ratcliffe
- w. Sen. James Risch
- x. Sen. Marco Rubio
- y. Sen. Susan Collins
- z. Sen. Roy Blunt
- aa. Sen. Tom Cotton
- bb. Sen. John Cornyn
- cc. Sen. Ben Sasse
- dd. Sen. Diane Feinstein
- ee. Sen. Ron Wyden
- ff. Sen. Martin Heinrich
- gg. Sen. Angus King
- hh. Sen. Kamala Harris
- ii. Sen. Michael Bennet
- jj. Sen. James Lankford



PROJECT FOR PRIVACY &
SURVEILLANCE ACCOUNTABILITY

- kk. Sen. Mark Warner
- ll. Rep. Peter King
- mm. Former Rep. Frank LoBiondo
- nn. Former Rep. Trey Gowdy
- oo. Former Rep. Tom Rooney
- pp. Former Rep. Ileana Ros-Lehtinen
- qq. Former Rep. Jeff Miller
- rr. Former Rep. Lynn Westmoreland
- ss. Former Rep. Joe Heck
- tt. Former Rep. Mike Pompeo
- uu. Former Rep. Luis Gutierrez
- vv. Former Rep. Patrick Murphy

2. All documents, reports, memoranda, or communications regarding the upstreaming—including all requests for upstreaming—of any individual listed in Question 1 above, from Jan. 1, 2008 to Jan. 15, 2020.

Rather than physical production of any responsive records, we ask that you please provide each record in electronic form. If a portion of responsive records may be produced more readily than the remainder, we request that those records be produced first and that the remaining records be produced on a rolling basis. Further, we recognize the possibility that some responsive records may be exempt. **To the extent possible, if redaction under 5 U.S.C. § 552(b) can render a responsive but exempt record nonexempt, please produce any such record in redacted form.** We believe that any redaction should foreclose the need to issue a Glomar response, as anonymized and redacted production would neither (1) reveal intelligence sources or methods nor (2) disclose the agency's interest (or lack thereof) in any particular individual. Indeed, as the Office of the Director of National Intelligence has recently and emphatically confirmed, the disclosure of unmasking information “poses absolutely no risk of compromise of either sources or methods.”³

We are prepared to pay up to \$2000 for the material in question. Please contact me if the fees associated with this request exceed that figure, or if you have any other questions about this request.

Thank you in advance for your speedy attention and assistance.

³ ODNI Letter to Senator Mark Warner, May 25, 2020 (Attachment A). *See also id.* (reiterating that Section 1.7 of Executive Order 13526 forbids maintaining information as classified “to conceal violations of law” or “prevent embarrassment to a person, organization, or agency”).



Sincerely,

Gene C. Schaerr
PPSA, Inc.
General Counsel



NATIONAL SECURITY AGENCY
FORT GEORGE G. MEADE, MARYLAND 20755-6000

FOIA Case: 110225
1 September 2020

GENE SCHAERR
PROJECT FOR PRIVACY & SURVEILLANCE ACCOUNTABILITY
651 N BROAD ST
SUITE 205, #745
MIDDLETOWN, DE 19709

Dear Gene Schaerr:

This responds to your Freedom of Information Act (FOIA) request of 20 August 2020, which was received by this office on 26 August 2020, for "Request under FOIA regarding the electronic surveillance of members of Congress conducted by the NSA under FISA. 1. All documents, reports, memoranda, or communications regarding the unmasking--including all unmasking requests--of any person listed below from January 1, 2008 to January 15, 2020: a. Re. Adam Schiff; b. Rep. Jim Himes; c. Rep. Terri Sewell; d. Rep. Andre Carson; e. rep. Jackie Speier; f. Rep. Mike Quigley; g. Rep. Eric Swalwell; h. Rep. Joaquin Castro; i. Rep. Denny Heck; j. Rep. Peter Welch; k. Rep. Sean Patrick Maloney; l. Rep. Val Demings; m. rep. Raj Krishnamoorthi; n. rep. Devin Nunes; o. rep. Mike Conaway; p. Rep. Michael Turner; q. Rep. Brad Wenstrup; r. Rep. Chris Stewart; s. Rep. Rick Crawford; t. Rep. Elise Stefanik; u. rep. Will Hurd; v. Rep. John Ratcliffe; w. Sen. James Risch; x. Sen. Marco Rubio; y. Sen. Susan Collins; z. Sen. Roy Blunt; aa. Sen. Tom Cotton; bb. Sen. John Cornyn; cc. Sen. Ben Sasse; dd. Sen. Diane Feinstein; ee. Sen Ron Wyden; ff. Sen. Martin Heinrich; gg. Sen. Angus King; hh. Sen. Kamala Harris; ii. Sen. Michael Bennet; jj. Sen. James Lankford; kk. Sen. Mark Warner; ll. rep. Rep Peter King; mm. Former Rep. Frank LoBiondo; nn. Former Rep. Trey Gowdy; oo. Former Rep. Tom Rooney; pp. Former Rep. Ileana Ros-Lehtinen; qq. Former Rep. Jeff Miller; rr. Former Rep. Lynn Westmoreland; ss. Former Rep. Joe Heck; tt. Former Rep. Mike Pompeo; uu. Former Rep. Luis Gutierrez; vv. Former Rep. Patrick Murphy. 2. All documents, reports, memoranda, or communications regarding the upstreaming--including all requests for upstreaming--of any individual listed in Question 1 above, from Jan 1, 2008 to Jan. 15, 2020." Your request has been assigned Case Number 110225.

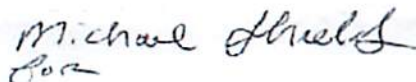
This Agency has already complied with the requirements of the FOIA, and provided a response to you concerning this subject matter in your FOIA request received 28 January 2020, assigned Case Number 108990. For your convenience, we have enclosed a copy of your previous request and our response letter dated 12 February 2020.

FOIA Case: 110225

Because this Agency has already responded to you and has fully complied with its FOIA obligation, we are not processing this request. Additionally, any future requests made by you concerning this topic will be filed with your previous FOIA case with no further action by this Agency.

If you need further assistance or would like to discuss any aspect of your request, please do not hesitate to contact me at foialo@nsa.gov or you may call (301)688-6527.

Sincerely,

Handwritten signature of Michael Shuels in cursive, with the initials "Soc" written below it.

SHARON C. LINKOUS
Acting Chief, FOIA/PA Office

Encls:
a/s



**PROJECT FOR PRIVACY &
SURVEILLANCE ACCOUNTABILITY**

January 28, 2020

National Security Agency
ATTN: FOIA Office
9800 Savage Road, STE 6932
Ft. George G. Meade, MD 20755-6932

Dear FOIA Officer:

This is a request under the Freedom of Information Act, 5 U.S.C. § 552, regarding the electronic surveillance of members of Congress conducted by the National Security Agency under the Foreign Intelligence Surveillance Act of 1978, P.L. 95-511, 92 Stat. 1783 ("FISA"), as amended by the FISA Amendments Act of 2008, P.L. 110-261, 122 Stat. 2436. This request is filed on behalf of the Project for Privacy and Surveillance Accountability, Inc. ("PPSA").

Specifically, this request concerns circumstances where the identities of United States Senators or Congressmen whose communications were collected by FISA surveillance may have been "unmasked"—that is, their identities were revealed when the products of FISA surveillance were disseminated within the government. *See, e.g.*, National Security Agency, United States Signals Intelligence Directive 18, § 7 (January 25, 2011); Federal Bureau of Investigation, Minimization Procedures Used by the Federal Bureau of Investigation in Connection with Acquisition of Foreign Intelligence Information at 9, 19–20, 31 (July 10, 2015). A broad variety of governmental appointees are apparently authorized to request unmasking of names masked in intelligence reports. This request also concerns "upstreaming"—that is, the process of extracting certain data from the electronic sources for analysis. *See, e.g.*, National Security Agency, NSA Stops Certain Section 702 "Upstream" Activities (press release April 28, 2017). In the past, the intelligence community has been unwilling to disclose—even to individual Senators or Congressmen themselves—whether their identities had been unmasked or upstreamed.¹

Using these understandings of the relevant terms, we respectfully request that you produce:

1. All documents, reports, memoranda, or communications regarding the unmasking—including all unmasking requests—of any person listed below from January 1, 2008 to January 15, 2020:
 - a. Rep. Adam Schiff
 - b. Rep. Jim Himes
 - c. Rep. Terri Sewell

¹ *See, e.g.* Katie Bo Williams, *Graham Gets Frustrated in Public 'Unmasking' Debate*, The Hill (June 27, 2017), <https://thehill.com/policy/national-security/339670-graham-gets-emotional-in-public-unmasking-debate>.



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- d. Rep. Andre Carson
- e. Rep. Jackie Speier
- f. Rep. Mike Quigley
- g. Rep. Eric Swalwell
- h. Rep. Joaquin Castro
- i. Rep. Denny Heck
- j. Rep. Peter Welch
- k. Rep. Sean Patrick Maloney
- l. Rep. Val Demings
- m. Rep. Raj Krishnamoorthi
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- u. Rep. Will Hurd
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- w. Sen. James Risch
- x. Sen. Marco Rubio
- y. Sen. Susan Collins
- z. Sen. Roy Blunt
- aa. Sen. Tom Cotton
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- cc. Sen. Ben Sasse
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- ee. Sen. Ron Wyden
- ff. Sen. Martin Heinrich
- gg. Sen. Angus King
- hh. Sen. Kamala Harris
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- jj. Sen. James Lankford
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- qq. Former Rep. Jeff Miller
- rr. Former Rep. Lynn Westmoreland
- ss. Former Rep. Joe Heck



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- tt. Former Rep. Mike Pompeo
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2. All documents, reports, memoranda, or communications regarding the upstreaming—including all requests for upstreaming—of any individual listed in Question 1 above, from Jan. 1, 2008 to Jan. 15, 2020.

Rather than physical production of any responsive records, we ask that you please provide each record in electronic form. If a portion of responsive records may be produced more readily than the remainder, we request that those records be produced first and that the remaining records be produced on a rolling basis. Further, we recognize the possibility that some responsive records may be exempt. To the extent possible, if redaction under 5 U.S.C. § 552(b) can render a responsive but exempt record nonexempt, please produce any such record in redacted form. We believe that any redaction should foreclose the need to issue a Glomar response, as anonymized and redacted production would neither (1) reveal intelligence sources or methods nor (2) disclose the agency's interest (or lack thereof) in any particular individual.

We are prepared to pay up to \$2000 for the material in question. Please contact me if the fees associated with this request exceed that figure, or if you have any other questions about this request.

Thank you in advance for your speedy attention and assistance.

Sincerely,

Gene C. Schaerr
PPSA, Inc.
General Counsel



NATIONAL SECURITY AGENCY
FORT GEORGE G. MEADE, MARYLAND 20755-6000

FOIA Case: 108990
12 February 2020

GENE SCHAERR
PROJECT FOR PRIVACY &
SURVEILLANCE ACCOUNTABILITY
1101 CONNECTICUT AVE NW, SUITE 450
WASHINGTON, DC 20036

Dear Gene Schaerr:

This responds to your Freedom of Information Act (FOIA) request of 28 January 2020, which was received by this office on 29 January 2020, for "Using these understandings of the relevant terms, we respectively request that you produce:

1. All documents, reports, memoranda, or communications regarding the unmasking--including requests--of any person listed below from January 1, 2008 to January 15, 2020:
 - a) Rep. Adam Schiff;
 - b) Rep. Jim Himes;
 - c) Rep. Terri Sewell;
 - d) Rep. Andre Carson;
 - e) Rep. Jackie Speier;
 - f) Rep. Mike Quigley;
 - g) Rep. Eric Swalwell;
 - h) Rep. Joaquin Casreo;
 - i) Rep. Denny Heck;
 - j) Rep. Peter Welch;
 - k) Rep. Sean Patrick Maloney;
 - l) Rep. Val Demings;
 - m) Rep. Rai Krishnamoorthi;
 - n) Rep. Devin Nunes;
 - o) Rep. Mike Conaway;
 - p) Rep. Michael Turner;
 - q) Rep. Brad Wenstrup;
 - r) Rep. Chris Stewart;
 - s) Rep. Rick Crawford;
 - t) Rep. Elise Stefanik;

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- u) Rep. Will Hurd;
- v) Rep. John Ratcliffe;
- w) Sen. James Risch;
- x) Sen. Marco Rubio;
- y) Sen. Susan Collins;
- z) Sen. Roy Blunt;
- aa) Sen. Tom Cotton;
- bb) Sen. John Cornyn;
- cc) Sen. Ben Sasse;
- dd) Sen. Diane Feinstein;
- ee) Sen. Ron Wyden;
- ff) Sen. Martin Heinrich;
- gg) Sen. Angus King;
- hh) Sen. Kamala Harris;
- ii) Sen. Michael Bennet;
- jj) Sen. James Lankford;
- kk) Sen. Mark Warner;
- ll) Rep. Peter King;
- mm) Former Rep. Frank LoBiondo;
- nn) Former Rep. Trey Gowdy;
- oo) Former Rep. Tom Rooney;
- pp) Former Rep. Ileana Ros-Lehtinen;
- qq) Former Rep. Jeff Miller;
- rr) Former Rep. Lynn Westmoreland;
- ss) Former Rep. Joe Heck;
- tt) Former Rep. Mike Pompeo;
- uu) Former Rep. Luis Gutierrez;
- vv) Former Rep Patrick Murphy

2. All documents, reports, memoranda, or communications regarding the upstreaming--including all requests for upstreaming--of any individual listed in Question 1 above, from Jan.1, 2008 to Jan. 15, 2020."

Your request has been assigned Case Number 108990. There are no assessable fees for this request; therefore, we did not address your fee category.

Regarding **Parts 1 and 2** of your request, please be advised that NSA collects and provides intelligence derived from foreign communications to policymakers, military commanders, and law enforcement officials. We do this to help these individuals protect the security of the United States, its allies, and their citizens from threats such as terrorism, weapons of mass destruction, foreign espionage, international organized crime, and other hostile activities. What we are authorized to do, and how we do it, is described in

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Executive Order 12333. Information about how NSA conducts signals intelligence activities is available on the websites of NSA (www.nsa.gov) and the Office of the Director of National Intelligence (www.dni.gov).

We have determined that the fact of the existence or non-existence of the materials you request is a currently and properly classified matter in accordance with Executive Order 13526, as set forth in Subparagraph (c) of Section 1.4. Thus, your request is denied pursuant to the first exemption of the FOIA which provides that the FOIA does not apply to matters that are specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign relations and are, in fact properly classified pursuant to such Executive Order.

In addition, this Agency is authorized by various statutes to protect certain information concerning its activities. The third exemption of the FOIA provides for the withholding of information specifically protected from disclosure by statute. Thus, your request is also denied because the fact of the existence or non-existence of the information is exempted from disclosure pursuant to the third exemption. The specific statutes applicable in this case are Title 18 U.S. Code 798; Title 50 U.S. Code 3024(i); and Section 6, Public Law 86-36 (50 U.S. Code 3605).

You may appeal this decision. If you decide to appeal, you should do so in the manner outlined below. NSA will endeavor to respond within 20 working days of receiving any appeal, absent any unusual circumstances.

- The appeal must be sent via U.S. postal mail, fax, or electronic delivery (e-mail) and addressed to:

NSA/CSS FOIA/PA Appeal Authority (P132)
National Security Agency
9800 Savage Road STE 6932
Fort George G. Meade, MD 20755-6932

The facsimile number is (443)479-3612.
The appropriate email address to submit an appeal is
FOIARSC@nsa.gov.

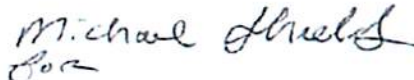
- It must be postmarked or delivered electronically no later than 90 calendar days from the date of this letter. Decisions appealed after 90 days will not be addressed.
- Please include the case number provided above.
- Please describe with sufficient detail why you believe the denial of requested information was unwarranted.

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You may also contact our FOIA Public Liaison at foialo@nsa.gov for any further assistance and to discuss any aspect of your request. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Rd. - OGIS
College Park, MD 20740
ogis@nara.gov
877/684-6448
202/741-5769

Sincerely,

A handwritten signature in cursive script that reads "Michael Shields" with a small mark below it that appears to be "for".

JOHN R. CHAPMAN
Chief
FOIA/PA Office
NSA Initial Denial Authority

OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE

WASHINGTON, DC

MAY 25 2020

The Honorable Mark R. Warner
Vice Chairman
Select Committee on Intelligence
United States Senate
Washington, DC 20510

Vice Chairman Warner:

I write in response to your letter of 20 May 2020. My declassification determination was made in the interests of full transparency and public accountability given serious unanswered questions about the potential misuse of intelligence for partisan purposes following the 2016 election.

The protection of intelligence sources and methods is always at the fore of any declassification decision which I might make. As you well know, the decision to declassify the names of individuals who sought to unmask the identity of General Flynn poses absolutely no risk of compromise of either sources or methods. Additionally, far from undermining the credibility of the Intelligence Community (IC), the utmost transparency in this matter builds public trust and confidence in the Community and ensures the IC will not conceal potential abuse behind unnecessary security classification. I appreciate your reference to Executive Order 13526. I remind you that this Order makes clear in Section 1.7 that “in no case shall information...continue to be maintained as classified, or fail to be declassified in order to conceal violations of law...(or) prevent embarrassment to a person, organization, or agency.”

I find it puzzling that your letter initially complains about the declassification of the identities of unmaskers, a declassification that posed no conceivable risks to sources or methods, only to then request the declassification of actual intelligence reports. Cherry picking certain documents for release, while attacking the release of others that don't fit your political narrative, is part of the problem the American people have with Washington DC politicians. I would appreciate it if you would explain your philosophy on transparency as it appears to be based solely on political advantage.

Lastly, I should add, I gladly would have discussed this and other intelligence matters with you directly had you not chosen to cancel our planned call and then ignored subsequent requests by my office to reschedule.

Sincerely,



Richard A. Grenell
Acting Director

Cc: The Honorable Marco Rubio

UNCLASSIFIED