EXHIBIT A

December 13, 2019

Federal Bureau of Investigation
Attn: FOI/PA Request
Record/Information Dissemination Section
170 Marcel Drive
Winchester, VA 22602-4843
Fax: (540) 868-4391/4997

Dear FOIA Officer:

This is a request under the Freedom of Information Act, 5 U.S.C. § 552, regarding electronic surveillance conducted by any member of the U.S. Intelligence Community 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"). PPSA's General Counsel, Gene C. Schaerr, has previously submitted a number of FOIA requests seeking information about politically motivated unmasking and upstreaming under the Obama administration. All of those FOIA requests—including those currently being litigated in federal court—have now been assigned to PPSA.

PPSA remains deeply concerned about the politically motivated—and warrantless—"unmasking" of United States persons. Among other things, it hopes to determine the extent and scope of such unmaskings by obtaining access to particular records enumerated in this request. Each record has been directly referenced in either popular media or official government sources. In a previous proceeding, multiple federal agencies were informed of both (1) the existence of these documents and (2) their responsiveness to a prior FOIA request. To date, regrettably, no agency has produced any of the enumerated records. To the contrary, the various agencies have circumvented FOIA disclosure requirements by claiming in a motion for summary judgment that PPSA was merely speculating that the listed documents were responsive to specific categories of documents requested in prior requests. *See attached* Exhibit A at 2 ("Plaintiff claims that the agencies conducted inadequate searches principally because they did not produce certain documents that Plaintiff speculates are responsive to his request."). PPSA vehemently disagrees, as cataloged more fully in Gene Schaerr's cross-motion for summary judgment in the U.S. District Court for the District of Columbia but submits this FOIA request to avoid any further confusion. Let there be no mistake here—PPSA is affirmatively requesting each of the documents listed below.

With the understanding that the documents enumerated below are the subject of this request, we respectfully request that you produce:

1. The rule/policy issued on Dec. 5, 2016 by Director of National Intelligence James Clapper and referenced in a May 23, 2018 article in *The Hill* by Sharyl Attkisson,[1] which modified the restrictions on the NSA's dissemination of surveillance material.

2. The previous rule/policy in effect before the Dec. 15, 2016 modification referenced above.

3. Any reports related to the policy change described above and any documents referenced, consulted, discussed, summaries or relied upon in those reports.

4. The 2013 revision to E/S 00176, "Dissemination of Congressional Identity Information Within the Executive Branch" (commonly known as the "Gates Procedures") referenced in Subsection B(5) of "Annex A: Dissemination of Congressional Identity Information."

5. The NSA's Signals Intelligence Directorate (SID) policies on the dissemination of U.S. identities from data collected under Executive Order (E.O. 12333), as amended and its annex, referenced in the "Identities in SIGINT Manual."

6. USSID CR 1423, USSID CR 1400, USSID CR 1252; the NSA's Implementation of Intelligence Source Descriptors; and any other sources cited, discussed, or relied upon in the "Dissemination Guidance for Hostage Situations Worldwide."

7. The FBI's quarterly reports referenced in Subsection 2.4 of the "Identities in SIGINT Manual" issued between Jan. 1, 2015 and Feb. 1, 2017.

8. The Identity Release Request Form referenced in Subsection 7.1 of the "Identities of SIGINT Manual."

9. The Intelligence Community Directive 112, *Congressional Notification*, dated Nov. 16, 2011, referenced in the Intelligence Community Directive, dated June 29, 2017.

10. All "Significant Legal Interpretations" sent by any agency's General Counsel to either or both of the Congressional Intelligence Committees pursuant to the Intelligence Community Directive 112 or any predecessor directive, policy, manual or regulation.

11. All "written notifications" provided to either or both of the Congressional Intelligence Committees by any agency pursuant to Subsection 9(c), (f), (g), or (j) of

[1] Sharyl Attkisson, *8 Signs Pointing to a Counterintelligence Operation Deployed Against Trump's Campaign*, The Hill (May 23, 2018), https://thehill.com/opinion/white-house/388978-growing-signs-of-a-counterintelligence-operation-deployed-against-trumps.

the Intelligence Community Directive 112, or any predecessor directive, policy, manual, or regulation, related in any way to the 2016 election, the Trump transition team, or the process of "unmasking" or "upstreaming."

12. Each "Annual Report on Violations of Law or Executive Order" submitted by the ODNI to Congressional intelligence committees pursuant to Intelligence Community Directive 112.

13. The NSD and ODNI's bimonthly reports of their review of the agencies' compliance with their minimization procedures, issued between Jan. 1, 2015 and Feb. 1, 2017, referenced in the Joint Assessments and provided to the Congressional committees as required by Section 707(b)(1)(F) of FISA.

14. The 260+ unmasking requests made by U.N. Ambassador Samantha Power or attributed to her that were sent to or received by any of the agencies between Jan. 1, 2015 to Feb. 1, 2017, as reported in a Sept. 20, 2017 Fox News Report by Bret Baier and Catherine Herridge.[2]

15. Any reports or memoranda that reference, cite, quote, summarize, or discuss any of the aforementioned requests from Samantha Power, either individually or collectively; and any document referenced, consulted, discussed, or relied upon in those requests or reports.

16. All communications concerning American citizens between Samantha Power, or her staff, and members of the media between Jan. 1, 2015 and Feb. 1, 2017, especially those media outlets referenced in the emails provided by the government to the ACLJ in response to its FOIA suits.[3]

17. The report provided to the House Intelligence Committee and referenced in a Sept. 13, 2017 CNN article by Manu Raju,[4] revealing that Susan Rice had unmasked Michael Flynn, Jared Kushner, and Steve Bannon in connection with a meeting with the crown prince of the United Arab Emirates.

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[2] Bret Baier & Catherin Herridge, *Samantha Power Sought to Unmask Americans on Almost Daily Basis, Sources Say,* Fox News (Sept. 21, 2017), 2 Bret Baier & Catherine Herridge, Samantha Power Sought to Unmask Americans on Almost Daily Basis, https://www foxnews.com/politics/samantha-power-sought-to-unmask-americans-on-almost-daily-basis-sources-say; *see also* Pete Kasperowicz, *Trey Gowdy: Samantha Power testified that intel officials made 'unmasking' requests in her name*, Washington Examiner (Oct. 17, 2017), https://www.washingtonexaminer.com/trey-gowdy-samantha-power-testified-that-intel-officials-made-unmasking-requests-in-her-name.

[3] See Power Emails, http://media.aclj.org/pdf/Powers-Emails-Timeline.pdf.

[4] Manu Raju, *Exclusive: Rice Told House Investigators Why She Unmasked Senior Trump Officials*, CNN (Sept. 18, 2017), https://www.cnn.com/2017/09/13/politics/susan-rice-house-investigators-unmasked-trump-officials/index.html.

18. The unmasking request(s) sent by Rice to the FBI and refenced in the above-mentioned report to the House Intelligence Committee.

19. Any other documents referenced, consulted, discussed or relied upon in the preparation of the above-mentioned report to the House Intelligence Committee.

20. The intercepted communication(s) between Russian officials mentioned in a May 26, 2017 *Washington Post* article by Ellen Nakashima, Adam Entous, and Greg Miller[5] discussing a conversation between Kushner and Sergey Kislyak.

21. The requests made to the FBI to unmask the communication between Kushner and Kislyak referenced above.

22. All reports that reference, cite, quote, summarize or discuss any portion of that communication between Kushner and Kislyak.

23. The unmasking request(s) "of Mr. Trump, his associates, or any member of Congress" that Mr. Clapper, in his March 8, 2017 testimony before the Senate Judiciary Subcommittee on Crime & Terrorism, testified he had submitted to at least one agency.[6]

24. Any reports that reference, cite, quote, or discuss the aforementioned request(s) of Mr. Trump, his associates, or any member of Congress; and any documents referenced, consulted, discussed, or relied upon in those reports.

25. The documents obtained and/or reviewed by Mr. Clapper pursuant to those requests, as mentioned in Mr. Clapper's March 8, 2017 testimony before the Senate Judiciary Subcommittee on Crime & Terrorism discussing instances in which "Mr. Trump, his associates, or any member of Congress" had been unmasked.

26. Any reports that reference, cite, quote, or discuss the aforementioned documents obtained and/or review by Mr. Clapper; and any documents referenced, consulted, discussed, or relied upon in those reports.

27. The documents reviewed by and referenced in Deputy Attorney General Sally Yates' March 8, 2017 testimony before the Senate Judiciary Subcommittee on Crime &

[5] Ellen Nakashima, et. al., *Russian Ambassador Told Moscow that Kushner Wanted Secret Communications Channel with Kremlin,* Washington Post (March 26, 2017), https://www.washingtonpost.com/world/national-security/russian-ambassador-told-moscow-that-kushner-wanted-secret-communications-channel-with-kremlin/2017/05/26/520a14b4-422d-11e7-9869-bac8b446820a_story.html?tid=sm_fb&utm_term=.4874632f6fce&noredirect=on.
[6] Tim Haines, Yates & Clapper Admit Viewing "Unmasked" Trump Campaign Communications; Deny Leaking To Press, Real Clear Politics (May 8, 2017), https://www.realclearpolitics.com/video/2017/05/08/yates_and_clapper_admit_unmasking_trump_campaign_communications_deny_leaking_to_press html.

Terrorism discussing instances in which "Mr. Trump, his associates, or any member of Congress" had been unmasked.

28. Any reports that reference, cite, quote, summarize, or discuss the aforementioned documents reviewed or referenced by Yates, and any documents referenced, consulted, discussed, or relied upon in those reports.

29. All records reporting and/or analyzing whether the unmaskings of Carter Page and/or George Papadapolous were lawful or consistent with agency or Executive Branch policy.

30. All requests to disseminate documents containing unmasked Congressional names, filed pursuant to subsection C(3)(b)(iii) of "Annex A: Dissemination of Congressional Identity Information" or any predecessor rule, regulation, manual, or policy.

31. All documents mentioned in the requests identified in the previous item, especially but not limited to those that pertain to the Congressmen listed in the Requests, and any report(s) that cites, quotes, references, summarizes or relies upon any of the aforementioned documents.

32. All "Notifications of the Dissemination of Unmasked Congressional Identity Information" issued in compliance with Subsection D of "Annex A: Dissemination of Congressional Identity Information" or any predecessor rule, regulation, manual, or policy.

33. All Notifications of "Possible Violations of the Law" issued in compliance with Subsection D of "Annex A: Dissemination of Congressional Identity Information" or any predecessor rule, regulation, manual, or policy.

34. All documents underlying or referenced in Devin Nunes' March 22, 2017 press release on the subject of incidental collection.[7]

35. All correspondence between individual Senators or Congressmen and any agency, or between an agency and Congressional leadership and/or either or both Congressional intelligence committees, concerning the unmasking of Congressmen or Senators, including but not limited to correspondence from or to Senator Rand Paul (R-KY), Senator Lindsey Graham (R-SC), Congresswoman Jane Harmon (D-CA), Congressman Dennis Kucinich (D-OH), Congressman Lou Barletta (R-PA), Congresswoman/Senator-elect Marsha Blackburn (R-TN), Congressman Chris Collins (R-NY), Congressman Tom Marino (R-PA), Congressman Devin Nunes (R-

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[7] Chairman Nunes Comments on Incidental Collection of Trump Associates, U.S. House of Representatives' Permanent Select Committee on Intelligence, (March 22, 2017), https://intelligence.house.gov/news/documentsingle.aspx?DocumentID=774.

CA), Congressman Sean Duffy (R-WI), Congressman Trey Gowdy (R-SC), and Congressman Dennis Ross (R-FL).

36. All reports or documents referencing the possible existence and/or nature of "exculpatory evidence" exonerating Papadopoulos or Page, mentioned by Representative John Ratcliffe and reported in an October 14, 2018 article on that subject.[8]

37. All documents concerning whether unmasking material was used to launch either the initial Russian counterintelligence/criminal investigations regarding the hacking of the DNC's Servers in the Summer 2016, or any portion of the Special Counsel's ongoing work.

38. All records reviewed or created by the ODNI, the FBI, NSA or CIA in compiling the 14th, 15th, 16th, 17th, and/or 18th Joint Assessments.

39. The "NSA's targeting procedures" referenced on pg. 7 of the 14th Joint Assessment.

40. The NSA's "tasking records" referenced on pg. 7 of the 14th Joint Assessment.

41. The "FBI's Section 702 targeting procedures" referenced on page 10 of the 14th Joint Assessment.

42. The FBI's "targeting checklist" referenced on page 11 of the 14th Joint Assessment.

43. The FBI's "internal compliance mechanisms and procedures to oversee proper implementation of its Section 702 authorities" referenced on pg. 12 of the 14th Joint Assessment.

44. The "serialized reports" referenced on pg. 8 of the 14th Joint Assessment.

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 production would

[8] See, e.g., Chuck Ross, FBI has evidence that 'directly refutes premise of the Trump-Russia probe, (Oct. 14, 2018), https://dailycaller.com/2018/10/14/fbi-evidence-refutes-papadopoulos/.

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

Exhibit A:
Motion for Summary Judgment

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GENE SCHAERR, Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, *et al.*, Defendants.	)	Case No. 1:18-cv-575-ABJ

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants Department of Justice, including the Federal Bureau of Investigation and the National Security Division; Office of the Director of National Intelligence; National Security Agency; Central Intelligence Agency; and Department of State respectfully move for summary judgment pursuant to Federal Rule of Civil Procedure 56(a). Accompanying this motion are a memorandum of points and authorities in support of the motion, several declarations and supporting exhibits, a statement of undisputed material facts, and a proposed order. Defendants respectfully request that the Court grant the motion for the reasons described in the memorandum.

Dated: May 14, 2019

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HASHIM MOOPPAN
Principal Deputy Assistant Attorney General

MARCIA BERMAN
Assistant Branch Director

/s/ Laura Hunt ___________
LAURA HUNT
Trial Attorney
Maryland Bar Member
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L St., N.W.
Washington, D.C. 20530
(202) 616-8337 (office)
(202) 616-8470 (fax)
laura.a.hunt@usdoj.gov

Attorneys for Defendants

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GENE SCHAERR,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF JUSTICE, *et al.*,

Defendants.

Case No. 1:18-cv-575-ABJ

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

This action concerns six multi-part Freedom of Information Act ("FOIA") requests submitted by Plaintiff Gene Schaerr to Defendants the U.S. Department of Justice ("DOJ"), including the Federal Bureau of Investigation ("FBI") and the National Security Division ("NSD"); the Office of the Director of National Intelligence ("ODNI"); the National Security Agency ("NSA"); the Central Intelligence Agency ("CIA"); and the Department of State ("State"). Plaintiff requested sensitive national security information relating to the agencies' "unmasking" policies and procedures, the "unmasking" of particular named individuals, and the "upstreaming" of particular named individuals. Plaintiff's "unmasking" requests implicate the agencies' possession and dissemination of Foreign Intelligence Surveillance Act ("FISA")-derived intelligence information on specific individuals, as well as whether the agencies "unmasked," or were asked to "unmask" the individuals' identities. Likewise, Plaintiff's "upstreaming" requests seek information about whether the agencies maintain any information referring to the named individuals obtained as a result of the upstream collection of intelligence information under the FISA, an intelligence method. Given the subject matter of the request, the agencies' responses were necessarily limited.

Defendants conducted adequate searches for records responsive to the parts of the requests they were able to respond to and properly withheld certain information pursuant to well-established FOIA exemptions. They properly declined to confirm or deny the existence of records responsive to other parts of the requests, where doing so would reveal exempt information. Defendants are therefore entitled to summary judgment.

BACKGROUND

I. PLAINTIFF'S FOIA REQUESTS

In July and August 2017, Plaintiff submitted six different FOIA requests to the defendant agencies in this action. *See* Compl., ECF No. 1, Exhs. A, C, F, K, Q, T. Each requested the following:

1. All policies, procedures, and reports involving the process for unmasking, or requesting unmasking, including reports on any incidents of policy violations, from January 1, 2015 to February 1, 2017.

2. All documents concerning the unmasking, or any request for unmasking, of any person listed below, from January 1, 2015 to February 1, 2017:

    a. Steve Bannon
    b. Rep. Lou Barletta
    c. Rep. Marsha Blackburn
    d. Florida Attorney General Pam Bondi
    e. Rep. Chris Collins
    f. Rep. Tom Marino
    g. Rebekah Mercer
    h. Steven Mnuchin
    i. Rep. Devin Nunes
    j. Reince Priebus
    k. Anthony Scaramucci
    l. Peter Thiel
    m. Donald Trump Jr.
    n. Eric Trump
    o. Ivanka Trump
    p. Jared Kushner
    q. Rep. Sean Duffy
    r. Rep. Trey Gowdy
    s. Rep. Dennis Ross
    t. Pastor Darrell C. Scott
    u. Kiron Skinner

3. All documents concerning the upstreaming of the names of any individual listed in Question 2 above, from January 1, 2015 to February 1, 2017.

Id.

Plaintiff additionally requested a fourth category of information from ODNI, NSD,

and NSA. Specifically, Plaintiff requested from ODNI and NSD, "[c]opies of any materials sent in response to any inquiry from the House Intelligence Committee or other congressional committees regarding unmasking from January 1, 2017 to August 11, 2017." Compl. Exh. C. Plaintiff requested from NSA, "[a]ll reports made to S12 and SV regarding improper dissemination of any individual listed in Question 2, above. *See* National Security Agency, United States Signals Intelligence Directive 18, § 7.5 (January 25, 2011)." Compl. Exh. F.

Plaintiff's FOIA requests focus on the intelligence processes of "unmasking" and "upstreaming." When information is gathered pursuant to the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. §§ 1801-1885c., there are certain minimization procedures that intelligence agencies must follow regarding the collection, retention, and dissemination of information concerning unconsenting United States persons ("USPERs"). Agencies may disseminate information obtained pursuant to FISA only to authorized recipients. In general, for non-public information concerning an unconsenting USPER, agencies may only include the identity of the USPER if it itself constitutes foreign intelligence, is necessary for the recipient to understand the foreign intelligence being transmitted, or is evidence of a crime. Otherwise, agency minimization procedures generally require the agency to "mask" the identity of a USPER by substituting it with a generic phrase, such as "U.S. Person 1" or "a named U.S. Person." If revealing a USPER's identity is necessary to the dissemination of needed intelligence to protect national security, U.S. government officials may request that masked USPER information be revealed. Hardy Decl. ¶ 11; Stein Decl. ¶ 33. This process is known as "unmasking." *Id.* "Unmasking" requests are rare. Shiner Decl. ¶ 13. Thus, implicit in Plaintiff's request for "unmasking" information about the identified individuals (Part 2 of the request) is (a) whether the agencies possess any FISA-derived intelligence information on them, (b) whether the

agencies disseminated any such intelligence information, and if so, (c) whether the agencies unmasked the individuals' identities, or were asked to do so. Hardy Decl. ¶ 11.

"Upstreaming" refers to a methodology for collecting intelligence information from internet communications pursuant to FISA Section 702. Hardy Decl. ¶ 12. In "downstream" collection, agencies "collect [a] target's communications directly from the U.S. company that services the account." *Id.* With upstream collection, the NSA "collects [a] target's communications as they cross the backbone of the internet with the compelled assistance of companies that maintain those networks." *Id.* This includes "acquired information 'about' targets…for example, where the target is neither the sender nor the recipient of the collected communication." *Id.* Thus, upstream collection may obtain information sent to or from the non-USPER targets of Section 702 surveillance by individuals, including USPERS, who are not targets of the surveillance. *Id.* Part 3 of Plaintiff's request, for "upstreaming" information about the identified individuals, therefore seeks information about whether the agency maintains any information referring to the individuals obtained as a result of the upstream collection of intelligence information under FISA. Hardy Decl. ¶ 12; Stein Decl. ¶ 35.

II. AGENCY RESPONSES TO PLAINTIFF'S REQUESTS

A. FBI

The FBI asserted a Glomar response to Parts 2 and 3 of the request pursuant to FOIA Exemptions 6 and 7(C), because the mere acknowledgement of the existence of FBI records could reasonably be expected to constitute an unwarranted invasion of the personal privacy interests of the individuals named in the request. Hardy Decl. ¶ 16 Exh. D. The FBI additionally asserted a Glomar response pursuant to FOIA Exemptions 1 and 3. Hardy Decl. ¶ 23, Exh. K. Plaintiff appealed the first Glomar response in a letter received by FBI on April 27, 2018. Hardy

Decl. ¶ 25, Exh. L. FBI responded to Part 1 of Plaintiff's FOIA request by producing eight pages of responsive records, which were withheld in part. Hardy Decl. ¶ 82, Exh. P. Plaintiff did not appeal the second Glomar until after the filing of the Complaint. *Id.* ¶¶ 24-25, Exh. L.

B. ODNI

ODNI did not respond to Plaintiff's FOIA request until after this suit was filed. ODNI conducted a search for Part 1 of the request and identified 15 responsive documents that were already publicly available. Accordingly, ODNI provided Plaintiff with the web links to those documents, 10 of which contained redactions and 5 of which did not. Gaviria Decl. ¶ 13, Exh. D. ODNI issued a Glomar response to Parts 2 and 3 of Plaintiff's request, pursuant to Exemptions 1 and 3. *Id.* ODNI conducted a search for Part 4 of the request and identified 2 responsive documents, which it released in part. *Id.*

C. NSA

NSA issued an interim response to Plaintiff on October 10, 2017 stating that it completed its search for responsive records to Part 1 of Plaintiff's request and issued a Glomar response to Parts 2, 3, and 4 of Plaintiff's request pursuant to FOIA Exemptions 1 and 3. Thompson Decl. ¶ 15, Exh. E. At that time, NSA informed Plaintiff that six of the responsive records were publicly available and indicated where Plaintiff could find them, and that it was processing the remainder of the records. *Id.* Plaintiff administratively appealed the Glomar assertion and provided a privacy waiver for a member of the transition team. Thompson Decl. ¶ 17, Exh. F. NSA did not adjudicate the appeal before Plaintiff filed this suit on March 14, 2018. After the suit was filed, NSA released additional documents responsive to Part 1. Specifically, it released seven documents in part and withheld 10 documents in full. Thompson Decl. ¶¶ 21-22, Exhs. K-L. Four documents were later deemed non-responsive. Thompson Decl. ¶ 23.

D. NSD

NSD, a component of the Department of Justice, did not respond to Plaintiff's FOIA request until after he filed this suit. NSD conducted searches for records responsive to Parts 1 and 4 of the request but found no records. Findlay Decl. ¶ 9, Exh. C. NSD asserted a Glomar response to Parts 2 and 3 of the request pursuant to FOIA Exemption 1. *Id.*

E. State

State also responded to the request after suit was filed. State conducted a search for records responsive to Part 1 of Plaintiff's FOIA request and found no records. Stein Decl. ¶ 7, Exh. 3. State asserted a Glomar response to Parts 2 and 3 of the request pursuant to FOIA Exemptions 1 and 3. *Id.*

F. CIA

The CIA similarly responded to the request after suit was filed. The CIA conducted a search for records responsive to Part 1 of the request. It identified three responsive records including one publicly available document and other documents belonging to other government agencies, which were referred to those agencies for direct response to Plaintiff. Shiner Decl. ¶¶ 10, 17-18, Exh. G. The CIA issued a Glomar response to Parts 2 and 3 of the request, pursuant to FOIA Exemptions 1 and 3. *Id.* ¶ 10.

III. THIS CASE

Plaintiff filed his Complaint on March 14, 2018. ECF No. 1. After Defendants answered, they produced to Plaintiff all responsive, non-exempt records that could be acknowledged, and now move for summary judgment on the adequacy of their searches, the propriety of any withholdings of information, and the propriety of their Glomar responses.

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STANDARD OF REVIEW

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Diamond v. Atwood*, 43 F.3d 1538, 1540 (D.C. Cir. 1995). FOIA actions are typically resolved on summary judgment. *See Leopold v. CIA*, 106 F. Supp. 3d 51, 55 (D.D.C. 2015); *Reliant Energy Power Generation, Inc. v. FERC*, 520 F. Supp. 2d 194, 200 (D.D.C. 2007). The court conducts a *de novo* review of the agency's response to the challenged FOIA requests. 5 U.S.C. § 552(a)(4)(B).

The "basic purpose" of FOIA reflects a "general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989). "Congress recognized, however, that public disclosure is not always in the public interest." *CIA v. Sims*, 471 U.S. 159, 166–67 (1985). Accordingly, in passing FOIA, "Congress sought 'to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy.'" *John Doe Agency*, 493 U.S. at 152 (quoting H.R. Rep. No. 89-1497, at 6 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2423). As the D.C. Circuit has recognized, "FOIA represents a balance struck by Congress between the public's right to know and the [G]overnment's legitimate interest in keeping certain information confidential." *Ctr. for Nat'l Sec. Studies v. Dep't of Justice*, 331 F.3d 918, 925 (D.C. Cir. 2003) (citing *John Doe Agency*, 493 U.S. at 152).

FOIA mandates disclosure of government records unless the requested information falls within one of nine enumerated exemptions. *See* 5 U.S.C. § 552(b). "A district court only has jurisdiction to compel an agency to disclose improperly withheld agency records," *i.e.* records

that do "not fall within an exemption." *Minier v. CIA*, 88 F.3d 796, 803 (9th Cir. 1996) (emphasis omitted); *see also* 5 U.S.C. § 552(a)(4)(B) (providing the district court with jurisdiction only "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant"); *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980) ("Under 5 U.S.C. § 552(a)(4)(B)[,] federal jurisdiction is dependent upon a showing that an agency has (1) 'improperly' (2) 'withheld' (3) 'agency records.'"). While narrowly construed, FOIA's statutory exemptions "are intended to have meaningful reach and application." *John Doe Agency*, 493 U.S. at 152; *accord DiBacco v. U.S. Army*, 795 F.3d 178, 183 (D.C. Cir. 2015).

The Government bears the burden of proving that the withheld information falls within the exemptions it invokes. *See* 5 U.S.C. § 552(a)(4)(B); *King v. Dep't of Justice*, 830 F.2d 210, 217 (D.C. Cir. 1987). "Summary judgment is warranted on the basis of agency affidavits when the affidavits describe the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Larson v. Dep't of State*, 565 F.3d 857, 865 (D.C. Cir. 2009) (quotation omitted). "Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears 'logical' or 'plausible.'" *Wolf v. CIA*, 473 F.3d 370, 374-75 (D.C. Cir. 2007) (quoting *Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982), and *Hayden v. NSA*, 608 F.2d 1381, 1388 (D.C. Cir. 1979)). Agency declarations are accorded "a presumption of good faith, which cannot be rebutted by purely speculative claims[.]" *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991).

The issues presented in this case directly "implicat[e] national security, a uniquely

executive purview." *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 926–27. While courts review *de novo* an agency's withholding of information pursuant to a FOIA request, "*de novo* review in FOIA cases is not everywhere alike." *Ass'n of Retired R.R. Workers, Inc. v. U.S. R.R. Ret. Bd.*, 830 F.2d 331, 336 (D.C. Cir. 1987). Indeed, the courts have specifically recognized the "propriety of deference to the executive in the context of FOIA claims which implicate national security." *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 927–28; see *Ray v. Turner*, 587 F.2d 1187, 1194 (D.C. Cir. 1978) ("[T]he executive ha[s] unique insights into what adverse [e]ffects might occur as a result of public disclosure of a particular classified record.").

For these reasons, the courts have "consistently deferred to executive affidavits predicting harm to the national security, and have found it unwise to undertake searching judicial review." *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 927; *see Larson v. Dep't of State*, 565 F.3d 857, 865 (D.C. Cir. 2009) ("Today we reaffirm our deferential posture in FOIA cases regarding the 'uniquely executive purview' of national security."); accord *Benjamin*, 178 F. Supp. 3d at 4. Consequently, a reviewing court must afford "substantial weight" to agency declarations "in the national security context." *King*, 830 F.2d at 217; *see Fitzgibbon v. CIA*, 911 F.2d 755, 766 (D.C. Cir. 1990) (holding that the district court erred in "perform[ing] its own calculus as to whether or not harm to the national security or to intelligence sources and methods would result from disclosure"); *Frugone v. CIA*, 169 F.3d 772, 775 (D.C. Cir. 1999) (because "courts have little expertise in either international diplomacy or counterintelligence operations, we are in no position to dismiss the CIA's facially reasonable concerns" about the harm that disclosure could cause to national security). FOIA "bars the courts from prying loose from the government even the smallest bit of information that is properly classified or would disclose intelligence sources or methods." *Afshar v. Dep't of State*, 702 F.2d 1125, 1130 (D.C. Cir. 1983).

ARGUMENT

I. THE DEFENDANT AGENCIES PROPERLY ASSERTED GLOMAR RESPONSES FOR PARTS 2, 3 AND 4 (NSA) OF PLAINTIFF'S FOIA REQUESTS.

A Glomar response allows the Government to "refuse to confirm or deny the existence of records where to answer the FOIA inquiry would cause harm cognizable under an FOIA exception." *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007) (quoting *Gardels v. CIA*, 689 F.2d 1100, 1103 (D.C. Cir. 1982)); *accord Sea Shepherd Conservation Soc'y v. IRS*, 208 F. Supp. 3d 58, 89 (D.D.C. 2016) ("The Glomar doctrine applies when confirming or denying the existence of records would itself cause harm cognizable under a FOIA exception."). The Court should afford "substantial weight" to the agencies' determinations to assert Glomar responses. *Sea Shepherd Conservation Society*, 208 F. Supp. 3d at 89. Summary judgment is appropriate when the asserting agencies put forth "affidavit[s] explaining in as much detail as is possible the basis for its claim that it can be required neither to confirm nor to deny the existence of the requested records." *Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976). Ultimately, the Government can establish the appropriateness of the Glomar response by demonstrating that it is "logical" or "plausible." *Wolf*, 473 F.3d at 375.

Courts in this circuit have consistently upheld Glomar responses where, as here, confirming or denying the existence of records would reveal classified information protected by FOIA Exemption 1 or disclose information protected by statute in contravention of FOIA Exemption 3. *See, e.g.*, *Frugone v. CIA*, 169 F.3d 772, 774–75 (D.C. Cir. 1999) (finding that CIA properly refused to confirm or deny the existence of records concerning the plaintiff's alleged employment relationship with CIA pursuant to Exemptions 1 and 3); *Larson v. Dep't of State*, 565 F.3d 857, 861–62 (D.C. Cir. 2009) (upholding the NSA's use of the Glomar response

to the plaintiffs' FOIA requests regarding past violence in Guatemala pursuant to Exemptions 1 and 3); *Carter v.* NSA, 962 F. Supp. 2d 130, 141 (D.D.C. 2013) (upholding the NSA's Glomar response to a request for information relating to a specific individual pursuant to Exemption 1); *Morley v. CIA*, 699 F. Supp. 2d 244, 257–58 (D.D.C. 2010) (upholding CIA's Glomar response to the plaintiff's request concerning covert CIA operations pursuant to Exemptions 1 and 3); *Wheeler v. CIA*, 271 F. Supp. 2d 132, 140 (D.D.C. 2003) (ruling that CIA properly invoked a Glomar response to a request for records concerning the plaintiff's activities as a journalist in Cuba during the 1960s pursuant to Exemption 1).

Here, Plaintiff seeks intelligence information related to the alleged "unmasking" or "upstreaming" of particular individuals. All of the defendants determined that the existence or non-existence of records responsive to Parts 2 and 3 of Plaintiffs' FOIA request is exempt from disclosure pursuant to FOIA Exemption 1, which protects classified information. Thompson Decl. ¶ 35; Findlay Decl. ¶ 10; Stein Decl. ¶ 31; Shiner Decl. ¶ 27; Hardy Decl. ¶ 29; Gaviria Decl. ¶ 41. Additionally, the CIA, State, NSA, FBI, and ODNI asserted Glomar responses pursuant to FOIA Exemption 3 relating to information protected from disclosure by statute. Thompson Decl. ¶ 35; Stein Decl. ¶ 7; Shiner Decl. ¶ 27; Gaviria Decl. ¶ 41. The FBI further asserts that the existence or non-existence of records is exempt from disclosure pursuant to FOIA Exemptions 6, 7(C) and 7(E), which protect individual privacy interests. Hardy Decl. ¶ 29. Finally, NSA asserted a Glomar response to Part 4 of Plaintiff's FOIA request pursuant to FOIA Exemptions 1 and 3. Thompson Decl. ¶ 35.

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A. Defendants Correctly Issued Glomar Responses Under FOIA Exemption 1. [1]

FOIA Exemption 1 protects from disclosure information that is "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" and "are in fact properly classified pursuant to such Executive Order." 5 U.S.C. § 552(b)(1). Under Executive Order 13,526, an agency may withhold information that an official with original classification authority has determined to be classified because its "unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security[.]" Exec. Order 13,526 § 1.4, 75 Fed. Reg. 707, 709 (Dec. 29, 2009). The information must also "pertain[] to" one of the categories of information specified in the Executive Order, including "intelligence activities (including covert action), intelligence sources or methods." Exec. Order 13,526 § 1.4(c); *see also Judicial Watch, Inc. v. Dep't of Defense*, 715 F.3d 937, 941 (D.C. Cir. 2013) ("[P]ertains is not a very demanding verb."). As addressed above, when it comes to matters affecting national security, the courts afford "substantial weight" to an agency's declarations addressing classified information, *King v. Dep't of Justice*, 830 F.2d 210, 217 (D.C. Cir. 1987), and defer to the expertise of agencies involved in national security and foreign relations. *See Fitzgibbon v. CIA*, 911 F.2d 755, 766 (D.C. Cir.

[1] Plaintiff failed to exhaust his administrative remedies with respect to the FBI's Glomar assertion pursuant to Exemptions 1 and 3. A FOIA requestor must exhaust his administrative remedies before bringing a challenge to an agency's response to a FOIA action in federal court. *Oglesby v. Dep't of the Army*, 920 F.2d 57, 61 (D.C. Cir. 1990); *Schoenman v. FBI*, 2006 WL 1582253, at *10-16 (D.D.C. June 5, 2006). The exhaustion requirement is not satisfied if the FOIA requester files his appeal after or contemporaneously with the filing of the complaint because it does not provide the agency with sufficient time to redress the grievance. *See, e.g. Sieverding v. DOJ*, 910 F. Supp. 2d 149, 155 (D.D.C. 2012) (failure to exhaust administrative remedies found when FOIA requester contemporaneously filed FOIA appeal and complaint). On January 23, 2018, the FBI issued its Glomar response pursuant to FOIA Exemptions 1 and 3. Plaintiff did not appeal that decision until after he filed this suit. Hardy Decl. ¶¶ 23-25. Accordingly, Plaintiff's challenge to the FBI's Glomar assertion pursuant to Exemptions 1 and 3 should be dismissed for failure to exhaust administrative remedies.

1990); *see also Benjamin*, 178 F. Supp. 3d at 4. Pursuant to Executive Order 13,526, Section 3.6(a), an agency "may refuse to confirm or deny the existence or nonexistence of requested records whenever the fact of their existence or nonexistence is itself classified . . ."

The agencies' Glomar responses pursuant to FOIA Exemption 1 were proper because disclosing whether or not they have records about the "unmasking" or "upstreaming" of particular individuals (1) has been determined to be classified by an Original Classification Authority; (2) pertains to intelligence activities and intelligence sources and methods; (3) would damage national security; and (4) is not classified for an improper purpose. Each agency's declarant has Original Classification Authority as required by Executive Order 13,526, Section 1.1(a), and each declarant has determined that disclosing the existence or non-existence of documents which Plaintiff seeks would reveal classified information. *See* Thompson Decl. ¶ 2; Findlay Decl. ¶ 3; Stein Decl. ¶ 38; Shiner Decl. ¶ 2; Hardy Decl. ¶ X; Gaviria Decl. ¶ 3.

Revealing the existence or non-existence of the information sought by Plaintiff in Parts 2 and 3 of his requests would cause damage to national security because it would reveal highly sensitive national security information relating to the intelligence sources and methods of the defendant agencies, with respect to specific individuals. Executive Order 13,526, Section 1.4. If a defendant agency were to reveal that it does or does not have documents about the unmasking of the individuals listed in the request, that would necessarily reveal whether those individuals were identified in intelligence reports, whether the agency possesses any FISA-derived intelligence information on those individuals, whether the agency disseminated any such intelligence information, and if so, whether the agency unmasked, or was asked to unmask, the individuals' identities. Hardy Decl. ¶ 11; Stein Decl. ¶¶ 33-34; Shiner Decl. ¶ 30. Similarly, revealing whether an agency has documents about the upstreaming of the named individuals

would also reveal whether the agency possesses any FISA-derived intelligence information on those individuals, obtained through upstream collection, and also the extent to which the information was shared within the intelligence community. Hardy Decl. ¶ 12; Stein Decl. ¶ 35. This would necessarily confirm or deny the use of this intelligence method (upstream collection) to gather intelligence that contained information about these individuals. Stein Decl. ¶ 35.

Thus, confirming or denying the existence of responsive records would reveal the use of intelligence activities, sources, and methods with respect to particular individuals and the intelligence community's interest, or lack of interest, in particular individuals. Stein Decl. ¶ 34; Gaviria Decl. ¶¶ 39-40; Thompson Decl. ¶ 40; Shiner Decl. ¶¶ 30-31; Findlay Decl. ¶ 15; Hardy Decl. ¶¶ 41-42. For example, "[d]isclosing whether or not the CIA possesses intelligence reports on a specific subject – whether that specific person was the target of an intelligence collection effort or if information regarding the subject was collected incidentally as a result of interactions with subjects of intelligence interest – would provide the CIA's adversaries information about the Agency' priorities, capabilities, activities, and methods." If the CIA were "to confirm the existence or nonexistence of any 'unmasking' requests regarding any particular individual, it would, in effect, tend to confirm the existence or nonexistence of broader U.S. Government intelligence interest in and/or activity regarding a particular subject." Shiner Decl. ¶ 31. *See also* Hardy Decl. ¶ 44 (regarding incidental collection); Thompson Decl. ¶ 40 (same).

The revelation of this information would be harmful to national security because the information's public disclosure could allow adversaries of the United States, including terrorist organizations, foreign intelligence services, and other hostile groups, to identify the intelligence community's priorities. Gaviria Decl. ¶ 45; Stein Decl. ¶¶ 29-33; Shiner Decl. ¶¶ 31-32; Findlay Decl. ¶¶ 15-16; Thompson Decl. ¶¶ 39-40; Hardy Decl. ¶ 40.

According to the CIA, "[t]errorist organizations, foreign intelligence services, and other hostile groups continually gather details regarding the CIA's specific intelligence capabilities, authorities, interests, and attempt to use this information to their advantage. In order to effectively collect and analyze foreign intelligence, the Agency must avoid disclosing the subjects of its studies." Shiner Decl. ¶ 32. Confirming or denying the existence of records regarding the unmasking of particular individuals could "cause damage to national security because such a disclosure would reveal broader intelligence priorities of the Agency (or, conversely, gaps in intelligence), which would reveal sensitive details about the CIA's intelligence methods and activities." *Id.*

NSD states that disclosure of information relating to whether the agency sought authority for intelligence collection would "permit hostile intelligence services to use FOIA to acquire information about United States intelligence investigations. Once a particular source or method, or the fact of its use in a particular situation, is discovered, its continued usefulness may be degraded." Findlay Decl. ¶ 14. This information could also be used to "deploy counterintelligence assets against the U.S. Government and significantly impair U.S. intelligence collection." *Id.* Even confirming the absence of this type of information "could be valuable to foreign powers and hostile intelligence services who could use it to carry out intelligence activities with the knowledge that the U.S. Government is not monitoring certain people and may not even suspect them." *Id.* ¶ 15.

Additional harms from confirming or denying whether responsive records exist include, "affect[ing] [the] intelligence community's ability to counter threats to the national security of the United States," Stein Decl. ¶ 31, and "inform[ing] our adversaries of the degree to which

NSA is aware of some of their operatives or can successfully exploit particular communications." Thompson Decl. ¶ 40.

The problem is magnified here because Plaintiff's request is limited to a specific date range, meaning that confirming the existence or non-existence of intelligence possessed by the agency during those dates could reveal the agency's intelligence priorities during a particular time period, *see, e.g.* Hardy Decl. ¶ 44.

For the same reasons, NSA also properly asserted a Glomar response to Part 4 of Plaintiff's request, which sought all reports made to S12 and SV regarding improper dissemination of any individual listed in Part 2 of the request. S12, which is now part of the Mission Engagement, Requirements and Assessments organization within NSA "governs NSA's engagement with partners, customers, and stakeholders, including providing policy and implementation support to NSA's information sharing activities. Thompson Decl. ¶ 35 n.7. SV, now known as P7, "provides compliance support to NSA, including providing compliance guidance to NSA organizations, investigates and coordinates possible incidents, and provides support for external oversight activities." *Id.* ¶ 35 n. 8. Confirming or denying the existence of reports of improper disseminations made to S12 and SV about any individuals listed in Part 2 "could tend to reveal whether or not NSA engaged in certain, or any, intelligence activities, and/or did or did not target individual communications for collection, and/or did or did not disseminate intelligence products or process certain unmasking requests." Thompson Decl. ¶ 35.

Finally, each agency has confirmed that, pursuant to Executive Order 13,526, Section 1.7(a), the information at issue is not classified to "(1) conceal violations of law, inefficiency, or administrative error; (2) prevent embarrassment to a person, organization, or agency; (3) restrain competition; or (4) prevent or delay the release of information that does not require protection in

the interest of the national security." Thompson Decl. ¶ 42; Findlay Decl. ¶ 17; Stein Decl. ¶ 37; Shiner Decl. ¶ 22; Hardy Decl. ¶ 45; Gaviria Decl. ¶ 42.

B. Defendants Correctly Invoked Their Glomar Responses Under FOIA Exemption 3.

FOIA Exemption 3 permits an agency to withhold records that are "specifically exempted from disclosure by statute," provided that the statute either "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3). In order to establish whether information falls within Exemption 3, the agency must identify the relevant statute and establish that the information sought falls within that statute. *James Madison Project v. CIA*, 344 F. Supp. 3d 380, 389 (D.D.C. 2018); *see also Goland v. CIA*, 607 F.2d 339, 350 (D.C. Cir. 1978) (holding that in FOIA Exemption 3 cases "the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within that statute's coverage"). NSA, State, CIA, FBI, and ODNI asserted Exemption 3 for their Glomar responses, relying on the National Security Act, long held in this circuit to qualify as an Exemption 3 statute. NSA also invoked the National Security Agency Act of 1959, and a criminal statute prohibiting unwarranted disclosure of classified information. All of these assertions are proper.

The National Security Act authorizes the Director of National Intelligence to protect "intelligence sources and methods" as well as establish and implement guidelines for the intelligence community which balances the need for dissemination of intelligence within the intelligence community while maintaining adequate protections. 50 U.S.C. §§ 403-1(i)(1)-(2).[2]

[2] NSA additionally cites to 50 U.S.C. § 3024, the Intelligence Reform and Terrorism Prevention Act of 2004, which amended the National Security Act, which affords absolute protection of intelligence sources and methods regardless of whether the sources and methods are classified. Thompson Decl. ¶ 49.

The National Security Act defines the intelligence community to include ODNI, CIA, NSA, the Bureau of Intelligence and Research of the Department of State as well as the "intelligence elements" of the FBI. 50 U.S.C. § 3003. Courts have long held that this Act qualifies as an Exemption 3 statute under FOIA. *See, e.g. Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007); *Mobley v. CIA*, 924 F. Supp. 2d 24, 54-55 (D.D.C. 2013). Courts have also recognized that not just the Director of National Intelligence, but also other agencies, may rely upon the amended National Security Act to withhold records under FOIA. *See, e.g.*, *Larson*, 565 F.3d at 862–63, 865 (permitting the CIA to withhold information under Exemption 3 pursuant to the National Security Act); *Talbot v. CIA*, 578 F. Supp. 2d 24, 28–29 n.3 (D.D.C. 2008) (permitting the State Department to withhold information under Exemption 3 pursuant to the National Security Act). The Supreme Court has also recognized the "wide-ranging authority" provided by this provision to protect intelligence sources and methods. *Sims*, 471 U.S. at 159, 169–70, 177, 180; *see Halperin v. CIA*, 629 F.2d 144, 147 (D.C. Cir. 1980) (explaining that the only question for the court is whether the agency invoking Exemption 3 pursuant to the National Security Act has shown that responding to a FOIA request "can reasonably be expected to lead to unauthorized disclosure of intelligence sources and methods").

For the reasons discussed above, confirming or denying whether the defendant agencies possess responsive records would divulge information about the existence or non-existence of intelligence sources and methods. *See* Gaviria Decl. ¶ 47; Thompson Decl. ¶ 45; Stein Decl. ¶ 41; Shiner Decl. ¶ 26; Hardy Decl. ¶ 47. Acknowledging the existence or non-existence of records responsive to Parts 2 and 3 of the request would provide information about FISA targets and surveillance. Hardy Decl. ¶ 50. Part 3 specifically asks for documents about the use of an intelligence method – upstream collection. Hardy Decl. ¶ 12; Stein Decl. ¶ 35. Because

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intelligence sources and methods are unambiguously protected from disclosure by the National Security Act, the agencies' invocation of the Act and Exemption 3 (including NSA's Glomar response to Part 4 of the request, Thompson Decl. ¶ 45) are proper.

Additionally, the National Security Agency Act of 1959 ("NSA Act"), 50 U.S.C. § 3605, specifically allows NSA to withhold any information related to its activities, particularly its signal intelligence activities ("SIGINT"). *Linder v. NSA*, 94 F.3d 693 (D.C. Cir. 1996). Parts 2 and 3 of Plaintiff's request seek intelligence records that, if they exist, could reveal information about NSA's mission and activities, including its sensitive sources and methods, which clearly falls within the purview of the NSA Act. Thompson Decl. ¶ 47. NSA therefore properly issued a Glomar response under Exemption 3 pursuant to this agency-specific statute.

Finally, the NSA asserted a Glomar response pursuant to FOIA Exemption 3 based on 18 U.S.C. § 798, a criminal statute that prohibits the unauthorized disclosure of classified information "(i) concerning the communications intelligence activities of the United States; or (ii) obtained by the process of communications intelligence derived from the communications of any foreign government." Thompson Decl. ¶ 48. The term "communications intelligence" means the "procedures and methods used in the interception of communications and the obtaining of information from such communications by other than the intended recipients." Parts 2 and 3 of Plaintiff's request seeks intelligence records which, if they exist, could reveal the exact type of information (i.e., communications intelligence) that Section 798 protects. *Id.*

C. FBI Correctly Invoked Its Glomar Responses Under FOIA Exemption 6, 7(C) and 7(E).

In addition to its invocations of Exemption 1 and 3 in support of its Glomar response, the FBI asserted that the disclosure of the existence or non-existence of records responsive to Parts 2 and 3 of Plaintiff's FOIA request is exempted from disclosure under Exemptions 6 and 7(C), as

well as 7(E). *See, e.g.*, ***People for the Ethical Treatment of Animals v. HHS***, 745 F.3d 535, 541 (D.C. Cir. 2014) (upholding a Glomar response pursuant to Exemption 7(C) on the basis that, "[i]f NIH were required to acknowledge responsive documents in instances where there was no investigation but were permitted to give a Glomar response in cases where there had been one, it would become apparent that a Glomar response really meant that an investigation had occurred. The agency must be permitted to issue a Glomar response in both situations to maintain the uncertainty essential to Glomar's efficacy."); *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 898 F. Supp. 2d 93, 104–05 (D.D.C. 2012) (revealing that a person is the subject of a criminal investigation is intrusive of personal privacy rights).

FOIA Exemption 6 exempts from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). FOIA Exemption 7(C) exempts from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). For both exemptions, the privacy interests are balanced against the public interest in disclosure. *Horowitz v. Peace Corps*, 428 F.3d 271, 278 (D.C. Cir. 2005).

Parts 2 and 3 of Plaintiff's FOIA request directly ask for law enforcement information that the FBI purportedly possesses on particular individuals. Individuals have substantial privacy interests in relation to being associated with law enforcement investigations because any such association can engender comment, speculation, or harassment; can be embarrassing or stigmatizing, and can, in some circumstances, result in physical harm or threats. Hardy Decl. ¶ 61. Moreover, Plaintiff is seeking records that, if they exist, would publicly connect these

individuals to sensitive law enforcement, national security, and foreign intelligence operations of the FBI. *Id.* ¶ 70. "Public disclosure could reasonably be expected to draw negative and unwanted attention to these individuals, could result in them receiving harassing inquiries, and otherwise stigmatize and adversely affect them." *Id*. The FBI weighed this substantial privacy interest against Plaintiff's asserted public interest in disclosure of the information, which the FBI found to be largely speculative. *Id.* ¶ 72. The FBI concluded that while there may be a minimal public interest in how the FBI implements policies regarding upstream collection (assuming it conducts such activities) and/or unmasking of USPERS in intelligence disseminations, any such public interest is not sufficient to override the very significant privacy interests of the individuals listed in Plaintiff's request. *Id*. ¶¶ 64-72.[3]

Lastly, the FBI also relied on Exemption 7(E) for its Glomar response to Parts 2 and 3 of Plaintiff's FOIA request. This exempts from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . 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). "[A]cknowledging or denying the existence or non-existence of the law enforcement records Plaintiff seeks would be tantamount to confirming or denying whether or not the FBI employed a specific surveillance technique authorized under the FISA at

[3] As noted above, Plaintiff submitted a privacy waiver to the FBI for one of the individuals listed in Part 2 of Plaintiff's FOIA request. Hardy Decl. ¶ 73. When a privacy waiver is submitted, the FBI treats the request as a Privacy Act request. *Id.* The FBI did not release any records after receiving the privacy waiver because Plaintiff was requesting law enforcement records relating to an individual, the disclosure of which was exempted pursuant to Privacy Act Exemption (j)(2) (law enforcement investigative records) and (k)(1) (properly classified information). *Id.* ¶¶ 75-76.

a particular period in time, which resulted in the collection and dissemination of intelligence information against particular individuals." Hardy Decl. ¶ 57. Individuals and adversaries could use this information to their advantage to avoid detection by law enforcement. *Id.* Therefore, the FBI properly asserted a Glomar response pursuant to Exemption 7(E). *See Kalu v. IRS*, 159 F. Supp. 3d 16, 20 (D.D.C. 2016) (upholding FBI's Glomar pursuant to FOIA Exemption 7(E) in response to a request for confirmation of whether the requester was on an FBI watch list).

II. ALL DEFENDANT AGENCIES CONDUCTED ADEQUATE SEARCHES FOR RECORDS RESPONSIVE TO PART 1 OF PLAINTIFF'S REQUEST, AND ODNI AND NSD CONDUCTED ADEQUATES SEARCHES FOR RECORDS RESPONSIVE TO PART 4.

With regards to the adequacy of an agency's search, "[i]n order to obtain summary judgment, the agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Oglesby v. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990); *Weisberg v. DOJ*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). The Court may grant summary judgment concerning the adequacy of an agency's search for responsive records based on information provided in "[a] reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched." *Valencia–Lucena v. U.S. CoastGuard*, 180 F.3d 321, 326 (D.C. Cir. 1999) (quoting *Oglesby*, 920 F.2d at 68) (alteration in original); *Meeropol v. Meese*, 790 F.2d 942, 952 (D.C. Cir. 1986). "Such agency affidavits attesting to a reasonable search 'are afforded a presumption of good faith,' and 'can be rebutted only with evidence that the agency's search was not made in good faith.'" *Mudrock, LCC v. Central Intelligence Agency*, 300 F. Supp. 3d 108, 119 (D.D.C. 2018) (citations omitted).

Reasonableness, not perfection, is, therefore, the Court's guiding principle in determining

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the adequacy of a FOIA search. *Weisberg*, 745 F.2d at 1485; *see also Campbell v. DOJ*, 164 F.3d 20, 27 (D.C. Cir. 1998). "There is no requirement that an agency search every record system." *Oglesby*, 920 F.2d at 68. Rather, an agency need only search those systems in which it believes responsive records are likely to be located. *W. Ctr. for Journalism v. IRS*, 116 F. Supp. 2d 1, 9 (D.D.C. 2000), *aff'd*, 22 F. App'x 14 (D.C. Cir. 2001); *Roberts v. DOJ*, Civ. No. 92-1707 (NHJ), 1995 WL 356320, at * 1 (D.D.C. Jan. 29, 1993). Additionally, "the issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was adequate." *Ctr. for Biological Diversity v. EPA*, 279 F. Supp. 3d 121, 139 (D.D.C. 2017) *quoting Weisberg v. U.S. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

Reliance on agency custodians most familiar with the subject matter at issue in the FOIA request is appropriate and constitutes an adequate search for responsive records. *See, e.g., Hall & Assoc. v. EPA*, 14 F. Supp. 3d 1, 7 (D.D.C. 2014) ("This human-centered approach is entirely proper . . . it is reasonable for an agency to limit its search to asking staff members familiar with all aspects of a government program to find the relevant documents."); *see also Roman v. Dep't of Air Force,* 952 F. Supp. 2d 166, 175 (D.D.C.2013); *Anderson v. U.S. Dep't of State,* 661 F. Supp. 2d 6, 11 n. 2 (D.D.C.2009) (holding that "[m]anually searching ... records without using specific search terms could reasonably be expected to produce the requested information given ... that those conducting the search were familiar with the request").

A. The FBI's Search For Records Responsive To Part 1

To determine whether the FBI had records responsive to Part 1 of Plaintiff's FOIA request, the FBI's Records and Information Dissemination Section ("RIDS") first identified the offices most likely to possess information responsive to Part 1. Hardy Decl. ¶ 83. Given that

Plaintiff's request sought FISA unmasking policy records, RIDS consulted with the Office of the General Counsel for the National Security and Cyber Law Branch ("NSCLB"). *Id.* Attorneys in NSCLB are responsible for "providing legal advice regarding any issues concerning the FISA; coordinating with other offices in the FBI and DOJ to develop procedures for monitoring compliance with the FISA Standard Minimization Procedures ("SMPs"); maintaining and updating the FBI's 'Foreign Intelligence Surveillance Act and Standard Minimization Procedures Policy Guide' (hereafter, the 'FISA and SMP Policy Guide'); and developing and providing legal guidance regarding other FBI policies regarding the FISA." *Id.* Since "unmasking" relates to the dissemination of FISA-derived intelligence, NSCLB was the appropriate office to help determine where responsive records would be located. *Id.*

RIDS provided a copy of the FOIA request to NSCLB and asked it to identify policy documents within the parameters of Part 1. *Id.* ¶ 84. NSLCB searched FBI policy documents for any related to FISA "unmasking." NSLCB determined that FBI policy and guidance on "unmasking" was contained in the FISA and SMP Policy Guide, dated August 11, 2016. *Id.* The FBI processed the discrete sections of the guide on a page-by-page basis and produced non-exempt information from those sections. *Id.* ¶ 89 n. 21.

RIDS reviewed the record located by NSCLB and found no indication of other responsive records. It therefore concluded that there were no additional locations where responsive records would be located. Hardy Decl. ¶ 85.

B. ODNI's Search For Records Responsive To Parts 1 and 4

ODNI identified the offices most likely to possess records responsive to Parts 1 and 4 of Plaintiff's FOIA request. Those offices are the Office of Civil Liberties, Privacy and Transparency ("CLPT"), the Office of Legislative Affairs, and the ODNI Executive Secretariat.

Gaviria Decl. ¶ 14. No other offices were reasonably expected to have responsive records. *Id.* Each office was provided with a copy of the FOIA request and was tasked with conducting a search. *Id.*

The CLPT leads the integration of civil liberties and privacy protections with the policies, procedures, programs, and activities of the intelligence community. It is responsible for, among other things, "ensuring that privacy and civil liberties protections are appropriately addressed in the policies and procedures of intelligence agencies" as well as overseeing ODNI's compliance with these policies and procedures. Gaviria Decl. ¶ 15. The CLPT searched their classified shared drive and email accounts using the terms "mask," which would return documents containing the words "unmask," "unmasking," and "unmasked." *Id.* Unclassified systems were not searched because, due to the nature of the request, responsive information would not be housed on these systems. *Id.* The Office of Legislative Affairs is the primary interface between the ODNI and Congress, and thus was reasonably likely to have records responsive to Part 4. *Id.* ¶ 16. The office searched its classified shared drive and identified specifically the folder which contains all records related to unmasking (again, given the nature of the request, responsive records would have been housed on the classified system). *Id.* The Executive Secretariat "serves as the central point of contact, coordination, and control for correspondence and other communications" for ODNI leadership and also preserves and archives institutional information relating to ODNI's "functions, policies, decisions, procedures, and operations." *Id.* ¶ 17. While the Executive Secretariat was not believed to have responsive records, it was searched out of an abundance of caution. The office searched its classified shared drive and email accounts for responsive records using the search terms "mask," "unmask," and "unmasking." *Id.* As a result of these searches, a total of 17 documents were identified as responsive. *Id.* ¶ 19.

C. NSA's Search For Records Responsive To Part 1

NSA searched its FOIA office for responsive records that may have been previously processed in other similar requests. Thompson Decl. ¶ 30. It also searched NSA's Mission Engagement, Requirements and Assessments organization, which includes Information Sharing and Collaboration and its subcomponent Information Sharing Execution and Dissemination & Guidance Services. *Id.* ¶ 31. This is the organization within NSA that orchestrates and implements NSA's policies and procedures relating to unmasking, is responsible for providing information sharing policy support and coordination, and handles all information sharing requests and releases. Thompson Decl. ¶ 32.

NSA issued a search action form to personnel most likely to maintain responsive records within NSA's Mission Engagement, Requirements and Assessments organization requesting that records possibly responsive to Part 1 of Plaintiff's request be provided to NSA's FOIA office. Thompson Decl. ¶ 31. Personnel within the office with the most familiarity with the policies and procedures that would govern unmasking as well as with extensive knowledge of the information systems that would contain responsive information, reviewed Part 1 of Plaintiff's FOIA request verbatim in order to identify the universe of policies, procedures and guidance that govern unmasking requests. *Id* ¶ 32. These experienced personnel then identified the policies, procedures, and guidance that govern unmasking requests and provided the comprehensive list of documents to the NSA's FOIA office for processing. *Id.* ¶ 32. NSA also consulted with other offices as identified by the Information Sharing and Collaboration organization, including organizations within the Office of the Director. *Id.* ¶ 30. Finally, NSA searched within its FOIA systems using the term "unmasking" to determine whether any previous requests on the topic were submitted. *Id.* No similar FOIA requests were previously submitted. *Id.*

As a result of these searches, NSA identified seventeen potentially responsive documents, and later determined that four were not responsive to the request. *Id*. ¶ 21-23. NSA confirms that it identified and searched all components likely to possess records responsive to Part 1 of Plaintiff's FOIA request. *Id.* ¶ 33.

D. NSD's Search For Records Responsive To Parts 1 and 4

The NSD FOIA office determined that the Office of Intelligence ("OI") would be the component most likely to maintain responsive records. OI represents the Intelligence Community, including the FBI, before the Foreign Intelligence Surveillance Court to obtain FISA authorization to proceed with its intelligence activities. Findlay Decl. ¶ 20. OI personnel knowledgeable about the subject matter of Plaintiff's request were provided the FOIA request. *Id.* ¶ 20. OI personnel then searched OI policies, procedures, and reports for records responsive to Part 1 and 4 of Plaintiff's FOIA request. *Id.* OI personnel, based on their familiarity with the types of records at issue in the matter, confirmed that there were no records responsive to Parts 1 or 4 of Plaintiff's FOIA request. *Id.* ¶ 21.

NSD additionally searched the Office of the Assistant Attorney General ("OAAG") for responsive records. *Id.* ¶ 22. The OAAG's document tracking system was searched using the terms "unmask" and "upstream." No responsive records were identified as a result of this search.

Finally, the agency also confirmed with the leadership of NSD's Office of Law and Policy that there were no records responsive to Parts 1 and 4. *Id.* ¶ 23. NSD confirmed that no other components or records repositories within NSD would likely possess records responsive to Parts 1 and 4. *Id.* ¶ 24.

E. State's Search For Records Responsive To Part 1

State's Office of Information Programs and Services ("IPS"), based on its knowledge of the responsibilities of the offices within State, determined that the State Archiving System ("SAS"), the Bureau of Intelligence and Research ("INR"), and the Office of the Legal Adviser were reasonably likely to have records responsive to Part 1. Stein Decl. ¶ 10.

State searched its State Archiving System, which has the capability of querying full text records including incoming and outgoing cables, correspondence from other governmental entities, position papers and reports, memoranda of conversations, and interoffice memoranda. *Id.* ¶ 12. This repository was searched with the term "FISA" AND ("unmasked" or "unmasking" or "unmask"). Stein Decl. ¶ 13. "FISA" OR "Foreign Intelligence Surveillance Act" OR "unmasked" . . . yielded tens of thousands of hits, and a sampling found no relevant records, so the search was refined to: "FISA" AND ("unmasked" OR "unmasking" OR "unmask"). Stein Decl. ¶ 13. The date range was January 1, 2015 to December 31, 2017. *Id.* No responsive records were found. *Id.* ¶ 14.

Second, State Department employees familiar with the responsibilities and work performed by the Bureau of Intelligence and Research determined that the only INR custodians reasonably likely to have responsive records were the Office of Intelligence Operations and Oversight ("INR/OPS") and the INR Special Assistants. INR/OPS "ensures foreign policy oversight of intelligence and counterintelligence operations" and "coordinates INR's engagements with Congress and provides intelligence oversight training and guidance for Ambassadors and Deputy Chiefs of Mission." Stein Decl. ¶ 17. The Director and an Office Assistant from INR/OPS searched their unclassified and classified email for the term "unmasking" with no date range. *Id.* ¶¶ 18-19. These searches returned no responsive records.

Id. ¶ 24. INR Special Assistants work directly with Department principals' senior staff on intelligence issues. A current INR Special Assistant searched Special Assistant email accounts on the classified and unclassified systems as well as shared folders on the classified and unclassified systems using the terms "unmask," "ident," and "identity request" without limitation as to date. *Id.* ¶ 21. A back up INR Special Assistant searched his email accounts on the classified and unclassified systems as well as shared folders on the classified and unclassified systems using the terms "unmask," "ident," and "identity request" without limitation as to date. *Id.* ¶ 22. An INR Engineering Lead also searched the INR's email archives for the term "idents" to follow a lead identified in previous searches. *Id.* ¶ 23. No responsive records were found as a result of the searches conducted in INR. *Id.* ¶ 24.

Finally, an employee knowledgeable about the responsibilities and work performed by the Office of the Legal Adviser determined that the component most likely to have records responsive to Part 1 of Plaintiff's request was the Office of Law Enforcement and Intelligence because it coordinates international law enforcement matters. Stein Decl. ¶ 26. An attorney advisor with primary responsibility for advising on intelligence activities within the office conducted electronic searches of their classified and unclassified emails, as well as the emails of their predecessor, for the date range January 1, 2015 through February 1, 2017 for the terms "unmask" or "ident request." *Id.* ¶ 27-28. The attorney also searched the relevant paper records which are organized "alphabetically by subject matter in an effort to identify responsive documents." *Id.* ¶ 28.

No responsive records were found as a result of these searches. *Id.* ¶ 29.

State confirms that "no other components or records systems were reasonably likely to maintain documents responsive to Plaintiff's requests, and that the tasked components searched

all files reasonably likely to contain relevant documents." Stein Decl. ¶ 10.

F. CIA's Search For Records Responsive To Part 1

CIA determined that the Office of Privacy and Civil Liberties, the Office of the Inspector General, the FISA Program Office, the Office of Congressional Affairs, and the Office of General Counsel were most likely to have records responsive to Part 1 of Plaintiff's FOIA request. Shiner Decl. ¶ 14. The Office of Privacy and Civil Liberties was identified because it periodically reviews CIA actions to assure the CIA is considering privacy and civil liberties in its activities. *Id.* The Office of Inspector General was identified because it investigates potential violations to agency rules and regulations. *Id.* The FISA Program Office has knowledge of the receipt, review, and dissemination of certain data acquired under FISA, to include "unmasking" identifying information. *Id.* The Office of Congressional Affairs ensures that Congress is informed of intelligence activities and issues, including those implicated by Plaintiff's FOIA request. *Id.* Finally, the Office of General Counsel is responsible for the legal affairs of the agency, which would squarely implicate the records sought in Part 1. *Id.* No additional offices were identified as maintaining responsive records. *Id.* ¶ 15.

Agency search professionals conducted a search of each offices' holdings to include emails of custodians identified as subject matter experts, internal share drives, relevant databases, paper file holdings, and the agency system containing publicly disclosed records. *Id.* ¶ 15. With the assistance of officers who are familiar with their office's records, the CIA conducted manual and electronic searches for records related to "unmasking" and then further refined the results to identify policies, procedures, reports, and violations related to unmasking. *Id.* ¶ 16. The search was limited to the date specified in Part 1 of Plaintiff's request and the search terms used were "unmasking" and Section 702 Minimization Procedures, as well as

variations on these terms. *Id.*

The search identified three responsive records, the 2015 and 2016 Standard Minimization Procedures as well as an internal CIA procedure document. *Id.* ¶ 17. Additionally, as a result of the searches, CIA identified five records which belonged to other governmental agencies and referred those records to those agencies. *Id.* ¶ 17. The four documents are: (1) 2015 Section 702 Standard Minimization Procedures for the CIA; (2) 2015 Section 702 Standard Minimization Procedures for the FBI; (3) 2015 Section 702 Standard Minimization Procedures for NSA; (4) February 2016 Semi-Annual Joint Assessment; and (5) November 2016 Semi-Annual Joint Assessment. *Id.* ¶ 18. These documents were produced by ODNI in response to Plaintiff's FOIA request issued to the agency which is at issue in this action. *Id.*; *see* Gaviria Decl. ¶ 21.

CIA confirms that "no other Agency offices, systems, or search terms were reasonably likely to uncover records responsive to Plaintiff's request." *Id.* ¶ 18.[4]

III. THE DEFENDANT AGENCIES PROPERLY WITHHELD INFORMATION UNDER FOIA EXEMPTIONS.

State and NSD did not identify any records responsive to Parts 1 or 4 (NSD) of Plaintiff's requests. ODNI and FBI released some records in part. CIA and NSA withheld some documents in full and released some in part.

[4] During the parties' conferral process prior to summary judgment, Plaintiff complained about 47 specific documents that he claims should have been produced to him, and that he will presumably rely upon to challenge the adequacy of the agencies' searches. Many of the documents were outside the scope of the request. For example, several categories reference "targeting" procedures, which are different than unmasking procedures. Additionally, some documents were outside the date range of the request, such as the 18th Semi-Annual Joint Assessment, which was finalized in October 2018, outside Plaintiff's date range of January 1, 2015 to February 1, 2017. That assessment has, however, been made publicly available and can be found at https://icontherecord.tumblr.com/.

A. FBI

i. Exemptions 1, 3 and 7(E)

FBI withheld information from seven of the eight pages produced pursuant to FOIA Exemption 1, as the information is classified at the SECRET level. Hardy Decl. ¶¶ 88-89, 95. The disclosure of the withheld information which relates to intelligence activities, sources, and methods, could cause harm to the national security because it would, for example, all "terrorist organizations and other hostile or Foreign Intelligence groups . . . to gather information from myriad sources, analyze it, and deduce means and methods from disparate details to defeat the U.S. Government's collection efforts." *Id.* ¶ 101. The FBI also withheld non-public information about methods, techniques, and procedures for gathering intelligence under the FISA, an intelligence method – specifically, specific and detailed FBI policy and procedures for implementing FISA, to include policies and procedures for disseminating FISA-derived information pursuant to Exemption 3. *Id.* ¶ 102. Disclosure of the withheld information could reasonably be expected to cause serious damage to the national security. With the aid of this detailed information, adversaries could develop countermeasures that would, in turn, severely disrupt the FBI's ability to gather critical intelligence utilizing FISA authorities. *Id.* ¶ 102. Such disruption would "severely damage the FBI's efforts to detect, interdict, and apprehend those posing national security threats to the United States and those who violate the national security and criminal laws of the United States." *Id.* These intelligence sources and methods were also properly withheld under Exemption 3. Hardy Decl. ¶¶ 104-06.

The FBI withheld information based on Exemption 7(E) from seven of the eight pages produced because the information would disclose nonpublic, detailed information about the implementation of FISA techniques and procedures, Hardy Decl. ¶¶ 113-116, as well as sensitive

FISA-related databases, Hardy Decl. ¶ 117. "The ability to conduct FISA surveillance has proven to be an indispensable law enforcement tool and continues to serve as a building block in many of the FBI's national security investigations." Hardy Decl. ¶ 114. To maintain the integrity of the investigations and ensure accountability, the FBI has created and implemented Standard Minimization Procedures which "govern the use and disclosure of information about USPERs collected pursuant to FISA authorities." *Id.* The disclosure of information relating to the "procedures for obtaining proper approvals for requesting FISA authorities and properly utilizing FISA techniques, disseminating information obtained under the FISA, and implementing SMPs [Standard Minimization Procedures] . . . could give adversaries key insights into the FBI's collection and use/dissemination of intelligence acquired through FISA techniques . . . and make an important law enforcement tool less effective." Hardy Decl. ¶ 114.

The FBI also redacted under these exemptions information relating to non-public databases used by the agency to "collect, store, and disseminate critical FISA-derived intelligence." Hardy Decl. ¶ 117. "Revealing how the FBI uses these databases for law enforcement purposes would reveal information about the capabilities of these particular databases; how and when the FBI queries them to pursue investigations and/or foreign intelligence gathering; and the types of information collected using FISA authorities, which would reveal the FBI's intelligence-gathering priorities." *Id.* Additionally, the release of the information could "allow adversaries to judge the FBI's ability to track and disseminate FISA-derived intelligence and allow them to predict the nature of FBI's response when it receives particular pieces of FISA-derived intelligence," and could "reveal to adversaries a prime target for cyber intrusion." *Id.*

ii. Exemptions 6 and 7(C)

The FBI withheld an employee unique identification number on the cover page of the FISA and Standard Minimization Procedure Policy Guide pursuant to Exemptions 6 and 7(C) because it would reveal the employee who reviewed the document and could “subject the employee to targeted attempts to obtain sensitive information from this guide” among other dangers to the employee. Hardy Decl. ¶ 112. “In contrast, there is no public interest in this singular piece of information because its disclosure would not significantly increase the public’s understanding of FBI operations and activities.” *Id.*

The information withheld was compiled pursuant to the Attorney General’s Guidelines for Domestic FBI Operations (“AGG-ODM”) as well as 28 C.F.R. § .85, and thus qualifies as information compiled for law enforcement purposes, for purposes of Exemption 7(C). Hardy Decl. ¶ 110.

B. ODNI

i. Exemptions 1 and 3

ODNI withheld information from ten documents based on FOIA Exemptions 1 and 3, which, as discussed above, protect classified information and intelligence sources and methods from disclosure. These documents consist of the Section 702 Standard Minimization Procedures for NSA, FBI, CIA, and the National Counterterrorism Center (NCTC) for 2015 and 2016, and the 14th and 15th Section 702 Semi-Annual Joint Assessments. Gaviria Decl. ¶¶ 21-22.

Section 702 Standard Minimization Procedures (“SMPs”) “detail the requirements that the Government must meet to use, retain, and disseminate Section 702 data.” *Id.* ¶ 29. ODNI withheld from the responsive SMPs nonpublic intelligence sources and methods that “would reveal how U.S. intelligence agencies target individuals under Section 702.” *Id.* ¶ 29.

Specifically, the withheld information "identifies the types of communications that the agencies are able to target and acquire pursuant to Section 702 and the means by which each agency performs its Section 702 targeting and collection activities." *Id.* ¶ 35. The disclosure of this information "would provide adversaries with insights into which of their methods of communications are vulnerable to U.S. government surveillance (and, conversely, which of their methods of communications are not vulnerable.)" and could therefore reasonably be expected to cause serious damage to national security. *Id.* ¶¶ 29-30. Thus, this information is properly classified and exempt under Exemption 1. This information is also exempt under Exemption 3 pursuant to the National Security Act and 18 U.S.C. § 798, both discussed above. Gaviria Decl. ¶¶ 32-35.

The Section 702 Semi-Annual Joint Assessments are Section 702 compliance assessments for particular reporting periods that contain information from, and are compiled based upon information regarding, the U.S. intelligence agencies that implement Section 702 collection. Gaviria Decl. ¶ 36. The withheld information "reveals how these agencies conduct foreign intelligence analysis, target and identify selectors for collection and acquire communications and intelligence information." *Id.* The disclosure of the information would provide adversaries with insights into which of their communications are vulnerable to U.S. government surveillance (and which are not). *Id.* It could compromise national security by alerting our adversaries to the scope of Section 702 collection, the capabilities of the intelligence agencies implementing Section 702 collection, and the relative security of adversaries' communications. *Id.* ¶ 37. Because disclosure of this information would reveal sensitive intelligence sources and methods, it is exempt from release under Exemptions 1 and 3. *Id.* ¶¶ 36-37.

ii. Exemption 6

ODNI also withheld information from two documents responsive to Part 4 of Plaintiff's FOIA request based on Exemption 6, which protects private information from disclosure. One document is a letter from ODNI to the Senate Select Committee on Intelligence, and the other is a letter from ODNI to a Member of Congress. Gaviria Decl. ¶¶ 48-49. ODNI withheld the names of members of Congress, as that information, coupled with the number of times their name and/or identifiers have been disseminated in U.S. intelligence reporting, implicates heightened privacy interests. Gaviria Decl. ¶ 51. ODNI balanced this heightened privacy interest against the fact that release of the names would not provide any information about how ODNI conducts its business or performs its statutory duties, and determined that the information was properly exempt under Exemption 6. *Id.* ¶ 50.

C. NSA

i. Exemption 1

The NSA withheld 9 records, in full or in part, based on FOIA Exemption 1. Thompson Decl. Exh. M (NSA Vaughn) Entries 1-3, 8-13. The documents are policy documents that provide reporting and dissemination guidance to SIGINT reporters and analysts; memoranda providing reporting and dissemination guidance regarding particular SIGINT activities; and a SIGINT dissemination guidance manual. *Id.* The documents describe guidance on how to handle reporting and dissemination processes directly related to NSA's core mission and intelligence activities, sources, and methods, Vaughn Entries 1-3, 11-13, and describe reporting and dissemination guidance regarding a particular SIGINT activity directly related to NSA's core mission and intelligence activities, sources, and methods, Vaughn Entries 8-10. They were withheld are classified as SECRET or TOP SECRET. Thompson Decl. ¶¶ 56. The release of the

information would allow the United States' adversaries to "likely change their communication methods to evade collection, which could undermine NSA's entire mission," thereby harming national security. *Id.* ¶ 67.[5]

ii. Exemption 3

NSA withheld information from 13 documents under Exemption 3, pursuant to the National Security Act and 18 U.S.C. § 798. NSA Vaughn Index Entries 1-13. Four documents were withheld based on the National Security Act but not 18 U.S.C. § 798. NSA Vaughn Index Entries 4-7. The documents include policy documents that provide reporting and dissemination guidance to SIGINT analysts and informative memoranda about reporting and dissemination guidance regarding particular SIGINT activities. These records clearly fall within the categories of information which the two statutes were designed to protect, intelligence sources and methods. Thompson Decl. ¶ 62, 71-72.

NSA additionally withheld information from 13 records it produced in full or in part under Exemption 3 pursuant to the National Security Agency Act, referred to in the Vaughn index as "P.L. 86-36," which protects NSA's organization, function, activities, and nonpublic personnel from disclosure regardless of whether the information is classified. NSA Vaughn Index Entries 1-13; Thompson Decl. ¶ 60. NSA withheld information about its SIGINT activities and procedures which include discussion of the "existence and depth of signal intelligence-related analytical and successes and exploitation techniques." Thompson Decl. ¶¶ 60-61, 70-71. This is a core function of the NSA and the information is thus subject to the protections of the NSA Act. *Id.* Additionally, the documents contained information properly

[5] NSA has described the withheld information as much as it can on the public record, without revealing classified information. Should the Court determine that it needs additional description, NSA would be happy to provide a classified description of the materials for the Court's *in camera* review.

withheld and protected from disclosure by Section 102A(i)(1) of the Intelligence Reform and Terrorism Prevention Act of 2004, 50 U.S.C. § 3024, which states that "[t]he Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure." *Id.* ¶ 61. Lastly, names of non-public NSA personnel were redacted as identities of non-public personnel are protected if they do not fall within the category of a public position as designated by the NSA/CSS Policy 1-69, "NSA/CSS Designated Public Positions." Id. ¶ 62.

D. CIA

i. Exemption 1

The CIA withheld two documents in part, the 2015 and 2016 Minimization Procedures used by the CIA, pursuant to FOIA Exemption 1. Shiner Decl. ¶ 23. These documents "detail[ ] the CIA's procedures for the maintenance and dissemination of 'unminimized' communications acquired with FISA 702. Specifically, it discusses specific uses, ways of treating and limitations on disseminating information derived pursuant to FISA." *Id.* The information withheld from these documents is properly classified as "its unauthorized disclosure could reasonably be expected to result in damage to national security." *Id.* ¶ 22. The disclosure of the information could cause damage to national security because it "would provide sensitive details as to how foreign intelligence is acquired, retained and disseminated, thereby revealing strengths, weaknesses, and gaps in intelligence coverage. If this information were to be released, adversaries can use countermeasures to undermine U.S. intelligence capabilities and render collection efforts ineffective." *Id.* ¶ 24.

ii. Exemption 3

The CIA withheld in part the two documents referenced above, as well as one document

in full, pursuant to Exemption 3, based on the National Security Act. Shiner Decl. ¶ 26. The document withheld in full is an internal CIA procedure document. *Id.* ¶ 17. All three documents, the 2015 and 2016 CIA Minimization procedures and the internal CIA procedure document, contain information which could "reveal procedures used in the conduct of intelligence activities." *Id.* ¶ 26. This includes "the specific sources and methods use to acquire foreign intelligence." *Id.* This information clearly falls within the scope of information which the National Security Act was designed to protect.

E. THE DEFENDANT AGENCIES RELEASED ALL NON-EXEMPT, SEGREGABLE INFORMATION

FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection," 5 U.S.C. § 552(b), unless the non-exempt portions are "inextricably intertwined with exempt portions," *Mead Data Ctr. v. Dep't of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977); *Kurdykov v. U.S. Coast Guard*, 578 F. Supp. 2d 114, 128 (D.D.C. 2008). This provision does not, however, require disclosure of records in which the non-exempt information that remains is meaningless. *See Nat'l Sec. Archive Fund, Inc. v. CIA*, 402 F. Supp. 2d 211, 221 (D.D.C. 2005) (concluding that no reasonably segregable information existed because "the non-exempt information would produce only incomplete, fragmented, unintelligible sentences composed of isolated, meaningless words"). For records released in part, each agency confirmed that it released as much non-exempt information as was reasonably segregable from exempt information. Hardy Decl. ¶ 118; Thompson Decl. ¶ 58; Gaviria Decl. ¶ 20; Shiner Decl. ¶ 22.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant their motion and enter summary judgment in their favor on all of Plaintiff's claims.

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HASHIM MOOPPAN
Principal Deputy Assistant Attorney General

MARCIA BERMAN
Assistant Branch Director

/s/ Laura Hunt
LAURA HUNT
Trial Attorney
Maryland Bar Member
United States Department of Justice
Civil Division, Federal Programs
Branch
1100 L St. NW
Washington, D.C. 20530
(202) 616-8207 (office)
(202) 616-8470 (fax)
laura.a.hunt@usdoj.gov

Attorneys for Defendants