EXHIBIT C

SCHAERR JAFFE LLP

April 25, 2022

Via Online Portal
Director, Office of Information Policy (OIP)
United States Department of Justice
441 G Street, NW, 6th Floor
Washington, DC 20530

RE: FOIPA Request No. 1440257-000

To Whom It May Concern:

I write to appeal the FBI's denial of the above-captioned FOIA request (the "Request").[1]

The Request seeks:

"**The 'Woods file' related to the application for (and subsequent renewals of) a FISA order authorizing surveillance on Carter Page. The term 'Woods file' includes, but is not limited to, any document concerning or relating to any attempt to verify the accuracy of any alleged facts stated in the FISA applications for Mr. Page.**"

The FBI categorically denied the Request on January 25, 2022.[2] The agency gave no indication that it had initiated any searches or attempted to segregate or redact any documents before making its response, instead denying the Request under FOIA Exemptions 1, 3, 5, 6, 7(C), and 7(E).

The agency's categorical denial was unwarranted because none of the invoked exemptions justifies a blanket nondisclosure. In the alternative, unique public interests justify waiving those exemptions even if they apply.

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

A. Exemption 1 does not justify categorical withholding.

The agency vaguely suggests that the documents requested are national security documents and thus exempt under Exemption 1. Such an assertion would be incorrect. Exemption 1 exempts from disclosure materials that are (1) "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense

[1] *See* Item 2 (page 1) of Letter from G. Schaerr to David M. Hardy, April 11, 2019 (Attachment A)

[2] *See* Letter from Michael G. Seidel to G. Schaerr, Jan. 25, 2022 (Attachment B)

or foreign policy" and (2) "are in fact properly classified pursuant to such Executive order." 5 U.S.C. 552(b)(1)(a). The agency does not cite which Executive Order it purports to rely on. However, the most relevant executive order requires that, for a document to be classified, the agency must show (among other things) that its disclosure could "reasonably [ ] be expected to result in damage to the national security[.]" Executive Order 13526 ("EO 13526") § 1.1(a)(4) (Dec. 29, 2009). Not only has the FBI made no such showing, but any such implication is belied by the DOJ's own actions: the DOJ Inspector General (IG) has officially acknowledged not just the existence of four separate Woods files responsive to the Request, but extensive details about their contents.[3] Moreover, the FBI has made no showing that all responsive documents are in fact properly classified under the procedural criteria of EO 13526 or otherwise. Finally, the IG's well-publicized criticisms of the FBI's systematic misbehavior in its handling of the Carter Page FISA applications—including the mismanagement of the four related Woods files[4]—indicates that any classification of those records would violate EO 13526's mandate that "[i]n no case shall information be classified, continue to be maintained as classified, or fail to be declassified in order to … conceal violations of law, inefficiency, or administrative error; [or] prevent embarrassment to a person, organization, or agency." EO 13526 § 1.7(a).

B. Exemption 3 does not justify categorical withholding.

Exemption 3 also does not justify the FBI's categorical denial. That exemption permits non-disclosure when the documents in question are "specifically exempted from disclosure by statute." 5 U.S.C. 552(b)(3). The FBI's denial cites only one statute, the National Security Act, that allegedly exempts responsive materials from disclosure.[5] Although that statute instructs the Director of National Intelligence to "protect intelligence sources and methods from unauthorized disclosure," 50 U.S.C. 3024(i)(1), it also instructs the Director to prepare "intelligence products in such a way that source information is removed to allow for dissemination … in declassified form to the extent practicable." 50 U.S.C. § 3024(i)(2)(C). The agency has not demonstrated that declassified versions of the documents—versions that protect sources and methods—cannot be provided under § 3024(i)(2)(C). Even for documents that contain some classified information, the agency must consider and, where possible, conduct redaction as well. 5 U.S.C. § 552(a)(8), (b); *see also Krikorian v. Dep't of State,* 984 F.2d 461, 466 (D.C. Cir. 1993) (noting requirement to redact applies to all FOIA exemptions). Indeed, the IG's publication of extensive details about the contents of at least four responsive Woods files indicates that much of the information responsive to the Request can be safely

---

[3] *See*, *e.g.*, Office of the Inspector General, U.S. Dep't of Justice, *Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation* ("Crossfire Hurricane Review")(Dec. 2019 (revised)), at 151 n.288, 208 n.360, 217 n.367, 225 n. 374, 373-74, 418 & n.531, 419 & n.533, 420 & n.534, 421, 422 & n.535, and 423.

[4] *See*, *e.g.*, *id.* at v-ix, xi-xiv.

[5] Attachment B at 1.

disclosed without any danger to intelligence sources or methods.[6] Thus, to the extent declassified or redacted versions of responsive documents can be produced, the agency must do so.

To be sure, even with redactions, particular documents generated by the search *may* (but not necessarily will) reveal "sources or methods" that cannot be revealed. And in such circumstances, *those* documents could be withheld under Exemption 1 and Exemption 3 in whole or in part. But the agency's refusal to disclose the unprotected portions of responsive documents is inappropriate and unlawful.

C. Exemption 5 does not justify categorical withholding.

Exemption 5 does not justify a categorical response because that exemption only protects, at most, inter- or intra-agency "memorandums or letters," whereas the Request asks for *all* records in responsive Woods files. 5 U.S.C. § 552(b)(5). Moreover, although the FBI claims that the requested records all fall under the deliberative process privilege, the agency cites no precedent extending that privilege to Woods files. And to the contrary, whereas that privilege protects "advisory opinions, recommendations, and deliberations," *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975), Woods files are compiled merely to "maintain an accuracy sub-file … that contains … supporting documentation for every factual assertion contained in a FISA application," Crossfire Hurricane Review, *supra* n.3, at 43. Thus, while the privilege might cover some deliberative memoranda or letters *contained* in responsive Woods files, the privilege cannot justify the FBI's categorical withholding of all responsive records.

D. Any privacy interests protected by Exemptions 6 and 7(C) do not categorically outweigh the public interest in disclosure.

The FBI's categorical, boilerplate invocation of Exemptions 6 and 7(C) to protect the privacy interests of third parties implicated by the Request conveniently ignores the applicable balancing test, which requires disclosure when the public interest outweighs such privacy interests. *See, e.g.*, *U.S. Dep't of Defense v. FLRA*, 510 U.S. 487 (1994); *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). Indeed, that balance tips heavily "in favor of disclosure." *Ripskis v. HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984). In this case, not only was Carter Page a nationally prominent adviser to the President of the United States, but the particulars of his FISA investigation—including significant details about his Woods files—have been both publicly disclosed and widely covered in the media.[7] Further, Page has willingly extended the public airing of his FISA investigation through multiple lawsuits, including an ongoing suit placing the contents of his Woods files squarely at issue.[8]

---

[6] *See supra* n.3.

[7] *See*, *e.g.*, https://en.wikipedia.org/wiki/Carter_Page

[8] *See*, *e.g.*, *Page v. Comey, et. al.*, No. 1:20-cv-3460-DLF, Complaint (D.D.C. Nov. 27, 2020) (ECF No. 1) at ¶¶ 39, 57, 78, 130, 162.

Thus, when compounded with the law's strong preference for disclosure, the public's interest in being informed about the FBI's acknowledged mishandling of FISA surveillance on a U.S. citizen greatly outweighs any privacy interests, which are in any event "diminished" in this context. *Kimberlin v. DOJ*, 139 F.3d 944, 949 (D.C. Cir. 1998).

E. Exemption 7(E) does not preclude disclosure.

The FBI's reliance on Exemption 7(E) stretches the coverage of that exemption to an untenable degree. The agency claims that "[h]ow the FBI applies its investigative resources … is, itself a law enforcement technique or procedure" protected by Exemption 7(E). This reading would cause the exemption to swallow the FBI's general duty of disclosure, as any confirmation of responsive records would to some extent disclose "the scope of law enforcement techniques and procedures." The FBI's argument thus proves too much, as it is difficult to imagine any disclosure touching FBI activities that would not, by necessity, reveal at least *some* information about its use of investigative resources. The FBI's strained interpretation of "technique or procedure" cannot survive the Supreme Court's repeated direction that, because the FOIA should be construed heavily in favor of disclosure, its exemptions must be read very narrowly. *See*, *e.g.*, *U.S. Dep't of Justice v. Julian*, 486 U.S. 1, 8 (1988) (FOIA's "broad" mandate of disclosure requires its exemptions to be "narrowly construed").

But even if the FBI's overreaching interpretation of "law enforcement technique or procedure" were tenable, Exemption 7(E) only protects such information if its disclosure "could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E). As mentioned above, both the fact of the FBI's FISA surveillance on Carter Page and the detailed contents of related Woods files have been matters of public knowledge for several years. The FBI fails to explain why the Request will add any marginal risk beyond the existing, extensive publicity.

II. In the alternative, important public interests justify waiving those exemptions here.

Even if an exemption were to *permit* the FBI to deny this FOIA request, they do not *require* denial. Assuming the exemptions are properly invoked here, they should be waived.

One important consideration strongly supporting a waiver is that this Request concerns whether the FBI, an Executive Branch agency, abused intelligence surveillance powers against an American citizen for political reasons. Yet, without access to the requested documents, the general public cannot assess the extent of the FBI's misbehavior.

If the agency is nonetheless cautious about full disclosure, we would be willing to consider access to the documents pursuant to confidentiality agreements or other mutually satisfactory arrangements. Federal courts have acknowledged that agencies could enter into confidentiality agreements with private parties in analogous circumstances. *Cf., e.g.*,

Salomon Bros. Treasury Litig. v. Steinhardt Partners, L.P. (In re Steinhardt Partners, L.P.), 9 F.3d 230, 236 (2d Cir. 1993).

For all these reasons, this appeal should be granted, and the FBI should immediately conduct a search, declassify documents as needed, and begin producing them.

Thank you for your attention to this important matter.

Sincerely,

Gene C. Schaerr