

EXHIBIT R



November 11, 2021

Via Email

Chief FOIA Officer
c/o Director, Information Management Division
Office of the Director of National Intelligence
Washington, DC 20511
dni-foia@dni.gov

RE: FOIA Case DF-2021-00314

To Whom It May Concern:

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

The Request seeks:

“All documents, reports, memoranda, or communications regarding the obtaining, by any element of the intelligence community from a third party in exchange for anything of value, of any covered customer or subscriber record or any illegitimately obtained information regarding any person listed [in the Request].”

The Request listed past and present members of congressional judiciary committees, with a date range for responsive records covering the period between January 1, 2008 and July 26, 2021.

The agency issued a blanket denial on August 13, 2021.² The agency gave no indication that it had initiated any searches before making its response, instead denying the Request under FOIA Exemptions 1 and 3.

The agency’s cursory denial, made mere days after receiving the Request, demonstrates its failure to conduct an adequate search for responsive records. Further, the blanket denial was itself unwarranted because neither Exemption 1 nor Exemption 3 justifies nondisclosure. In the alternative, unique public interests justify waiving those exemptions even if they apply.

¹ See Letter from G. Schaerr to ODNI FOIA/Privacy Act Office, July 26, 2021 (Attachment A).

² See Letter from Sally Nicholson to G. Schaerr, Aug. 13, 2021 (Attachment B).

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

A. Exemption 1 does not justify a *Glomar* response because there are categories of documents whose disclosure cannot be reasonably expected to result in damage to national security.

Exemption 1 exempts from disclosure materials that are (1) “specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy” and (2) “are in fact properly classified pursuant to such Executive order.” 5 U.S.C. 552(b)(1)(a). Under the relevant executive order, 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 1.1(a)(4) (Dec. 29, 2009). Moreover, no classification is permanent: “[i]nformation shall be declassified as soon as it no longer meets the standards for classification under this order.” *Id.* at 3.1(a). Many of the individuals listed in the Request are no longer members of congressional judiciary committees, several no longer hold any public office at all, and some are dead. Further, by mandating procedures to challenge classification decisions, the order recognizes the existence of “improperly classified” records and information. *Id.* at 1.8(b). Because there are categories of documents responsive to PPSA’s request that are not properly classified as of today, Exemption 1 does not shield them from disclosure, nor can it justify a blanket *Glomar* response or refusal to search.

B. Exemption 3 does not justify a *Glomar* response.

Exemption 3 also does not shield these documents from disclosure. That exemption permits non-disclosure when the documents in question are “specifically exempted from disclosure by statute.” 5 U.S.C. 552(b)(3). ODNI’s denial cites just one statute that allegedly exempts responsive materials from disclosure—Section 102(A)(i)(1) of the National Security Act of 1947. 50 U.S.C. 3024(i)(1) instructs the Director of National Intelligence to “protect intelligence sources and methods from unauthorized disclosure.” But nothing about the original Request would require the ODNI to jeopardize any of the intelligence community’s “sources [or] methods.” From the very beginning, I have encouraged the agency to redact names and other identifying information before records are produced if it would “render a responsive but exempt record nonexempt.”³ Doing so would enable the agency to comply with the requirements of FOIA without divulging the agency’s interest or non-interest in any specific individual.

To be sure, particular documents generated by the search *may* (but not necessarily will) reveal “sources or methods” that cannot be revealed even with redactions. And in such circumstances, *those* documents could be withheld under

³ See Letter from G. Schaerr to ODNI FOIA/Privacy Act Office, July 26, 2021 (Attachment A)

Exemption 1 and Exemption 3 in whole or in part. But the agency's refusal to even search for responsive documents is inappropriate.

C. The agency's *Glomar* objection is misplaced

Instead of considering redaction or production of responsive, non-classified documents, the agency issued a *Glomar* response. The agency thus refused to produce any documents in those categories, or to admit or deny the existence of any responsive documents. But a *Glomar* response is appropriate only when "the fact of [documents'] existence or nonexistence is itself classified." Executive Order 13526 ¶ 3.6(a). Here no national security interest justifies classifying the mere existence of these documents.

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

Finally, even if there were legitimate concerns about releasing the names of the individual members of Congress whose data was purchased, those names could be redacted from the records provided in response to my request. As noted earlier, I have been clear that I would prefer records with information redacted over a simple denial of my request as to any category of records.

In short, contrary to the agency's concerns, it can reasonably respond to the Requests without needing to respond in other circumstances that do raise the concerns it identifies.

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

Even if Exemption 1 or Exemption 3 *permits* the ODNI 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 Executive Branch agencies (including the ODNI) abused intelligence surveillance powers against American citizens in the Legislative Branch. Those troubling violations of separation-of-powers may well have been intended to serve the Executive Branch's own institutional purposes rather than legitimate national security interests.⁴ Violating the privacy of American citizens for politicized reasons, perhaps to shield the Executive Branch from legitimate congressional oversight, undermines our democratic processes and violates the law. 50 U.S.C. §§ 1809(a)(1), 1810; 18 U.S.C. § 2712.

⁴ See, e.g., Rebecca Heilweil, *The Trump administration forced Apple to turn over lawmakers' data. Democrats are outraged.*, VOX (June 14, 2021, 12:07 PM), <https://tinyurl.com/9hd84upk>.

In that unique setting, it is difficult to imagine any national security interest that justifies concealing whether data purchasing—itsself a troubling end-run around Fourth Amendment protections—has been weaponized for political purposes. Yet without access to the requested documents, members of Congress as the general public cannot know whether such violations occurred. This FOIA request, then, is one of the only pathways to vindicate the legal rights that the agency may have violated.

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

- First, withholding reports about potential agency misconduct puts a shadow on the ODNI and other involved agencies. If documents remain secret—or if the ODNI covers up a political operation to undermine congressional oversight—that hurts the ODNI and any other agencies involved in such an operation. Everyone would be helped by a full airing.
- Second, current and past congressional members have other legal recourses against the ODNI and its officials, including civil litigation. 50 U.S.C. § 1810; 18 U.S.C. § 2712. In such a suit, the plaintiffs could likely obtain these same documents through civil discovery. *See* 50 U.S.C. § 1806(f). The agency should prefer to provide responsive documents under FOIA rather than in adversarial litigation.
- Last, the agency’s categorical denial raises serious Fourth Amendment and Due Process considerations. Without the ability to discover whether or not his or her private information was purchased for political gain, a person is “deprived . . . of liberty”—freedom of speech and freedom from unreasonable searches and seizures—without due process of law. *See* U.S. Const. Amend. V, IV.

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

For all these reasons, this appeal should be granted, and the ODNI 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
PPSA, Inc.
General Counsel



July 26, 2021

FOIA/Privacy Act Office
Office of the Director of National Intelligence (ODNI)
Washington, D.C. 20511
DNI-FOIA@dni.gov

Dear FOIA Officer:

This is a request under the Freedom of Information Act, 5 U.S.C. § 552, regarding government purchases of the private data of members of the House and Senate Judiciary Committees. This request is filed on behalf of the Project for Privacy and Surveillance Accountability, Inc. (“PPSA”).

As an organization concerned with government surveillance overreach, PPSA is troubled by the extent to which U.S. law enforcement and intelligence agencies may be purchasing Americans’ private data without meaningful court oversight.¹ Accordingly, PPSA applauds congressional efforts to pass the Fourth Amendment is Not For Sale Act (also known as H.R. 2738² or S.1265³; the “Act”), legislation introduced on or about April 21, 2021 by Senators Ron Wyden,⁴ Rand Paul, and others which would curtail such data purchases. Specifically, the proposed Act provides that “[a] law enforcement agency of a governmental entity and an element of the intelligence community may not obtain from a third party in exchange for anything of value a covered customer or subscriber record or any illegitimately obtained information.” As relevant to this request, the Act further defines the terms: “covered customer or subscriber record”; “illegitimately obtained information”; “intelligence community”; “obtain in exchange for anything of value”; and “third party”.

Using the definitions provided in the Act, PPSA respectfully requests that you produce:

¹ See, e.g., Katie Canales, *Sen. Ron Wyden is introducing a privacy bill that would ban government agencies from buying personal information from data brokers*, BUSINESS INSIDER (Aug. 4, 2020), <https://www.businessinsider.com/ron-wyden-fourth-amendment-is-not-for-sale-privacy-2020-8/>

² See <https://www.congress.gov/bill/117th-congress/house-bill/2738?q=%7B%22search%22%3A%5B%22hr2738%22%5D%7D&s=1&r=1/>

³ See <https://www.congress.gov/bill/117th-congress/senate-bill/1265?q=%7B%22search%22%3A%5B%22s1265%22%5D%7D&s=3&r=1/>

⁴ Bill text available at <https://www.wyden.senate.gov/download/the-fourth-amendment-is-not-for-sale-act-of-2021-bill-text/>



**PROJECT FOR PRIVACY &
SURVEILLANCE ACCOUNTABILITY**

All documents, reports, memoranda, or communications regarding the obtaining, by any element of the intelligence community from a third party in exchange for anything of value, of any covered customer or subscriber record or any illegitimately obtained information regarding any person listed below:

- Rep. Jerrold Nadler
- Rep. Mary Gay Scanlon
- Rep. Zoe Lofgren
- Rep. Sheila Jackson Lee
- Rep. Steve Cohen
- Rep. Henry C. "Hank" Johnson
- Rep. Theodore E. Deutch
- Rep. Karen Bass
- Rep. Hakeem Jeffries
- Rep. David N. Cicilline
- Rep. Eric Swalwell
- Rep. Ted Lieu
- Rep. Jamie Raskin
- Rep. Pramila Jayapal
- Rep. Val Butler Demings
- Rep. J. Luis Correa
- Rep. Sylvia R. Garcia
- Rep. Joe Neguse
- Rep. Lucy McBath
- Rep. Greg Stanton
- Rep. Madeleine Dean
- Rep. Veronica Escobar
- Rep. Steve Chabot
- Rep. Louie Gohmert
- Rep. Jim Jordan
- Rep. Ken Buck
- Rep. Matt Gaetz
- Rep. Mike Johnson
- Rep. Andy Biggs
- Rep. Tom McClintock
- Rep. Debbie Lesko
- Rep. Guy Reschenthaler
- Rep. Ben Cline
- Rep. Kelly Armstrong
- Rep. W. Gregory Steube
- Rep. John Rutherford
- Rep. Mark Amodei



**PROJECT FOR PRIVACY &
SURVEILLANCE ACCOUNTABILITY**

- Rep. Judy Chu
- Rep. Scott Peters
- Rep. Bobby Scott
- Rep. Maxine Waters
- Rep. Michael Quigley
- Rep. Linda Sanchez
- Rep. Adam Schiff
- Rep. Mondaire Jones
- Rep. Deborah K. Ross
- Rep. Cori Bush
- Rep. Tom Tiffany
- Rep. Thomas Massie
- Rep. Chip Roy
- Rep. Dan Bishop
- Rep. Michelle Fischbach
- Rep. Victoria Spartz
- Rep. Scott Fitzgerald
- Rep. Cliff Bentz
- Rep. Burgess Owens
- Former Rep. Bob Goodlatte
- Former Rep. Lamar S. Smith
- Former Rep. Darrell Issa
- Former Rep. Steve King
- Former Rep. Ted Poe
- Former Rep. Tom Marino
- Former Rep. Trey Gowdy
- Former Rep. Raul Labrador
- Former Rep. Ron DeSantis
- Former Rep. Karen Handel
- Former Rep. Keith Rothfus
- Former Rep. Luis Gutierrez
- Former Rep. Randy Forbes
- Former Rep. Trent Franks
- Former Rep. Jason Chaffetz
- Former Rep. Blake Farenthold
- Former Rep. Mimi Walters
- Former Rep. Dave Trott
- Former Rep. Mike Bishop
- Former Rep. John Conyers
- Former Rep. Pedro Pierluisi
- Former Rep. Howard Coble
- Former Rep. Elton Gallegly



**PROJECT FOR PRIVACY &
SURVEILLANCE ACCOUNTABILITY**

- Former Rep. Dan Lungren
- Former Vice President and Former Rep. Mike Pence
- Former Rep. Timothy Griffin
- Former Rep. Dennis A. Ross
- Former Rep. Sandy Adams
- Former Rep. Ben Quayle
- Former Rep. Howard Berman
- Former Rep. Mel Watt
- Former Rep. Jared Polis
- Former Rep. Rick Boucher
- Former Rep. Bill Delahunt
- Sen. and Former Rep. Tammy Baldwin
- Former Rep. Charlie Gonzalez
- Former Rep. Anthony Weiner
- Former Rep. Dan Maffei
- Former Rep. Tom Rooney
- Former Rep. Gregg Harper
- Former Rep. Spencer Bachus
- Former Rep. Suzan DelBene
- Former Rep. Joe Garcia
- Former Rep. Cedric Richmond
- Former Rep. Debbie Mucarsel-Powell
- Former Rep. Doug Collins
- Former Rep. F. James Sensenbrenner
- Former Rep. John Ratcliffe
- Former Rep. Martha Roby
- Former Rep. George Holding
- Sen. Lindsey Graham
- Sen. Dianne Feinstein
- Sen. Chuck Grassley
- Sen. Patrick Leahy
- Sen. John Cornyn
- Sen. Dick Durbin
- Sen. Michael S. Lee
- Sen. Sheldon Whitehouse
- Sen. Ted Cruz
- Sen. Amy Klobuchar
- Sen. Ben Sasse
- Sen. Christopher A. Coons
- Sen. Joshua D. Hawley
- Sen. Richard Blumenthal
- Sen. Thom Tillis



- Sen. Mazie Hirono
- Sen. Joni Ernst
- Sen. Cory Booker
- Sen. Mike Crapo
- Sen. John Kennedy
- Sen. Marsha Blackburn
- Sen. Chuck Schumer
- Sen. Ron Wyden
- Sen. Alex Padilla
- Sen. Jon Ossoff
- Vice President and Former Sen. Kamala Harris
- Former Sen. Orrin Hatch
- Former Sen. Jeff Flake
- Former Sen. Al Franken
- Former Sen. Jeff Sessions
- Former Sen. David Vitter
- Former Sen. Herb Kohl
- Former Sen. Tom Coburn
- Former Sen. Jon Kyl
- Former Sen. Ben Cardin
- Former Sen. Russ Feingold
- Former Sen. Ted Kaufman
- Former Sen. Arlen Specter
- Former Sen. David Perdue

Scope of Request:

For all purposes of this request: (I) the date range for responsive materials encompasses those either created, altered, sent, or received between January 1, 2008 and July 26, 2021; and (II) PPSA requests a *Vaughn* index for any responsive materials that are withheld.

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 redaction should foreclose any need to issue a Glomar response, as anonymized and redacted production would neither (1) reveal intelligence sources or methods nor (2) disclose any agency 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

OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE
WASHINGTON, DC

Project for Privacy & Surveillance Accountability
ATTN Gene C. Schaerr
1101 Connecticut Avenue NW
Suite 450
Washington, DC 20036

August 13, 2021

Reference: ODNI Case DF-2021-00314

Mr. Schaerr:

This is in response to your request dated 26 July 2021 and received by the Office of the Director of National Intelligence (ODNI) on 27 July 2021. Pursuant to the FOIA, 5 U.S.C. § 552, as amended, you requested “*All documents, reports, memoranda, or communications regarding the obtaining, by any element of the intelligence community from a third party in exchange for anything of value, of any covered customer or subscriber record or any illegitimately obtained information regarding any person listed below....*” You then followed up with a list of members of the House and Senate Judiciary Committees in your specified timeframe of 1 January 2008 through 26 July 2021.

Your request was processed under the FOIA, 5 U.S.C. § 552, as amended. In accordance with Section 3.6(a) of Executive Order 13526, the ODNI can neither confirm nor deny the existence or nonexistence of requested records responsive to your request. The fact of the existence or nonexistence of requested records is currently and properly classified and is intelligence sources and methods information that is protected from disclosure pursuant to Section 102A(i)(1) of the National Security Act of 1947, as amended, 50 U.S.C. § 3024(i)(1). Therefore your request is denied pursuant to FOIA exemptions (b)(1) and (b)(3). By this statement, the ODNI neither confirms nor denies that such records may or may not exist.

You may contact me, the FOIA Public Liaison, at dni-foia-liaison@dni.gov or (703) 275-3500 for any further assistance or to discuss any aspect of your request. You may also contact the Office of Government Information Services (“OGIS”) of the National Archives and Records Administration to inquire about the mediation services they provide. OGIS can be reached by mail at 8601 Adelphi Road, Room 2510, College Park, MD 20740-6001; telephone (202) 741-5770; facsimile (202) 741-5769; Toll-free (877) 684-6448; or email at ogis@nara.gov.

If you are not satisfied with my response to your request, you may administratively appeal by submitting a written request to the Chief FOIA Officer, c/o Director, Information Management Office, Office of the Director of National Intelligence, Washington, DC 20511 or dni-foia@dni.gov. The request letter and envelope or subject line of the email should be marked “Freedom of Information Act Appeal.” Your appeal must be postmarked or electronically transmitted within 90 days of the date of this letter.

If you have any questions, please feel free to contact our Requester Service Center at dni-foia@dni.gov or (703) 275-1313.

Sincerely,

A handwritten signature in black ink that reads "Sally A. Nicholson". The signature is written in a cursive style with a large initial "S".

Sally A. Nicholson
Chief, Information Review &
Release Group
FOIA Public Liaison
Information Management Office