

# **EXHIBIT C**

**The Washington Post**  
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April 24, 2017

**BY EMAIL (sigar.pentagon.gen-coun.mbx.foia@mail.mil)**

Office of Privacy, Records, and Disclosures  
Attn: Mr. Stephen Kurylo, Jr.  
Special Investigator General for Afghanistan Reconstruction (SIGAR)  
2530 Crystal Drive  
Arlington, VA 22202-3940

**Re: Freedom of Information Act Appeal - Request # 2016-F-029**

Dear Mr. Kurylo:

Pursuant to 5 U.S.C. § 552(a)(6)(A)(ii), The Washington Post respectfully submits this appeal of the denial of its Freedom of Information Act request in the above-referenced matter. The Post's request ("Request," Exhibit A) seeks a transcript of SIGAR's interview of Lt. General Michael Flynn, which was conducted as part of the agency's "Lessons Learned Program" relating to the war in Afghanistan. The Request was denied through a letter dated January 24, 2017 ("Response," Exhibit B.), which indicated that the transcript falls within FOIA exemption (b)(5). For the reasons set forth below, we appeal.

**Background**

The FOIA request in this matter was submitted by two Post reporters, Greg Miller and Craig Whitlock, on August 24, 2016.<sup>1</sup> It sought:

*Transcripts, reports, audio recordings and video recordings of interviews conducted by SIGAR's Lessons Learned Program with Lt. Gen. Michael Flynn (U.S. Army, retired). Upon information and belief, LTG Flynn was interviewed as part of SIGAR's Lessons Learned Program sometime in 2015 or 2016. Please include any notes, tabs, emails, appendices or other documentation related to the interviews.*

A word of context is perhaps helpful. At the time of the Request, Lt. General Flynn was not in public office, but he had steadily become a prominent figure in

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<sup>1</sup> SIGAR's correspondence refers to the Request as dated August 29, 2016. The reasons for this discrepancy are unclear, but do not in any event bear on the substance of the issues raised in this appeal.

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connection with the 2016 U.S. presidential election. LTG Flynn had emerged as the top national security adviser to Donald Trump, the Republican nominee for president, and he had even reportedly been considered as a possible Trump running mate. At the Republican Party's national convention in July, the previous month, LTG Flynn took on a starring role, addressing the crowd and leading chants of "Lock Her Up!" from the stage. It was widely believed that, should Trump win the election, LTG Flynn would be appointed to a high-ranking position in the new administration – a belief that was later to prove true. These considerations were cited by Messrs. Miller and Whitlock in support of the Post's request for expedited processing. *See Exhibit A*, at 2 ("[A] delay in releasing records of LTG Flynn's interviews with SIGAR's Lessons Learned Program could undermine public confidence not only in the government's policy toward counterterrorism and Afghanistan, but also in the whole premise of SIGAR's Lessons Learned Program").

At the direction of Jennifer George-Nichol, a public-affairs specialist for SIGAR, Miller and Whitlock submitted the FOIA request by email on Aug. 24, 2016 to Christopher Staszak, senior investigative counsel at SIGAR. Mr. Staszak never responded to the Request or to several follow-up emails between August and November 2016. The Request had been pending without any answer or acknowledgment for more than 70 days when the U.S. presidential election took place on November 8, 2016.

Trump's victory in the election clearly ramped up the urgency and newsworthiness of the Request, at least from the Post's perspective. Since it was now a near-certainty that Flynn would receive a powerful position in the White House, the public had an even stronger interest in knowing more about Flynn's views regarding successes and failures of the war in Afghanistan. Accordingly, Mr. Whitlock renewed his inquiries about the Request, trying in vain to reach Mr. Staszak many times in the weeks after the election. During this time, Flynn was named Trump's national security adviser (on November 18) and soon became the subject of intense, near-daily coverage in the national news media.

Finally, in late November and early December, Mr. Whitlock spoke several times with Ms. George-Nichol, who appeared to be doing what she could to facilitate a response. In a December 6 email following up one of these conversations, Ms. George-Nichol advised: "Apologies for the delay on this, but I can finallyyy [sic] say that I expect you'll have it within the next week or two." A week later, on December 13, she wrote that she was continuing to prod SIGAR's Office of General Counsel for action. (We have these emails and would be glad to produce them upon request.)

Still, the unexplained delays persisted. Though Ms. George-Nichol continued to be responsive to Mr. Whitlock's emails, she could give no real insight into the status of the Request, and effectively told him on January 13, 2017 that the Request was entirely in OGC's court and she could do nothing further to advance it. At her suggestion, Mr. Whitlock tried to reach OGC directly, making multiple attempts to reach general counsel John Arlington by email and telephone. Mr. Arlington did not reply.

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Finally, on January 24, 2017, Mr. Whitlock received a letter via email from Stephen Kurylo, Jr., public information manager for SIGAR, denying the Request in full. (Response, Exhibit B.) As justification for the denial, the Response states, without explanation or elaboration, that “the transcript that you requested is exempt from disclosure by Exemption (b)(5) of the FOIA, 5 U.S.C. 552.” The request for expedited processing, and the arguments advanced by the Post in support of that request, were never addressed at all.

### **Argument**

SIGAR’s decision to withhold LTG Flynn’s interview in its entirety is both legally unjustified and, in these circumstances, contrary to public policy. Legally, SIGAR’s conclusory invocation of Exemption 5 is insufficient to overcome the standing presumption in favor of disclosure of public records under FOIA, particularly with respect to records that shed light on important government policies and actions. As a matter of public policy, the failure to disclose the interview undermines the stated purposes of the “Lessons Learned Program” and ultimately harms the public interest.

### **Legal Argument – Exemption 5**

The Response provides very little explanation for SIGAR’s determination that the requested records are exempt. It merely recites in bare, conclusory language that “[t]he transcript you requested is exempt from disclosure by Exemption (b)(5), 5 U.S.C. § 552.”

Exemption 5 *authorizes*, but does not necessarily require, agencies to withhold “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. §552(b)(5). Thus, the exemption covers “traditional privileges” available to the government in civil litigation with a private party, such as the protections for attorney-client communications and attorney work product. *Loving v. U.S. Dep’t of Defense*, 550 F.3d 32, 37. Because Exemption 5 is defined in relation to hypothetical litigation, it covers “those documents, and only those documents, normally privileged in the civil discovery context.” *Id.* (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975)). It does not extend to documents, of whatever nature, that are “routinely or normally disclosed in civil discovery.” *Dep’t of Justice v. Julian*, 486 U.S. 1, 12 (1988) (internal quotation marks omitted).

In this case, the Response does not actually specify any litigation privilege(s) that are claimed to apply through Exemption 5. It simply cites Exemption 5 itself, which is akin to citing an empty bucket. We respectfully submit that this deficiency alone may warrants a reversal of SIGAR’s determination letter, and at minimum, the withdrawal of that letter in issuance of a fresh determination that identifies the grounds for denial with enough specificity to permit meaningful review by both the Post and, if necessary, a

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federal court. If the latter approach is taken, we also urge SIGAR to examine whether any portions of the requested Flynn interview can be made public even if, in SIGAR's view, there are other sections that must remain exempt. *See generally* 5 U.S.C. §552(b) ("Any 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 section. The amount of information deleted shall be indicated on the released portion of the record . . .").

While the Response fails to state the privilege that is said to apply, it seems likely that SIGAR is implicitly relying on the deliberative process privilege. (In part because no other privilege has even a conceivable bearing on the circumstances of Flynn's interview.) Without belaboring a point that has not actually been made, it is enough to say that the reporting by Messrs. Whitlock and Miller seems to undermine any argument for withholding the Flynn interview as part of an agency "deliberative process" by SIGAR. For one thing, the interview was apparently an attempt to review, *post-decisionally*, various decisions, strategies, and tactics that were taken years ago during the U.S. war in Afghanistan. Such a retrospective review is not a strong candidate for deliberative process protection, even if some of the "lessons" that are presumably being learned could, in theory, be translated into the future. The fact remains that reviewing what worked and what didn't work in a historically concluded war, especially with subjects like LTG Flynn who will not likely have an involvement in such future decisions, is quite different from the kind of "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated" that the privilege is meant to cover. *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8, 121 S.Ct. 1060, 149 L.Ed.2d 87 (2001) (internal quotation marks omitted).

Moreover, the two cornerstone requirements for finding a deliberative process privilege exists – that the records be "predecisional" and "deliberative" in nature, *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997) – are not present here. The Flynn interview is not "pre-decisional" in any meaningful way; it is a historical look-back at decisions that were undertaken years ago, in connection with a war in which Flynn no longer plays an ongoing role. Nor is it "deliberative." It is much more akin to a kind of process courts have expressly said is *not* part of a protected deliberative process – namely, documents reflecting discussion that is primarily factual in nature and tends to "state or explain a decision the government *has already made*." *See id.* at 738 (citing *Sears*, 421 U.S. at 151-52; *Army Times Publ'g Co. v. Dep't of Air Force*, 998 F.2d 1067, 1071 (D.C. Cir. 1993)).

### **Policy Arguments**

The legal considerations weighing in favor of disclosure are, if anything, vastly amplified by what we know of the purpose and nature of SIGAR's "Lessons Learned" program. As the name suggests, the program is an attempt to contribute to a better understanding of the U.S. accomplishments, problems, and general conduct of the war in Afghanistan.

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SIGAR's own website recognizes this, describing the program as follows on its website:

SIGAR's Lessons Learned Program was created to identify and preserve lessons from the U.S. reconstruction experience in Afghanistan, and to make recommendations to Congress and executive agencies on ways to improve our efforts in current and future operations. The team's reports focus on key aspects of the reconstruction effort and document what the U.S. government sought to accomplish, assess what it achieved, and evaluate the degree to which these efforts helped the United States reach its strategic goals in Afghanistan.

<https://www.sigar.mil/lessonslearned/index.aspx?SSR=11&SubSSR=59&WP=Lessons%20Learned%20Program>

Similarly, the Executive Summary of the primary SIGAR "Lessons Learned" public report issued thus far -- "Corruption in Conflict: Lessons from the U.S. Experience in Afghanistan," published Sept. 14, 2016 -- stated in its Executive Summary:

This report draws important lessons from the U.S. experience with corruption in Afghanistan since 2001. These lessons are relevant for ongoing efforts in Afghanistan, where the United States will remain engaged in coming years and continue to face the challenge of corruption. The United States may also participate in future efforts to rebuild other weak states emerging from protracted conflict. It is vital that anticorruption lessons from Afghanistan inform and improve these efforts.

<https://www.sigar.mil/pdf/lessonslearned/SIGAR-16-58-LL.pdf>

Naturally, the "lessons learned" by the U.S. war effort in Afghanistan are curtailed if the public is not given access to those lessons. We trust that SIGAR has this fact in mind, and that it will pursue a policy that releases as much as possible -- starting with the LTG Flynn interview -- both in accordance with FOIA and in order to advance the noble policy objectives cited above.

Moreover, we understand that SIGAR has conducted, or will conduct, interviews of perhaps some 300 individuals as part of this program. While perhaps few of the individual interviewees will be as newsworthy as LTG Flynn, there is little question that the Post and other news organizations will have interest in seeing what comes of these interviews. Rather than continue to confront these issues *seriatim* through individual FOIA appeals as they come up, it might make sense for SIGAR and representatives of the news media to engage in a broader discussion of what the agency's plans are for making these records available. Ultimately, they will constitute a valuable trove of important

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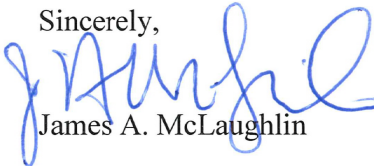
historical documents relating to the Afghanistan war, and we would welcome an opportunity to exchange views about an appropriate general policy, redaction process (if justified) and timetable for public access to these records. I am available to participate in such a dialogue, and I am confident the Post's reporters involved (Craig Whitlock and Greg Miller) would be too.

### **Conclusion**

For all the reasons detailed above, the Post's appeal should be granted. SIGAR should immediately disclose the transcript of the LTG Flynn interview in its entirety. If some limited portions of the transcript are genuinely subject to exemption after a rigorous and searching analysis under FOIA, we request that SIGAR release those portions anyway to the extent it has discretion to do so (*i.e.*, to the extent the information is subject to discretionary, not mandatory, exemption), and release all non-exempt portions immediately.

Thank you for your attention to the Post's appeal. I am available to discuss any questions you might have.

Sincerely,



James A. McLaughlin

cc (email):

Greg Miller  
Craig Whitlock