

EXHIBIT N

SCHAERR DUNCAN

LLP

September 15, 2017

David M. Hardy
Federal Bureau of Investigation
Record/Information Dissemination Section
Work Process Unit
170 Marcel Drive
Winchester, VA 22602-4843

Re: FOIPA Request number 1381851-000

Dear Mr. Hardy:

I write in response to your August 24, 2017 letter concerning the above-captioned request under the Freedom of Information Act (“FOIA”).

The request seeks information about whether the names of certain listed individuals—all members of the Donald Trump presidential transition team—were revealed in foreign intelligence surveillance reports (“unmasked”) or searched through a large internet database (“upstreamed”).¹ In your letter, you indicated that the FBI will refuse to process the request without (1) consent of the named individuals, (2) proof of their death, or (3) justification for why “the public interest in disclosure outweighs personal privacy[.]”² The letter cited two FOIA exemptions as justification for its position: Exemption 7(C), which pertains to “records or information compiled for law enforcement purposes [that] could reasonably be expected to constitute an unwarranted invasion of personal privacy,” 5 U.S.C. § 552(b)(7), and Exemption 6, which pertains to “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]” *Id.* § 552(b)(6).³

As shown below, the FBI’s position is at odds with FOIA, which obligates the agency to undertake its search of records in this case and evaluate personal privacy interests (if any) based on the actual responsive documents it identifies. FOIA does not permit the agency to refuse to conduct a search in this instance based on its unilateral speculation about what privacy interests *might* ultimately be implicated by hypothetical documents. I therefore request that the agency perform that search promptly and produce responsive records, as

¹ See Letter from G. Schaerr to FBI FOIA Office, Jul. 13, 2017 (Attachment A).

² See Letter from D. M. Hardy to G. Schaerr, Aug. 24, 2017 (Attachment B).

³ Exception 6’s privacy rights are narrower than Exception 7(C)’s. See *Citizens for Responsibility & Ethics in Wash. v. United States DOJ*, 854 F.3d 675, 681 (D.C. Cir. 2017) (“CREW”). Accordingly, “[w]hen information is claimed to be exempt from disclosure under both provisions, courts ‘focus on Exemption 7(C) because it provides broader privacy protection than Exemption 6 and thus establishes a lower bar for withholding material.’” *Id.* (alteration omitted).

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FOIA requires. In the alternative, as also shown below, the public interest outweighs any possible privacy interests.

A. The FBI must conduct a search before it asserts an exception.

FOIA's text clearly requires the agency to complete the requested search. When an agency receives a "request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules"—such as the request at issue here—the agency, subject to an exception that you haven't invoked, "shall make reasonable efforts to search for the records in electronic form or format" 5 U.S.C. § 552(a)(3) (emphasis added). That obligates the agency to make "a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested[.]" *Nation Magazine v. United States Customs Serv.*, 71 F.3d 885, 890 (D.C. 1995). Accordingly, the statute does not permit an agency to refuse to conduct a search based on abstract fears about hypothetical privacy interests in unidentified documents.

The D.C. Circuit has admonished agencies against weighing privacy exemptions in the abstract: "[T]he mere fact that records pertain to an individual's activities does not necessarily qualify them for exemption." *Id.* at 894–95. The D.C. Circuit has further admonished agencies that even where exemptions are applicable, they must be "narrowly construed" in order to preserve FOIA's "strong presumption in favor of disclosure[.]" See *CREW*, 854 F.3d at 681. Moreover, the application of Exception 7(C) is fact-intensive, and accordingly "per se rules of nondisclosure based upon the type of document requested, the type of individual involved, or the type of activity inquired into, are generally disfavored." See *CREW*, 854 F.3d at 682–83 (citation omitted). By refusing even to perform the requested search, you are in direct violation of those commands.

Several practical concerns underscore the FBI's obligation to conduct a search before speculating about potential exemptions. First, although the agency is permitted in some circumstances to decline to disclose the existence of documents requested under FOIA, this is not such a case, because it is not obvious that responsive records will implicate Exemptions 6 or 7(C) at all. For example, some responsive documents may lack the names of particular individuals. The fact of unmasking or upstreaming—or the subject matter of their communications (when identified)—may turn out to raise only *de minimis* concerns of "personal privacy." See 5 U.S.C. § 552(b)(6), (7)(C), *ACLU v. United States DOJ*, 655 F.3d 1, 12 (D.C. Cir. 2011) (some records "would not compromise much more" than a *de minimis* interest); *Multi AG Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1229 (D.C. Cir. 2008) (*de minimis* privacy interests insufficient). And insofar as any documents do compromise personal privacy, the agency is obligated to consider whether to redact (or segregate) them rather than withholding them altogether. 5 U.S.C. § 552(b); see also *Krikorian v. Dep't of State*, 984 F.2d 461, 466 (D.C. Cir. 1993) (noting requirement to segregate applies to all FOIA exemptions). Other reasons why the cited exemptions do not apply may become apparent as well. The only way to know is for the agency to perform the requested search.

Second, the FBI's position is internally contradictory. Unlike traditional law enforcement tools, unmasking and upstreaming are utilized to gain intelligence on *foreign* persons. *See, e.g.*, 50 U.S.C. § 1881a(a), (b). When information about United States persons is collected, their identities typically must be kept anonymous. *See* 50 U.S.C. §§ 1881a(c)(1)(A), (e); *id.* § 1801(h). If the individuals named by the request were unmasked, it would raise serious concerns that their privacy has *already* been improperly invaded by the government. If unmasking occurred—and only a search can reveal if it did—then by refusing to search for examples of unmasking, the agency would be concealing an *invasion* of privacy in the name of privacy.

It follows that the agency is obligated to search for records responsive to the request. Once the agency identifies responsive documents, it can consider privacy interests, if any, before making its production.

B. Even if a search had been conducted, the public interest would outweigh any privacy interests.

In the alternative, the public interest in responsive materials will likely outweigh any personal privacy interests. Exemptions 6 and 7(C) only prohibit “clearly unwarranted” or “unwarranted invasions” into privacy. 5 U.S.C. § 552 (b)(6), (7)(C). This means that the agency is required to balance the public interest in disclosure against the private interests. *See, e.g., Citizens for Responsibility & Ethics in Wash. v. United States DOJ*, 746 F.3d 1082, 1095 (D.C. Cir. 2014).

As relevant here, courts have noted several weighty public interests:

- First, there is a public interest in assessing “[t]he use of and justification for warrantless [] tracking,” *ACLU*, 655 F.3d at 12—the very kind of surveillance with which unmasking and upstreaming are concerned.
- Second, there is a more general public interest in “shed[ding] light” on the conduct of governmental agencies. *See, e.g., id.*
- Last, the public interest is enhanced when there is “[w]idespread media attention, [and] an ongoing public policy discussion,” *Citizens for Responsibility & Ethics in Wash. v. United States DOJ*, 978 F. Supp. 2d 1, 13 (D.D.C. 2013) *see also ACLU*, 655 F.3d at 13.

The FOIA request at issue falls squarely within each of these substantial public interests. There is a clear public interest in understanding the practical application of the FBI's unmasking and upstreaming procedures. This interest is enhanced by the potential abuse of these powers, by multiple government officials, against members of the Trump transition team—potentially including the persons named in the request.⁴ And abuse of

⁴ *See, e.g.,* John Solomon, *Intelligence chairman accuses Obama aides of hundreds of unmasking requests*, The Hill (July 27, 2017; 6:00pm), <http://thehill.com/policy/national-security/344226-intelligence-chairman-accuses-obama-aides-of-hundreds-of-unmasking>.

unmasking during the Trump presidential transition is a subject of wide-ranging media attention, with reports coming from numerous media outlets including The Hill and CNN.⁵

Of course, as the agency apparently has not made a search, it is impossible to precisely assess whether responsive documents fall within one of the statutory exemptions. The privacy concerns arising from the fact of unmasking and upstreaming are likely minor. Without conducting the search, the agency likewise cannot determine if the privacy interests are more than *de minimis*, let alone conduct the required balancing test. And, as noted above, this FOIA request is based on a belief that privacy was *already* invaded—indeed, invaded for political reasons. Revealing whether an individual has been unmasked would thus create no more than *de minimis* harm to that individual.

Any one of these public interests would outweigh any minimal privacy interests at stake here. Given that *all* of these public interests are present, and the minimal (at most) countervailing privacy considerations, the public interest clearly is controlling. And even if the privacy interest were substantial, it would be outweighed by the *multiple* public interests at stake here.

For all these reasons, the FBI is required to conduct its search and begin producing documents immediately. Please let me know by Friday, September 29, whether the FBI is conducting the requested search, and when we can expect the first installment of documents.

Thank you in advance for your attention and assistance.

Sincerely,



Gene C. Schaerr

⁵ See, e.g., *id.*; Tom Lobianco, Jeremy Herb, and Deidre Walsh, House intelligence panel subpoenas Flynn, Cohen; seeks 'unmasking' docs, CNN (June 1, 2017; 8:29 AM), <http://www.cnn.com/2017/05/31/politics/house-russia-investigators-subpoena-flynn-cohen/index.html>;

Attachment A

SCHAERR DUNCAN LLP

July 13, 2017

Federal Bureau of Investigation
Attn: FOI/PA Request
Record/Information Dissemination Section
170 Marcel Drive
Winchester, VA 22602-4843

Dear FOIA Officer:

This is a request under the Freedom of Information Act, 5 U.S.C. § 552, regarding electronic surveillance conducted by the Federal Bureau of Investigation 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 a client who prefers to remain anonymous at present.

Specifically, this request concerns circumstances in which the identities of United States persons whose communications were collected by FISA surveillance may have been “unmasked” — that is, their identities were revealed when the products of FISA surveillance were disseminated within the government. *See, e.g.*, National Security Agency, United States Signals Intelligence Directive 18, § 7 (January 25, 2011); Federal Bureau of Investigation, Minimization Procedures Used by the Federal Bureau of Investigation in Connection with Acquisition of Foreign Intelligence Information at 9, 19–20, 31 (July 10, 2015). This request also concerns “upstreaming” — that is, the process of extracting certain data from the Internet for analysis. *See, e.g.*, National Security Agency, NSA Stops Certain Section 702 “Upstream” Activities (press release April 28, 2017).

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

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**

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- 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.

Please produce responsive records in electronic form in lieu of a paper production. 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. If redaction under 5 U.S.C. § 552(b) can make any responsive but exempt material nonexempt, please produce such materials in redacted form.

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 questions about this request.

Thank you in advance for your attention and assistance.

Sincerely,



Gene C. Schaerr

Attachment B



Federal Bureau of Investigation
Washington, D.C. 20535

August 24, 2017

MR. GENE C. SCHAERR
SCHAERR DUNCAN LLP
SUITE 900
1717 K STREET NW
WASHINGTON, DC 20006

FOIPA Request No.: 1381851-000
Subject: Documents Concerning the
Unmasking of Individuals
(Steve Bannon et al.)

Dear Mr. Schaerr:

This acknowledges receipt of your Freedom of Information Act (FOIA) request to the FBI. The FOIPA number listed above has been assigned to your request.

You have requested records concerning one or more third party individuals. The FBI recognizes an important privacy interest in the requested information. To continue processing your request regarding a third party, submit one of the following: (1) an authorization and consent from the individual(s) (*i.e.*, express authorization and consent of the third party); (2) proof of death (*i.e.*, proof that your subject is deceased); or (3) a justification that the public interest in disclosure outweighs personal privacy (*i.e.*, a clear demonstration that the public interest in disclosure outweighs personal privacy interests). In the absence of such information, the FBI can neither confirm nor deny the existence of any records responsive to your request, which, if they were to exist, would be exempt from disclosure pursuant to FOIA Exemptions (b)(6) and (b)(7)(C), 5 U.S.C. §§ 552 (b)(6) and (b)(7)(C).

Express authorization and consent. If you seek disclosure of any existing records on this basis, enclosed is a Certification of Identity form. You may make additional copies of this form if you are requesting information on more than one individual. The subject of your request should complete this form and then sign it. Alternatively, the subject may prepare a document containing the required descriptive data and have it notarized. The original certification of identity or notarized authorization with the descriptive information must contain a legible, original signature before FBI can conduct an accurate search of our records.

Proof of death. If you seek disclosure of any existing records on this basis, proof of death can be a copy of a death certificate, Social Security Death Index, obituary, or another recognized reference source. Death is presumed if the birth date of the subject is more than 100 years ago.

Public Interest Disclosure. If you seek disclosure of any existing records on this basis, you must demonstrate that the public interest in disclosure outweighs personal privacy interests. In this regard, you must show that the public interest sought is a significant one, and that the requested information is likely to advance that interest.

Fax your request to the Work Process Unit at (540) 868-4997, or mail to 170 Marcel Drive, Winchester, VA 22602. If we do not receive a response from you within 30 days from the date of this letter, your request will be closed. You must include the FOIPA request number with any communication regarding this matter.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c). As such, this response is limited to those records, if any exist, that are subject to the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

You may file an appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, D.C. 20530-0001, or you may submit an appeal through OIP's FOIAonline portal by creating an account on the following web site: <https://foiaonline.regulations.gov/foia/action/public/home>. Your appeal must be postmarked or electronically transmitted within ninety (90) days from the date of this letter in order to be considered timely. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal." Please cite the FOIPA Request Number assigned to your request so that it may be easily identified.

You may seek dispute resolution services by contacting the Office of Government Information Services (OGIS) at 877-684-6448, or by emailing ogis@nara.gov. Alternatively, you may contact the FBI's FOIA Public Liaison by emailing foipaquestions@fbi.gov. If you submit your dispute resolution correspondence by email, the subject heading should clearly state "Dispute Resolution Services." Please also cite the FOIPA Request Number assigned to your request so that it may be easily identified.

For questions on how to reasonably describe your request, please email us at foipaquestions@fbi.gov. You may also visit www.fbi.gov and select "Services," "Records Management," and "Freedom of Information/Privacy Act" for additional guidance.

Enclosed for your information is a copy of the FBI Fact Sheet and a copy of the Explanation of Exemptions.

Sincerely,



David M. Hardy
Section Chief,
Record/Information
Dissemination Section
Records Management Division

Enclosures