IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN OVERSIGHT, Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, and FEDERAL BUREAU OF INVESTIGATION, Defendants.	)	Case No. 17-718-RL

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants United States Department of Justice ("DOJ") and the Federal Bureau of Investigation ("FBI") hereby move for summary judgment pursuant to Fed. R. Civ. P. 56(b) and Local Rule 7(h) for the reasons stated in the attached memorandum of points and authorities, statement of material facts, and supporting declarations and exhibits.

Dated: September 1, 2017

Respectfully Submitted,

CHAD A. READLER
Acting Assistant Attorney General

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STATEMENT OF MATERIAL FACTS IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

As required by Local Civil Rule 7(h)(1), and in support of the Motion for Summary Judgment, Defendants hereby make the following statement of material facts as to which there is no genuine issue.

1. This action arises from FOIA requests submitted by the Plaintiff to the Federal Bureau of Investigation ("FBI") and DOJ National Security Division ("NSD"). Those requests seek:

> 1) All warrant applications or other records requesting a court to institute an intercept of telecommunications or a pen register trap and trace on electronic communications or telecommunications in connection with presidential candidate Donald Trump, Trump Tower (located at 725 5th Avenue, New York, NY), entities housed in Trump Tower, or any person affiliated with Mr. Trump's campaign, whether paid or unpaid, between June 16, 2015, and the present, whether under the authority of the Foreign Intelligence Surveillance Act [FISA]; Title III of the Omnibus Crime Control and Safe Streets Act of 1968m as amended; or other authority.
> 2) Any court order or other document providing authority to institute or maintain such a requested wiretap, intercept, or pen register.
> 3) Any court order or other document rejecting such an application or request for authority for a wiretap, intercept, or pen register.
> 4) Any records logging or listing any such wiretaps, intercepts, or pen registers.
> 5) All communications, documents, or other material exchanged between DOJ or the FBI and Congress, or briefing papers or talking points prepared for congressional

> briefings, regarding the wiretaps, intercepts, or pen registers discussed, or records described, in Items 1-4, supra.

See Declaration of David M. Hardy, dated September 1, 2017, ¶ 5 & Exh. A; Declaration of G. Bradley Weinsheimer, dated August 31, 2017, ¶ 4 & Exh. A. Plaintiff also sought "records describing the processing of this request" and limited the dates of the search "from June 1, 2015 to the date the search is conducted." Hardy Decl. ¶ 6, 7 Plaintiff further requested expedited processing and a fee waiver. *Id*, at ¶ 8.

2. By email dated April 3, 2017, NSD refused to confirm or deny the existence of responsive records, explaining that it does not search for records in response to requests regarding the use or non-use of certain foreign intelligence gathering techniques in which the confirmation or denial of the existence of responsive records would, in and of itself, reveal information properly classified under Executive Order 13526. *See* Weinsheimer Decl. ¶ 5 & Exhibit B.

3. Plaintiff appealed NSD's determination to the Department of Justice's Office of Information Policy ("OIP"), by letter dated April 12, 2017. *See id*. & Exhibit C. OIP affirmed NSD's determination in a letter dated, April 13, 2017. *See id*. & Exhibit D.

4. FBI acknowledged Plaintiff's request by letter dated April 11, 2017, and denied the fee waiver. FBI had not yet made a final determination at the time Plaintiff filed suit on April 19, 2017.

5. FBI has acknowledged a counterintelligence investigation of "the Russian government's efforts to interfere in the 2016 presidential election[, including] the nature of any links between individuals associated with the Trump campaign and the Russian government and whether there was any coordination between the campaign and Russia's efforts[, and] an assessment of whether any crimes were committed." *See* Transcript of the House Permanent Select Committee on

Intelligence Hearing on Russian Interference in the 2016 U.S. Election, March 20, 2017 https://www.washingtonpost.com/news/post-politics/wp/2017/03/20/full-transcript-fbi-director-james-comey-testifies-on-russian-interference-in-2016-election/?utm_term=.b9f19a0cf9cf (last accessed 9/1/2017; Hardy Decl. ¶ 21(A). That investigation is now under the direction of Special Counsel Robert Mueller. *Id*. ¶ 46

6. President Trump's Twitter account made a four-part post on March 4, 2017:

- "Terrible! Just found out that Obama had my "wires tapped" in Trump Tower just before the victory. Nothing found. This is McCarthyism!"
- "Is it legal for a sitting President to be "wire tapping" a race for president prior to an election? Turned down by court earlier. A NEW LOW!"
- "I'd bet a good lawyer could make a great case out of the fact that President Obama was tapping my phones in October, just prior to Election!"
- "How low has President Obama gone to tapp [*sic*] my phones during the very sacred election process. This is Nixon/Watergate. Bad (or sick) guy!"

Available at https://twitter.com/realDonaldTrump.

7. During sworn testimony before the House Permanent Selection Committee on Intelligence ("HPSCI") on March 20, 2017, then FBI Director James B. Comey was asked about this by Congressman Schiff and responded:

> With respect to the President's tweets about alleged wiretapping directed at him by the prior administration, I have no information that supports those tweets and we have looked carefully inside the FBI. The Department of Justice has asked me to share with you that the answer is the same for the Department of Justice and all its components. The Department has no information that supports those tweets.

See Transcript of the House Permanent Select Committee on Intelligence Hearing on Russian Interference in the 2016 U.S. Election, March 20, 2017.

8. Both FBI and NSD confirm that they have no records related to wiretaps as described by the March 4, 2017 tweets. Hardy Decl. ¶ 15; Weinsheimer Decl. ¶ 8. FBI again confirmed that

they do not have any such records by consulting with personnel knowledgeable about Director Comey's statements and the surveillance activities of the FBI. Hardy Decl. ¶ 15.

9. Because Plaintiff's request is broader than the category of alleged wiretaps described in those statements, however, FBI and DOJ do not confirm or deny the existence of any other responsive records. Hardy Decl. ¶ 16; Weinsheimer Decl. ¶ 9.

10. G. Bradley Weinsheimer is an original classification authority. Weinsheimer Decl. ¶ 3. He determined that the information withheld by NSD is protected by Exemption 1. *Id*. ¶¶ 10-17.

11. David Hardy is an original classification authority. Hardy Decl. ¶ 2. He determined that the information withheld by FBI is protected by Exemption 1. *Id*. ¶¶ 19-20, 25-37.

12. The information withheld pursuant to Exemption 1 is under control of the United States Government, and contains information pertaining to intelligence activities, sources or methods. *See* Executive Order 13526 §§ 1.4(c); Hardy Decl. ¶¶ 30-33; Weinsheimer Decl. ¶ 10-17.

13. The information withheld pursuant to Exemption 1 also pertains to foreign relations. Hardy Decl. ¶¶ 34-37.

14. Mr. Weinsheimer and Mr. Hardy both determined that disclosure of the existence or non-existence of other responsive records would cause harm to national security, and have articulated the harm that could be expected to occur. Hardy Decl. ¶¶ 30-37; Weinsheimer Decl. ¶¶ 14-17.

15. Mr. Hardy further determined that disclosure of the existence or non-existence of responsive records risks disclosure of intelligence sources and methods and is therefore protected by the National Security Act and Exemption 3. Hardy Decl. ¶¶ 38-40.

16. Mr Hardy determined that surveillance records – if they existed – are records compiled for law enforcement purposes within the meaning of Exemption 7. *See* Hardy Decl. ¶¶ 41-43.

17. Mr. Hardy further determined that disclosure of the existence or non-existence of responsive records could reasonably be expected to interfere with enforcement proceedings that are pending or reasonably anticipated, and that the information is therefore properly withheld under Exemption 7A. Hardy Decl. ¶¶ 44-49.

18. Mr. Hardy further determined that disclosure of the existence or non-existence of responsive records would disclose techniques and procedures for law enforcement investigations and that such disclosure could reasonably be expected to risk circumvention of the law, and that the information is therefore properly withheld under Exemption 7E. Hardy Decl. ¶¶ 50-52.

19. No authorized Executive Branch official has disclosed the information withheld in this matter. Hardy Decl. ¶ 14; Weinsheimer Decl. ¶ 18.

20. NSD and FBI reasonably determined that no responsive "processing records" existed as of the day they began working on the response to the request. Hardy Decl. ¶¶ 53-55; Weinsheimer Decl. ¶ 19.

Dated: September 1, 2017

Respectfully Submitted,

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ELIZABETH J. SHAPIRO
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MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Under the Freedom of Information Act, Plaintiff American Oversight seeks information from the United States Department of Justice National Security Division and the Federal Bureau of Investigation about electronic surveillance activity allegedly related to an ongoing investigation. More specifically, Plaintiff seeks warrant applications for telecommunications intercepts in connection with presidential candidate Donald Trump, Trump Tower, or the Trump campaign, as well as related court orders, logs, and Congressional briefings. Defendants United States Department of Justice and the Federal Bureau of Investigation have properly refused to confirm or deny the existence of responsive records, and no authorized Executive Branch official has disclosed the specific information at issue – namely, the existence or non-existence of a specific kind of surveillance related to particular individuals allegedly related to an ongoing investigation. This information is currently and properly classified, and otherwise exempt, and the Government's previous confirmation that a limited subset of such documents do not exist does not waive the Glomar response provided here.

The Government's supporting declarations establish that providing a substantive response would reveal classified information protected by Freedom of Information Act ("FOIA") Exemption 1, the disclosure of which would cause harm to national security. The FBI's declaration further establishes that disclosure of the existence or non-existence of responsive records would reveal intelligence sources and methods protected by Exemption 3 and the National Security Act, as well as law enforcement information protected by Exemptions 7(A) and 7(E). The Court should defer to Defendants' determination in this regard.

Finally, because Plaintiff also sought "processing records", Defendants also properly confirmed that there were no processing records within the relevant timeframe. Accordingly, the Government is entitled to summary judgment.

BACKGROUND

I. Administrative Background

This matter arises from identical FOIA requests submitted to the Federal Bureau of Investigation ("FBI") and DOJ National Security Division ("NSD"). Those requests seek:

> 1) All warrant applications or other records requesting a court to institute an intercept of telecommunications or a pen register trap and trace on electronic communications or telecommunications in connection with presidential candidate Donald Trump, Trump Tower (located at 725 5th Avenue, New York, NY), entities housed in Trump Tower, or any person affiliated with Mr. Trump's campaign, whether paid or unpaid, between June 16, 2015, and the present, whether under the authority of the Foreign Intelligence Surveillance Act [FISA]; Title III of the Omnibus Crime Control and Safe Streets Act of 1968m as amended; or other authority.
>
> 2) Any court order or other document providing authority to institute or maintain such a requested wiretap, intercept, or pen register.
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> 4) Any records logging or listing any such wiretaps, intercepts, or pen registers.
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> 5) All communications, documents, or other material exchanged between DOJ or the FBI and Congress, or briefing papers or talking points prepared for congressional briefings, regarding the wiretaps, intercepts, or pen registers discussed, or records described, in Items 1-4, supra.

See Declaration of David Hardy, dated September 1, 2017, ¶ 5 & Ex. A; Declaration of G. Bradley Weinsheimer, dated August 31, 2017, ¶ 4 & Ex. A. Plaintiff also sought "records describing the processing of this request" and limited the dates of the search "from June 1, 2015 to the date the search is conducted." *Id*. Plaintiff further requested expedited processing and a fee waiver. *Id*.

By email dated April 3, 2017, NSD refused to confirm or deny the existence of responsive records, explaining that it does not search for records in response to requests regarding the use or non-use of certain foreign intelligence gathering techniques in which the confirmation or denial of the existence of responsive records would, in and of itself, reveal information properly classified under Executive Order 13526. *See* Weinsheimer Decl. ¶ 5 & Ex. B. This is known as a "Glomar" response, and is proper if the fact of the existence or non-existence of agency records falls within a FOIA exemption. *See Phillippi v. CIA*, 546 F.2d 1009, 1011 (D.C. Cir. 1976) (acknowledging CIA refusal to confirm or deny existence of records regarding activities of a ship named Hughes Glomar Explorer). Plaintiff appealed NSD's determination to the Department of Justice's Office of Information Policy ("OIP"), by letter dated April 12, 2017. *See id*. & Exhibit C. OIP affirmed NSD's determination in a letter dated, April 13, 2017. *See id*. & Exhibit D.

FBI acknowledged Plaintiff's request by letter dated April 11, 2017. Hardy Decl. ¶¶ 9-11. FBI had not yet made a final determination at the time Plaintiff filed suit on April 19, 2017. The Complaint makes claims for wrongful denial of expedited processing, failure to conduct an adequate search, and wrongful withholding of records.

II. Factual Background.

Plaintiff's FOIA requests arise in a factual context in which there is an ongoing, acknowledged official investigation related to the Trump campaign. Specifically, the FBI has acknowledged a counterintelligence investigation of "the Russian government's efforts to interfere in the 2016 presidential election[, including] the nature of any links between individuals associated with the Trump campaign and the Russian government and whether there was any coordination between the campaign and Russia's efforts[, and] an assessment of whether any

crimes were committed." *See* Transcript of the House Permanent Select Committee on Intelligence Hearing on Russian Interference in the 2016 U.S. Election, March 20, 2017, https://www.washingtonpost.com/news/post-politics/wp/2017/03/20/full-transcript-fbi-director-james-comey-testifies-on-russian-interference-in-2016-election/?utm_term=.b9f19a0cf9cf (last accessed 9/1/2017); Hardy Decl. ¶ 21. That investigation is now under the direction of Special Counsel Robert Mueller. *Id*. ¶ 46.

Plaintiff claims that the FOIA request was prompted by certain statements of the President. In particular, President Trump's Twitter account made a four-part post on March 4, 2017:

- "Terrible! Just found out that Obama had my "wires tapped" in Trump Tower just before the victory. Nothing found. This is McCarthyism!"
- "Is it legal for a sitting President to be "wire tapping" a race for president prior to an election? Turned down by court earlier. A NEW LOW!"
- "I'd bet a good lawyer could make a great case out of the fact that President Obama was tapping my phones in October, just prior to Election!"
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Available at https://twitter.com/realDonaldTrump.

During sworn testimony before the House Permanent Selection Committee on Intelligence ("HPSCI") on March 20, 2017, then FBI Director James B. Comey was asked about this by Congressman Schiff and responded:

> With respect to the President's tweets about alleged wiretapping directed at him by the prior administration, I have no information that supports those tweets and we have looked carefully inside the FBI. The Department of Justice has asked me to share with you

> that the answer is the same for the Department of Justice and all its components. The Department has no information that supports those tweets.

See Transcript of the House Permanent Select Committee on Intelligence Hearing on Russian Interference in the 2016 U.S. Election, March 20, 2017; Hardy Decl. ¶ 13. Other than this public statement by then-Director Comey addressing this specific statement, neither the FBI nor DOJ have publicly commented on or acknowledged the existence or non-existence of any FISA, Title III, or other wiretaps "in connection with presidential candidate Donald Trump, Trump Tower (located at 725 5th Avenue, New York, NY), entities housed in Trump Tower, or any person affiliated with Mr. Trump's campaign, whether paid or unpaid, between June 16, 2015 and the present." Hardy Decl. ¶ 14.

In light of these statements, both FBI and NSD can again confirm that they have no records related to wiretaps as described by the March 4, 2017 tweets. Hardy Decl. ¶ 15; Weinsheimer Decl. ¶ 8.[1] Because Plaintiff's request is broader than the category of alleged wiretaps described in those statements, however, FBI and DOJ do not confirm or deny the existence of any other responsive records. Hardy Decl. ¶¶ 16, 56; Weinsheimer Decl. ¶ 9.[2]

[1] The Hardy Declaration indicates that FBI consulted with personnel knowledgeable about Director Comey's statements and the surveillance activities of the FBI and again confirmed that there are no such records at FBI. Hardy Decl. ¶ 15.

[2] To the extent Plaintiff is pressing its claim for denial of expedited processing, that claim is now moot. This Court lacks jurisdiction over plaintiff's claim for wrongful denial of expedition because DOJ has completed its processing of plaintiff's FOIA request. *See* 5 U.S.C. § 552(a)(6)(E)(iv) (a court lacks subject matter jurisdiction "to review an agency denial of expedited processing of a request for records after the agency has provided a complete response to the request."); *see also Muttitt v. Dep't of State*, 926 F. Supp. 2d 284, 296 (D.D.C.2013); *Liberation Newspaper v. Dep't of State*, 80 F. Supp. 3d 137, 140 (D.D.C. 2015); *CREW v. DOJ*, 535 F. Supp. 2d 157, 160 n.1 (D.D.C. 2008).

ARGUMENT

I. STATUTORY STANDARDS

A. The Freedom of Information Act

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. DOJ*, 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); *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 courts resolve most FOIA actions on summary judgment. *See Judicial Watch, Inc. v. Dep't of the Navy*, 25 F. Supp. 3d 131, 136 (D.D.C. 2014). 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. DOJ*, 830 F.2d 210, 217 (D.C. Cir. 1987). A court may grant summary judgment to the Government based entirely on an agency's declarations, provided they articulate "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." *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981); *accord Gov't Accountability Project v. Food & Drug Admin.*, 206 F. Supp. 3d 420, 430 (D.D.C. 2016). Such 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).

B. Special Considerations in National Security Cases

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, 1193 (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."). "[A]ccordingly, the government's 'arguments needs only be both "plausible" and "logical" to justify the invocation of a FOIA exemption in the national security context.'" *Unrow Human Rights Litig. Clinic v. Dep't of State*, 134 F. Supp. 3d 263, 272 (D.D.C. 2015) (quoting *ACLU v. Dep't of Def.*, 628 F.3d 612, 624 (D.C. Cir. 2011)).

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 Unrow Human Rights Impact Litig. Clinic*, 134 F. Supp. 3d at 272. 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).

C. The Glomar Response.

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 Wilner v. NSA*, 592 F.3d 60, 68 (2d Cir. 2009) ("The Glomar doctrine is well settled as a proper response to a FOIA request because it is the only way in which an agency may assert that a particular FOIA statutory exemption covers the 'existence or non-existence of the requested records[.]'" (quoting *Phillippi v. CIA*, 546 F.2d 1009, 1012 (D.C. Cir. 1976)). In support of a Glomar response, the asserting agency "must explain why it can neither confirm nor deny the existence of responsive records." *James Madison Project v. Dep't of Justice*, 208 F. Supp. 3d 265, 283 (D.D.C. 2016) (quoting *Parker v. EOUSA*, 852 F. Supp. 2d 1, 10 (D.D.C. 2012)). The agency can satisfy this obligation by providing "public 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*, 546 F.2d at 1013.

The 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*, 169 F.3d at 774–75 (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*, 565 F.3d at 861–62 (upholding the National Security Agency's use of the Glomar response to the plaintiffs' FOIA requests regarding past violence in Guatemala 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).

II. NSD and FBI Properly Refused to Confirm or Deny the Existence of Other Responsive Records Pursuant to Exemption One.

FOIA Exemption 1 exempts 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 No. 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," and "foreign relations or foreign activities of the United States. . . ." Exec. Order 13,526 §§ 1.4(c), (d); *see also Judicial Watch, Inc. v. DOD*, 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*, 830 F.2d at 217, and defer to the expertise of agencies involved in national security and foreign relations. *See Fitzgibbon*, 911 F.2d at 766; *see also Unrow Human Rights Impact Litig. Clinic*, 134 F. Supp. 3d at 272.

Defendants invoked their Glomar responses in order to safeguard currently and properly classified information involving categories of information set forth in Section 1.4 of Executive Order 13,526. *See* Hardy Decl. ¶¶ 20, 28-37; Weinsheimer Decl. ¶¶ 10-17. First, the existence

or non-existence of responsive records implicates "intelligence activities (including covert action), intelligence sources or methods, or cryptology." Exec. Order 13,526 §1.4(c). The supporting declarations establish that disclosing whether or not the defendant agencies possessed responsive records would disclose the existence or non-existence of surveillance records related to a particular individual or organization, including in the course of an ongoing national security investigation. *See* Hardy Decl. at ¶¶ 28, 33; Weinsheimer Decl. at ¶ 13. Moreover, during the date range specified by the request, NSD only maintains surveillance records pursuant to the Foreign Intelligence Surveillance Act. Weinsheimer Decl. ¶ 11. Surveillance authorized by the FISC under any of its authorities is itself an intelligence method, and its use in any particular matter thus "pertains to" an intelligence source or method. *Cf. Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013) (describing FISA authorities).

Second, the Hardy Declaration confirms that the existence or non-existence of responsive records implicates "foreign relations or foreign activities of the United States, including confidential sources." Exec. Order 13,526 § 1.4(d). Verifying whether or not the defendant agencies possessed responsive records would tend to reveal a specific type of counterintelligence activity with respect to one or more foreign governments. Hardy Decl. ¶¶ 19, 34-37.

The supporting declarations demonstrate that confirming whether or not Defendants possessed responsive records reasonably could be expected to cause damage to the national security of the United States by disclosing the existence or non-existence of intelligence sources and methods. *See* Hardy Decl. at ¶ 20, 30-33; Weinsheimer Decl. at ¶¶ 13-14. As explained in the Hardy Declaration, "acknowledging the existence or non-existence of records responsive to Plaintiffs' request would be tantamount to confirming whether or not the FBI has relied on a particular intelligence activity or method targeted at particular individuals or organizations" and

"would reveal otherwise non-public information regarding the nature of the FBI's intelligence interests, priorities, activities, and methods—information that is highly desired by hostile actors who seek to thwart the FBI's intelligence-gathering mission." Hardy Decl. ¶ 33. "Once an intelligence activity or method – or the fact of its use or non-use in a certain situation – is discovered, its continued successful use is seriously jeopardized." Hardy Decl. ¶ 31; *see* Weinsheimer Decl. ¶¶ 5, 14-17. Moreover, U.S. adversaries review publicly available information to deduce intelligence methods, catalogue information, and take countermeasures, and disclosure of the existence or non-existence of responsive records would reasonably be expected to harm national security. *See* Hardy Decl. ¶ 32.

Further, the Hardy Declaration establishes that confirming the existence or non-existence of responsive documents would reveal information about the United States Government's foreign relations, the disclosure of which could cause damage to national security. Hardy Decl. ¶¶ 34-37. Such disclosure could "weaken, or even sever, the relationship between the United States and its foreign partners (present and future), thus degrading the Government's ability to combat hostile threats abroad," and "any confirmation of records could be interpreted by some to mean that certain foreign liaison partners were involved in espionage against the United States, which could have political implications in those and other countries and also make them less willing to cooperate with the U.S. Government in the future." *Id.*[3]

The Government routinely makes a Glomar response to similar requests for information about particular surveillance subjects, and Courts routinely uphold such responses. *See, e.g.*, *Marrera v. DOJ*, 622 F. Supp. 51, 53–54 (D.D.C. 1985) ("[T]his Court finds that OIPR's refusal

[3] To the extent possible on the public record, the declarations explain the harm to national security that would result from disclosure of the properly classified information at issue here. If the Court finds that explanation inadequate, Defendants could offer further explanation *ex parte* and *in camera*.

to confirm or deny the existence of FISA records pertaining to this particular plaintiff to be justified in the interests of national security as part of an overall policy of [the Executive Order] with respect to all FISA FOIA requests."); *Schwarz v. Dep't of Treasury*, 131 F. Supp. 2d 142, 149 (D.D.C. 2000) ("The Office properly refused to confirm or deny that it had any responsive records maintained under the Foreign Intelligence Surveillance Act of 1978 (FISA) and in non-FISA files relating to various intelligence techniques."), aff'd, No. 00-5453, 2001 WL 674636 (D.C. Cir. May 10, 2001); *Competitive Enter. Inst. v. NSA*, 78 F. Supp. 3d 45, 60 (D.D.C. 2015) (upholding NSA Glomar response to request for metadata records with respect to two particular individuals); *Agility Pub. Warehousing Co. K.S.C. v. NSA*, 113 F. Supp. 3d 313, 329 (D.D.C. 2015) (upholding NSA Glomar in response to request for particular surveillance records); s*ee also Wilner*, 592 F.3d at 65 ("Glomar responses are available, when appropriate, to agencies when responding to FOIA requests for information obtained under a publicly acknowledged intelligence program, such as the TSP, at least when the existence of such information has not already been publicly disclosed.").

Accordingly, the Glomar response was proper under Exemption One.

III. The Glomar Response Was Proper Under Exemption Three and the National Security Act.

FOIA Exemption 3 exempts from disclosure records that are "specifically exempted from disclosure by [another] statute" if the relevant statute "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)(A). The Government's mandate to withhold information under FOIA Exemption 3 is broader than its authority under FOIA Exemption 1, as it does not have to demonstrate that the disclosure will harm national security. *See Sims*, 471 U.S. at 167; *Gardels*, 689 F.2d at 1106–07.

Instead, "the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within the statute's coverage. It is particularly important to protect intelligence sources and methods from public disclosure." *Morley v. CIA*, 508 F.3d 1108, 1126 (D.C. Cir. 2007). In analyzing the propriety of a withholding made pursuant to FOIA Exemption 3, the Court need not examine "the detailed factual contents of specific documents[.]" *Id.*

Defendant FBI invokes Section 102A(i)(1) of the National Security Act of 1947, as amended (now codified at 50 U.S.C. § 3024(i)(1)) ("NSA"), which requires the Director of National Intelligence to "protect intelligence sources and methods from unauthorized disclosure."[4] It is well-established that Section 102A qualifies as a withholding statute for the purposes of FOIA Exemption 3. *See, e.g.*, *ACLU v. DOD*, 628 F.3d at 619. In fact, the Supreme Court has recognized the "wide-ranging authority" provided by the NSA to protect intelligence sources and methods. *See Sims*, 471 U.S. at 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 has shown that responding to a FOIA request "could reasonably be expected to lead to unauthorized disclosure of intelligence sources and methods"). The NSA has been properly invoked to withhold information about FISA and other surveillance techniques. *See, e.g., Agility Pub. Warehousing Co. K.S.C.*, 113 F. Supp. 3d at 329

The Hardy Declaration attests that Defendants have properly invoked the Glomar response to protect classified information under the NSA and FOIA Exemption 3. *See* Hardy Decl. at ¶¶ 38-40. For the reasons discussed above with regard to Exemption 1, confirming the existence or non-existence of responsive records could divulge information about the existence

[4] The courts have recognized that not just the Director of National Intelligence, but also other agencies may rely upon the amended NSA to withhold records under FOIA. *See, e.g., Larson*, 565 F.3d at 862–63, 865; *Talbot v. CIA*, 578 F. Supp. 2d 24, 28–29 n.3 (D.D.C. 2008).

or non-existence of intelligence sources and methods protected from disclosure under the NSA. *Id.* ¶¶ 33, 39-40. Indeed, the declaration explains that a substantive response to Plaintiffs' request could reveal whether or not the United States Government has intelligence sharing relationships with foreign liaison partners. *See id.* ¶ 37. Accordingly, the FBI has demonstrated the appropriateness of the Glomar response under FOIA Exemption 3.

IV. The Glomar Response Was Proper Under Exemption 7(A).

FOIA Exemption 7 protects from disclosure all "records or information compiled for law enforcement purposes" that could reasonably be expected to cause one of the six harms outlined in the Exemption's subparts. 5 U.S.C. § 552(b)(7). "To fall within any of the exemptions under the umbrella of Exemption 7, a record must have been 'compiled for law enforcement purposes.'" *Pub. Emps. for Envtl. Responsibility v. U.S. Section, Int'l Boundary & Water Comm'n, U.S.-Mexico*, 740 F.3d 195, 202 (D.C. Cir. 2014) (quoting 5 U.S.C. § 552(b)(7)). "According to the Supreme Court, the term 'compiled' in Exemption 7 requires that information be created, gathered, or used by an agency for law enforcement purposes at some time before the agency invokes the exemption." *Id*. at 203.

Exemption 7(A) "exempts from disclosure 'records or information compiled for law enforcement purposes . . . to the extent that the production of [the] records or information . . . could reasonably be expected to interfere with enforcement proceedings.'" *Citizens for Responsibility & Ethics in Wash. v. DOJ*, 746 F.3d 1082, 1096 (D.C. Cir. 2014) (hereinafter "*CREW*") (quoting 5 U.S.C. § 552(b)(7)(A)). "Exemption 7(A) reflects the Congress's recognition that 'law enforcement agencies ha[ve] legitimate needs to keep certain records confidential, lest the agencies be hindered in their investigations or placed at a disadvantage when it [comes] time to present their case.'" *Id.* (quoting *NLRB v. Robbins Tire & Rubber Co.*,

437 U.S. 214, 224 (1978)). "To justify withholding, [an agency] must therefore demonstrate that 'disclosure (1) could reasonably be expected to interfere with (2) enforcement proceedings that are (3) pending or reasonably anticipated.'" *Id.* (quoting *Mapother v. DOJ*, 3 F.3d 1533, 1540 (D.C. Cir. 1993)).

An ongoing investigation typically triggers Exemption 7(A). *See CREW*, 746 F.3d at 1098 (quoting *Juarez v. Dep't of Justice*, 518 F.3d 54, 59 (D.C. Cir. 2008)). "In the typical case," therefore, "the requested records relate to a specific individual or entity that is the subject of the ongoing investigation, making the likelihood of interference readily apparent." *Id.*

Here, the Hardy Declaration justifies the FBI's use of Exemption 7(A) to protect the currently undisclosed fact of the existence or non-existence of investigative records that would be responsive to Plaintiff's requests. As an initial matter, FBI records related to surveillance are plainly compiled for law enforcement purposes. As the Hardy Declaration establishes, the "only circumstance under which the FBI can request – and the Department of Justice can and would seek on the FBI's behalf – a FISA, Title III, or other surveillance order is when the FBI is conducting an authorized, predicated investigation within the scope of its law enforcement and, with respect to FISA, its foreign intelligence responsibilities. Hardy Decl. ¶ 43. Accordingly, surveillance records – when they exist – are records compiled for law enforcement purposes.

Additionally, the information requested purportedly relates to an ongoing investigation because, as discussed above, there is a publicly acknowledged investigation into Russian interference in the election. Hardy Decl. ¶ 46. Any sort of investigation involving such surveillance records would be the sort of active investigation protected by Exemption 7(A). *See, e.g., People for the Ethical Treatment of Animals v. NIH*, 745 F.3d 535, 541 (D.C. Cir. 2014) (Exemption 7's threshold requirement satisfied in a *Glomar* response case because FOIA

requester did not dispute that "any responsive documents," if they existed, "would constitute records or information compiled for law enforcement purposes").

The Hardy Declaration further describes the harm to an investigation that may result:

> Confirming or denying the existence or non-existence of responsive records would reveal non-public information about the focus, scope, and conduct of that investigation. Specifically, it would reveal whether or not specific investigative techniques have been used; when and to what extent they were used, if they were; their relative value or benefit if they were used; and the targets they were used against, if any. None of this information about the Russian interference investigation has been publicly disclosed and prematurely disclosing it here would give targets and others intent on interfering with the FBI's investigative efforts the information necessary to: take defensive actions to conceal criminal activities; develop and implement countermeasures to elude detection; suppress, destroy, or fabricate evidence; and identify potential witnesses or sources, exposing them to harassment, intimidation, coercion, and/or physical threats. Accordingly, to the extent that Plaintiff's request seeks records in relation to this investigation, confirming or denying the existence or non-existence of responsive records could reasonably be expected to adversely affect it.

Hardy Decl. ¶ 47. Moreover, to the extent the request implicates some investigation other than that alleged by Plaintiffs, revealing such an investigation prematurely would cause the same type of harm. *Id*. ¶ 48. Accordingly, a Glomar response is available under these circumstances to protect the integrity of confidential law-enforcement investigations, and to therefore prevent harm cognizable by FOIA Exemption 7(A). *See, e.g.*, *Cozen O'Connor v. Dep't of Treasury*, 570 F. Supp. 2d 749, 788 (E.D. Pa. 2008); *see also CREW*, 746 F.3d at 1096 ("Exemption 7(A) reflects the Congress's recognition that 'law enforcement agencies ha[ve] legitimate needs to keep certain records confidential, lest the agencies be hindered in their investigations or placed at a disadvantage when it [comes] time to present their case.'" (quoting *Robbins Tire*, 437 U.S. at 224)).

For these reasons, the FBI's Glomar response is justified by Exemption 7(A).

V. The Glomar Response Was Proper Under Exemption 7(E)

Exemption 7(E) authorizes withholding of information compiled for law enforcement purposes if release of the 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). Congress intended that Exemption 7(E) protect law enforcement techniques and procedures from disclosure, as well as techniques and procedures used in all manner of investigations after crimes or other incidents have occurred. *See, e.g.*, *PHE, Inc. v. DOJ*, 983 F.2d 248, 250–51 (D.C. Cir. 1993). "[T]he exemption is written in broad and general terms" to avoid assisting lawbreakers. *Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1193 (D.C. Cir. 2009).

The terms of the statute provide that, to withhold records that would reveal law enforcement "guidelines," an agency must show that "disclosure could reasonably be expected to risk circumvention of the law." It is not clear whether this requirement also applies to withholding of records that would reveal "techniques and procedures." *See CREW*, 746 F.3d at 1102 n.8. However, the D.C. Circuit has stressed that the risk-of-circumvention requirement sets a "low bar." *Blackwell v. FBI*, 646 F.3d 37, 42 (D.C. Cir. 2011); *accord Gosen v. USCIS*, 75 F. Supp. 3d 279, 291 (D.D.C. 2014) (describing the risk-of-circumvention requirement as a "low bar"). Given the low threshold for meeting the risk-of-circumvention requirement, and given that disclosure of law enforcement techniques and procedures usually has obvious potential to create a risk of circumvention, it generally makes little practical difference whether the risk-of-circumvention requirement applies to all of Exemption 7(E) or only the part dealing with

"guidelines." *See Pub. Emps. for Envtl. Responsibility*, 740 F.3d at 204 n.4. In any event, FBI's Glomar response under Exemption 7(E) meets the requirement if it applies.

Here, the Hardy Declaration establishes that disclosure of existence or non-existence of responsive records would reveal a law enforcement technique or procedure. "How the FBI applies its investigative resources (or not) against a particular allegation, report of criminal activity, or perceived threat is itself a law enforcement technique or procedure that the FBI protects." Hardy Decl. ¶ 51. Such an acknowledgment of the existence or non-existence of responsive records would reveal when and under what circumstances the FBI relies upon these authorized law enforcement techniques (*i.e.*, FISA, Title III, or other authorized surveillance) in an investigation against particular targets in an investigation, and provide pieces of information that adversaries could use to ascertain at what point, and against whom we might use particular techniques. Hardy Decl. ¶¶ 51-52. Adversaries could glean significant "insight into the activities likely to attract – or not attract – the FBI's law enforcement attention. These individuals would then be able alter their behavior to avoid attention by law enforcement, making it more difficult for the FBI to be proactive in assessing threats and investigating crimes." *Id*. Accordingly, the FBI properly invoked Exemption 7(E).

VI. Defendants Have Not Officially Acknowledged the Existence or Non-Existence of Responsive Records

As a general matter, under FOIA, "when an agency has officially acknowledged otherwise exempt information through prior disclosure, the agency has waived its right to claim an exemption with respect to that information." *ACLU v. CIA*, 710 F.3d 422, 426 (D.C. Cir. 2013). This "official acknowledgement" principle applies to the Glomar context, so a requester "can overcome a Glomar response by showing that the agency has already disclosed the fact of the existence (or non-existence) of responsive records, since that is the purportedly exempt

information that a Glomar response is designed to protect." *Id.* at 427. But the plaintiff "must bear the initial burden of pointing to specific information in the public domain that appears to duplicate that being withheld." *Id.* (quoting *Wolf*, 473 F.3d at 378).

The D.C. Circuit has narrowly construed the "official acknowledgment" doctrine, however, and to bring such a challenge plaintiff must satisfy three stringent criteria, none of which are satisfied here. "First, the information requested must be as specific as the information previously released." *Wolf*, 473 F.3d at 378 (quoting *Fitzgibbon*, 911 F.2d at 765). "Prior disclosure of similar information does not suffice; instead, the *specific* information sought by the plaintiff must already be in the public domain by official disclosure. This insistence on exactitude [by the D.C. Circuit] recognizes 'the Government's vital interest in information relating to national security and foreign affairs." *Id.* (quoting *Pub. Citizen v. Dep't of State*, 11 F.3d 198, 203 (D.C. Cir. 1993); *Competitive Enter. Inst.*, 78 F. Supp. 3d at 54 ("Plaintiffs in this case must therefore point to specific information in the public domain establishing that the NSA has [the claimed information.]"). The information already released must also be of the same level of generality as the information sought—broadly crafted disclosures, even on the same general topic, do not waive the Glomar response. *See, e.g.*, *Afshar*, 702 F.2d at 1133 (previous disclosure that plaintiff had "'created a problem' in U.S.-Iranian relations" was too general to justify releasing documents detailing the nature of that problem).

"Second, the information requested must match the information previously disclosed." *Wolf*, 473 F.3d at 378 (quoting *Fitzgibbon*, 911 F.2d at 765). If there are "substantive differences" between the two, an official-acknowledgment claim must fail. *ACLU v. DOD*, 628 F.3d at 621. That is true even if the previous disclosures are on the same topic. *See, e.g.*, *Competitive Enter. Inst.*, 78 F. Supp. 3d at 57 (a Presidential statement that "the intelligence

community . . . is looking at phone numbers and durations of calls," was not adequately congruent with a request seeking the companies that had provided that data to U.S. intelligence agencies); *Wolf*, 473 F.3d at 379 (holding that CIA could not claim Glomar protection when it had previously read excerpts from materials sought into the record during congressional hearing).

"Third, . . . the information requested must already have been made public through an official and documented disclosure." *Id.* at 378 (quoting *Fitzgibbon*, 911 F.2d at 765). Key to this element is that the source must be *official*; non-governmental releases, or anonymous leaks by government officials or former government officials do not qualify. *See, e.g.*, *ACLU v. DOD*, 628 F.3d at 621-22; *Agility Public Warehousing Co. K.S.C.*, 113 F. Supp. 3d at 330 n.8; *Competitive Enter. Inst.*, 78 F. Supp. 3d at 55. In other words, "mere public speculation, no matter how widespread," cannot undermine the agency's Glomar prerogative. *Wolf*, 473 F.3d at 378. And Congressional statements also cannot waive Executive Branch classification or other Exemptions. *See Military Audit Project v. Casey*, 656 F.2d 724, 742-745 (D.C. Cir. 1981); *see also Moore v. CIA*, 666 F.3d 1330, 1333 n.4 (D.C. Cir. 2011) ("[W]e do not deem 'official' a disclosure made by someone other than the agency from which the information is being sought.")

Plaintiffs cannot meet their burden of pointing to an official disclosure of the information they seek. The Hardy Declaration and the Weinsheimer Declaration establish that no authorized government official has disclosed the precise information withheld. *See* Hardy Decl. ¶ 19; Weinsheimer Decl. ¶ 18. The Complaint cites a number of public statements that Plaintiff alleges constitute official acknowledgement of properly classified facts. *See* Compl. ¶¶ 9-11,

ECF No. 1. But these cited public statements do not come close to meeting the standard for official acknowledgement of the information sought by Plaintiff.

Primarily, Plaintiffs appear to rely on President Trump's four-part post on Twitter on March 4, 2017 quoted above. This series of tweets contains several allegations regarding wiretapping, including that (1) his phones were tapped; (2) at Trump Tower; (3) in October just prior to the election; (4) on the orders of President Obama; and (5) that such actions were comparable to "Nixon/Watergate." Nowhere do these tweets mention FISA, the FISC, any targets other than President Trump, or the involvement of DOJ or FBI. Moreover, the statements are limited to a particular time, a particular target, and a particular place, in contrast to Plaintiff's FOIA request. Thus, the statements are narrower and do not match the information sought in this FOIA request.

The follow-up statements by Mr. Comey as cited in the complaint also do not impair the Glomar response here. Compl. ¶¶ 10-11. FBI Director James Comey stated that "With respect to the president's tweets about alleged wiretapping directed at him by the prior administration, I have no information that supports those tweets and we have looked carefully inside the FBI. The Department of Justice has asked me to share with you that the answer is the same for the Department of Justice and all its components." Hardy Decl. ¶ 13.[5] Accordingly, to the extent Plaintiff is seeking records that former Director Comey stated do not exist, Defendants have again confirmed that such records do not exist at NSD or FBI.

[5] Former Director Comey also testified about the need for continued secrecy in his March 20th testimony before HPSCI, where he discussed why the FBI does not confirm or refute unsourced media reports. *See* Transcript of the House Permanent Select Committee on Intelligence Hearing on Russian Interference in the 2016 U.S. Election, March 20, 2017 (question and answer exchanges between former Director Comey and Representative Trey Gowdy).

As described above, the Glomar response remains appropriate for the broader category of surveillance records sought by Plaintiff. The Government has not generally confirmed or denied the use of particular electronic surveillance techniques pertaining to particular individuals or organizations, particularly those allegedly related to ongoing national security investigations. This information is currently and properly classified, and otherwise exempt, and the Government's previous confirmation that a limited subset of such documents do not exist does not waive the proper Glomar response.

VI. The No-Records Response to the Request for Processing Records Is Appropriate.

As noted above, the original request sought FOIA processing records from NSD and FBI. *See* Hardy Decl., Ex. A; Weinsheimer Decl., Ex. A. However, under long-standing DOJ policy, a search for records extends up to the date on which a search begins. *See* 28 C.F.R. § 16.4(a) ("In determining which records are responsive to a request, a component ordinarily will include only records in its possession as of the date it begins its search."). However, alternate cut-off dates are permissible. *Id.* Here, no search was conducted with respect to the broad wiretap request, so the agencies used the date on which they began working on the request as the alternate cut-off date. Because, logically, they did not start to create records about the processing of this request until the day it started working on the request, no responsive records existed as of the cut-off date for responsive records in this case.[6] Hardy Decl. ¶¶ 54-55; Weinsheimer Decl. ¶ 19. Accordingly, NSD and FBI reasonably determined that no records would exist in those components.

[6] FBI also reviewed its FOIA Document Processing System (FDPS) to ensure that no processing records pre-dating the cut-off date existed in the system, and confirmed that no such records exist. Hardy Decl. ¶ 55.

Multiple courts in this district have examined the question of whether DOJ's search cut-off dates are reasonable, and "a date-of-search cut-off has routinely been found to be reasonable." *See McClanahan v. DOJ*, 204 F. Supp. 3d 30, 47 (D.D.C. 2016) (collecting cases). The purpose of such rules is to avoid "an endless cycle of judicially mandated reprocessing." *Bonner v. Dep't of State*, 928 F.2d 1148, 1152 (D.C. Cir. 1991); *see also Edmonds Inst. v. Dep't of Interior*, 383 F. Supp. 2d 105, 111 (D.D.C. 2005) ("The D.C. Circuit has all but endorsed the use of date-of-search as the cut-off date for FOIA requests. . . . Under the date-of-search approach, Edmonds can, with relative ease, file a second FOIA request for documents created since December 31, 2002.").

Here, the agencies reasonably determined that no responsive records exist as of the reasonable search cut-off date.

CONCLUSION

For the foregoing reasons, the Court should grant the Defendants' Motion for Summary Judgment.

Dated: September 1, 2017

Respectfully Submitted,

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CERTIFICATION OF SERVICE

I hereby certify that the foregoing document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants by First Class Mail or Federal Express, on the 1st of September, 2017.

/s/Amy E. Powell
AMY POWELL
September 1, 2017

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

AMERICAN OVERSIGHT,
1030 15th Street NW, B255
Washington, DC 20005
Plaintiff,

v.

U.S. DEPARTMENT OF JUSTICE,
950 Pennsylvania Avenue NW
Washington, DC 20530

and

FEDERAL BUREAU OF INVESTIGATION,
935 Pennsylvania Avenue NW
Washington, DC 20535
Defendants.

Civil Action No. 17-CV-718

DECLARATION OF G. BRADLEY WEINSHEIMER

I, G. BRADLEY WEINSHEIMER, declare as follows:

1. I am the Acting Chief of Staff and the Director of Risk Management and Strategy for the National Security Division ("NSD") of the United States Department of Justice ("DOJ" or "Department"). NSD is a component of the Department which formally began operations on October 2, 2006, by consolidating the resources of the Office of Intelligence Policy and Review ("OIPR")[1] and the Criminal Division's Counterterrorism Section ("CTS") and Counterespionage Section (now known as the Counterintelligence and Export Control Section "CES"). I have served as Director of Risk Management and Strategy since March 2016, prior to which time I served as the Deputy Counsel in the DOJ's Office of Professional Responsibility from June 2011

[1] OIPR is now known as the Office of Intelligence ("OI").

until March 2016, and as an Assistant U.S. Attorney in the District of Columbia from June 1991 until June 2011.

2. Among other responsibilities, in my capacity as the Director of Risk Management and Strategy, I supervise the Freedom of Information ("FOIA") and Declassification Unit ("NSD FOIA"), which is responsible for responding to requests for access to NSD records and information pursuant to the FOIA, 5 U.S.C. § 552 and the Privacy Act of 1974. I currently serve as the acting Director of NSD FOIA. Through the exercise of my official duties, I have become familiar with this action and the underlying FOIA requests. The statements contained in this declaration are based upon my personal knowledge and information provided to me in the course of my official duties.

3. In addition, I have TOP SECRET original classification authority delegated to me by the Attorney General of the United States pursuant to Section 1.3(c) of Executive Order 13526. Therefore, I am authorized to conduct classification reviews and to make original classification and declassification decisions up to the TOP SECRET level. Through the exercise of my official duties, I have become familiar with this civil action and the underlying FOIA request. I make the following statements based upon my personal knowledge and information made available to me in the course of performing my official duties.

4. In a letter dated March 20, 2017, plaintiff, American Oversight stated, "the President of the United States, Donald Trump, asserted that the former President, Barack Obama, had placed wiretaps on Mr. Trump and entities or associates in Trump Tower for improper purposes during the course of the 2016 presidential campaign." Plaintiffs then requested the following:

(1) All warrant applications or other records requesting a court to institute an intercept of telecommunications or a pen register trap and trace on electronic communications or

telecommunications in connection with presidential candidate Donald Trump, Trump Tower (located at 725 5th Avenue, New York, NY), entities housed in Trump Tower, or any person affiliated with Mr. Trump's campaign, whether paid or unpaid, between June 16, 2015, and the present, whether under the authority of the Foreign Intelligence Surveillance Act; Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended; or other authority.

(2) Any court order or other document providing authority to institute or maintain such a requested wiretap, intercept, or pen register.

(3) Any court order or other document rejecting such an application or request for authority for a wiretap, intercept, or pen register.

(4) Any records logging or listing any such wiretaps, intercepts, or pen registers.

(5) All communications, documents, or other material exchanged between DOJ or the FBI and Congress, or briefing papers or talking points prepared for congressional briefings, regarding the wiretaps, intercepts, or pen registers discussed, or records described, in Items 1-4, *supra*.

This request was assigned NSD FOI/PA #17-116. A copy of this request is attached as Exhibit A.

5. In an email dated, April 3, 2017, NSD FOIA issued a "Glomar response" by stating that it does not search for records in response to requests regarding the use or non-use of certain foreign intelligence gathering techniques in which the confirmation or denial of the existence of responsive records would, in and of itself, reveal information properly classified under Executive Order 13526. A copy of this April 3, 2017, email is attached as Exhibit B. Plaintiffs appealed NSD's determination to the Department of Justice's Office of Information Policy ("OIP") on April 12, 2017. A copy of this letter is attached as Exhibit C. OIP affirmed NSD's determination in a letter dated April 13, 2017. A copy of this determination is attached as Exhibit D. Plaintiffs filed this lawsuit on April 19, 2017.

6. On March 4, 2017, President Trump made a four-part post on Twitter, alleging that President Obama "had my 'wires tapped' in Trump Tower just before the victory." During sworn testimony before the House Permanent Selection Committee on Intelligence ("HPSCI")

on March 20, 2017, then FBI Director James B. Comey was asked about this by Congressman Schiff and responded:

> With respect to the President's tweets about alleged wiretapping directed at him by the prior administration, I have no information that supports those tweets and we have looked carefully inside the FBI. The Department of Justice has asked me to share with you that the answer is the same for the Department of Justice and all its components. The Department has no information that supports those tweets.

See Transcript of the House Permanent Select Committee on Intelligence Hearing on Russian Interference in the 2016 U.S. Election, March 20, 2017.

https://www.washingtonpost.com/news/post-politics/wp/2017/03/20/full-transcript-fbi-director-james-comey-testifies-on-russian-interference-in-2016-election/?utm_term=.b9f19a0cf9cf

(last accessed 6/12/2017).

7. Other than this public statement by then-Director Comey addressing this specific assertion by the President, neither the FBI nor DOJ have publicly commented on or acknowledged the existence or non-existence of any FISA, Title III, or other wiretaps "in connection with presidential candidate Donald Trump, Trump Tower (located at 725 5th Avenue, New York, NY), entities housed in Trump Tower, or any person affiliated with Mr. Trump's campaign, whether paid or unpaid, between June 16, 2015, and the present."

8. As the preceding demonstrates, the Department of Justice – including NSD – has no records responsive to Plaintiff's request inasmuch as it seeks records of alleged wiretapping of then-Candidate Trump in Trump Tower by President Obama prior to the election, as referenced in the March 4, 2017, tweet. *See id.*

9. Plaintiff's request, however, is broader than the subject of the March 4, 2017, tweet. As to whether any other records exist that are responsive to those portions of Plaintiff's FOIA request that do not pertain to the President's March 4, 2017, tweet, NSD can neither confirm nor deny the existence or non-existence of such responsive records, as explained below.

10. FOIA Exemption (b)(1) protects records that are: "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). Executive Order 13526 § 1.1(a) provides that information may be classified under the terms of this order only if all of the following conditions are met: (1) an original classification authority is classifying the information; (2) the information is owned by, produced by or for, or is under the control of the U.S. Government; (3) the information falls within one or more of the categories of information listed in § 1.4 of Executive Order 13526; and (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in some level of damage to the national security, and the original classification authority is able to identify or describe the damage. Executive Order 13526 further states that, in response to a FOIA request, "[a]n 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 under this order or its predecessors." Exec. Order 13526, § 3.6(a).

11. A substantive response from NSD would necessarily reveal the existence or non-existence of responsive FISA-related records. This is because in general NSD does not maintain records of other types of wiretaps. NSD's only wiretap–related records for the specified date range in the request are FISA-related materials. NSD's criminal litigating units consist of CES and CTS. CES does not maintain records of wiretaps acquired pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended ("Title III"). CTS does not maintain records of any recent Title III wiretaps. All Title III wiretap applications are drafted and sought by other components within the Department of Justice.

12. Pursuant to Exemption 1 of FOIA and Executive Order 13526, absent highly unusual circumstances, NSD generally does not confirm or deny the existence of records regarding any particular individual alleged to be pertinent to operational FISA work. Pursuant to the Department of Justice, National Security Information, Security Classification Guide (July 2012), the fact that a FISA application was applied for or used in a particular case is classified national security information, as is identification of specific individuals or organizations who are subjects of a national security investigation making use of a FISA warrant.

13. Here, to disclose the existence or nonexistence of responsive documents in NSD files would disclose whether or not particular individuals were pertinent to FISA applications and warrants, thus disclosing information pertaining to intelligence sources and methods under E.O. 13526 § 1.4(c)[2].

14. Such disclosure would cause harm to national security because it permits hostile intelligence services to use FOIA to acquire information about U.S. 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 or impossible.

15. Furthermore, information disclosed in response to a FOIA request becomes public information. Intelligence organizations and other adversaries are expert at acquiring and analyzing information in the public domain. Thus, information given to one FOIA requester will be available to subsequent requesters and to foreign powers and their intelligence services. If NSD were to indicate that it maintains responsive information, these responses would provide trained intelligence analysts with individual pieces of information that could be compiled into a

[2] Pursuant to Executive Order § 1.7(a), this information 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.

catalogue of FISA activities. Intelligence services and other adversaries could use these disclosures to discover which intelligence agents operating in this country were known to the U.S. Government and which were not. This information could be used to deploy counterintelligence assets against the U.S. Government and impair U.S. intelligence collection.

16. Conversely, revealing the absence of responsive records pertaining to particular individuals would tend to indicate that persons within the scope of the request were not pertinent to the approval of FISA applications. That fact could be extremely valuable to foreign powers and hostile intelligence services who could use it to carry out intelligence activities with the knowledge that the United States Government is not monitoring certain people and may not even suspect them.

17. As a result, the best way for NSD to protect critical intelligence information and minimize the harm to national security for the Government is to assert a Glomar response to requests for information pertaining to operational FISA work. To be credible and effective, the NSD must use the Glomar response consistently in all cases where the existence or nonexistence of records responsive to a FOIA request is a classified fact, as it is here, including instances in which NSD does not possess records responsive to a particular request. If NSD were to invoke a Glomar response only when it actually possessed responsive records, the Glomar response would be interpreted as an admission that responsive records exist. This practice would reveal the very information that NSD must protect in the interest of national security. If NSD were to possess responsive records and acknowledged that, such an admission would provide hostile foreign powers with access to additional, operationally valuable information about hypothetical U.S. intelligence investigations and allow those powers to subvert those same hypothetical investigations. Further, if NSD does not possess responsive records and informed the public of

that fact, hostile foreign powers could use that fact to carry out activities against the United States with the knowledge the Government is not surveilling certain people.

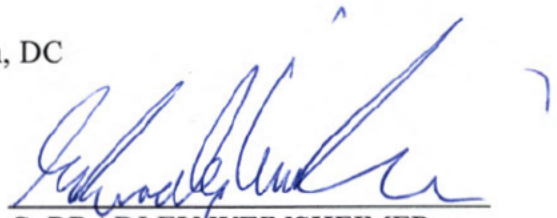
18. I have reviewed the Complaint, which quotes public statements made by President Donald J. Trump and former FBI Director James Comey. These statements do not alter NSD's decision to neither confirm nor deny whether there are records responsive to those portions of the request that do not pertain to President Trump's March 4, 2017, tweets. To my knowledge, no authorized Executive Branch official has officially disclosed such information, and its disclosure is reasonably expected to harm national security.

19. Finally, Plaintiff requested records relating to the processing of this FOIA request and in particular records about NSD's search for records responsive to Plaintiff's wiretap request; in other words, records that did not exist at the time of Plaintiff's request and that exist only because of its request. The normal cut-off date for responsive records for FOIA requests is the date on which searches were initiated. See 28 C.F.R. § 16.4(a) ("In determining which records are responsive to a request, a component ordinarily will include only records in its possession as of the date it begins its search."). However, alternate cut-off dates are permissible. *Id.* Here, no search was conducted with respect to this request, so NSD used the date on which it began working on its response to this request – March 20, 2017 – as the alternate cut-off date. Because NSD did not start to create records about the processing of this request until the day it started working on the request, no responsive records existed or were in the possession of NSD as of the cut-off date for responsive records in this case.

CONCLUSION

I certify, pursuant to 28 U.S.C. § 1746, under penalty of perjury that the foregoing is true and correct.

Executed this 31st day of August 2017, Washington, DC



G. BRADLEY WEINSHEIMER

Exhibit A

AMERICAN OVERSIGHT

March 20, 2017

VIA ELECTRONIC MAIL AND ELECTRONIC SUBMISSION PORTAL

David M. Hardy, Chief
Record/Information Dissemination Section
Records Management Division
Federal Bureau of Investigation
Department of Justice
170 Marcel Drive
Winchester, VA 22602-4843
Online Request via https://efoia.fbi.gov

Arnetta Mallory
FOIA Initiatives Coordinator
National Security Division
Department of Justice
Room 6150, 950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001
Email: nsdfoia@usdoj.gov

Amanda M. Jones
Acting Chief, FOIA/PA Unit
Criminal Division
Department of Justice
Suite 1127, Keeney Building
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001
Email: crm.foia@usdoj.gov

Re: Expedited Freedom of Information Act Request

Dear Mr. Hardy, Ms. Mallory & Ms. Jones:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.*, and Department of Justice (DOJ) implementing regulations, 28 C.F.R. Part 16, American Oversight makes the following request for records.

On March 4, 2017, the President of the United States, Donald Trump, asserted that the former President, Barack Obama, had placed wiretaps on Mr. Trump and entities or associates in Trump Tower for improper purposes during the course of the 2016 presidential campaign. This

acknowledgement by the President that his campaign and associates had been subject to wiretapping, whether lawfully or unlawfully, raises significant questions about the conduct of both Mr. Obama and Mr. Trump and his associates. Mr. Trump questioned whether it was "legal for a sitting President to be 'wire tapping' a race for president prior to an election";[1] compared Mr. Obama's asserted role in the wiretapping to Nixon, Watergate, and McCarthyism;[2] and described Mr. Obama as a "Bad (or sick) guy!"[3] When asked about the basis for Mr. Trump's assertions, the White House stated, "He's the president of the United States. He has information and intelligence that the rest of us do not."[4] American Oversight is seeking records relating to the wiretapping that Mr. Trump has acknowledged occurred to inform the public about these important allegations.

Requested Records

American Oversight requests that DOJ produce the following within twenty business days and seeks expedited review of this request for the reasons identified below:

1. All warrant applications or other records requesting a court to institute an intercept of telecommunications or a pen register trap and trace on electronic communications or telecommunications in connection with presidential candidate Donald Trump, Trump Tower (located at 725 5th Avenue, New York, NY), entities housed in Trump Tower, or any person affiliated with Mr. Trump's campaign, whether paid or unpaid, between June 16, 2015, and the present, whether under the authority of the Foreign Intelligence Surveillance Act; Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended; or other authority.
2. Any court order or other document providing authority to institute or maintain such a requested wiretap, intercept, or pen register.
3. Any court order or other document rejecting such an application or request for authority for a wiretap, intercept, or pen register.
4. Any records logging or listing any such wiretaps, intercepts, or pen registers.
5. All communications, documents, or other material exchanged between DOJ or the FBI and Congress, or briefing papers or talking points prepared for congressional briefings,

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[1] Donald Trump (@realDonaldTrump), TWITTER (Mar. 4, 2017, 3:49 AM), https://twitter.com/realDonaldTrump/status/837993273679560704.
[2] Donald Trump (@realDonaldTrump), TWITTER (Mar. 4, 2017, 4:02 AM), https://twitter.com/realDonaldTrump/status/837996746236182529 (Nixon and Watergate); Donald Trump (@realDonaldTrump), TWITTER (Mar. 4, 2017, 3:35 AM), https://twitter.com/realDonaldTrump/status/837989835818287106 (McCarthyism).
[3] Donald Trump (@realDonaldTrump), TWITTER (Mar. 4, 2017, 4:02 AM), https://twitter.com/realDonaldTrump/status/837996746236182529.
[4] *White House Officials Stand By Trump Wiretapping Claim*, FoxNews.com, Mar. 6, 2017, http://www.foxnews.com/politics/2017/03/06/white-house-officials-stand-by-trump-wiretapping-claim.html.

regarding the wiretaps, intercepts, or pen registers discussed, or records described, in Items 1–4, *supra*.

Please provide all responsive records from June 1, 2015, to the date the search is conducted.

In addition to the records requested above, American Oversight also requests records describing the processing of this request, including records sufficient to identify search terms used and locations and custodians searched and any tracking sheets used to track the processing of this request. If your agency uses FOIA questionnaires or certifications completed by individual custodians or components to determine whether they possess responsive materials or to describe how they conducted searches, we also request any such records prepared in connection with the processing of this request.

In processing this request, please note that the President of the United States has officially acknowledged that the federal government instituted wiretaps on communications at Trump Tower. Specifically, the President stated that he "[j]ust found out that Obama had my 'wires tapped' in Trump Tower just before the victory. Nothing found."[5] The President further elaborated, "[i]s it legal for a sitting President to be 'wire tapping' a race for president prior to an election? Turned down by court earlier,";[6] "I'd bet a good lawyer could make a great case out of the fact that President Obama was tapping my phones in October, just prior to Election!";[7] and "How low has President Obama gone to tapp [sic] my phones during the very sacred election process."[8] In light of the official acknowledgement of these activities by the President, the government may not rely on exemptions permitting the withholding of material that is classified, protected by statute, or related to an ongoing law enforcement matter. If DOJ does rely on an exemption to withhold records, whether under Exemption 1 (classified information), Exemption 3 (statutorily protected information), Exemption 7 (law enforcement information); or any so-called "Glomar" response under *Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976), and its progeny, American Oversight will challenge those withholdings in court in light of the President's acknowledgment.

American Oversight seeks all responsive records regardless of format, medium, or physical characteristics. In conducting your search, please understand the terms "record," "document," and "information" in their broadest sense, to include any written, typed, recorded, graphic, printed, or audio material of any kind. We seek records of any kind, including electronic records, audiotapes, videotapes, and photographs, as well as letters, emails, facsimiles, telephone messages, voice mail

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[5] Donald Trump (@realDonaldTrump), TWITTER (Mar. 4, 2017, 3:35 AM), https://twitter.com/realDonaldTrump/status/837989835818287106.
[6] Donald Trump (@realDonaldTrump), TWITTER (Mar. 4, 2017, 3:49 AM), https://twitter.com/realDonaldTrump/status/837993273679560704.
[7] Donald Trump (@realDonaldTrump), TWITTER (Mar. 4, 2017, 3:52 AM), https://twitter.com/realdonaldtrump/status/837994257566863360.
[8] Donald Trump (@realDonaldTrump), TWITTER (Mar. 4, 2017, 4:02 AM), https://twitter.com/realDonaldTrump/status/837996746236182529.

messages and transcripts, notes, or minutes of any meetings, telephone conversations or discussions. Our request includes any attachments to these records. **No category of material should be omitted from search, collection, and production.**

Please search all records regarding agency business. **You may not exclude searches of files or emails in the personal custody of your officials, such as personal email accounts.** Records of official business conducted using unofficial systems or stored outside of official files is subject to the Federal Records Act and FOIA.[9] **It is not adequate to rely on policies and procedures that require officials to move such information to official systems within a certain period of time; American Oversight has a right to records contained in those files even if material has not yet been moved to official systems or if officials have, through negligence or willfulness, failed to meet their obligations.**[10]

In addition, please note that in conducting a "reasonable search" as required by law, you must employ the most up-to-date technologies and tools available, in addition to searches by individual custodians likely to have responsive information. Recent technology may have rendered DOJ's prior FOIA practices unreasonable. **In light of the government-wide requirements to manage information electronically by the end of 2016, it is no longer reasonable to rely exclusively on custodian-driven searches.**[11] **Furthermore, agencies that have adopted the National Archives and Records Agency (NARA) Capstone program, or similar policies, now maintain emails in a form that is reasonably likely to be more complete than individual custodians' files.** For example, a custodian may have deleted a responsive email from his or her email program, but DOJ's archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that DOJ use the most up-to-date technologies to search for responsive information and take steps to ensure that the most complete repositories of information are searched. American Oversight is available to work with you to craft appropriate search terms. **However, custodian searches are still**

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[9] *See Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145, 149–50 (D.C. Cir. 2016); *cf. Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 955–56 (D.C. Cir. 2016).

[10] *See Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016) ("The Government argues that because the agency had a policy requiring [the official] to forward all of his emails from his [personal] account to his business email, the [personal] account only contains duplicate agency records at best. Therefore, the Government claims that any hypothetical deletion of the [personal account] emails would still leave a copy of those records intact in [the official's] work email. However, policies are rarely followed to perfection by anyone. At this stage of the case, the Court cannot assume that each and every work related email in the [personal] account was duplicated in [the official's] work email account." (citations omitted)).

[11] Presidential Memorandum—Managing Government Records, 76 Fed. Reg. 75,423 (Nov. 28, 2011), *available at* https://obamawhitehouse.archives.gov/the-press-office/2011/11/28/presidential-memorandum-managing-government-records; Office of Mgmt. & Budget, Exec. Office of the President, Memorandum for the Heads of Executive Departments & Independent Agencies, "Managing Government Records Directive," M-12-18 (Aug. 24, 2012), *available at* https://www.archives.gov/files/records-mgmt/m-12-18.pdf.

required; agencies may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.

Under the FOIA Improvement Act of 2016, agencies must adopt a presumption of disclosure, withholding information "only if . . . disclosure would harm an interest protected by an exemption" or "disclosure is prohibited by law."[12] If it is your position that any portion of the requested records is exempt from disclosure, American Oversight requests that you provide an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). As you are aware, a *Vaughn* index must describe each document claimed as exempt with sufficient specificity "to permit a reasoned judgment as to whether the material is actually exempt under FOIA."[13] Moreover, the *Vaughn* index "must describe *each* document or portion thereof withheld, and for *each* withholding it must discuss the consequences of disclosing the sought-after information."[14] Further, "the withholding agency must supply 'a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.'"[15]

In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If it is your position that a document contains non-exempt segments, but that those non-exempt segments are so dispersed throughout the document as to make segregation impossible, please state what portion of the document is non-exempt, and how the material is dispersed throughout the document.[16] Claims of nonsegregability must be made with the same degree of detail as required for claims of exemptions in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

You should institute a preservation hold on information responsive to this request. American Oversight intends to pursue all legal avenues to enforce its right of access under FOIA, including litigation if necessary. Accordingly, DOJ is on notice that litigation is reasonably foreseeable.

To ensure that this request is properly construed, that searches are conducted in an adequate but efficient manner, and that extraneous costs are not incurred, American Oversight welcomes an opportunity to discuss its request with you before you undertake your search or incur search or duplication costs. By working together at the outset, American Oversight and the Department can decrease the likelihood of costly and time-consuming litigation in the future.

Where possible, please provide responsive material in electronic format by email or in PDF or TIF format on a USB drive. Please send any responsive material being sent by mail to American

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[12] FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).
[13] *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).
[14] *King v. U.S. Dep't of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).
[15] *Id.* at 224 (citing *Mead Data Central, Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977)).
[16] *Mead Data Central*, 566 F.2d at 261.

Oversight, 1030 15th Street, NW, Suite B255, Washington, DC 20005. If it will accelerate release of responsive records to American Oversight, please also provide responsive material on rolling basis.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 28 C.F.R. § 16.10(k), American Oversight requests a waiver of fees associated with processing this request for records. The subject of this request concerns the operations of the federal government, and the disclosures will likely contribute to a better understanding of relevant government procedures by the general public in a significant way. Moreover, the request is primarily and fundamentally for non-commercial purposes. 5 U.S.C. § 552(a)(4)(A)(iii).[17]

American Oversight requests a waiver of fees because disclosure of the requested information is "in the public interest because it is likely to contribute significantly to public understanding" of government operations and is not "primarily in the commercial interest of the requester."[18] The disclosure of the information sought under this request will document and reveal the operations of the federal government, including how public funds are spent and how officials conduct the public's business.

Allegations of Russian interference in the U.S. election and the Trump campaign's closeness to Russian officials has been the subject of significant media coverage. On August 27, 2016, then-Senate Minority Leader Harry Reid wrote to F.B.I. Director James Comey asking Mr. Comey to investigate evidence of planned tampering by the Russians.[19] Then on September 8, 2016, the same day that then-Senator Jeff Sessions reportedly held a one-on-one meeting with Russian Ambassador Sergey Kislyak, the *New York Times* published an article quoting Mr. Sessions in which Mr. Trump's campaign reaffirmed its embrace of Russian president Vladimir Putin.[20] More recently, a week prior to Mr. Trump's inauguration, reports surfaced that Michael T. Flynn, Mr. Trump's first National Security Advisor, spoke with Mr. Kislyak the day before the Obama administration imposed sanctions on Russia as retaliation for the election interference.[21]

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[17] *See, e.g.*, *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987).

[18] 5 U.S.C. § 552(a)(4)(A)(iii); 28 C.F.R. § 16.10(k).

[19] David E. Sanger, *Harry Reid Cites Evidence of Russian Tampering in U.S. Vote, and Seeks F.B.I. Inquiry*, N.Y. TIMES, Aug. 29, 2016, https://www.nytimes.com/2016/08/30/us/politics/harry-reid-russia-tampering-election-fbi.html.

[20] Jonathan Martin & Amy Chozick, *Donald Trump's Campaign Stands By Embrace of Putin*, N.Y. TIMES, Sept. 8, 2016, https://www.nytimes.com/2016/09/09/us/politics/hillary-clinton-donald-trump-putin.html.

[21] Julie Hirschfeld Davis et al., *Trump National Security Adviser Called Russian Envoy Day Before Sanctions Were Imposed*, N.Y. TIMES, Jan. 13, 2017, https://www.nytimes.com/2017/01/13/us/politics/donald-trump-transition.html.

On March 4, 2017, Mr. Trump asserted that former President Obama had placed wiretaps on Mr. Trump and entities in Trump Tower during the course of the 2016 presidential campaign for improper purposes. Mr. Trump questioned whether it was "legal for a sitting President to be 'wire tapping' a race for president prior to an election";[22] compared Mr. Obama's asserted role in the wiretapping to Nixon, Watergate, and McCarthyism;[23] and described Mr. Obama as a "Bad (or sick) guy!"[24] Disclosure of the requested information is in the public interest because it would inform the public regarding these very serious allegations about the conduct of both the current and former presidents and their staffs.

This request is primarily and fundamentally for non-commercial purposes. As a 501(c)(3) nonprofit, American Oversight does not have a commercial purpose and the release of the information requested is not in American Oversight's financial interest. American Oversight's mission is to promote transparency in government, to educate the public about government activities, and to ensure the accountability of government officials. American Oversight will use the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media. American Oversight will also make materials it gathers available on our public website.

Accordingly, American Oversight qualifies for a fee waiver.

Application for Expedited Processing

Pursuant to 5 U.S.C. § 552(a)(6)(E)(1) and 28 C.F.R. § 16.5(b), (e)(1)(iv), American Oversight requests that the Department of Justice expedite the processing of this request.

I certify to be true and correct to the best of my knowledge and belief, that there is widespread and exceptional media interest and there exist possible questions concerning the government's integrity, which affect public confidence. There is widespread and exceptional media interest in Mr. Trump's allegations that Mr. Obama directed the tapping of the communications of Mr. Trump and persons affiliated with his campaign for purposes related to the 2016 presidential election,[25] and in the allegations that Mr. Trump and his campaign affiliates had contacts with

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[22] Donald Trump (@realDonaldTrump), TWITTER (Mar. 4, 2017, 3:49 AM), https://twitter.com/realDonaldTrump/status/837993273679560704.
[23] Donald Trump (@realDonaldTrump), TWITTER (Mar. 4, 2017, 4:02 AM), https://twitter.com/realDonaldTrump/status/837996746236182529 (Nixon and Watergate); Donald Trump (@realDonaldTrump), TWITTER (Mar. 4, 2017, 3:35 AM), https://twitter.com/realDonaldTrump/status/837989835818287106 (McCarthyism).
[24] Donald Trump (@realDonaldTrump), TWITTER (Mar. 4, 2017, 4:02 AM), https://twitter.com/realDonaldTrump/status/837996746236182529.
[25] *See, e.g.*, Philip Rucker et al., *Trump Accuses Obama of 'Nixon/Watergate' Wiretap – But Offers No Evidence*, WASH. POST, Mar. 4, 2017, https://www.washingtonpost.com/politics/trump-accuses-obama-of-nixonwatergate-wiretap--but-offers-no-evidence/2017/03/04/1ddc35e6-0114-11e7-8ebe-6e0dbe4f2bca_story.html?hpid=hp_hp-top-table-main_trumpwiretap-

Russian officials, and that those contacts are under investigation.[26] The requested documents will shed light on these issues of considerable interest to the public. Both the allegation that Mr. Obama improperly instituted wiretaps for electoral purposes and the possibility that investigations established national security or criminal bases to seek court ordered wiretapping of Mr. Trump and persons affiliated with his campaign similarly raise questions about whether both the current and the former president or their associates acted unlawfully and about the very integrity of the 2016 presidential election. These are self-evidently matters "in which there exist possible questions about the government's integrity that affect public confidence."[27]

Accordingly, American Oversight's request satisfies the criteria for expedition.

Conclusion

We share a common mission to promote transparency in government. American Oversight looks forward to working with you on this request. If you do not understand any part of this request, have any questions, or foresee any problems in fully releasing the requested records, please contact

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8pm%3Ahomepage%2Fstory&tid=a_inl&utm_term=.c2ab0fcc0033; Elliot Smilowitz, *Trump Accuses Obama of Wiretapping Trump Tower* (Mar. 4, 2017, 6:51 AM), http://thehill.com/homenews/administration/322337-trump-accuses-obama-of-wiretapping-trump-tower; Jeremy Diamond et al., *Trump's Baseless Wiretap Claim*, CNN (Mar. 5, 2017, 6:59 AM), http://www.cnn.com/2017/03/04/politics/trump-obama-wiretap-tweet/.

[26] *See, e.g.*, Adam Entous et al., *Sessions Met with Russian Envoy Twice Last Year, Encounters He Later Did Not Disclose*," WASH. POST, Mar. 1, 2017, https://www.washingtonpost.com/world/national-security/sessions-spoke-twice-with-russian-ambassador-during-trumps-presidential-campaign-justice-officials-say/2017/03/01/77205eda-feac-11e6-99b4-9e613afeb09f_story.html; Brooke Seipel, *Bush's Ethics Lawyer On Sessions Talks with Russia Ambassador: 'Good Way To Go To Jail'*, THE HILL BLOG (Mar. 1, 2017, 10:34 PM), http://thehill.com/blogs/blog-briefing-room/news/321936-ethics-lawyer-to-george-w-bush-on-sessions-talks-with-russa; David E. Sanger, *Harry Reid Cites Evidence of Russian Tampering in U.S. Vote, and Seeks F.B.I. Inquiry*, N.Y. TIMES, Aug. 29, 2016, https://www.nytimes.com/2016/08/30/us/politics/harry-reid-russia-tampering-election-fbi.html; Julie Hirschfeld Davis et al., *Trump National Security Adviser Called Russian Envoy Day Before Sanctions Were Imposed*, N.Y. TIMES, Jan. 13, 2017, https://www.nytimes.com/2017/01/13/us/politics/donald-trump-transition.html; Margaret Hartmann, *What We Know about the Investigations Into Trump's Russia Scandal,* N.Y. MAG. (Mar. 7, 2017), http://nymag.com/daily/intelligencer/2017/03/what-we-know-about-the-probes-into-trumps-russia-scandal.html; Karen Demirjian et al., *Attorney General Jeff Sessions Will Recuse Himself from Any Probe Related to 2016 Presidential Campaign*, WASH. POST (Mar. 2, 2017), https://www.washingtonpost.com/powerpost/top-gop-lawmaker-calls-on-sessions-to-recuse-himself-from-russia-investigation/2017/03/02/148c07ac-ff46-11e6-8ebe-6e0dbe4f2bca_story.html?hpid=hp_hp-top-table-main_gopreax-840a%3Ahomepage%2Fstory&tid=ptv_rellink&utm_term=.1edd2d00bd99.

[27] 28 C.F.R. § 16.5(e)(1)(iv).

Sara Creighton at foia@americanoversight.org or 202-869-5246. Also, if American Oversight's request for a fee waiver is not granted in full, please contact us immediately upon making such a determination.

Sincerely,

Austin R. Evers
Executive Director
American Oversight

cc: Sarah Isgur Flores, Director, Office of Public Affairs

Exhibit B

Mallory, Arnetta (NSD)

From: NSDFOIA (NSD)
Sent: Monday, April 03, 2017 11:32 AM
To: American Oversight FOIA
Subject: NSD FOIA #17-116

Sara Creighton
1030 15th Street N.W.
Suite B255
Washington, DC 20005

FOIA/PA #17-116

Dear: Ms. Creighton:

This is to acknowledge your email dated March 20, 2017, pertaining 1. All warrant applications or other records requesting a court to institute an intercept of telecommunications or a pen register trap and trace on electronic communications or telecommunications in connection with presidential candidate Donald Trump, Trump Tower (located at 725 5th Avenue, New York, NY), entities housed in Trump Tower, or any person affiliated with Mr. Trump's campaign, whether paid or unpaid, between June 16, 2015, and the present, whether under the authority of the Foreign Intelligence Surveillance Act; Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended; or other authority. 2. Any court order or other document providing authority to institute or maintain such a requested wiretap, intercept, or pen register. 3. Any court order or other document rejecting such an application or request for authority for a wiretap, intercept, or pen register. 4. Any records logging or listing any such wiretaps, intercepts, or pen registers. 5. All communications, documents, or other material exchanged between DOJ or the FBI and Congress, or briefing papers or talking points prepared for congressional briefings. Our FOIA office received your Freedom of Information request on March 20, 2017.

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) (2006 & Supp. IV (2010). This response is limited to those records that are subject to the requirements of 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 have requested expedited processing of your request under the Department of Justice standards permitting expedition when a requester demonstrates a "compelling need." A compelling need is defined as follows:

1. Failure to obtain requested records on an expedited basis could reasonably he expected to pose an imminent threat to the life or physical safety of an individual; or

2. With respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.

You have not demonstrated that there is a particular urgency to inform the public about an actual or alleged federal government activity. Therefore, we have determined that your request for expedited processing is denied.

Also, you requested a waiver of processing fees. Your reason for a fee waiver does meet the fee waiver threshold. Therefore, your request for a fee waiver has been granted.

The National Security Division (NSD) maintains operational files which document requests for and approvals of authority for the U.S. Intelligence Community to conduct certain foreign intelligence activities.

tend to reveal properly classified information regarding whether particular surveillance techniques have or have not been used by the U.S. Intelligence Community. Accordingly, we can neither confirm nor deny the existence of records in these files responsive to your request pursuant to 5 U.S.C. 552(b)(1).

If you are not satisfied with my response to this request, you may administratively appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, DC 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 90 days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,
Arnetta Mallory
Government Information Specialist

From: American Oversight FOIA [mailto:foia@americanoversight.org]
Sent: Monday, March 20, 2017 12:44 PM
To: NSDFOIA (NSD) <Ex_NSDFoia@jmd.usdoj.gov>; CRM FOIA <CRM.FOIA@CRM.USDOJ.GOV>
Subject: Expedited FOIA Request DOJ-17-0035

FOIA Officers:

Please find attached a request for records under the Freedom of Information Act. American Oversight requests expedition pursuant to 28 C.F.R. § 16.5(e)(1)(iv); accordingly, please forward a copy to Sarah Isgur Flores, Director, Office of Public Affairs.

Sincerely,
Sara Creighton
American Oversight

DOJ-17-0035

Exhibit C

AMERICAN OVERSIGHT

April 12, 2017

VIA ONLINE PORTAL

Melanie Ann Pustay
Director, Office of Information Policy
U.S. Department of Justice
1425 New York Avenue NW
Suite 11050
Washington, DC 20530-0001
FOIAOnline

Re: Freedom of Information Act Appeal for NSD Request #17-116

Dear Ms. Pustay:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552(a)(6)(A), and Department of Justice (DOJ) regulations at 28 C.F.R. § 16.8, American Oversight submits the following administrative appeal.

Background

On March 20, 2017, American Oversight submitted a FOIA request (the AO FOIA Request) to the DOJ National Security Division (NSD) seeking a variety of records relating to the use of FISA or other authorities to wiretap candidate Donald Trump, his associates, or Trump Tower. *See* Appendix A. The AO FOIA Request sought expedited review.

On April 3, 2017, NSD responded to this request. *See* Appendix B. NSD assigned the request tracking number FOIA/PA #17-116. NSD denied our request for expedited processing, granted our request for a fee waiver, and then responded that the agency could "neither confirm nor deny the existence of records" responsive to our request.

American Oversight hereby appeals the denial of expedited processing as well as the agency's use of a so-called "Glomar" response that neither confirmed nor denied the existence of responsive records.

Appeal of DOJ's Denial of Expedited Processing

DOJ regulations provide for expedited processing of FOIA requests when one of four factors is satisfied:

> (i) Circumstances in which the lack of expedited processing could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;
>
> (ii) An urgency to inform the public about an actual or alleged Federal Government activity, if made by a person who is primarily engaged in disseminating information;
>
> (iii) The loss of substantial due process rights; or
>
> (iv) A matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity that affect public confidence.

28 C.F.R. § 16.5(e)(1)(i)-(iv).

American Oversight requested expedited processing of its request under prong (iv) above, asserting that this request involves a matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity that affect public confidence. Because American Oversight sought expedition under 28 C.F.R. § 16.5(e)(1)(iv), we asked that the request be forwarded to Sarah Isgur Flores, the Director of the Office of Public Affairs, as required by 28 C.F.R. § 16.5(e)(2).

In its response to American Oversight's request, the NSD applied a different standard than the one set out above. The NSD stated that DOJ standards permit expedition if "(1) Failure to obtain requested records on an expedited basis could reasonably he [sic] expected to pose an imminent threat to the life or physical safety of an individual; or (2) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity." In other words, NSD stated that expedition is permitted under prongs (i) and (ii) above, but ignored prongs (iii) and (iv).[1] Given that American Oversight had not requested expedition under prong (i) or (ii), it is therefore not surprising that NSD concluded that American Oversight had not established a need for expedited processing.

NSD's response did not indicate whether the Director of the Office of Public Affairs had taken any position on expedition under prong (iv). More than 10 days have passed since the AO FOIA Request was submitted, and American Oversight has received no indication from the NSD or

[1] To be clear, the Freedom of Information Act itself provides that agencies must provide for expedited processing in cases in which the requester demonstrates a compelling need for the information, and further clarifies that "compelling need" is defined consistent with prongs (i) and (ii) above. *See* 5 U.S.C. § 552(a)(6)(E)(i)(I), (v)(I)-(II). However, it further provides for expedited processing of requests "in other cases determined by the agency," 5 U.S.C. § 552 (a)(6)(E)(i)(II), and DOJ has determined that prongs (iii) and (iv) above justify expedited processing, *see* 28 C.F.R. § 16.5(e)(1)(iii)-(iv).

Office of Public Affairs regarding whether its request for expedited review under prong (iv) has been granted. Had DOJ applied the appropriate standard under DOJ regulations, DOJ would have concluded that American Oversight's request was entitled to expedited processing.

In its request, American Oversight certified to be true and correct to the best of its knowledge and belief, that there is widespread and exceptional media interest in the subject of the request and there exist possible questions concerning the government's integrity, which affect public confidence.

First, at the time of this request, there had been widespread and exceptional media interest in Mr. Trump's allegations that then-President Barack Obama directed the tapping of the communications of Mr. Trump and persons affiliated with his campaign for purposes related to the 2016 presidential election,[2] and in the allegations that Mr. Trump and his campaign affiliates had contacts with Russian officials, and that those contacts are under investigation.[3] Since the

[2] *See, e.g.*, Philip Rucker et al., *Trump Accuses Obama of 'Nixon/Watergate' Wiretap – But Offers No Evidence*, WASH. POST, Mar. 4, 2017, https://www.washingtonpost.com/politics/trump-accuses-obama-of-nixonwatergate-wiretap--but-offers-no-evidence/2017/03/04/1ddc35e6-0114-11e7-8ebe-6e0dbe4f2bca_story.html?hpid=hp_hp-top-table-main_trumpwiretap-8pm%3Ahomepage%2Fstory&tid=a_inl&utm_term=.c2ab0fcc0033; Elliot Smilowitz, *Trump Accuses Obama of Wiretapping Trump Tower*, THE HILL (Mar. 4, 2017, 6:51 AM), http://thehill.com/homenews/administration/322337-trump-accuses-obama-of-wiretapping-trump-tower; Jeremy Diamond et al., *Trump's Baseless Wiretap Claim*, CNN (Mar. 5, 2017, 6:59 AM), http://www.cnn.com/2017/03/04/politics/trump-obama-wiretap-tweet/.

[3] *See, e.g.*, Adam Entous et al., *Sessions Met with Russian Envoy Twice Last Year, Encounters He Later Did Not Disclose*," WASH. POST, Mar. 1, 2017, https://www.washingtonpost.com/world/national-security/sessions-spoke-twice-with-russian-ambassador-during-trumps-presidential-campaign-justice-officials-say/2017/03/01/77205eda-feac-11e6-99b4-9e613afeb09f_story.html; Brooke Seipel, *Bush's Ethics Lawyer On Sessions Talks with Russia Ambassador: 'Good Way To Go To Jail,'* THE HILL BLOG (Mar. 1, 2017, 10:34 PM), http://thehill.com/blogs/blog-briefing-room/news/321936-ethics-lawyer-to-george-w-bush-on-sessions-talks-with-russa; David E. Sanger, *Harry Reid Cites Evidence of Russian Tampering in U.S. Vote, and Seeks F.B.I. Inquiry*, N.Y. TIMES, Aug. 29, 2016, https://www.nytimes.com/2016/08/30/us/politics/harry-reid-russia-tampering-election-fbi.html; Julie Hirschfeld Davis et al., *Trump National Security Adviser Called Russian Envoy Day Before Sanctions Were Imposed*, N.Y. TIMES, Jan. 13, 2017, https://www.nytimes.com/2017/01/13/us/politics/donald-trump-transition.html; Margaret Hartmann, *What We Know About the Investigations Into Trump's Russia Scandal*, N.Y. MAG. (Mar. 7, 2017), http://nymag.com/daily/intelligencer/2017/03/what-we-know-about-the-probes-into-trumps-russia-scandal.html; Karen Demirjian et al., *Attorney General Jeff Sessions Will Recuse Himself from Any Probe Related to 2016 Presidential Campaign*, WASH. POST, Mar. 2, 2017, https://www.washingtonpost.com/powerpost/top-gop-lawmaker-calls-on-sessions-to-recuse-himself-from-russia-investigation/2017/03/02/148c07ac-ff46-11e6-8ebe-

request was filed, Mr. Trump and his associates have stuck by their allegations of wiretapping, and there has been extensive media coverage on all aspects of this issue.[4]

The requested documents will shed light on these issues of considerable interest to the public. Both the allegation that Mr. Obama improperly instituted wiretaps for electoral purposes and the possibility that investigations established national security or criminal bases to seek court ordered wiretapping of Mr. Trump and persons affiliated with his campaign similarly raise questions about whether either the current or former president or their associates acted unlawfully and about the integrity of the 2016 presidential election. There can be no doubt that these are matters "in which there exist possible questions about the government's integrity that affect public confidence."[5]

Accordingly, American Oversight's request satisfied the criteria for expedition, and DOJ should reverse its initial determination on this issue. Additionally, American Oversight asks that this appeal be handled on an expedited basis pursuant to the criteria of 28 C.F.R. § 16.5(e)(1)(iv), which is addressed above.

Appeal of NSD's April 3rd *Glomar* Response

American Oversight appeals NSD's refusal to confirm or deny the existence of records responsive to American Oversight's FOIA request pursuant to 5 U.S.C. § 552(b)(1).

On the substance of American Oversight's request, NSD did not provide any records, nor did NSD indicate that it was withholding any records because of the application of any exemptions permitted under FOIA. Rather, NSD responded with what is known as a "Glomar" response to our request, stating that it "can neither confirm nor deny the existence of records" responsive to our request because doing so would "reveal information properly classified under Executive Order 13526." Specifically, the NSD acknowledged that it "maintains operational files which document requests for and approvals of authority for the U.S. Intelligence Community to conduct certain foreign intelligence activities," but stated that it could not search those records for information responsive to our request because to confirm or deny the existence of such materials "would tend

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[4] *See, e.g.*, Nolan McCaskill, *Trump Claims Wiretap Tweet 'Is Turning Out to Be True,'* POLITICO (Apr. 3, 2017, 8:13 AM), http://www.politico.com/story/2017/04/trump-surveillance-financial-times-interview-236819; Michael Shear & Julie Hirschfeld Davis, *Sean Spicer Repeats Trump's Unproven Wiretapping Allegation*, N.Y. TIMES, Mar. 31, 2017, https://www.nytimes.com/2017/03/31/us/politics/sean-spicer-trump-wiretapping.html; Philip Bump, *The Latest Attempt to Validate Trump's Wiretapping Claim? An Obama Official Who Left in 2015*, WASH. POST, Mar. 31, 2017, https://www.washingtonpost.com/news/politics/wp/2017/03/31/the-latest-attempt-to-validate-trumps-wiretapping-claim-an-obama-official-who-left-in-2015/?utm_term=.76064308d2b3.

[5] 28 C.F.R. § 16.5(e)(1)(iv).

to reveal properly classified information regarding whether particular surveillance techniques have or have not been used by the U.S. Intelligence Community."

It is NSD's burden to sustain the validity of its actions under FOIA. *See* 5 U.S.C. § 552(a)(4)(B) (the "burden is on the agency to sustain its actions"). To be sure, the government may be entitled to "refuse to confirm or deny the existence or nonexistence of requested records whenever the fact of their existence or nonexistence it itself classified under [Executive Order 13,526] or its predecessors."[6] To support such a claim—known as a "Glomar" response—the agency would be required to make a particularized showing that justified the refusal to either confirm or deny the existence of responsive records.

But whatever the classification status of FISA wiretapping orders or NSD's operational files in general, the question here is whether the existence or nonexistence of the records sought by the AO FOIA Request remains properly classified after two quite senior government officials have publicly addressed the existence or nonexistence of those records. A so-called "Glomar" response is not appropriate if the government "has already disclosed the fact of the existence (or nonexistence) of responsive records."[7] Courts have long held that when the government officially acknowledges information, the government can no longer claim that the acknowledged information is exempt from disclosure under FOIA.[8] Accordingly, NSD cannot refuse to confirm or deny the existence or nonexistence of responsive records where senior government officials have already officially acknowledged the existence or nonexistence of such records. In this case, remarkably, senior government officials have done both.

Similar to the fact pattern recently addressed by the D.C. Circuit,[9] here, the "President of the United States himself publicly acknowledged" the existence of responsive records when he officially acknowledged that the federal government instituted wiretaps on communications at Trump Tower. Specifically, the president stated that he "[j]ust found out that Obama had my 'wires tapped' in Trump Tower just before the victory. Nothing found."[10] Mr. Trump further elaborated, "[i]s it legal for a sitting President to be 'wire tapping' a race for president prior to an

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[6] Executive Order 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009).

[7] *ACLU v. CIA*, 710 F.3d 422, 427, 432 (D.C. Cir. 2013); *see also N.Y. Times v. U.S. Dep't of Justice*, 756 F.3d 100, 121-23 (2d Cir. 2014).

[8] *See, e.g.*, *ACLU*, 710 F.3d at 426 (when the government "has officially acknowledged otherwise exempt information through prior disclosure, the agency has waived its right to claim an exemption with respect to that information"); *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990) ("[W]hen information has been 'officially acknowledged,' its disclosure may be compelled even over an agency's otherwise valid exemption claim."); *see also Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007).

[9] *ACLU*, 710 F.3d at 430.

[10] Donald Trump (@realDonaldTrump), TWITTER (Mar. 4, 2017, 3:35 AM), https://twitter.com/realDonaldTrump/status/837989835818287106.

election? Turned down by court earlier";[11] "I'd bet a good lawyer could make a great case out of the fact that President Obama was tapping my phones in October, just prior to Election!";[12] and "How low has President Obama gone to tapp [sic] my phones during the very sacred election process."[13] When asked about the basis for Mr. Trump's assertions, the White House stated, "He's the president of the United States. He has information and intelligence that the rest of us do not."[14] The president is the highest authority in the executive branch and undoubtedly has the authority to officially acknowledge facts that might otherwise be exempt from disclosure under FOIA because of classification.

The existence of an official acknowledgement of the wiretapping by the president precludes NSD's resort to a so-called "Glomar" response, "neither confirm[ing] nor deny[ing]" the existence of the same wiretapping. Regardless of whether confirming or denying the existence of such wiretaps prior to the president's acknowledgement would have disclosed properly classified facts, now that the president has officially acknowledged the activity, by definition the existence of those wiretaps is no longer classified. Accordingly, NSD cannot appropriately decline to confirm or deny the existence of facts that the president has already acknowledged. As the courts have recognized, a Glomar response is not appropriate when the government "has already disclosed the fact of the existence (or nonexistence) of responsive records."[15]

NSD's refusal to address whether it has responsive records is all the more troubling here, where not only the president but also the Director of the Federal Bureau of Investigation have publicly addressed the question of whether wiretapping of associates of Mr. Trump at Trump Tower did, in fact, occur. In a hearing before the Permanent Select Committee on Intelligence in the House of Representatives, FBI Director James Comey publicly stated that he had "no information" to support Mr. Trump's claims that Mr. Trump and his associates were wiretapped at Trump Tower by former President Barack Obama.[16] Mr. Comey's willingness to testify on the record at an open hearing about the existence or nonexistence of evidence of wiretapping of Mr. Trump's associates at Trump Tower belies NSD's assertion that the existence or non-existence of those same records remains classified.

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[11] Donald Trump (@realDonaldTrump), TWITTER (Mar. 4, 2017, 3:49 AM), https://twitter.com/realDonaldTrump/status/837993273679560704.
[12] Donald Trump (@realDonaldTrump), TWITTER (Mar. 4, 2017, 3:52 AM), https://twitter.com/realdonaldtrump/status/837994257566863360.
[13] Donald Trump (@realDonaldTrump), TWITTER (Mar. 4, 2017, 4:02 AM), https://twitter.com/realDonaldTrump/status/837996746236182529.
[14] *White House Officials Stand By Trump Wiretapping Claim*, FOXNEWS.COM, Mar. 6, 2017, http://www.foxnews.com/politics/2017/03/06/white-house-officials-stand-by-trump-wiretapping-claim.html.
[15] *ACLU*, 710 F.3d at 427.
[16] *See* Stephen Collinson, *FBI: Trump Campaign, Russia Ties Investigated, No Wiretap Evidence Found*, CNN POLITICS (Mar. 21, 2017, 12:41 PM), http://www.cnn.com/2017/03/20/politics/comey-hearing-russia-wiretapping/index.html.

Now the public is in the surreal and bewildering position of confronting conflicting acknowledgements regarding the existence or nonexistence of the same records. Different government entities have simultaneously acknowledged both the existence of the requested records and the non-existence of the same records. While it is obviously true that only one of those statements can be correct (there either was or was not wiretapping conducted of Trump Tower by the Obama administration), it is evident that neither the president nor the FBI Director believes that the truth or falsity of that fact is classified and therefore protected from disclosure.

For the foregoing reasons, NSD's declination to search its operational files and its refusal to either confirm or deny the existence of records responsive to American Oversight's FOIA request failed to meet its legal obligations under FOIA. Rather, given the government's official acknowledgements regarding the surveillance of Trump Tower, NSD is obligated to continue to expeditiously process American Oversight's FOIA request by searching for and processing all responsive records. American Oversight therefore respectfully requests that OIP reject NSD's resort to a "Glomar" response to its request.

Conclusion

Thank you for your consideration of this appeal. As provided in 5 U.S.C. § 552(a)(6)(A)(ii), we look forward to your determination on our appeal within twenty working days.

For questions regarding any part of this appeal or the underlying request for records, please contact Sara Creighton at foia@americanoverright.org or 202-869-5246.

Respectfully submitted,

Austin R. Evers
Executive Director
American Oversight

Exhibit D

U.S. Department of Justice
Office of Information Policy
Suite 11050
1425 New York Avenue, NW
Washington, DC 20530-0001

Telephone: (202) 514-3642

Mr. Austin R. Evers
American Oversight
Suite B255
1030 15th Street, NW
Washington, DC 20005
foia@americanoversight.org

Re: Appeal No. DOJ-AP-2017-003494
Request No. 17-116
SRO:DRC

VIA: FOIAonline

Dear Mr. Evers:

You appealed from the action of the National Security Division (NSD) on your Freedom of Information Act request for access to records concerning wiretaps or intercepts of communications to or from presidential candidate Donald Trump or others associated with Mr. Trump's campaign from June 1, 2015 to present. I note that you also appealed NSD's denial of your request for expedited processing of your request.

After carefully considering your appeal, I am affirming NSD's action on your request. I have determined that NSD properly refused to confirm or deny the existence of any records responsive to your request because the existence or nonexistence of any responsive records is currently and properly classified. See 5 U.S.C. § 552(b)(1). However, I am referring this matter to the Department of Justice's Department Review Committee so that it may determine if the existence or nonexistence of any responsive records should remain classified under Executive Order No. 13,526. You will be informed of the Department's final decision on this matter. This referral does not affect your right to pursue litigation.

With regard to your appeal of NSD's denial of your request for expedited processing, please be advised that NSD responded to your request by letter dated April 3, 2017. Because NSD responded to your request, your appeal from NSD's failure to grant expedited processing of your request is moot. Your request for expedited processing of your appeal is likewise moot, because I am responding to your appeal within ten days.

Please be advised that this Office's decision was made only after a full review of this matter. Your appeal was assigned to an attorney with this Office who thoroughly reviewed and analyzed your appeal, your underlying request, and the action of NSD in response to your request. If you have any questions regarding the action this Office has taken on your appeal, you may contact this Office's FOIA Public Liaison for your appeal. Specifically, you may speak with the undersigned agency official by calling (202) 514-3642.

If you are dissatisfied with my action on your appeal, the FOIA permits you to file a lawsuit in federal district court in accordance with 5 U.S.C. § 552(a)(4)(B).

For your information, the Office of Government Information Services (OGIS) offers mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, Maryland 20740-6001; e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

Sincerely,

4/13/2017

X

Sean R. O'Neill
Chief, Administrative Appeals Staff
Signed by: OIP

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN OVERSIGHT, Plaintiff, v. U.S. DEPARTMENT OF JUSTICE et al., Defendants.	)	Civil Action No. 1:17-cv-00718

DECLARATION OF DAVID M. HARDY

I, David M. Hardy, declare as follows:

(1) I am currently the Section Chief of the Record/Information Dissemination Section (RIDS), Records Management Division (RMD), in Winchester, Virginia. I have held this position since August 1, 2002. Prior to my joining the FBI, from May 1, 2001 to July 31, 2002, I was the Assistant Judge Advocate General of the Navy for Civil Law. In that capacity, I had direct oversight of Freedom of Information Act (FOIA) policy, procedures, appeals, and litigation for the Navy. From October 1, 1980 to April 30, 2001, I served as a Navy Judge Advocate at various commands and routinely worked with FOIA matters. I am also an attorney who has been licensed to practice law in the State of Texas since 1980.

(2) In my official capacity as Section Chief of RIDS, I supervise approximately 249 employees who staff a total of ten (10) Federal Bureau of Investigation Headquarters ("FBIHQ") units and two (2) field operational service center units whose collective mission is to effectively plan, develop, direct, and manage responses to requests for access to FBI records and information pursuant to the FOIA as amended by the OPEN Government Act of 2007 and the OPEN FOIA Act of 2009; the Privacy Act of 1974; Executive Order 13526; Presidential,

Attorney General, and FBI policies and procedures; judicial decisions; and Presidential and Congressional directives. My responsibilities also include the review of FBI information for classification purposes as mandated by E.O. 13526, 75 Fed. Reg. 707 (2010), and the preparation of declarations in support of Exemption (b)(1) claims under the FOIA. I have been designated by the Attorney General of the United States as an original classification authority, and a declassification authority pursuant to Executive Order 13526 §§ 1.3 and 3.1. The statements contained in this declaration are based upon my personal knowledge, upon information provided to me in my official capacity, and upon conclusions and determinations reached and made in accordance therewith.

(3) Due to the nature of my official duties, I am familiar with the procedures followed by the FBI in responding to requests for information pursuant to the provisions of the FOIA, 5 U.S.C. § 552, and the Privacy Act of 1974, 5 U.S.C. § 552a. Specifically, I am aware of the FBI's handling of Plaintiff's FOIA request that is the subject of this lawsuit.

(4) This declaration is being submitted in support of Defendant's motion for summary judgment.

(5) Plaintiff submitted a request using the FBI's eFOIA portal on March 20, 2017, requesting the following records:

1) All warrant applications or other records requesting a court to institute an intercept of telecommunications or a pen register trap and trace on electronic communications or telecommunications in connection with presidential candidate Donald Trump, Trump Tower (located at 725 5th Avenue, New York, NY), entities housed in Trump Tower, or any person affiliated with Mr. Trump's campaign, whether paid or unpaid, between June 16, 2015, and the present, whether under the authority of the Foreign Intelligence Surveillance Act [FISA]; Title III of the Omnibus Crime Control and Safe Streets Act of 1968m as amended; or other authority.

2) Any court order or other document providing authority to institute

> or maintain such a requested wiretap, intercept, or pen register.
>
> 3) Any court order or other document rejecting such an application or request for authority for a wiretap, intercept, or pen register.
>
> 4) Any records logging or listing any such wiretaps, intercepts, or pen registers.
>
> 5) All communications, documents, or other material exchanged between DOJ or the FBI and Congress, or briefing papers or talking points prepared for congressional briefings, regarding the wiretaps, intercepts, or pen registers discussed, or records described, in Items 1-4, *supra*.

(*See* Exhibit A.) Hereafter, this portion of Plaintiff's request is collectively referenced as the "wiretap" request.

(6) Plaintiff further requested:

> [R]ecords describing the processing of this request, including records sufficient to identify search terms used and locations and custodians searched and any tracking sheets used to track the processing of this request[,] and … FOIA questionnaires or certifications completed by individual custodians or components to determine whether they possess responsive materials or to describe how they conducted searches… .

Id.

(7) Plaintiff limited its request to "all responsive records from June 1, 2015, to the date the search is conducted." *Id.*

(8) Lastly, Plaintiff requested both expedited processing and a public interest fee waiver.

(9) In a letter dated April 11, 2017, the FBI acknowledged receipt of Plaintiff's FOIA request; assigned it FOIPA Request No. 1371005; denied Plaintiff's request for a public interest fee waiver; and notified Plaintiff of its right to appeal to DOJ's Office of Information Policy ("OIP") within ninety (90) days from the date of the letter or alternatively, seek dispute resolution services by contacting the Office of Government Information Services ("OGIS").

(*See* Exhibit B.)

(10) Plaintiff filed this FOIA lawsuit on April 19, 2017. ***See* ECF No. 1, Complaint.**

(11) By letter dated May 2, 2017, the FBI granted Plaintiff's request for expedited processing. **(*See* Exhibit C.)**

BACKGROUND INFORMATION

(12) President Trump made a four-part post on Twitter on March 4, 2017, alleging that President Obama had his "'wires tapped' in Trump Tower just before the victory."

(13) During sworn testimony before the House Permanent Selection Committee on Intelligence ("HPSCI") on March 20, 2017, then FBI Director James B. Comey was asked about this by Congressman Schiff and responded:

> With respect to the President's tweets about alleged wiretapping directed at him by the prior administration, I have no information that supports those tweets and we have looked carefully inside the FBI. The Department of Justice has asked me to share with you that the answer is the same for the Department of Justice and all its components. The Department has no information that supports those tweets.

See Transcript of the House Permanent Select Committee on Intelligence Hearing on Russian Interference in the 2016 U.S. Election, March 20, 2017. https://www.washingtonpost.com/news/post-politics/wp/2017/03/20/full-transcript-fbi-director-james-comey-testifies-on-russian-interference-in-2016-election/?utm_term=.b9f19a0cf9cf (last accessed 6/12/2017).

(14) Other than this public statement by then-Director Comey addressing this specific assertion by the President, neither the FBI nor DOJ have publicly commented on or acknowledged the existence or non-existence of any FISA, Title III, or other wiretaps "in connection with presidential candidate Donald Trump, Trump Tower (located at 725 5th Avenue,

New York, NY), entities housed in Trump Tower, or any person affiliated with Mr. Trump's campaign, whether paid or unpaid, between June 16, 2015 and the present."

WIRETAP REQUEST – NO RECORDS RESPONSE

(15) As the preceding demonstrates, the FBI has no records responsive to Plaintiff's request inasmuch as it seeks records of alleged wiretapping[1] of Trump Tower by President Obama prior to the election, as referenced in the March 4th tweet. *See id.* Out of an abundance of caution, FBI personnel confirmed this by consulting with personnel knowledgeable about Director Comey's statements and the surveillance activities of the FBI and confirmed that no such records exist.

WIRETAP REQUEST – *GLOMAR* RESPONSE

(16) Plaintiff's request, however, is broader than the subject of the March 4th statement. As to whether any other records exist that are responsive to this portion of Plaintiff's FOIA request, the FBI can neither confirm nor deny the existence or non-existence of other responsive records, as explained below.

(17) The FBI relies on a *Glomar* response in instances in which, assuming that responsive records existed, even acknowledging their existence would result in harm protected against by one or more FOIA exemptions. To be credible and effective, the FBI must use a *Glomar* response in all similar cases regardless of whether responsive records actually exist, including instances in which the FBI does not possess records responsive to a particular request. If the FBI were to invoke a *Glomar* response only when it actually possessed responsive records, the *Glomar* response would be interpreted as an admission that responsive records exist.

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[1] *I.e.*, warrant applications/requests for court authorization to intercept telecommunications or electronic communications; court orders granting or rejecting such authority; logs; intercepted communications; and briefing materials about such intercepted communications.

(18) Here, the FBI has determined that merely acknowledging the existence or non-existence of records responsive to Plaintiff's wiretap request could trigger harm under FOIA exemptions.

(19) With limited exceptions, the FBI does not and cannot publicly confirm or deny whether or not particular individuals or entities are the subject of Foreign Intelligence Surveillance Court (FISC) orders; that FISC orders have been sought or obtained in the conduct of any particular investigation; or that it has undertaken/is conducting surveillance against specific targets in a pending investigation. I have reviewed the public statements above and those quoted in the Complaint, and none of those statements match the specific information sought in Plaintiff's wiretap request or acknowledge the existence or non-existence of responsive documents. Similarly, no authorized Executive Branch official has acknowledged the existence or non-existence of this specific information – *i.e.*, warrant applications/requests for court authorization to intercept telecommunications or electronic communications; court orders granting or rejecting such authority; logs; intercepted communications; and briefing materials about such intercepted communications.

(20) As an original classification authority, I have determined that the FBI can neither confirm nor deny whether the FBI maintains responsive records because to do so could reasonably be expected to compromise national security and/or reveal intelligence activities, sources, or methods. *See* 5 U.S.C. §§ 552(b)(1), (b)(3).

(21) Moreover, acknowledging or denying the existence or non-existence of records could result in harms protected against by FOIA Exemption (b)(7)(A), 5 U.S.C. § 552(b)(7)(A).

(A) The FBI has acknowledged a counterintelligence investigation of "the Russian government's efforts to interfere in the 2016 presidential election[, including] the nature

of any links between individuals associated with the Trump campaign and the Russian government and whether there was any coordination between the campaign and Russia's efforts[, and] an assessment of whether any crimes were committed." *See* Transcript of the House Permanent Select Committee on Intelligence Hearing on Russian Interference in the 2016 U.S. Election, March 20, 2017. To the extent that Plaintiff's request for wiretap/electronic surveillance records related to, *inter alia*, the Trump campaign seeks records related to the FBI's and Special Counsel's acknowledged Russian Interference investigation, confirming or denying the existence or non-existence of responsive records could reasonably be expected to adversely affect the investigation.

(B) Second, to the extent there is an allegation that the FBI is conducting some other investigation in furtherance of which FISC orders were sought or obtained, the FBI has not publicly confirmed or denied any such investigation and assuming such an investigation exists, disclosing its existence here could similarly be expected to adversely affect it.

(22) Additionally, acknowledging the existence or non-existence of wiretap/electronic surveillance records – whether pursuant to FISA, Title III, or other legal authority – could reasonably be expected to reveal non-public information about the FBI's use of law enforcement techniques and procedures in a way that risks circumvention of the law. *See* 5 U.S.C. § 552(b)(7)(E).

(23) Finally, the FBI cannot confirm or deny the existence or non-existence of briefing/similar materials about the requested wiretap records without disclosing the existence or non-existence of the very information that is protected by its *Glomar* responses. In other words, the existence or non-existence of briefing materials about activities that would be documented by

the records sought in items 1-4 of Plaintiff's wiretap request would itself tend to reveal the existence or non-existence of such records, and thus undermine the FBI's *Glomar* response.

(24) Media speculation and non-authoritative reports relying on anonymous/unnamed sources do not constitute official disclosures on behalf of the FBI, and therefore do not undermine the FBI's *Glomar* response in this matter. The FBI generally does not confirm or deny the accuracy of reports attributed to unnamed, anonymous, or unofficial sources because responding in either fashion could reasonably be expected to cause harm to protected law enforcement and/or national security interests. Specifically, confirming such reports would require the disclosure of law enforcement sensitive information about pending investigations, investigative targets or activities, classified information, or other information that would be damaging to law enforcement or national security interests. Indeed, some public reports based on unnamed/anonymous sources contain classified information, so confirming those reports would perpetuate the improper public dissemination of classified information. Similarly, the FBI usually cannot respond to such reports only when they are incorrect because that would, itself, highlight those instances when they are correct.

FOIA EXEMPTION (b)(1)

(25) FOIA Exemption (b)(1) protects records that are: "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1).

(26) E.O. 13526 § 1.1(a) provides that information may be originally classified under the terms of this order only if all of the following conditions are met: (1) an original classification authority is classifying the information; (2) the information is owned by, produced

by or for, or is under the control of the U.S. Government; (3) the information falls within one or more of the categories of information listed in § 1.4 of E.O. 13526; and (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in some level of damage to the national security, and the original classification authority is able to identify or describe the damage.

(27) E.O. 13526 explicitly authorizes precisely the type of response that the FBI has provided to Plaintiffs in this case. Specifically, § 3.6(a) provides that "[a]n 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 under this order or its predecessors."

(28) Consistent with E.O. 13526 and as described below, I have determined that acknowledging the existence or nonexistence of the records requested by Plaintiff would require the FBI to disclose properly classified facts that concern § 1.4(c) ("intelligence activities, sources, and methods") and § 1.4(d) ("foreign relations and foreign activities of the United States"). Moreover, responsive records, if they exist, would be owned by and under the control of the U.S. Government. Finally, I have determined that acknowledging the existence or non-existence of the requested records reasonably could be expected to result in damage to national security.

(29) My determination that the existence or nonexistence of the requested records is classified has not been made to conceal violations of law, inefficiency, or administrative error; to prevent embarrassment to a person, organization, or agency; to restrain competition; or to prevent or delay the release of information that does not require protection in the interests of national security.[2]

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[2] To the extent possible on the public record, I have explained the harm to national security that would result from confirming or denying the existence or non-existence responsive records here. If the Court finds that

Intelligence Activities, Sources, and Methods

(30) The records requested by Plaintiff, if they exist, implicate classified intelligence activities and methods, and acknowledging the existence or non-existence of any such records reasonably can be expected to cause damage to national security. An intelligence activity or method includes any intelligence action or technique utilized by the FBI against a targeted individual or organization that has been determined to be of national security interest, and includes any procedure (human or non-human) utilized to obtain information concerning such individual or organization. An intelligence activity or method has two characteristics. First, the intelligence activity or method, and information generated by it, is needed by United States Intelligence/Counterintelligence agencies to carry out their missions. Second, confidentiality must be maintained with respect to the use or non-use of the activity or method, including intelligence sources, if the viability, productivity, and usefulness of the activity, method, and source are to be preserved.

(31) Intelligence activities and methods must be protected from disclosure in every situation in which a certain intelligence capability, technique, or interest – or its specific use – is unknown to the groups against which it is deployed, since those groups could take countermeasures to nullify its effectiveness. Intelligence activities and methods are valuable only so long as they remain unknown and unsuspected. Once an intelligence activity or method – or the fact of its use or non-use in a certain situation – is discovered, its continued successful use is seriously jeopardized.

(32) The U.S. Government must do more than prevent explicit references to an intelligence activity or method; it must also prevent indirect references to them. One vehicle for

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explanation inadequate, Defendants could offer further explanation *ex parte* and *in camera*.

gathering information about the U.S. Government's capabilities is by reviewing officially-released information. We know that terrorist organizations and other hostile or Foreign Intelligence groups have the capacity and ability 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. Thus, even seemingly innocuous, indirect references to an intelligence activity, source, or method could have significant adverse effects when juxtaposed with other publicly-available data.

(33) Here, acknowledging the existence or non-existence of records responsive to Plaintiffs' request would be tantamount to confirming whether or not the FBI has relied on a particular intelligence activity or method targeted at particular individuals or organizations, particularly in an ongoing national security investigation. This information would reveal otherwise non-public information regarding the nature of the FBI's intelligence interests, priorities, activities, and methods—information that is highly desired by hostile actors who seek to thwart the FBI's intelligence-gathering mission. Accordingly, to confirm or deny that the FBI possesses or does not possess records responsive to Plaintiff's request could risk compromising intelligence activities or methods, and thus would pose at least a serious risk to the national security.[3]

Foreign Relations and Foreign Activities of the United States

(34) Responding to Plaintiff's request specifically as to FISA-related materials with anything other than a *Glomar* response would also reveal information concerning U.S. foreign relations and foreign activities, the disclosure of which reasonably can be expected to cause

[3] FISC orders, applications, and minimization procedures are classified, at a minimum, at the SECRET level.

damage to national security. Plaintiff's request necessarily implicates U.S. foreign relations and foreign activities in relation to foreign governments or government officials/employees.

(35) The Foreign Intelligence Surveillance Act prescribes procedures for the physical and electronic surveillance and collection of "foreign intelligence information" between "foreign powers" and "agents of foreign powers" suspected of espionage and terrorism. Thus, on its face, a request for information about FISA materials implicates foreign relations and foreign activities because those are at the heart of the FBI's use of FISA as an intelligence and investigative tool.

(36) The FBI's confirmation or denial of the existence of responsive records could reasonably be expected to cause damage to the national security interests of the United States by negatively impacting U.S. foreign relations with these and other countries. Any response by the FBI would confirm or refute whether or not the FBI is using FISA as a tool to target purported activities by specific foreign governments or foreign actors, which could damage the United States' relationship with those and/or other countries, and thereby damage the national security interests of the United States.

(37) Such disclosure could weaken, or even sever, the relationship between the United States and its foreign partners (present and future), thus degrading the Government's ability to combat hostile threats abroad. Further, any confirmation of records could be interpreted by some to mean that certain foreign liaison partners were involved in espionage against the United States, which could have political implications in those and other countries and also make them less willing to cooperate with the U.S. Government in the future. Given the sensitivity of the United States' present and future relationships with foreign countries and the importance of such relationships to our national security, requests like Plaintiff's—which, directly or indirectly, call for records that would relate to sensitive and appropriately classified details of the United States'

relationship with foreign government(s)—reflect precisely the situation in which the FBI finds it necessary to assert a *Glomar* response.

FOIA EXEMPTION (b)(3)

(38) FOIA Exemption (b)(3) protects information "specifically exempted from disclosure by statute . . . , provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3).

(39) Section 102A(i)(1) of the National Security Act of 1947, as amended, 50 U.S.C. § 403-1 (i)(1) (the "National Security Act"), provides that the Director of National Intelligence ("DNI") "shall protect intelligence sources and methods from unauthorized disclosure." Accordingly, the National Security Act constitutes a federal statute which "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue" under 5 U.S.C. § 552(b)(3). Under the direction of the DNI, other components within the U.S. Government are authorized to protect intelligence sources and methods from unauthorized disclosure.

(40) As previously described in relation to Exemption (b)(1), acknowledging the existence or non-existence of records responsive to Plaintiff's request would tend to reveal whether an intelligence method[4] is being deployed against a particular target or organization, thus compromising the national security interests of the United States. Accordingly, the

[4] An intelligence method includes any intelligence action or technique utilized by the FBI against a targeted individual or organization determined to be of national security interest; any procedure (human or non-human) or intelligence source, used to obtain information concerning the individual or organization; and foreign liaison relationships.

National Security Act, in conjunction with Exemption (b)(3), provides an additional and independent basis for the FBI's *Glomar* response to Plaintiff's request.

FOIA EXEMPTIONS (b)(7)(A) AND (b)(7)(E)

Exemption (b)(7) Threshold

(41) Before an agency can invoke any of the harms enumerated in Exemption (b)(7), it must first demonstrate that the records or information at issue were compiled for law enforcement purposes. Law enforcement agencies such as the FBI must demonstrate that the records at issue are related to the enforcement of federal laws and that the enforcement activity is within the law enforcement duty of that agency.

(42) Pursuant to 28 U.S.C. §§ 533 and 534, Executive Order 12333 as implemented by the Attorney General's Guidelines for Domestic FBI Operations ("AGG-DOM"), and 28 C.F.R. § 0.85, the FBI is the primary investigative agency of the federal government, with authority and responsibility to investigate all violations of federal law not exclusively assigned to another agency; to conduct investigations and activities to protect the United States and its people from terrorism and threats to national security; and to further the foreign intelligence objectives of the United States.

(43) The only circumstance under which the FBI can request – and the Department of Justice can and would seek on the FBI's behalf – a FISA, Title III, or other surveillance order is when the FBI is conducting an authorized, predicated investigation[5] within the scope of its law enforcement and, with respect to FISA, its foreign intelligence responsibilities. Accordingly, the types of wiretap/electronic surveillance records Plaintiff requested – when they exist – are records compiled for law enforcement purposes.

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[5] FISA authority can only be requested as part of a predicated national security investigation.

Exemption (b)(7)(A)

(44) FOIA Exemption 7(A) protects "records or information compiled for law enforcement purposes [when disclosure] could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A).

(45) In addition to satisfying Exemption (b)(7)'s threshold, an agency must establish that (a) there is a pending or prospective law enforcement proceeding and (b) disclosure of responsive records could reasonably be expected to adversely affect it.

(46) As previously noted, the FBI has publicly acknowledged that it is conducting an investigation into the Russian government's efforts to interfere in the 2016 presidential election, to include investigating into the nature of any links between individuals associated with the Trump campaign and the Russian government and whether there was any coordination between the campaign and Russia's efforts. To the extent that Plaintiff is seeking records that it believes to be related to that investigation, that investigation satisfies the requirement of a pending enforcement proceeding in Exemption (b)(7)(A) because it is an active investigation, currently under the direction of Special Counsel Mueller.

(47) Moreover, the final element – interference with that investigation – is readily established. Confirming or denying the existence or non-existence of responsive records would reveal non-public information about the focus, scope, and conduct of that investigation. Specifically, it would reveal whether or not specific investigative techniques have been used; when and to what extent they were used, if they were; their relative value or benefit if they were used; and the targets they were used against, if any. None of this information about the Russian interference investigation has been publicly disclosed and prematurely disclosing it here would give targets and others intent on interfering with the FBI's investigative efforts the information

necessary to: take defensive actions to conceal criminal activities; develop and implement countermeasures to elude detection; suppress, destroy, or fabricate evidence; and identify potential witnesses or sources, exposing them to harassment, intimidation, coercion, and/or physical threats. Accordingly, to the extent that Plaintiffs' request seeks records in relation to this investigation, confirming or denying the existence or non-existence of responsive records could reasonably be expected to adversely affect it.

(48) Finally, to the extent that Plaintiff's request implicates some other investigation, responsive records – if they exist – would likely also be related to a pending investigation, given the facts, circumstances, and timing of its request. Confirming or denying that the FBI does or does not possess responsive records would require the FBI to reveal sensitive investigative information that could reasonably be expected to cause the same harms described in the prceding paragraph.

(49) Therefore, the FBI can neither confirm nor deny the existence or non-existence of records responsive to Plaintiff's request without causing harms protected against by FOIA Exemption (b)(7)(A).

Exemption (b)(7)(E)

(50) FOIA Exemption (b)(7)(E) protects "records or information compiled for law enforcement purposes [when disclosure] 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). This exemption affords categorical protection to techniques and procedures used in law enforcement investigations; it protects techniques and procedures that are not well-known to the public as well as non-public details

about the use of well-known techniques and procedures.

(51) How the FBI applies its investigative resources (or not) against a particular allegation, report of criminal activity, or perceived threat is itself a law enforcement technique or procedure that the FBI protects pursuant to Exemption (b)(7)(E).

(52) As previously demonstrated, acknowledging or denying the existence or non-existence of the law enforcement records Plaintiff seeks would be tantamount to confirming or denying whether or not it is employing specific investigative techniques authorized under the FISA, Title III, or other investigative authority against specific targets as part of its pending Russian interference investigation or some other investigation. Even in acknowledged investigations, the FBI does not routinely disclose whether or not it has employed FISA-authorized surveillance, a classified investigative technique, against a particular target, nor does it routinely advise targets of pending investigations that the FBI is employing particular investigative techniques against them. Indeed, the very concept of electronic – or other – surveillance is that it is conducted covertly. Acknowledging when and under what circumstances the FBI relies upon these authorized law enforcement techniques in an investigation against particular targets would provide them and other adversaries with insight into the activities likely to attract – or not attract – the FBI's law enforcement attention. These individuals would then be able alter their behavior to avoid attention by law enforcement, making it more difficult for the FBI to be proactive in assessing threats and investigating crimes. Therefore, the FBI can neither confirm nor deny the existence of records responsive to Plaintiff's request without causing harms protected against by FOIA Exemption (b)(7)(E).

SEARCH AND PROCESSING RECORDS REQUEST – NO RECORDS RESPONSE

(53) Finally, Plaintiff requested records relating to the FBI's processing of this FOIA

request and in particular records about its search for records responsive to Plaintiff's wiretap request; in other words, records that did not exist at the time of Plaintiff's request and that exist *only* because of its request.

(54) The normal cut-off date for responsive records used by the FBI for FOIA requests is the date on which searches were initiated. *See* 28 C.F.R. § 16.4(a) ("In determining which records are responsive to a request, a component ordinarily will include only records in its possession as of the date it begins its search."). However, alternate cut-off dates are permissible. *Id.* Here, no search was conducted with respect to the wiretap request, so the FBI used the date on which it began working on its response to this request – March 27, 2017 – as the alternate cut-off date. Because the FBI did not start to create records about the processing of this request until the day it started working on the request – *i.e.*, March 27, 2017 – no responsive records existed or were in the possession of the FBI as of cut-off date for responsive records in this case.

(55) To be certain of this conclusion, however, the FBI reviewed its FOIA Document Processing System (FDPS) to ensure that no processing records pre-dating March 27, 2017, existed in the system, and concluded that no such records exist. FDPS is the system in which the FBI maintains FOIA requests, associated processing records, and responsive records. FOIA processing records would not exist in any other system or location.

CONCLUSION

(56) For the reasons set forth above, the FBI: (a) has no records responsive to the "wiretap" portion of Plaintiff's request to the extent that the request seeks records related to the President's March 4th tweet; (b) neither confirms nor denies the existence of other records responsive to the "wiretap" portion of Plaintiff's request because merely acknowledging whether

or not responsive records exist would itself cause harms protected against by FOIA Exemptions (b)(1), (b)(3), (b)(7)(A), and (b)(7)(E); and (c) has no records responsive to the "search and processing records" portion of Plaintiff's request because no such records were created until after the cut-off date for responsive records.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct, and that Exhibits A-C attached hereto are true and correct copies.

Executed this 1st day of September, 2017.

David M. Hardy
Section Chief
Record/Information Dissemination Section
Records Management Division
Federal Bureau of Investigation
Winchester, Virginia

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN OVERSIGHT Plaintiff, v. U.S. DEPARTMENT OF JUSTICE, *et al.* Defendant.	Civil Action No. 1:17-cv-00718

EXHIBIT A

----START MESSAGE---- Subject: eFOIA Request Received Sent: 2017-03-20T16:41:49.699227+00:00
Status: pending Message:

Organization Representative Information

Organization Name	American Oversight
Prefix	
First Name	Sara
Middle Name	
Last Name	Creighton
Suffix	
Email	foia@americanoversight.org
Phone	2028695246
Location	United States

Domestic Address

Address Line 1	1030 15th Street NW
Address Line 2	B255
City	Washington
State	District of Columbia
Postal	20005

Agreement to Pay

How you will pay

I am requesting a fee waiver for my request and have reviewed the FOIA reference guide. If my fee waiver is denied, I would like to limit my request to the two free hours of searching and 100 duplicated pages

Proof Of Affiliation for Fee Waiver

Waiver Explanation Please see attached.

Documentation Files DOJ-17-0035-1.pdf

Non-Individual FOIA Request

Request Information Please see attached.

Expedite

Expedite Reason Please see attached request. Additionally, please inform Sarah Isgur Flores Director of the Office of Public Affairs, of this expedited request for records.

----END MESSAGE----

AMERICAN OVERSIGHT

March 20, 2017

VIA ELECTRONIC MAIL AND ELECTRONIC SUBMISSION PORTAL

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Re: Expedited Freedom of Information Act Request

Dear Mr. Hardy, Ms. Mallory & Ms. Jones:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.*, and Department of Justice (DOJ) implementing regulations, 28 C.F.R. Part 16, American Oversight makes the following request for records.

On March 4, 2017, the President of the United States, Donald Trump, asserted that the former President, Barack Obama, had placed wiretaps on Mr. Trump and entities or associates in Trump Tower for improper purposes during the course of the 2016 presidential campaign. This

acknowledgement by the President that his campaign and associates had been subject to wiretapping, whether lawfully or unlawfully, raises significant questions about the conduct of both Mr. Obama and Mr. Trump and his associates. Mr. Trump questioned whether it was "legal for a sitting President to be 'wire tapping' a race for president prior to an election";[1] compared Mr. Obama's asserted role in the wiretapping to Nixon, Watergate, and McCarthyism;[2] and described Mr. Obama as a "Bad (or sick) guy!"[3] When asked about the basis for Mr. Trump's assertions, the White House stated, "He's the president of the United States. He has information and intelligence that the rest of us do not."[4] American Oversight is seeking records relating to the wiretapping that Mr. Trump has acknowledged occurred to inform the public about these important allegations.

Requested Records

American Oversight requests that DOJ produce the following within twenty business days and seeks expedited review of this request for the reasons identified below:

1. All warrant applications or other records requesting a court to institute an intercept of telecommunications or a pen register trap and trace on electronic communications or telecommunications in connection with presidential candidate Donald Trump, Trump Tower (located at 725 5th Avenue, New York, NY), entities housed in Trump Tower, or any person affiliated with Mr. Trump's campaign, whether paid or unpaid, between June 16, 2015, and the present, whether under the authority of the Foreign Intelligence Surveillance Act; Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended; or other authority.
2. Any court order or other document providing authority to institute or maintain such a requested wiretap, intercept, or pen register.
3. Any court order or other document rejecting such an application or request for authority for a wiretap, intercept, or pen register.
4. Any records logging or listing any such wiretaps, intercepts, or pen registers.
5. All communications, documents, or other material exchanged between DOJ or the FBI and Congress, or briefing papers or talking points prepared for congressional briefings,

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[1] Donald Trump (@realDonaldTrump), TWITTER (Mar. 4, 2017, 3:49 AM), https://twitter.com/realDonaldTrump/status/837993273679560704.
[2] Donald Trump (@realDonaldTrump), TWITTER (Mar. 4, 2017, 4:02 AM), https://twitter.com/realDonaldTrump/status/837996746236182529 (Nixon and Watergate); Donald Trump (@realDonaldTrump), TWITTER (Mar. 4, 2017, 3:35 AM), https://twitter.com/realDonaldTrump/status/837989835818287106 (McCarthyism).
[3] Donald Trump (@realDonaldTrump), TWITTER (Mar. 4, 2017, 4:02 AM), https://twitter.com/realDonaldTrump/status/837996746236182529.
[4] *White House Officials Stand By Trump Wiretapping Claim*, FoxNews.com, Mar. 6, 2017, http://www.foxnews.com/politics/2017/03/06/white-house-officials-stand-by-trump-wiretapping-claim.html.

regarding the wiretaps, intercepts, or pen registers discussed, or records described, in Items 1–4, *supra*.

Please provide all responsive records from June 1, 2015, to the date the search is conducted.

In addition to the records requested above, American Oversight also requests records describing the processing of this request, including records sufficient to identify search terms used and locations and custodians searched and any tracking sheets used to track the processing of this request. If your agency uses FOIA questionnaires or certifications completed by individual custodians or components to determine whether they possess responsive materials or to describe how they conducted searches, we also request any such records prepared in connection with the processing of this request.

In processing this request, please note that the President of the United States has officially acknowledged that the federal government instituted wiretaps on communications at Trump Tower. Specifically, the President stated that he "[j]ust found out that Obama had my 'wires tapped' in Trump Tower just before the victory. Nothing found."[1] The President further elaborated, "[i]s it legal for a sitting President to be 'wire tapping' a race for president prior to an election? Turned down by court earlier,";[2] "I'd bet a good lawyer could make a great case out of the fact that President Obama was tapping my phones in October, just prior to Election!";[3] and "How low has President Obama gone to tapp [sic] my phones during the very sacred election process."[4] In light of the official acknowledgement of these activities by the President, the government may not rely on exemptions permitting the withholding of material that is classified, protected by statute, or related to an ongoing law enforcement matter. If DOJ does rely on an exemption to withhold records, whether under Exemption 1 (classified information), Exemption 3 (statutorily protected information), Exemption 7 (law enforcement information); or any so-called "Glomar" response under *Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976), and its progeny, American Oversight will challenge those withholdings in court in light of the President's acknowledgment.

American Oversight seeks all responsive records regardless of format, medium, or physical characteristics. In conducting your search, please understand the terms "record," "document," and "information" in their broadest sense, to include any written, typed, recorded, graphic, printed, or audio material of any kind. We seek records of any kind, including electronic records, audiotapes, videotapes, and photographs, as well as letters, emails, facsimiles, telephone messages, voice mail

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[1] Donald Trump (@realDonaldTrump), TWITTER (Mar. 4, 2017, 3:35 AM), https://twitter.com/realDonaldTrump/status/837989835818287106.
[2] Donald Trump (@realDonaldTrump), TWITTER (Mar. 4, 2017, 3:49 AM), https://twitter.com/realDonaldTrump/status/837993278679560704.
[3] Donald Trump (@realDonaldTrump), TWITTER (Mar. 4, 2017, 3:52 AM), https://twitter.com/realdonaldtrump/status/837994257566863360.
[4] Donald Trump (@realDonaldTrump), TWITTER (Mar. 4, 2017, 4:02 AM), https://twitter.com/realDonaldTrump/status/837996746236182529.

messages and transcripts, notes, or minutes of any meetings, telephone conversations or discussions. Our request includes any attachments to these records. **No category of material should be omitted from search, collection, and production.**

Please search all records regarding agency business. **You may not exclude searches of files or emails in the personal custody of your officials, such as personal email accounts.** Records of official business conducted using unofficial systems or stored outside of official files is subject to the Federal Records Act and FOIA.[9] **It is not adequate to rely on policies and procedures that require officials to move such information to official systems within a certain period of time; American Oversight has a right to records contained in those files even if material has not yet been moved to official systems or if officials have, through negligence or willfulness, failed to meet their obligations."**

In addition, please note that in conducting a "reasonable search" as required by law, you must employ the most up-to-date technologies and tools available, in addition to searches by individual custodians likely to have responsive information. Recent technology may have rendered DOJ's prior FOIA practices unreasonable. **In light of the government-wide requirements to manage information electronically by the end of 2016, it is no longer reasonable to rely exclusively on custodian-driven searches."[10] Furthermore, agencies that have adopted the National Archives and Records Agency (NARA) Capstone program, or similar policies, now maintain emails in a form that is reasonably likely to be more complete than individual custodians' files.** For example, a custodian may have deleted a responsive email from his or her email program, but DOJ's archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that DOJ use the most up-to-date technologies to search for responsive information and take steps to ensure that the most complete repositories of information are searched. American Oversight is available to work with you to craft appropriate search terms. **However, custodian searches are still**

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[9] *See Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145, 149–50 (D.C. Cir. 2016); *cf. Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 955–56 (D.C. Cir. 2016).

[10] *See Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016) ("The Government argues that because the agency had a policy requiring [the official] to forward all of his emails from his [personal] account to his business email, the [personal] account only contains duplicate agency records at best. Therefore, the Government claims that any hypothetical deletion of the [personal account] emails would still leave a copy of those records intact in [the official's] work email. However, policies are rarely followed to perfection by anyone. At this stage of the case, the Court cannot assume that each and every work related email in the [personal] account was duplicated in [the official's] work email account." (citations omitted)).

[11] Presidential Memorandum—Managing Government Records, 76 Fed. Reg. 75,423 (Nov. 28, 2011), *available at* https://obamawhitehouse.archives.gov/the-press-office/2011/11/28/presidential-memorandum-managing-government-records; Office of Mgmt. & Budget, Exec. Office of the President, Memorandum for the Heads of Executive Departments & Independent Agencies, "Managing Government Records Directive," M-12-18 (Aug. 24, 2012), *available at* https://www.archives.gov/files/records-mgmt/m-12-18.pdf.

required; agencies may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.

Under the FOIA Improvement Act of 2016, agencies must adopt a presumption of disclosure, withholding information "only if . . . disclosure would harm an interest protected by an exemption" or "disclosure is prohibited by law."[11] If it is your position that any portion of the requested records is exempt from disclosure, American Oversight requests that you provide an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). As you are aware, a *Vaughn* index must describe each document claimed as exempt with sufficient specificity "to permit a reasoned judgment as to whether the material is actually exempt under FOIA."[12] Moreover, the *Vaughn* index "must describe *each* document or portion thereof withheld, and for *each* withholding it must discuss the consequences of disclosing the sought-after information."[13] Further, "the withholding agency must supply 'a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.'"[14]

In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If it is your position that a document contains non-exempt segments, but that those non-exempt segments are so dispersed throughout the document as to make segregation impossible, please state what portion of the document is non-exempt, and how the material is dispersed throughout the document.[15] Claims of nonsegregability must be made with the same degree of detail as required for claims of exemptions in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

You should institute a preservation hold on information responsive to this request. American Oversight intends to pursue all legal avenues to enforce its right of access under FOIA, including litigation if necessary. Accordingly, DOJ is on notice that litigation is reasonably foreseeable.

To ensure that this request is properly construed, that searches are conducted in an adequate but efficient manner, and that extraneous costs are not incurred, American Oversight welcomes an opportunity to discuss its request with you before you undertake your search or incur search or duplication costs. By working together at the outset, American Oversight and the Department can decrease the likelihood of costly and time-consuming litigation in the future.

Where possible, please provide responsive material in electronic format by email or in PDF or TIF format on a USB drive. Please send any responsive material being sent by mail to American

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[11] FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114–185).
[12] *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).
[13] *King v. U.S. Dep't of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).
[14] *Id.* at 224 (citing *Mead Data Central, Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977)).
[15] *Mead Data Central*, 566 F.2d at 261.

Oversight, 1030 15th Street, NW, Suite B255, Washington, DC 20005. If it will accelerate release of responsive records to American Oversight, please also provide responsive material on rolling basis.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 28 C.F.R. § 16.10(k), American Oversight requests a waiver of fees associated with processing this request for records. The subject of this request concerns the operations of the federal government, and the disclosures will likely contribute to a better understanding of relevant government procedures by the general public in a significant way. Moreover, the request is primarily and fundamentally for non-commercial purposes. 5 U.S.C. § 552(a)(4)(A)(iii).[17]

American Oversight requests a waiver of fees because disclosure of the requested information is "in the public interest because it is likely to contribute significantly to public understanding" of government operations and is not "primarily in the commercial interest of the requester."[18] The disclosure of the information sought under this request will document and reveal the operations of the federal government, including how public funds are spent and how officials conduct the public's business.

Allegations of Russian interference in the U.S. election and the Trump campaign's closeness to Russian officials has been the subject of significant media coverage. On August 27, 2016, then-Senate Minority Leader Harry Reid wrote to F.B.I. Director James Comey asking Mr. Comey to investigate evidence of planned tampering by the Russians.[19] Then on September 8, 2016, the same day that then-Senator Jeff Sessions reportedly held a one-on-one meeting with Russian Ambassador Sergey Kislyak, the *New York Times* published an article quoting Mr. Sessions in which Mr. Trump's campaign reaffirmed its embrace of Russian president Vladimir Putin.[20] More recently, a week prior to Mr. Trump's inauguration, reports surfaced that Michael T. Flynn, Mr. Trump's first National Security Advisor, spoke with Mr. Kislyak the day before the Obama administration imposed sanctions on Russia as retaliation for the election interference.[21]

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[17] *See, e.g., McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987).

[18] 5 U.S.C. § 552(a)(4)(A)(iii); 28 C.F.R. § 16.10(k).

[19] David E. Sanger, *Harry Reid Cites Evidence of Russian Tampering in U.S. Vote, and Seeks F.B.I. Inquiry*, N.Y. TIMES, Aug. 29, 2016, https://www.nytimes.com/2016/08/30/us/politics/harry-reid-russia-tampering-election-fbi.html.

[20] Jonathan Martin & Amy Chozick, *Donald Trump's Campaign Stands By Embrace of Putin*, N.Y. TIMES, Sept. 8, 2016, https://www.nytimes.com/2016/09/09/us/politics/hillary-clinton-donald-trump-putin.html.

[21] Julie Hirschfeld Davis et al., *Trump National Security Adviser Called Russian Envoy Day Before Sanctions Were Imposed*, N.Y. TIMES, Jan. 13, 2017, https://www.nytimes.com/2017/01/13/us/politics/donald-trump-transition.html.

On March 4, 2017, Mr. Trump asserted that former President Obama had placed wiretaps on Mr. Trump and entities in Trump Tower during the course of the 2016 presidential campaign for improper purposes. Mr. Trump questioned whether it was "legal for a sitting President to be 'wire tapping' a race for president prior to an election";[1] compared Mr. Obama's asserted role in the wiretapping to Nixon, Watergate, and McCarthyism;[2] and described Mr. Obama as a "Bad (or sick) guy!"[3] Disclosure of the requested information is in the public interest because it would inform the public regarding these very serious allegations about the conduct of both the current and former presidents and their staffs.

This request is primarily and fundamentally for non-commercial purposes. As a 501(c)(3) nonprofit, American Oversight does not have a commercial purpose and the release of the information requested is not in American Oversight's financial interest. American Oversight's mission is to promote transparency in government, to educate the public about government activities, and to ensure the accountability of government officials. American Oversight will use the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media. American Oversight will also make materials it gathers available on our public website.

Accordingly, American Oversight qualifies for a fee waiver.

Application for Expedited Processing

Pursuant to 5 U.S.C. § 552(a)(6)(E)(1) and 28 C.F.R. § 16.5(b), (e)(1)(iv), American Oversight requests that the Department of Justice expedite the processing of this request.

I certify to be true and correct to the best of my knowledge and belief, that there is widespread and exceptional media interest and there exist possible questions concerning the government's integrity, which affect public confidence. There is widespread and exceptional media interest in Mr. Trump's allegations that Mr. Obama directed the tapping of the communications of Mr. Trump and persons affiliated with his campaign for purposes related to the 2016 presidential election,[4] and in the allegations that Mr. Trump and his campaign affiliates had contacts with

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[1] Donald Trump (@realDonaldTrump), TWITTER (Mar. 4, 2017, 3:49 AM), https://twitter.com/realDonaldTrump/status/837993273679560704.
[2] Donald Trump (@realDonaldTrump), TWITTER (Mar. 4, 2017, 4:02 AM), https://twitter.com/realDonaldTrump/status/837996746236182529 (Nixon and Watergate); Donald Trump (@realDonaldTrump), TWITTER (Mar. 4, 2017, 3:35 AM), https://twitter.com/realDonaldTrump/status/837989835818287106 (McCarthyism).
[3] Donald Trump (@realDonaldTrump), TWITTER (Mar. 4, 2017, 4:02 AM), https://twitter.com/realDonaldTrump/status/837996746236182529.
[4] *See, e.g.*, Philip Rucker et al., *Trump Accuses Obama of 'Nixon/Watergate' Wiretap - But Offers No Evidence*, WASH. POST, Mar. 4, 2017, https://www.washingtonpost.com/politics/trump-accuses-obama-of-nixonwatergate-wiretap--but-offers-no-evidence/2017/03/04/1ddc35e6-0114-11e7-8ebe-6e0dbe4f2bca_story.html?hpid=hp_hp-top-table-main_trumpwiretap-

Russian officials, and that those contacts are under investigation." The requested documents will shed light on these issues of considerable interest to the public. Both the allegation that Mr. Obama improperly instituted wiretaps for electoral purposes and the possibility that investigations established national security or criminal bases to seek court ordered wiretapping of Mr. Trump and persons affiliated with his campaign similarly raise questions about whether both the current and the former president or their associates acted unlawfully and about the very integrity of the 2016 presidential election. These are self-evidently matters "in which there exist possible questions about the government's integrity that affect public confidence."["]

Accordingly, American Oversight's request satisfies the criteria for expedition.

Conclusion

We share a common mission to promote transparency in government. American Oversight looks forward to working with you on this request. If you do not understand any part of this request, have any questions, or foresee any problems in fully releasing the requested records, please contact

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8pm%3Ahomepage%2Fstory&tid=a_inl&utm_term=.c2ab0fcc0033; Elliot Smilowitz, *Trump Accuses Obama of Wiretapping Trump Tower* (Mar. 4, 2017, 6:51 AM), http://thehill.com/homenews/administration/322337-trump-accuses-obama-of-wiretapping-trump-tower; Jeremy Diamond et al., *Trump's Baseless Wiretap Claim*, CNN (Mar. 5, 2017, 6:59 AM), http://www.cnn.com/2017/03/04/politics/trump-obama-wiretap-tweet/.

["] *See, e.g.*, Adam Entous et al., *Sessions Met with Russian Envoy Twice Last Year, Encounters He Later Did Not Disclose*," WASH. POST, Mar. 1, 2017, https://www.washingtonpost.com/world/national-security/sessions-spoke-twice-with-russian-ambassador-during-trumps-presidential-campaign-justice-officials-say/2017/03/01/77205eda-feac-11e6-99b4-9e613afeb09f_story.html; Brooke Seipel, *Bush's Ethics Lawyer On Sessions Talks with Russia Ambassador: 'Good Way To Go To Jail'*, THE HILL BLOG (Mar. 1, 2017, 10:34 PM), http://thehill.com/blogs/blog-briefing-room/news/321936-ethics-lawyer-to-george-w-bush-on-sessions-talks-with-russa; David E. Sanger, *Harry Reid Cites Evidence of Russian Tampering in U.S. Vote, and Seeks F.B.I. Inquiry*, N.Y. TIMES, Aug. 29, 2016, https://www.nytimes.com/2016/08/30/us/politics/harry-reid-russia-tampering-election-fbi.html; Julie Hirschfeld Davis et al., *Trump National Security Adviser Called Russian Envoy Day Before Sanctions Were Imposed*, N.Y. TIMES, Jan. 13, 2017, https://www.nytimes.com/2017/01/13/us/politics/donald-trump-transition.html; Margaret Hartmann, *What We Know about the Investigations Into Trump's Russia Scandal*, N.Y. MAG. (Mar. 7, 2017), http://nymag.com/daily/intelligencer/2017/03/what-we-know-about-the-probes-into-trumps-russia-scandal.html; Karen Demirjian et al., *Attorney General Jeff Sessions Will Recuse Himself from Any Probe Related to 2016 Presidential Campaign*, WASH. POST (Mar. 2, 2017), https://www.washingtonpost.com/powerpost/top-gop-lawmaker-calls-on-sessions-to-recuse-himself-from-russia-investigation/2017/03/02/148c07ac-ff46-11e6-8ebe-6e0dbe4f2bca_story.html?hpid=hp_hp-top-table-main_gopreax-840a%3Ahomepage%2Fstory&tid=ptv_rellink&utm_term=.1edd2d00bd99.

[#] 28 C.F.R. § 16.5(e)(1)(iv).

Sara Creighton at foia@americanoversight.org or 202-869-5246. Also, if American Oversight's request for a fee waiver is not granted in full, please contact us immediately upon making such a determination.

Sincerely,

Austin R. Evers
Executive Director
American Oversight

cc: Sarah Isgur Flores, Director, Office of Public Affairs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN OVERSIGHT Plaintiff, v. U.S. DEPARTMENT OF JUSTICE, *et al.* Defendant.	Civil Action No. 1:17-cv-00718

EXHIBIT B

U.S. Department of Justice

Federal Bureau of Investigation
Washington, D.C. 20535

April 11, 2017

SARA CREIGHTON
AMERICAN OVERSIGHT
SUITE B255
1030 15TH STREET NW
WASHINGTON, DC 20005

FOIPA Request No.: 1371005-000
Subject: FBI Surveillance Orders on Donald Trump et. al (June 16, 2015 - Present)

Dear Ms. Creighton:

This acknowledges receipt of your Freedom of Information Act (FOIA) request to the FBI.

☑ Your request has been received at FBI Headquarters for processing.

☐ Your request has been received at the _____ Resident Agency / _____ Field Office and forwarded to FBI Headquarters for processing.

☑ You submitted your request via the FBI's eFOIA system.

- ☑ We have reviewed your request and determined that it is compliant with the terms and conditions of the eFOIA system. You will continue to receive correspondence online.
- ☐ We have reviewed your request and determined that it is not in compliance with the terms and conditions of the eFOIA system. Future correspondence will be mailed to you.

☐ The subject of your request is currently being processed for public release. Documents will be released to you upon completion.

☐ Release of responsive records will be made to the FBI's FOIA Library (The Vault), http:/vault.fbi.gov, and you will be contacted when the release is posted.

☑ Your request for a fee waiver is being considered and you will be advised of the decision at a later date. If your fee waiver is denied, you will be charged fees in accordance with the category designated below.

☑ For the purpose of assessing fees, we have made the following determination:

- ☐ As a commercial use requester, you will be charged applicable search, review, and duplication fees in accordance with 5 USC § 552 (a)(4)(A)(ii)(I).
- ☑ As an educational institution, noncommercial scientific institution or representative of the news media requester, you will be charged applicable duplication fees in accordance with 5 USC § 552 (a)(4)(A)(ii)(II).
- ☐ As a general (all others) requester, you will be charged applicable search and duplication fees in accordance with 5 USC § 552 (a)(4)(A)(ii)(III).

Please check the status of your FOIPA request at www.fbi.gov/foia by clicking on **FOIPA Status** and entering your FOIPA Request Number. Status updates are adjusted weekly. The status of newly assigned requests may not be available until the next weekly update. If the FOIPA has been closed the notice will indicate that appropriate correspondence has been mailed to the address on file.

For questions regarding our determinations, visit the www.fbi.gov/foia website under "Contact Us." The FOIPA Request number listed above has been assigned to your request. Please use this number in all correspondence concerning your request. Your patience is appreciated.

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@ic.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.

Sincerely,

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

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN OVERSIGHT Plaintiff, v. U.S. DEPARTMENT OF JUSTICE, *et al.* Defendant.	Civil Action No. 1:17-cv-00718

EXHIBIT C

U.S. Department of Justice

Federal Bureau of Investigation
Washington, D.C. 20535

May 2, 2017

SARA CREIGHTON
C/O CERISSA CAFASSO
AMERICAN OVERSIGHT
SUITE B255
1030 15TH STREET NW
WASHINGTON, DC 20005

Civil Litigation No.: 17-CV-718
FOIPA Request No.: 1371005-000
Subject: FBI Surveillance Orders on Donald Trump et. Al

Dear Ms. Creighton:

This is in reference to your letter directed to the Federal Bureau of Investigation (FBI), in which you requested expedited processing for the above-referenced Freedom of Information Act (FOIA) request. Pursuant to the Department of Justice (DOJ) standards permitting expedition, expedited processing can only be granted when it is determined that a FOIPA request involves one or more of the below categories.

You have requested expedited processing according to:

☐ **28 C.F.R. §16.5 (e)(1)(i):** "Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual."

☐ **28 C.F.R. §16.5 (e)(1)(ii):** "An urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information."

☐ **28 C.F.R. §16.5 (e)(1)(iii):** "The loss of substantial due process of rights."

☑ **28 C.F.R. §16.5 (e)(1)(iv):** "A matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence."

You have provided enough information concerning the statutory requirements permitting expedition; therefore, your request is approved.

Although your request is in litigation, 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.

Sincerely,

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