No. _____

In the Supreme Court of the United States

PROJECT FOR PRIVACY AND SURVEILLANCE ACCOUNTABILITY, INC., *Petitioner,*

v.

UNITED STATES DEPARTMENT OF JUSTICE, OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, NATIONAL SECURITY AGENCY, CENTRAL INTELLIGENCE AGENCY, AND UNITED STATES DEPARTMENT OF STATE

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In response to requests for records under the Freedom of Information Act (FOIA) regarding potential domestic surveillance abuse, the respondent agencies issued so-called *Glomar* responses that refuse to confirm or deny the existence of any responsive record on the supposed grounds that doing so would reveal information protected by a FOIA exemption. Worse, the agencies issued those responses without even *searching* for responsive records. The D.C. Circuit approved the agencies' searchless *Glomar* responses on the mistaken theory that FOIA allows agencies to decline even to search for responsive records if the agency believes such records—were they to exist—would be subject to a *Glomar* response.

The questions presented are:

1. Does FOIA allow agencies invoking any of the exemptions in 5 U.S.C. § 552(b), including those not based on national security, to refuse to confirm or deny the existence of any records responsive to a FOIA request?

2. Assuming FOIA allows such a response, may an agency issue it without first searching for responsive records to determine whether its concern actually applies to all responsive records and/or whether some can be released in segregated or redacted form?

PARTIES TO THE PROCEEDING

The case caption contains the names of all parties to the proceeding.

Petitioner Project for Privacy and Surveillance Accountability, Inc. was the Appellant in the D.C. Circuit and the Plaintiff in the district court.

Respondents United States Department of Justice, Office of the Director of National Intelligence, National Security Agency, Central Intelligence Agency, and United States Department of State were the Appellees in the D.C. Circuit and the Defendants in the district court.

CORPORATE DISCLOSURE STATEMENT

Petitioner Project for Privacy & Surveillance Accountability, Inc. certifies that it is a nonpartisan, nonprofit corporation that has no parent corporation and does not issue stock. It further certifies that no publicly held company has any form of ownership interest.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this case:

- *Project for Privacy and Surveillance Accountability, Inc.* v. *United States Department of Justice,* No. 22-5303 (D.C. Cir.) (opinion affirming dismissal entered July 18, 2025 (App.A)); and
- *Project for Privacy and Surveillance Accountability, Inc.* v. *United States Department of Justice,* No. 1:20-cv-03657-BAH (D.D.C.) (memorandum opinion dismissing claims entered September 12, 2022 (App.B)).

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INTRODUCTION

This petition presents two questions of fundamental importance to all who seek to hold the executive branch accountable by obtaining records under the Freedom of Information Act (FOIA). It first asks the Court to determine whether agencies who receive FOIA requests may issue so-called *Glomar* responses that refuse to confirm or deny the existence of any responsive record on the supposed grounds that even the mere existence or non-existence of a responsive record falls within one or more of the statutory exemptions set forth in FOIA. The petition then asks the Court to determine whether agencies issuing such non-responses may do so without even *searching* for responsive records—to see, for example, if the existence of some subset of records could be disclosed consistent with the statute, and/or if portions of the records protected from disclosure can be segregated from non-protected portions.

Under the text and purpose of FOIA, the answer to both questions is no. This Court's review is therefore important to ensure accountability for government agencies that hide behind sweeping claims of secrecy to conceal their suspect conduct. It is also necessary to correct the courts of appeals that have wrongly allowed agencies to get away with such gamesmanship contrary to FOIA's commands.

The first issue—regarding the option of a *Glomar* response at all—first arose in *Phillippi* v. *Central Intelligence Agency*, where the D.C. Circuit held that an agency's use of a "neither-confirm-nor-deny" response limits the extent to which judicial review

requires a public record. 546 F.2d 1009, 1012-1015 (D.C. Cir. 1976). There, the D.C. Circuit suggested that, under some circumstances, disclosing the existence or non-existence of a requested record may itself reveal classified information that implicates "national security considerations." *Id.* at 1012. The court then held that, if an agency issues a response refusing to confirm or deny the existence of a responsive record, it must "provide a public affidavit" setting forth "in as much detail as is possible" why it did so. *Id.* at 1013. Only after the agency's public rationale has been tested should the district court—"if necessary"—consider the agency's submission of a nonpublic affidavit. *Ibid.*

This judge-made rule became known as the "*Glomar* doctrine" because *Phillippi* involved a request for records about a boat called the Hughes Glomar Explorer. *Id.* at 1011. And every other court of appeals to have faced the same question has held that *Glomar* responses are permitted where an agency "fears" that a substantive response "could reveal classified sources or methods of obtaining foreign intelligence." See, *e.g.*, *Bassiouni* v. *CIA*, 392 F.3d 244, 246 (7th Cir. 2004). However, the D.C. Circuit has since expanded the *Glomar* doctrine to allow agencies to refuse to confirm or deny the existence of requested records on the basis of *any* exemption—even for privacy concerns. See App.62a-65a; see also *People for the Ethical Treatment of Animals* v. *National Insts. of Health*, 745 F.3d 535, 540-541 (D.C. Cir. 2014).

And, in the nearly 50 years since the D.C. Circuit created the *Glomar* doctrine, this Court has never addressed whether, or under what circumstances,

FOIA's text allows agencies to issue such non-responses. In the absence of this Court's guidance, agency reliance on *Glomar* has exploded, and transparency has cratered. It is time that this Court rein in agency reliance on *Glomar*, as FOIA's plain text and statutory purpose do not leave room for that doctrine—especially when based on concerns other than national security.

Moreover, the decision below compounds the error of allowing *Glomar* non-responses, and further departs from FOIA's text and purpose, by approving *searchless* non-responses on the mistaken theory that agencies may ignore FOIA's express search requirement if they profess to believe any responsive records would be subject to a *Glomar* response. That conclusion defies common sense and flouts FOIA's text and purpose. And the decision below is not an isolated instance. Rather, the D.C. Circuit has increasingly expanded the *Glomar* doctrine to defer to agencies' searchless non-responses to all sorts of FOIA requests. See, *e.g.*, *Schaerr* v. *United States Dep't of Just.*, 69 F.4th 924, 929 (D.C. Cir. 2023) (holding that "[a]n agency need not search for records when simply recognizing the existence or nonexistence of responsive records is protected by a FOIA exemption"); *People for the Ethical Treatment of Animals*, 745 F.3d at 540 (holding that "to the extent the circumstances justify a *Glomar* response, the agency need not conduct any search for responsive documents or perform any analysis to identify segregable portions of such documents").

If allowed to stand, the D.C. Circuit's continued expansion of the *Glomar* doctrine will have profound

negative implications for those who seek "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Department of Air Force* v. *Rose*, 425 U.S. 352, 361 (1976) (quoting upon affirmance, *Rose* v. *Department of Air Force*, 495 F.2d 261, 263 (2d Cir. 1974)). Further, the D.C. Circuit has a "significantly larger docket of FOIA requests" than other circuits, which have historically followed its lead. See *Ferri* v. *Bell*, 645 F.2d 1213, 1222 (3d Cir. 1981), *modified on reh'g*, 671 F.2d 769 (3d Cir. 1982); see also, *e.g.*, *Bassiouni*, 392 F.3d at 246.

This Court should therefore grant the petition and reverse the decision below, which conflicts with both FOIA's text and its purpose and poses a substantial threat to government transparency about critical issues such as domestic surveillance abuse.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the D.C. Circuit is reported at 143 F.4th 506 (D.C. Cir. 2025) and reproduced in Appendix A, App.1a-24a.

The district court's memorandum opinion granting defendants' motion for summary judgment is not published but can be found at 2022 WL 4365745 and is reproduced in Appendix B, App.25a-67a.

JURISDICTION

The D.C. Circuit's judgment and opinion were issued on July 18, 2025. App.A, App.1a. This petition was originally due on October 16, 2025, and—following a sixty-day extension—is now due on December 15, 2025. See No. 25A393. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Freedom of Information Act's text, 5 U.S.C. § 552, is reproduced in Appendix D, App.89a-128a.

STATEMENT OF THE CASE

A. Legal Background

Congress passed FOIA in 1966 to expand citizen oversight of the government and the "'actions which it supposedly takes on [the people's] behalf.'" H.R. Rep. No. 94-880(I), at 2 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 2183, 2184 (quoting The Federalist No. 49 (James Madison)). Indeed, as this Court has put it, Congress enacted FOIA "to ensure [the] informed citizenry" that is "vital to the functioning of a democratic society" and desperately "needed to check against corruption and to hold the governors accountable to the governed." *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (citation omitted). To do so, FOIA empowers any person to submit a request to inspect any records in the possession of federal agencies. See 5 U.S.C. § 552 (App.D).

1. Once a request is submitted, the statute's procedures are specific. FOIA expressly requires

agencies, upon receiving a request, to "make reasonable efforts to search for the * * * records which are responsive to a request." *Id.* § 552(a)(3)(C)-(D) (App.93a). FOIA imposes this search mandate "upon *any* request for records" that "reasonably describes such records" and "is made in accordance with published rules[.]" *Id.* § 552(a)(3)(A) (emphasis added) (App.92a). There are only two limited exceptions to the search requirement, neither of which applies here—administrative burdens, *id.* § 552(a)(3)(C), and requests made by federal entities, *id.* § 552(a)(3)(E) (App.93a-94a).

In addition to requiring agencies to search for responsive records, FOIA provides agencies with only two options for responding: either make "records promptly available to any person" who requests them, *id.* § 552(a)(3)(A) (App.92a-93a), or "withhold" the requested record if it falls under one of FOIA's nine enumerated statutory exemptions. *Id.* § 552(a)(8)(A)(i)(I) (App.110a); see also *id.* § 552(b) (enumerating these exemptions) (App.110a-113a).[1] This Court has long recognized that FOIA's text creates a "strong presumption in favor of disclosure." *United States Dep't of State* v. *Ray*, 502 U.S. 164, 173 (1991) (citations omitted). Indeed, FOIA's intent is to elucidate rather than to obscure.

FOIA, of course, does not require release of every government record. Rather, the statutory exemptions

[1] 5 U.S.C. § 552(c) allows—but does not require—agencies to ignore "the [procedural] requirements of this section" for limited periods in response to a limited subset of requests. App.113a-114a. No agency invoked § 552(c) here.

allow withholding of records that are, for example: "properly classified" on the grounds of national security; "related solely" to internal agency practices; trade secrets; and "compiled for law enforcement purposes," but only if their production would cause one or more specified harms, such as revealing investigative techniques. See 5 U.S.C. § 552(b) (App.110a-113a); see also *United States Dep't of Just.* v. *Julian*, 486 U.S. 1, 8 (1988) (records remain exempt from disclosure where "legitimate governmental and private interests could be harmed by release" (quoting *FBI* v. *Abramson,* 456 U.S. 615, 621 (1982)). Through these exemptions, FOIA reflects Congress's judgment about how best to "balance the public's need for access to official information with the Government's need for confidentiality." *Weinberger* v. *Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139, 144 (1981). And this Court "narrowly construe[s]" these exemptions to ensure maximum disclosure. *Department of Air Force* v. *Rose*, 425 U.S. 352, 361 (1976) (citations omitted).

When an agency denies a FOIA request based on one of the statutory exemptions, it must provide the requester with "the names and titles or positions of each person responsible for the denial" and "make a reasonable effort to estimate the volume of any [denied] matter." *Schindler Elevator Corp.* v. *United States ex rel. Kirk*, 563 U.S. 401, 410-411 (2011) (quoting 5 U.S.C. §§ 552(a)(6)(C)(i), (F)). Once the agency estimates the volume of responsive records it is withholding, it also must "provide any such estimate to the person making the request." *Id.* at 411 (quoting 5 U.S.C. § 552(a)(6)(F)).

And, even where an agency asserts that a statutory exemption applies, FOIA still requires the agency to "consider whether *partial* disclosure of information is possible" and "take reasonable steps necessary to segregate and release nonexempt information." 5 U.S.C. § 552(a)(8)(A)(ii) (App.110a) (emphasis added); see also *id.* § 552(b) ("[a]ny reasonably segregable portion of a record shall be [disclosed] * * * after deletion of the portions which are exempt under this subsection") (App.112a-113a). This segregation requirement was added by Congress in 1974 to cabin agencies' tendency to over-withhold documents that only contain a limited amount of exempt materials. See Act of November 21, 1974, Pub. L. No. 93-502, § 2(c), 88 Stat. 1561, 1564. Its purpose was to "strengthen the procedural aspects" of FOIA by, among other things, addressing "the inadequacy of agency indexes of pertinent information" and "difficulties in procedures" used to obtain responsive records. H.R. Rep. 93-876 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 6267, 6267.

2. Congress also created a system requiring judicial oversight of agency withholdings when such withholdings are challenged based on the agency's explanations for such withholdings. FOIA grants jurisdiction to district courts "to enjoin [an] agency from withholding agency records and to order the production of any agency records improperly withheld" in response to a FOIA request. 5 U.S.C. § 552(a)(4)(B) (App.98a-99a). And FOIA requires district courts to "determine the matter de novo," placing "the burden * * * on the agency to sustain its action." *Ibid.*

Congress also granted district courts the discretion to "examine the contents of such agency records in camera to determine whether such records or any part thereof" are protected by a statutory exemption. *Ibid.* And in *Vaughn* v. *Rosen*, the D.C. Circuit held that—to facilitate the judicial review that the statutory text requires—an agency must create an index of withheld documents to meet its statutory burden to justify withholdings. 484 F.2d 820, 827-828 (D.C. Cir. 1973). These "*Vaughn* indexes" require agencies to "itemiz[e] and index[]" withheld records by "correlat[ing] statements made in the Government's refusal justification with the actual portions of the document." *Id.* at 827.

3. Despite these requirements, the lower courts—starting with the D.C. Circuit—have allowed agencies to issue a "*Glomar* response" in which they may "'refuse to confirm or deny the existence' of the requested records." *Knight First Amend. Inst. at Columbia Univ.* v. *CIA*, 11 F.4th 810, 813 (D.C. Cir. 2021) (quoting *Wolf* v. *CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007)). And, because the D.C. Circuit has a "significantly larger docket of FOIA requests," *Ferri* v. *Bell*, 645 F.2d 1213, 1222 (3d Cir. 1981), *modified on reh'g*, 671 F.2d 769 (3d Cir. 1982), "[e]very appellate court to address the issue has" followed the D.C. Circuit's lead and "held that the FOIA permits" agencies "to make a '*Glomar* response' when it fears that inferences from *Vaughn* indexes or selective disclosure could reveal classified sources or methods of obtaining foreign intelligence." *Bassiouni* v. *CIA*, 392 F.3d 244, 246 (7th Cir. 2004). But—as demonstrated by this case—courts have now expanded the *Glomar*

doctrine to allow agencies to refuse to confirm or deny the existence of requested records even on the basis of non-national security concerns. See App.57a-67a (holding that *Glomar* responses were justified by Exemptions 7(A), 7(C) and 7(E)).

Worse still, the D.C. Circuit has expanded the *Glomar* doctrine over time to allow agencies to disregard even FOIA's initial search requirement. In *Wolf* v. *Central Intelligence Agency*, the D.C. Circuit rejected—in a footnote—the suggestion that "*de novo* review of the Agency's response requires the district court to order the Agency to search for responsive records and to submit a *Vaughn* index." 473 F.3d at 374 n.4. Similarly, in *Electronic Privacy Information Center* v. *National Security Agency*, the D.C. Circuit rejected the position that FOIA required an agency to "to search for responsive documents and conduct a segregability analysis prior to issuing a *Glomar* response." 678 F.3d 926, 934 (D.C. Cir. 2012).

Relying on those cases, the D.C. Circuit later held that "[c]ourts can grant summary judgment upholding a *Glomar* response based [only] on agency affidavits explaining the basis for the response" and that if a *Glomar* response is justified, "the agency need not conduct any search for responsive documents or perform any analysis to identify segregable portions of such documents." *People for the Ethical Treatment of Animals* v. *National Insts. of Health*, 745 F.3d 535, 540 (D.C. Cir. 2014). In the latter case, People for the Ethical Treatment of Animals (PETA) submitted FOIA requests to the National Institutes of Health (NIH) seeking records "concerning NIH investigations of animal abuse at a university research lab,"

including records related to three specific researchers. *Id.* at 538. Rather than providing responsive records or explaining why it was withholding them, NIH instead issued a *Glomar* response refusing to confirm or deny the existence of any responsive record, asserting that "acknowledging the[] existence" of responsive records "would itself undercut privacy interests protected by FOIA." *Ibid.* And the D.C. Circuit "affirm[ed] the validity of NIH's *Glomar* responses as to any documents that would reveal whether NIH had investigated the three researchers." *Ibid.*[2] That decision thus precluded any role for judicial review of agency judgments on such matters—including *in camera* examination of affidavits or *Vaughn* indices.

B. Factual Background

PPSA is a non-profit organization whose stated mission is to hold the Intelligence Community "accountable to constitutional and statutory limitations." App.4a, 70a. One way it furthers that mission is by submitting FOIA requests.

1. The FOIA requests here arose after whistleblowers within the Intelligence Community suggested that members of Congress and other government officials may have been the subject of unlawful surveillance. App.26a. The Foreign

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[2] This expansion of the *Glomar* doctrine was again confirmed in *Schaerr* v. *United States Department of Justice*, where the D.C. Circuit held that "[a]n agency need not search for records when simply recognizing the existence or nonexistence of responsive records is protected by a FOIA exemption." 69 F.4th 924, 928-929 (D.C. Cir. 2023).

Intelligence Surveillance Act of 1978 (FISA) authorizes and regulates "certain governmental electronic surveillance of communications for foreign intelligence purposes." *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 402 (2013) (citing FISA, Pub. L. No. 95-511, 92 Stat. 1783, codified at 50 U.S.C. § 1801 *et seq.*). But FISA prohibits the intentional targeting of persons within the United States or United States persons outside the United States. 50 U.S.C. § 1881a(b)(1)-(3). Despite this general prohibition on collecting information about United States persons intentionally, agencies conducting foreign surveillance may—and often do—incidentally obtain information from or about U.S. persons. App.6a.

One method of obtaining information is "[u]pstreaming," the process by which "an agency 'collects a target's communications as they cross the backbone of the internet with the compelled assistance of companies that maintain those networks.'" App.6a (citation omitted). FISA requires agencies who incidentally obtain information about United States persons through upstreaming to anonymize, or mask, it. See 50 U.S.C. § 1801(h)(1). Generally, this masking process "involves substituting a 'generic phrase, or term, such as "U.S. person 1" or "a named U.S. person"' if disclosing the identity of the U.S. person would 'not meet dissemination criteria.'" App.6a-7a. Although masking is the default, FISA also allows agencies to request to "unmask" the identity of an individual if that person's identity is "necessary to understand foreign intelligence information or assess its importance[.]" 50 U.S.C. § 1801(h)(2).

Whistleblowers within the Intelligence Community reported that members of Congress are often unmasked in intelligence reports shared within the executive branch.[3] And declassified orders of the Foreign Intelligence Surveillance Court from this period confirmed that intelligence agencies had engaged in upstream data collections in violation of internal minimization procedures—and likely the Fourth Amendment.[4]

2. Troubled by these reports of executive overreach and surveillance abuse, PPSA exercised its right under FOIA to inspect documents pertaining to this disturbing conduct. PPSA sent FOIA requests to the Office of the Director of National Intelligence (ODNI), CIA, DOJ, FBI, NSA, and State seeking:

> 1. All documents, reports, memoranda, or communications regarding the unmasking—including all unmasking requests—of [48 named current and former members of congressional intelligence committees] from January 1, 2008 to January 15, 2020; [and]
>
> 2. All documents, reports, memoranda, or communications regarding the

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[3] App.74a (citing Mark Hensch, *US spy agencies routinely unmask lawmakers: report*, The Hill (Apr. 6, 2017, 7:54 AM), https://tinyurl.com/yysphmed).

[4] See App.74a-75a; see also, *e.g.*, Opinion and Order Regarding Use and Disclosure of Information at 2, *In re Carter W. Page, A U.S. Person*, Nos. 16-1182, 17-52, 17-375, 17-679 (F.I.S.C. June 25, 2020); Memorandum Opinion and Order, [Redacted Caption], [Redacted Case No.] (F.I.S.C. Apr. 26, 2017), https://tinyurl.com/y5ej42fy. The surveillance of Carter Page is the subject of a different petition pending before this Court.

> upstreaming—including all requests for upstreaming—of any [of the same 48 individuals] from Jan. 1, 2008, to Jan. 15, 2020.

App.4a-5a.

In response to these requests, none of the agencies disclosed any responsive records. App.2a-3a. Rather, each agency—including the DOJ through its components FBI and National Security Division (NSD)—issued a *Glomar* response to PPSA "that neither confirmed nor denied the existence of records responsive to [PPSA's] request." App.26a; App.8a. And, prior to issuing their *Glomar* responses, none of the agencies even conducted a search for any potentially responsive records. App.8a.

C. Procedural History

After exhausting all administrative remedies, PPSA sued the agencies alleging, among other things, that the agencies' searchless *Glomar* responses violated their statutory obligations under FOIA. App.38a. PPSA and the agencies later moved for summary judgment on that issue. App.26a. Each agency asserted that it had properly asserted a *Glomar* response. App.41a-43a. And each argued that its *Glomar* response excused it from the duty to search for responsive documents. App.7a.

The agencies all asserted FOIA Exemption 1 in partial justification of their respective *Glomar* responses. App.41a. That exemption exempts records "specifically authorized under criteria established by," and "properly classified pursuant to," "an Executive order * * * in the interest of national defense or foreign

policy." 5 U.S.C. § 552(b)(1)(a) (App.110a). Additionally, the NSA, ODNI, CIA, State, and FBI asserted FOIA Exemption 3, App.56a, for records that are "specifically exempted from disclosure by [another] statute." 5 U.S.C. § 552(b)(3) (App.111a). The other statute identified by the agencies was the National Security Act of 1947, 50 U.S.C. § 3024, which protects "intelligence sources and methods from unauthorized disclosure." App.56a (quoting 50 U.S.C. § 3024(i)(1)).

Further, the FBI asserted Exemptions 7(C) and 7(E)[5] while the NSA cited Exemptions 7(A) and 7(C). App.62a, 65a. Exemption 7 provides carveouts for "records or information compiled for law enforcement purposes, but only to the extent that" producing those records would also cause one or more specified harms. 5 U.S.C. § 552(b)(7) (App.111a-112a). Exemption 7(A) exempts law enforcement records that "could reasonably be expected to interfere with enforcement proceedings"; Exemption 7(C) exempts law enforcement records that "could reasonably be expected to constitute an unwarranted invasion of personal privacy"; and Exemption 7(E) exempts law enforcement records that "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

[5] Although the FBI did not expressly rely on FOIA Exemption 6, which protects "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," 5 U.S.C. § 552(b)(6) (App.111a), it did mention that exemption as another potential basis for its *Glomar* response. See App.57a-58a n.10.

circumvention of the law." *Ibid.* But the agencies' assertions that any records responsive to PPSA's broad requests would have been created for law enforcement purposes and would cause one or more of the asserted harms if disclosed were neither facially plausible nor testable because they never searched for or reviewed their files. See App.7a.

The district court granted summary judgment to the agencies. It held that the agencies' *Glomar* responses were permissible based on Exemptions 1, 3, 7(A), 7(C), and 7(E), and that, "when an agency issues a *Glomar* response, no search for responsive documents needs to be undertaken." App.40a.

On appeal, a panel of the D.C. Circuit upheld the district court's ruling that the *Glomar* responses in this case were proper. App.23a-24a. The panel also agreed with the district court that no search is required before issuing a *Glomar* response, explaining that it was bound by controlling circuit precedent. App.9a.

The panel acknowledged that 5 U.S.C. § 552(a)(3)(C) requires agencies to make "reasonable efforts" to search for requested records. App.10a. But the panel explained that, in its view, "'reasonable efforts' do not include searches the results of which can never be publicly disclosed or discussed without damaging the very interests protected by FOIA exemptions." App.10a. It also acknowledged the requirement that agencies consider whether partial disclosure is possible by segregating nonexempt information. App.10a (citing 5 U.S.C. § 552(a)(8)(A)(ii)(I) & (II)). But the panel dismissed

that statutory language too, stating that it has "no role when even acknowledging the existence or absence of records will harm statutorily protected interests." App.11a. However, the agencies could have conducted reasonable searches and then submitted affidavits *in camera* describing their efforts and any results thereof, as initially contemplated by *Phillippi*. See 546 F.2d at 1013.

REASONS FOR GRANTING THE PETITION

FOIA expressly requires government agencies to search for responsive records and then either release the responsive records or determine that some or all fall within a statutory exemption. But the D.C. Circuit's *Glomar* doctrine allows agencies to ignore each of these requirements, even though the doctrine finds no support in FOIA's text, structure, or purpose. And the doctrine flies in the face of this Court's repeated instruction to construe statutes according to their plain meaning—and its instruction to construe FOIA's exemptions narrowly, in favor of disclosure. See, *e.g., Milner* v. *Department of Navy*, 562 U.S. 562, 571 (2011).

The D.C. Circuit's *Glomar* jurisprudence has thus tortured the statutory language, defied this Court's rule of construction for FOIA, and allowed the judicially-constructed *Glomar* doctrine to replace the judicial duty to conduct *de novo* review of agency withholding decisions. Review is warranted to ensure that agencies fulfill their FOIA statutory obligations and that lower courts meaningfully exercise the oversight over agency withholding decisions explicitly entrusted to them by Congress.

I. The *Glomar* Doctrine Is Inconsistent with FOIA's Text and Purpose.

The clearest reason for this Court to grant review is that the lower courts have uniformly adopted a doctrine that allows them to abandon the statutory procedures established by Congress.

A. FOIA's text does not authorize agencies to refuse to confirm or deny the existence of responsive records.

Starting with the text, nothing in FOIA authorizes agencies to issue *Glomar* responses or allows courts to defer to those responses.

1. As with any statute, consideration of the scope of FOIA and its exemptions "starts with its text." *Milner*, 562 U.S. at 569. As this Court has put it, "[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Park 'N Fly, Inc.* v. *Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985). Moreover, this Court has recognized that judges are forbidden from trying to "add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and [their] own imaginations." *Bostock* v. *Clayton County*, 590 U.S. 644, 654-655 (2020). Likewise, this Court has instructed that FOIA's exemptions, in particular, be "given a narrow compass." *Milner*, 562 U.S. at 571 (quoting *United States Dep't of Just.* v. *Tax Analysts*, 492 U.S. 136, 151 (1989)).

The *Glomar* doctrine applied here finds no support in FOIA's text. Even the D.C. Circuit has

acknowledged that the doctrine is a "judicial construct" that does not "flow[]" from the statute's "express language." *ACLU* v. *CIA*, 710 F.3d 422, 431 (D.C. Cir. 2013). And the lower court in this case and others has not cited any other statute that would make even the mere existence of documents classified information. In widely adopting that doctrine, then, the federal appellate courts have ignored the lack of statutory support for allowing agencies to refuse to confirm or deny the existence of responsive records.

Indeed, FOIA's text requires just the opposite: Once an agency receives a request, FOIA provides only two options for responding: (1) make "records promptly available to any person" who requests them, 5 U.S.C. § 552(a)(3) (App.92a-93a); or (2) "withhold" the record if it is protected by one or more of the nine statutory exemptions, *id.* § 552(a)(8) (App.110a). And if the agency decides to withhold records, FOIA requires that it explain its reasons, *id.* § 552(a)(6)(A)(i)(I) (App.101a-102a), as well as "consider whether partial disclosure of information is possible" and "take reasonable steps necessary to segregate and release nonexempt information," *id.* § 552(a)(8)(A)(ii) (App.110a); see also *id.* § 552(b) ("[a]ny reasonably segregable portion of a record shall be [disclosed] * * * after deletion of the portions which are exempt under this subsection") (App.112a-113a).

2. Beyond allowing agencies to shirk their own statutory duties, the *Glomar* doctrine also impairs the ability of the courts to engage in judicial review. As discussed above, FOIA contemplates *de novo* review of agency withholdings. See 5 U.S.C. § 552(a)(4)(B) (App.98a-99a). In particular, Congress provided

important judicial oversight of agency FOIA responses, including by authorizing courts to conduct *in camera* review of the withheld records—even of records that the agency claims are subject to an exemption. *Ibid.* And FOIA's broad grant of judicial oversight—including the requirement to examine and determine the exempt status of segregable content contained within withheld records—necessarily presumes that the agency has already followed FOIA's plain mandate to conduct a reasonable search for all responsive records and provide (at least to the court) a response indicating whether responsive records are in the agency's possession. Otherwise, it is impossible for a court to conduct any real review of agency withholding decisions.

Accordingly, interpreting FOIA's exemptions as negating the duty to provide a response about whether records exist hamstrings FOIA's *de novo* review and *in camera* review protections. The *Glomar* doctrine thus violates this Court's instruction to "give effect * * * to every clause and word" in construing a statute. *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) (citation omitted).

This Court should therefore grant certiorari to review the *Glomar* doctrine, which does not give FOIA's exemptions the "'narrower reach' Congress intended"—and certainly does not "confin[e] [their] meaning to [their] words." *Milner*, 562 U.S. at 572 (quoting *Rose*, 425 U.S. at 363).

B. Agencies violate FOIA's statutory purpose when they refuse to confirm or deny the existence of responsive records.

Not only is the *Glomar* doctrine unmoored from FOIA's text, it is contrary to FOIA's statutory purpose. As this Court has acknowledged, Congress's goal in passing FOIA was to "establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *Environmental Prot. Agency* v. *Mink*, 410 U.S. 73, 80 n.6 (1973) (quoting S. Rep. No. 89-813, at 3 (1965)).

The *Glomar* doctrine flips that philosophy on its head, allowing agencies to refuse to confirm or deny the existence of responsive records. That refusal does not make full agency disclosure the default. Rather, allowing such non-responses in practice removes lower courts' ability to conduct *de novo* review of agency withholding decisions—and therefore removes the public's ability to hold these agencies to account, on nothing more than the say-so of the agencies themselves. Without some ability for a court to review the records subject to a *Glomar* response, even if only *in camera*, there is no way to test the agencies' assertion that disclosing the existence or non-existence to the public would itself be information subject to a disclosure exemption.

Indeed, the FBI acknowledged over 40 years ago that using a *Glomar* response "to protect 'sensitive, ongoing criminal investigations' would *not* be 'in full compliance with the letter and spirit of the FOIA.'" *ACLU of Mich.* v. *FBI*, 734 F.3d 460, 469 (6th Cir.

2013) (emphasis added) (quoting *An Act Entitled "The Freedom of Information Reform Act": Hearings on S. 774 Before a Subcomm. of the H. Comm. on Gov't Operations*, 98th Cong. 906-910 (Aug. 9, 1984) (Memorandum from William H. Webster, FBI Director to U.S. Rep. Glenn English (Sep. 20, 1984))). Despite this acknowledgment, the FBI has continued to assert *Glomar* responses to supposedly protect law enforcement and privacy interests. See *ibid.*; see also App.7a (FBI relying on Exemptions 7(C) and 7(E) in this case).

Review is therefore warranted to ensure that FOIA's statutory purpose is not defeated by the judicially-constructed *Glomar* doctrine—especially where, as here, agencies are asserting interests other than national security as a basis for their non-responses.

II. Expanding the *Glomar* Doctrine to Enable *Searchless* Responses Further Violates FOIA's Text and Statutory Purpose.

Review is further necessary because the D.C. Circuit has now extended the *Glomar* doctrine far past its breaking point—permitting agencies to refuse even to search for records if the agency merely speculatively believes any responsive records (or lack thereof) will be subject to a *Glomar* response. But FOIA includes no such exception to its categorical search requirement.

A. Searchless *Glomar* responses are directly contrary to FOIA's text.

Where—as here—FOIA's "ordinary meaning and structure" yields a clear answer, "judges *must stop*." *Food Mktg. Inst.* v. *Argus Leader Media*, 588 U.S. 427,

436 (2019) (emphasis added) (citations omitted). And there can be no question that FOIA—in both its plain language and its structure—requires agencies to search for responsive records.

1. FOIA expressly mandates that an agency "responding * * * to a request for records * * * shall make reasonable efforts to search for the records." 5 U.S.C. § 552(a)(3)(C) (App.93a). Congress gave this search mandate universal scope, imposing it "upon *any* request for records" that "reasonably describes such records" and "is made in accordance with published rules[.]" *Id.* § 552(a)(3)(A) (emphasis added) (App.92a). That subsection explicitly creates only two limited exceptions to the search requirement, neither of which applies here. *See id.* § 552(a)(3)(C) (administrative burdens) (App.93a); *id.* § 552(a)(3)(E) (requests made by federal entities) (App.93a-94a). In fact, FOIA does not even provide an exception to the search requirement where a request seeks documents that may be exempt from disclosure. By including two exceptions—and omitting any others—Congress effectively precluded others. See, *e.g.*, *United States* v. *Johnson*, 529 U.S. 53, 58 (2000) ("When Congress provides exceptions in a statute, it does not follow that courts have authority to create others."). Thus, when an agency receives a valid FOIA request, the statute requires a reasonable search for every reasonable request.

2. Nor does the mere fact that any records identified by a search may be withheld under a FOIA exemption does not render a search unreasonable. FOIA's structure confirms that the search requirement remains in place even if the agency will

ultimately withhold records pursuant to a FOIA exemption. In fact, even FOIA's enumerated exemptions presume a prerequisite search: Although § 552(b) creates nine limited exemptions to disclosure, they can be invoked only after the agency "take[s] reasonable steps necessary to segregate and release nonexempt information." 5 U.S.C. § 552(a)(8)(A) (App.110a); see also *id.* § 552(b) (reiterating that "[a]ny reasonably segregable portion of a record shall be [disclosed] * * * *after* deletion of the portions which are exempt under this subsection" (emphasis added)) (App.112a-113a).

Tying the segregation mandate with the enumerated exemptions in § 552(b) underscores that agencies can withhold only specifically exempt information within particular records. The resulting duty to disclose reasonably segregable information necessarily presumes that an agency has already complied with its initial duty to identify responsive records.

Indeed, even if the existence of the record itself reveals information exempt from disclosure, the agency must make that determination as to each record, even if it ultimately wishes to issue basic *Glomar* responses. But without internally identifying any documents that may exist, it cannot credibly assert that the disclosure of their mere existence poises a problem triggering an exemption.

The panel's elevation of agency interests over FOIA's statutory requirements is thus flatly atextual.

3. Even more conclusively: FOIA subjects agency withholdings to *de novo* judicial review. See 5 U.S.C.

§ 552(a)(4)(B) (App.98a-99a). But a court cannot conduct any meaningful review of an agency's withholding decisions if the agency never conducts a reasonable search to determine whether any non-exempt records or portions of records exist. Even if agencies supposedly believe that *publicly* sharing the results of a search would reveal information exempt from disclosure, that says nothing about why the agencies cannot share that information with the court. In fact, the D.C. Circuit in *Phillippi* contemplated that agencies could submit affidavits to the court, sealed even from other litigants' counsel, to enable the court to decide whether the agencies' justifications were credible. See *Phillippi*, 546 F.2d at 1013.

In short, allowing searchless *Glomar* responses deprives the *de novo* review, segregability, and *in camera* review language in FOIA of any meaningful effect—notwithstanding the requirement to "give effect * * * to every clause and word" in a statute. See *Duncan*, 533 U.S. at 174 (citation omitted)). And little will be left of FOIA's procedural protections if this Court allows searchless *Glomar* responses to stand.

B. Searchless *Glomar* responses violate FOIA's statutory purpose.

Permitting agencies to issue *Glomar* responses without first conducting reasonable searches undercuts FOIA's statutory purpose even more egregiously than the *Glomar* doctrine itself. As this Court has repeatedly put it, FOIA's goal is "broad disclosure." See, *e.g.*, *Milner*, 562 U.S. at 571 (quoting *Tax Analysts*, 492 U.S. at 151).

To be sure, Congress created specific exemptions to protect "legitimate governmental" interests. *Julian*, 486 U.S. at 8 (quoting *Abramson*, 456 U.S. at 621). Yet, to ensure that FOIA's mandate of broad government disclosure is not swamped by those government interests, this Court has "consistently stated" that FOIA's exemptions are to be "narrowly construed." *Ibid.*

But the searchless *Glomar* doctrine is anything but narrow. To the contrary, it rests on an overly broad construction of FOIA's exemptions—just the very sort of "judicial tampering" Congress "sought 'to insulate its product from'" by stressing strict construction of exemptions. *Tax Analysts*, 492 U.S. at 151 (quoting *Abramson*, 456 U.S. at 642 (O'Connor, J., dissenting)).

Permitting searchless *Glomar* responses will result in FOIA's exemptions swallowing the broad agency disclosure that Congress set as the intended default through FOIA's text and structure. In doing so, it will allow agencies to wrongly withhold records not protected by any statutory exemption.

By granting certiorari to reject searchless *Glomar* responses, this Court would "give[] the exemption[s] the 'narrower reach' Congress intended through the simple device of confining the [statute's] meaning to its words." *Milner*, 562 U.S. at 572 (quoting *Rose*, 425 U.S. at 363). And that is an additional, powerful reason for granting the petition.

III. The Questions Presented Are Important and Worthy of Review.

The Court's review is also compelled by the exceptional importance of the questions presented. As explained, the decision below allows agencies to dodge their statutory duty under FOIA to conduct a reasonable search upon request, instead allowing them to provide *Glomar* responses without ever searching for responsive records. It also deprives lower courts of the ability to follow their statutory duty under FOIA to conduct *de novo* review of agency withholding decisions, including by conducting *in camera* review of any withheld documents. This, in turn, transforms a regime forged in the fires of public skepticism of agency action into a procedure that fast-tracks judicial rubber-stamping of the withholding decisions by those very agencies.

1. Such judicial deference to agency withholding decisions is contrary to the critical public point goals of FOIA, which is meant to enable American citizens to obtain information necessary for full democratic participation—unless a court independently determines that the sought records fall within a clearly-delineated statutory exemption. See *Mink*, 410 U.S. at 80 ("[FOIA] seeks to permit access to official information long shielded unnecessarily from public view[.]").

Congress enacted FOIA for good reason. As James Madison wrote, "A popular Government, without popular information, or the means of acquiring it, is but a prologue to a Farce or a Tragedy * * * and a people who mean to be their own Governours, must

arm themselves with the power which knowledge gives." Letter from James Madison to William T. Barry (Aug. 4, 1822) (available at *Founders Online,* Nat'l Archives, https://tinyurl.com/yc7wru58). When agencies withhold information necessary for effective governance, often to avoid embarrassment or conceal agency wrongdoing, it undermines our constitutionally protected democratic system.

2. Moreover, when courts defer to an agency's withholding decisions without conducting the *de novo* review entrusted to courts by Congress, it threatens the separation of powers, allowing executive authority to eclipse the proper roles of both the legislative and judicial branches.

And the potential consequences of courts waiving an agency's statutory duty to search, and their own statutory duty to review *de novo* agency withholding decisions, are severe. Without a meaningful judicial check, agencies have shown that they will circumvent their duty to provide "any person requesting" agency records "reasonably segregable portion[s]" of those records. 5 U.S.C. § 552(b) (App.112a-113a). Agencies will do so by issuing responses that refuse to confirm or deny the existence of responsive records even where—as here—at least some of the requested records, already in the public domain, almost certainly fall outside the scope of FOIA's statutory exemptions, and outside any legitimate national-security concerns.

Thus, through its *Glomar* doctrine, the D.C. Circuit is shirking its judicial duty to apply the law, and enabling agencies to ignore and undermine a requester's right to information that falls outside the

scope of FOIA protection. That failure undermines the very checks and balances that the Framers were at pains to impose.

3. The D.C. Circuit allowed this very transgression here. PPSA's FOIA request sought all records related to the unmasking or upstreaming of forty-eight named current and former members of congressional intelligence committees from January 1, 2008 to January 15, 2020. App.5a. That broad request could not have encompassed *only* records that fell under FOIA exemptions. Indeed, some such records had already been leaked to the public. App.74a-App.75a.

And without a search, the agencies could not have properly determined that the contents or even the existence of all these records were protected under the asserted FOIA exemptions. For example, the FBI and NSA asserted Exemption 7(C), which protects "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information * * * could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C) (App.111a-112a). But there can be no factual basis for the agencies' claim that any responsive records would be "compiled for law enforcement purposes" or "constitute an unwarranted invasion of personal privacy" unless and until the agencies search for and review their files. And, given the pre-existing public leaks regarding congressional surveillance, App.74a-App.75a, any privacy "horse" had long since left the barn. Yet, the D.C. Circuit excused the agencies from even their duty to search, eliminating PPSA's right to

information that is not protected by any FOIA exemption.

This case illustrates exactly what Congress sought to prevent by enacting FOIA. As the Senate explained in its report before FOIA's passage, Congress's goal was to create "an information policy of full disclosure." See S. Rep. No. 89-813, at 3 (1965). The notion that FOIA was structured to allow agencies to ignore their duty to conduct a reasonable search if they provided a *Glomar* response—particularly when the FOIA request seeks records that fall outside of FOIA's exemptions and outside of any legitimate national-security concern—is incorrect.

To the contrary, FOIA was designed to adopt a policy of robust government disclosure. And the transparency promised by FOIA, which supports the efficacy of our democratic system, requires agencies to conduct a reasonable search of requested records, regardless of whether some records fall under a FOIA exemption. This Court should make that point clear and answer this exceptionally important question of whether agencies must adhere to FOIA's statutory requirements.

Without this Court's intervention, the D.C. Circuit's decision will undermine the rights that Congress provided the public in FOIA, as more FOIA requests occur in the D.C. Circuit's jurisdiction than any other. Moreover, this violence to FOIA's text will continue to expand to other circuits, which routinely follow the D.C. Circuit's lead. Accordingly, information which FOIA has given the public a right to access will remain hidden until this Court acts.

IV. This Case Is An Excellent Vehicle.

This case also presents an excellent vehicle to consider whether agencies may respond to FOIA requests by refusing to confirm or deny the existence of responsive records—and further, whether they may provide such non-responses without first conducting a reasonable search.

The D.C. Circuit has squarely held in this case that searchless *Glomar* responses are permissible and condoned such responses when they were asserted in response to PPSA's request here. There can thus be no question that the ability of agencies to assert *Glomar* was outcome-determinative. Further, the legality of searchless *Glomar* responses was fully briefed by the parties below.

And, because other courts of appeals defer to the D.C. Circuit regarding FOIA issues, there would be no material benefit from delaying review of the questions presented. This case thus presents an excellent and timely vehicle through which to consider the important questions presented.

CONCLUSION

The *Glomar* doctrine—including its "searchless" variant—has undermined the disclosure procedures that Congress carefully crafted for long enough. This Court should not let the doctrine continue to harm the public's efforts to hold the executive accountable. The petition should be granted.

Respectfully submitted,

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December 15, 2025

APPENDIX

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Appendix A

USCA Case #22-5303 Document #2126125
Filed: 07/18/2025

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 4, 2024 Decided July 18, 2025

No. 22-5303

PROJECT FOR PRIVACY AND SURVEILLANCE ACCOUNTABILITY, INC.,
APPELLANT

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:20-cv-03657)

Gene C. Schaerr argued the cause for appellant. With him on the briefs was *Brian J. Field*.

Bradley G. Silverman, Assistant U.S. Attorney, argued the cause for appellees. With him on the brief were *Matthew M. Graves*, U.S. Attorney at the time the brief was filed, and *Brian P. Hudak* and *Jane M. Lyons*, Assistant U.S. Attorneys. *R. Craig Lawrence*, Assistant U.S. Attorney, entered an appearance.

Before: SRINIVASAN, *Chief Judge*, MILLETT and WILKINS, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* MILLETT.

MILLETT, *Circuit Judge*: The Project for Privacy and Surveillance Accountability, Inc. ("Project") filed Freedom of Information Act ("FOIA") requests with six intelligence agencies seeking all documents, reports, memoranda, or communications regarding the upstreaming and unmasking of forty-eight named current and former members of congressional intelligence committees, from January 1, 2008, to January 15, 2020. All six agencies issued *Glomar* responses in which they refused to confirm or deny whether they had responsive records on the ground that the existence or nonexistence of such records was itself protected from disclosure under multiple FOIA exemptions, including Exemption 1, which covers classified national security materials. The Project filed a lawsuit challenging the agencies' *Glomar* responses. The district court granted summary judgment for the agencies. We affirm because the agencies' *Glomar* responses were proper under FOIA's first exemption.

I

A

FOIA generally requires federal agencies to disclose their records upon request unless those records fall within one of the statute's nine exemptions. 5 U.S.C. § 552(a)–(b); *see Department of Justice v. Julian*, 486 U.S. 1, 8 (1988). While FOIA generally "calls for broad disclosure of Government records," the statute exempts certain records from

disclosure where "legitimate governmental and private interests could be harmed by release[.]" *Julian*, 486 U.S. at 8 (quotation marks and citation omitted). In that way, FOIA "balance[s] the public's need for access to official information with the Government's need for confidentiality." *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139, 144 (1981).

To withhold information under a FOIA exemption, an agency usually must "acknowledge the existence of information responsive to a FOIA request and provide specific, non-conclusory justifications for withholding that information." *Knight First Amend. Inst. at Columbia Univ. v. CIA*, 11 F.4th 810, 813 (D.C. Cir. 2021) (quoting *Roth v. Department of Justice*, 642 F.3d 1161, 1178 (D.C. Cir. 2011)). But sometimes even acknowledging the "existence or nonexistence of agency records" could harm interests protected by the exemptions. *Id.* (quotation marks omitted). In those cases, the agency may "'refuse to confirm or deny the existence' of the requested records" through what is known as a "*Glomar* response." *Id.* (quoting *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007)).[1]

The agencies in this case invoked FOIA Exemptions 1, 3, 6, and 7. 5 U.S.C. § 552(b)(1), (3), (6), (7)(A), (7)(C), (7)(E). As relevant here, Exemption 1 authorizes an agency to withhold information that is "specifically authorized under criteria established by

[1] The *Glomar* response gets its name from a case in which the Central Intelligence Agency refused to confirm or deny whether it had records about an alleged operation involving a research ship called the Hughes Glomar Explorer. *See Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976).

an Executive order to be kept secret in the interest of national defense or foreign policy and" is "properly classified pursuant to such Executive order[.]" *Id.* § 552(b)(1).

The relevant executive order in this case is Executive Order 13,526. That Order allows for classification of information when an "original classification authority"—that is, an individual authorized by the Order to classify information in the first instance—"determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, * * * and the original classification authority is able to identify or describe the damage." *See* Classified National Security Information, Exec. Order No. 13,526, § 1.1(a)(4), 75 Fed. Reg. 707, 707 (Dec. 29, 2009). Information that meets the substantive criteria of Executive Order 13,526 and is properly classified pursuant to that Order can be validly withheld under Exemption 1. *Schaerr v. Department of Justice*, 69 F.4th 924, 929–930 (D.C. Cir. 2023).[2]

B

According to the complaint, the Project is a non-profit corporation that "advocates for greater privacy and civil liberty protections from government surveillance, and seeks to hold such programs accountable to constitutional and statutory limitations." J.A. 10 (Compl. ¶ 5). In January 2020, the Project filed identical FOIA requests with the Department of Justice, the Office of the Director of

[2] Because this case can be resolved under Exemption 1, we need not address the other exemptions invoked by the agencies.

National Intelligence ("ODNI"), the National Security Agency ("NSA"), the Federal Bureau of Investigation, the Central Intelligence Agency, and the Department of State. The requests sought:

> 1. All documents, reports, memoranda, or communications regarding the unmasking—including all unmasking requests—of any person [on the Project's list] from January 1, 2008, to January 15, 2020;
>
> 2. All documents, reports, memoranda, or communications regarding the upstreaming—including all requests for upstreaming—of any individual [on the list] from Jan. 1, 2008, to Jan. 15, 2020.

See J.A. 17–23 (Compl. ¶¶ 27, 33, 38, 44, 50, 55). The relevant list of persons about whom records were sought consists of forty-eight then-current or former members of congressional intelligence committees.[3]

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[3] The Project's FOIA requests sought records about: Adam Schiff, Jim Himes, Terri Sewell, Andre Carson, Jackie Speier, Mike Quigley, Eric Swalwell, Joaquin Castro, Denny Heck, Peter Welch, Sean Patrick Maloney, Val Demings, Raj Krishnamoorthi, Devin Nunes, Mike Conaway, Michael Turner, Brad Wenstrup, Chris Stewart, Rick Crawford, Elise Stefanik, Will Hurd, John Ratcliffe, James Risch, Marco Rubio, Susan Collins, Roy Blunt, Tom Cotton, John Cornyn, Ben Sasse, Dianne Feinstein, Ron Wyden, Martin Heinrich, Angus King, Kamala Harris, Michael Bennet, James Lankford, Mark Warner, Peter King, Frank LoBiondo, Trey Gowdy, Tom Rooney, Ileana Ros-Lehtinen, Jeff Miller, Lynn Westmoreland, Joe Heck, Mike Pompeo, Luis Gutierrez, and Patrick Murphy. *See* J.A. 16–17 (Compl. ¶ 26).

"Upstreaming" and "unmasking" refer to agency practices governed by the Foreign Intelligence Surveillance Act ("FISA"), Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified as amended at 50 U.S.C. § 1801 *et seq*.). FISA authorizes and regulates "certain governmental electronic surveillance of communications for foreign intelligence purposes." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 402 (2013); *see Schaerr*, 69 F.4th at 926. Specifically, FISA authorizes "the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information." 50 U.S.C. § 1881a(a). As relevant here, FISA prohibits the intentional targeting of persons within the United States or U.S. persons outside the United States. *Id.* § 1881a(b)(1)–(3).

"Upstreaming" is a "methodology for collecting intelligence information from internet communications" that is used under FISA. J.A. 156 (FBI Decl. ¶ 17). In an "upstream collection," an agency "collects a target's communications as they cross the backbone of the internet with the compelled assistance of companies that maintain those networks." *Id.*

While conducting upstream collection, agencies may incidentally obtain information from or about U.S. persons. When that happens, agencies must employ procedures to "minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information[.]" 50

U.S.C. § 1801(h)(1). Minimization commonly involves substituting a "generic phrase, or term, such as 'U.S. person 1' or 'a named U.S. person'" if disclosing the identity of the U.S. person would "not meet dissemination criteria." J.A. 155 (FBI Decl. ¶ 15). This minimization process is referred to as "masking" the identity of the U.S. person. *Id.* Agencies may request to "unmask" the identity of an individual if that person's identity is "necessary to understand foreign intelligence information or assess its importance[.]" 50 U.S.C. § 1801(h)(2).

C

In response to the Project's FOIA request, all six agencies issued *Glomar* responses, declining to search for responsive records and stating that the existence or nonexistence of these records is a fact that itself is exempt from disclosure under FOIA. Specifically, each agency attested that disclosing the fact of the existence or nonexistence of responsive records would reveal intelligence sources and methods and pose a threat to national security. In doing so, all six agencies invoked Exemption 1. In addition, all agencies other than the Justice Department invoked Exemption 3. The Justice Department also claimed Exemptions 7(A) and 7(C), and the FBI additionally relied on Exemptions 6, 7(C), and 7(E).

The Project filed this lawsuit in the United States District Court for the District of Columbia challenging the agencies' *Glomar* responses. The district court granted the agencies' motion for summary judgment. *See Project for Privacy & Surveillance Accountability, Inc. v. Department of Justice*, No. 20-CV-3657, 2022

WL 4365745 (D.D.C. Sept. 19, 2022). The district court concluded that the agencies were not required to conduct a search for responsive documents prior to issuing their *Glomar* responses, and that the agencies' affidavits supported their *Glomar* responses. *Id.* at *6, *11, *13, *15. The Project appealed.

II

The district court had original jurisdiction under 28 U.S.C. § 1331. We have appellate jurisdiction under 28 U.S.C. § 1291. We review the district court's grant of summary judgment in a FOIA case *de novo*, including questions regarding FOIA's statutory requirements and limitations. *National Sec. Archive v. CIA*, 104 F.4th 267, 271 (D.C. Cir. 2024). In deciding whether a claimed exemption supports a *Glomar* response, we also review *de novo* the district court's conclusion that the agencies' *Glomar* responses were proper under the claimed exemption. *See Schaerr*, 69 F.4th at 929; *Knight First Amend. Inst.*, 11 F.4th at 815.

III

The Project argues that the agencies' *Glomar* responses were insufficient for two reasons. First, the Project insists that FOIA requires agencies to search for records prior to issuing *Glomar* responses. Second, the Project contends that its FOIA requests are broad enough to encompass some records that are not justifiably withheld under the cited exemptions, making a categorical *Glomar* response improper.

Neither argument succeeds. The first is foreclosed by precedent, and the second fails because the agencies' *Glomar* responses to the FOIA requests were

properly justified based on Exemption 1 for classified materials.

A

The Project first argues that the agencies were obligated to search for records prior to issuing their *Glomar* responses. Absent this initial search, the Project argues, it is impossible for the agencies to know whether they possess any responsive documents that do not necessitate a *Glomar* response.

That argument is foreclosed by circuit precedent. In *Schaerr*, this court held directly that "an agency need not search its records before invoking *Glomar*." 69 F.4th at 928. That makes sense because "'the nature of a *Glomar* response' is to 'narrow the FOIA issue to the existence of records *vel non*.'" *Id.* at 928–929 (quoting *Wolf*, 473 F.3d at 374 n.4); *see also Electronic Privacy Info. Ctr. v. National Sec. Agency*, 678 F.3d 926, 934 (D.C. Cir. 2012) (same). Requiring agencies to search for records, and then report the outcome of that search, would inevitably confirm or deny the existence of responsive records, which is precisely what a *Glomar* response is designed to avoid. FOIA, after all, does not require searches for their own sake. Searches are a means to the end of making disclosures or withholdings. That process has no application in a *Glomar* case because an agency could not even disclose the outcome of its search without defeating the point of its *Glomar* response.

The Project nonetheless argues that *Schaerr* runs afoul of the FOIA statute. Project Opening Br. 52. This panel is bound by *Schaerr* regardless. *See Honeywell Int'l, Inc. v. EPA*, 705 F.3d 470, 471 (D.C. Cir. 2013);

LaShawn A. v. Barry, 87 F.3d 1389, 1395 (D.C. Cir. 1996) ("One three-judge panel * * * does not have the authority to overrule another three-judge panel of the court.").

In any event, the Project's arguments are without merit.

First, the Project points out that FOIA directs agencies to "make reasonable efforts to search for the [requested] records[.]" 5 U.S.C. § 552(a)(3)(C). True enough. But "reasonable efforts" do not include searches the results of which can never be publicly disclosed or discussed without damaging the very interests protected by FOIA exemptions. Avoiding any such disclosure is the whole purpose of *Glomar*. *See Wolf*, 473 F.3d at 374 n.4 ("[T]he nature of a *Glomar* response * * * narrows the FOIA issue to the existence of records *vel non*. Indeed, '[w]hen the Agency's position is that it can neither confirm nor deny the existence of the requested records, there are no relevant documents for the court to examine other than the affidavits which explain the Agency's refusal.'") (second alteration in original) (quoting *Phillippi*, 546 F.2d at 1013).

Second, the Project cites to FOIA's requirement that "whenever the agency determines that a full disclosure of a requested record is not possible[,]" an agency must "consider whether partial disclosure of information is possible" and "take reasonable steps necessary to segregate and release nonexempt information[.]" 5 U.S.C. § 552(a)(8)(A)(ii)(I) & (II).

That argument does not work either. The cited provisions apply when record-specific decisions are

made about the disclosure or withholding of individual documents. They have no role when even acknowledging the existence or absence of records will harm statutorily protected interests.

In short, *Glomar* applies when even answering the question posed by a FOIA request—do responsive documents exist?—would harm the United States' interests. The Project's efforts to circumvent that harm by asking the subsidiary question of whether records can be searched or redacted fundamentally misunderstands the function of the *Glomar* response and the vital national interests that it protects.

B

The Project separately argues that the agencies did not properly invoke *Glomar* in this case. In deciding whether a claimed exemption supports a *Glomar* response, courts can resolve the case "based on agency affidavits alone." *Schaerr*, 69 F.4th at 928 (citation omitted). The agency bears the burden of establishing that the claimed exemption supports its response. 5 U.S.C. § 552(a)(4)(B). An agency is entitled to summary judgment if its affidavit "(1) describes the justifications for nondisclosure with 'reasonably specific detail'; and (2) is not substantially called into question by contrary record evidence or evidence of agency bad faith." *Schaerr*, 69 F.4th at 929 (quoting *Wolf*, 473 F.3d at 374). The agency's justification must be "logical or plausible." *Id.* at 929 (citing *Electronic Privacy Info. Ctr.*, 678 F.3d at 931).

In the national security context, courts exercise "great caution" before compelling an agency to disclose protected information. *Schaerr*, 69 F.4th at 929

(citation omitted). In reviewing FOIA withholdings, we "defer[] to executive affidavits predicting harm to national security[.]" *ACLU v. Department of Defense*, 628 F.3d 612, 624 (D.C. Cir. 2011) (quoting *Center for National Sec. Studies v. Department of Justice*, 331 F.3d 918, 927 (D.C. Cir. 2003)).

Each agency invoked Exemption 1 in support of its *Glomar* response. By way of reminder, Exemption 1 imposes both substantive and procedural requirements. Substantively, the exemption authorizes the withholding of information "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy[,]" which here is Executive Order 13,526. 5 U.S.C. § 552(b)(1)(A). Procedurally, Exemption 1 requires the information to be "properly classified pursuant to such Executive order[.]" *Id.*

As the district court concluded, Exemption 1 supports each agency's *Glomar* response in this case. *Project for Privacy & Surveillance Accountability, Inc.*, 2022 WL 4365745, at *11.

1

Each agency met the substantive criteria for classification set by Executive Order 13,526. The Order allows information to be classified if "unauthorized disclosure of the information reasonably could be expected to result in damage to the national security," and the agency "identif[ies] or describe[s] the damage." Exec. Order No. 13,526 § 1.1(a)(4); *see also Judicial Watch, Inc. v. Department of Defense*, 715 F.3d 937, 941 (D.C. Cir. 2013).

Each agency submitted an affidavit explaining that disclosing whether it had records concerning the upstreaming or unmasking of any individuals listed in the FOIA request during the specified time periods would gravely harm national security and intelligence activities. The agencies then explained that such harm would result because the records would reveal whether that agency had—or had not—intercepted communications of one or more of the named persons through FISA surveillance, the time period in which the surveillance was undertaken, and whether intelligence reports about FISA surveillance identified those persons. *See* J.A. 93–97 (NSA Decl. ¶¶ 19–27); J.A. 133–138 (CIA Decl. ¶¶ 10–20); J.A. 157–162 (FBI Decl. ¶¶ 19–37); J.A. 211–218 (Justice Dep't Decl. ¶¶ 10–21); J.A. 244–249 (State Dep't Decl. ¶¶ 9–19); J.A. 256–261 (ODNI Decl. ¶¶ 16–26). Those disclosures, in turn, would reveal information about the scope of FISA surveillance during the designated years. In particular, the disclosures could inform individuals interacting with the listed members of Congress either that those individuals were being monitored, allowing them to take evasive activities, or that they were not being monitored, revealing gaps in the government's surveillance methods.

Each agency also explained that disclosing the existence or non-existence of such records would reveal agency intelligence priorities, capabilities, activities, and methods. J.A. 136 (CIA Decl. ¶ 16); J.A. 95–96 (NSA Decl. ¶ 24); J.A. 162 (FBI Decl. ¶ 36); J.A. 216–217 (Justice Dep't Decl. ¶ 20); J.A. 244–245 (State Dep't Decl. ¶ 9); J.A. 259–260 (ODNI Decl. ¶ 24). For example, if an agency were to admit publicly in

response to a FOIA request that "no intelligence information about Persons A or B exists," but then in response to a request about Person C "state only that no response could be made," that would indicate that "Person C is or has been a target" of an intelligence investigation, "in communication with a target," or "the subject of a collected communication." J.A. 96 (NSA Decl. ¶ 25). At the same time, "adversaries would also know that communications of Persons A and B were secure and not subject to * * * surveillance." *Id.*

Similarly, if Person X has communications with Person Y, and an agency denies that it has intelligence records on Person Y, it would "necessarily reveal to our adversaries that Person X's communications are secure and not subject to * * * surveillance." J.A. 96 (NSA Decl. ¶ 25). On the other hand, if an agency confirms that it has intelligence records on Person Y, it would reveal "intelligence priorities" and that "Person X's communications may be unsecure and subject to surveillance[.]" *Id.* "Over time, the accumulation" of this information "would disclose the targets and capabilities, and therefore the sources and methods," of an agency's intelligence collection. *Id.*

In that same way, disclosure of the existence or non-existence of records capturing communications of the listed individuals would reveal areas where the agencies had a lack of interest, inability to obtain information, or general gaps and limitations in their capabilities during the relevant time period. J.A. 96–97 (NSA Decl. ¶ 26); J.A. 161–162 (FBI Decl. ¶ 36); J.A. 260 (ODNI Decl. ¶ 24).

The agencies added that disclosing whether responsive records exist would give "targets, their cohorts, foreign intelligence agencies, and others intent on interfering with [these] investigative efforts information necessary to take defensive actions to conceal criminal activities," as well as to "develop and implement countermeasures to elude detection." J.A. 217 (Justice Dep't Decl. ¶ 20). The affidavits explain that even piecemeal disclosures can provide targets with "a guide or 'road map' that instructs them on which communication modes or personnel remain secure" and which do not. J.A. 95–96 (NSA Decl. ¶ 25). That could reveal "the success of any evasive techniques." J.A. 260 (ODNI Decl. ¶ 24).

In addition, the State Department's affidavit explained that "[o]fficial public disclosures * * * acknowledge only that the [NSA] engages in upstream collection[,]" meaning that as to all of the other agencies, disclosing whether they have responsive records could reveal whether or not they even engage in upstreaming, or would at least "provide information about how intelligence is shared, analyzed, and used" among the agencies. J.A. 247 (State Dep't Decl. ¶ 14).

By providing that information, the agencies' affidavits properly justified their *Glomar* responses for the same reasons the affidavits sustained the agencies' invocations of *Glomar* in *Schaerr*. 69 F.4th at 929–930. In that case, the FOIA claimant similarly sought documents concerning the unmasking or upstreaming of twenty-one named individuals during a specific time period. *Id.* at 926–927. There, as here, the agency affidavits averred that "confirming or denying the existence of records related to upstreaming or

unmasking would damage national security by disclosing agency priorities, capabilities, and methods[,]" as well as "weaknesses, and gaps in intelligence coverage." *Id.* at 929–930. Here, as there, the agencies' careful explanations were sufficient to support the *Glomar* responses.

The Project nonetheless argues that its FOIA requests are broad enough to encompass "policy documents" that would not merit withholding under *Glomar*, such as "a hypothetical agency document titled, 'A Guide to Unmasking of Members of Congress[,]'" "correspondence regarding unmasking of members of Congress generally[,]" or "a letter from a member of Congress informing the FBI that she contemplated enshrining" procedures to govern the dissemination of intelligence information referring to congressmembers or their staff "by statute[.]" Project Opening Br. 26, 46; Project Reply Br. 7.

That argument fails for the simple reason that the Project's FOIA requests do not seek any such generic policy documents. Instead, the FOIA requests seek exclusively "documents, reports, memoranda, or communications regarding" the "unmasking" and "upstreaming"—"including all requests" for "unmasking" and "upstreaming"—only "of any person" on the list of named individuals, and even then, only for the January 1, 2008 to January 15, 2020 time period. So the Project's requests are, by their own terms, limited to documents regarding the unmasking and upstreaming of named individuals during certain years. Nothing more. As a result, the requests are not written to encompass general policy documents. In other words, the Project's "request was not broadly

drawn; it made a specific inquiry," and the "agenc[ies] [were] bound to read it as drafted, not as * * * [the Project] might wish it was drafted." *Miller v. Casey*, 730 F.2d 773, 776–777 (D.C. Cir. 1984) (rejecting the argument that an agency's *Glomar* response was improper because the agency should have "construed [a] request more broadly").

The Project argues that our decision in *People for the Ethical Treatment of Animals v. National Institutes of Health*, 745 F.3d 535 (D.C. Cir. 2014), requires reading its request to include such policy documents. Not so. The two FOIA requests and bases for *Glomar* responses are quite dissimilar.

In particular, the FOIA request in *People for the Ethical Treatment of Animals* sought all records involving "investigations into complaints filed" from 2005 to 2007 "regarding" three named National Institutes of Health grant-recipient researchers at Auburn University. 745 F.3d at 539. As the court recognized, that language would include not just investigations into the researchers themselves, but any investigation into their employing institution and its own practices and procedures. *Id.* at 544–545. For example, a complaint that Researcher X was operating without sufficient supervision could prompt an investigation into the supervisory rules and requirements at the University just as much as it could prompt an investigation into the individual researcher. *See id.*

In addition, the government's *Glomar* response in *People for the Ethical Treatment of Animals* rested on Exemption 7(C), which protects personal privacy, not

classified materials. *See* 5 U.S.C. § 552(b)(7)(C). As a result, to justify a *Glomar* response, the agency had to make a focused showing that the named individuals' personal privacy could reasonably be expected to be invaded, and that the public interest did not outweigh those privacy interests. *People for the Ethical Treatment of Animals*, 745 F.3d at 544–545; *see* 5 U.S.C. § 552(b)(7)(C). But when it came to the University itself, those privacy interests were "diminished," if they existed at all. *People for the Ethical Treatment of Animals*, 745 F.3d at 545; *see FCC v. AT&T Inc.*, 562 U.S. 397, 409–410 (2011) ("The protection in FOIA [Exemption 7(C)] against disclosure of law enforcement information on the ground that it would constitute an unwarranted invasion of personal privacy does not extend to corporations.").

Tellingly, the Project does not point to any language in its FOIA request that could be read to reach beyond its pointedly focused language. Quite the opposite, that the Project took the time to list by name each of the forty-eight individuals about whom it sought information—some in Congress and some no longer in Congress—says quite clearly that the request did not seek information about other unlisted persons, let alone the entire Congress. While "[a]gencies have 'a duty to construe a FOIA request liberally,'" agencies are under no obligation to rewrite them. *People for the Ethical Treatment of Animals*, 745 F.3d at 540 (quoting *Nation Magazine v. United States Customs Service*, 71 F.3d 885, 890 (D.C. Cir. 1995)).

Finally, the Project points out that "ODNI released in 2020 a once-classified, redacted list of

executive branch officials who requested the unmasking of former National Security Advisor Michael Flynn[,]" and insists that this "undermines the Agencies' claim that acknowledging *any* records related to unmasking or upstreaming would *necessarily* threaten national security." Project Reply Br. 9.

That argument tilts at windmills. Nothing in the agency affidavits says that every potential record generically relating to unmasking or upstreaming would automatically trigger a *Glomar* response. And "we have repeatedly rejected the argument that the government's decision to disclose some information prevents the government from withholding other information about the same subject." *ACLU*, 628 F.3d at 625 (collecting cases).

For all of those reasons, the agencies have each shown that their *Glomar* responses met the substantive criteria of Executive Order 13,526.

2

The second requirement for invoking Exemption 1 is that each agency must show that the information it seeks to withhold was "classified in accordance with the procedural criteria of the governing Executive Order[.]" *Judicial Watch*, 715 F.3d at 943 (quoting *Lesar v. Department of Justice*, 636 F.2d 472, 483 (D.C. Cir. 1980)). The agencies have each cleared that hurdle.

Under Executive Order 13,526, only "an original classification authority" can classify information. Exec. Order. 13,526, § 1.1(a)(1). Those vested with original classification authority are "(1) the President

and Vice President; (2) agency heads and officials designated by the President; and (3) United States Government officials delegated this authority" under the Order. *Id.* § 1.3(a).

Each agency's affidavit showed that the declarant had original classification authority under the Order. *See* J.A. 86, 92–93 (NSA Decl. ¶¶ 1, 18, 19) (Chief of Policy, Information, Performance, and Exports Linda M. Kiyosaki); J.A. 129–130, 134–135 (CIA Decl. ¶¶ 2, 13) (CIA Information Review Officer Vanna Blaine); J.A. 151, 160 (FBI Decl. ¶¶ 2, 31) (Chief of the Record/Information Dissemination Section Michael G. Seidel); J.A. 210, 213 (Justice Dep't Decl. ¶¶ 3, 14) (General Counsel of the National Security Division Patrick N. Findlay); J.A. 241, 249 (State Dep't Decl. ¶¶ 1, 19) (Deputy Assistant Secretary for Analysis and Production of the Bureau of Intelligence and Research Victor Raphael); J.A. 252, 258–259 (ODNI Decl. ¶¶ 3, 19, 23) (Chief of the Information Management Office Gregory M. Koch). That "removes any doubt that a person with original classification authority has approved the classification decision[.]" *Judicial Watch*, 715 F.3d at 944.

The Project invokes two other provisions of the Executive Order—Sections 1.5 and 1.6. Neither affects the validity of the *Glomar* responses.

First, Section 1.5 provides that, "[a]t the time of original classification, the original classification authority shall establish a specific date or event for declassification based on the duration of the national security sensitivity of the information." Exec. Order. 13,526 § 1.5(a). The Project is correct that no such date

was set at the time of classification. But setting such a date is not a procedural precondition to the original classification under the Order. It is a requirement that attaches "[*a*]*t the time of* original classification"—that is, once classification has occurred. *Id.* (emphasis added). It is not part of the process of establishing a permissible basis for classification. That makes sense. Until a classification judgment is validly made, there is no need for a declassification date.

Another section of the Executive Order makes that distinction even more apparent. Section 6.1 of the Order defines "classified information" as "information that has been determined pursuant to this order or any predecessor order to require protection against unauthorized disclosure *and* is marked to indicate its classified status when in documentary form." Exec. Order. 13,526 § 6.1(i) (emphasis added). So while the Order requires that a document be marked to be validly classified, the Order does not similarly make identifying a declassification date a prerequisite to valid classification.

In addition, Section 1.5 itself anticipates that there may be "classified information" that does not have a declassification date. Section 1.5 states that "[n]o information may *remain* classified indefinitely" and provides that "classified information that * * * lacks declassification instructions shall be declassified in accordance with [P]art 3 of [the] [O]rder." Exec. Order. 13,526 § 1.5(d) (emphasis added). By the express terms of Section 1.5, therefore, information may properly be classified even if it lacks a declassification date.

In sum, to properly invoke Exemption 1, the agencies were required to show that their *Glomar* facts were "properly classified pursuant to" the Executive Order, not that they met every post-classification requirement in the Order. 5 U.S.C. § 552(b)(1)(B). The issue here is simply one of ordering. And because nothing in the Executive Order mandates that a declassification date be set *before* information can validly be classified, any delay in setting that date here is beside the point.

The Project also relies on Section 1.6 of the Order, which provides that, "[a]t the time of original classification," the agency must mark the classification level, the original classification authority, the agency and office of origin, declassification instructions, and a concise reason for classification. Exec. Order. 13,526 § 1.6(a).

Like Section 1.5, Section 1.6 sets requirements that occur "*at the time of* original classification," but are not themselves part of the process for the original act of classification. And while the Order defines "classified information" in part as "information that * * * is marked to indicate its classified status *when in documentary form*[,]" that requirement, by its very terms, only applies when the classified information is "*in documentary form*." Exec. Order. 13,526 § 6.1(i) (emphases added).

That marking requirement cannot apply to the *Glomar* fact at issue here—the fact that any response would imperil national security and intelligence operations—since no markings can be made when the relevant fact takes the form not of a physical

document, but of an abstract expert mental judgment made by the original classifier who works at the agency. In this case, there simply was no physical record capable of receiving such markings.

The Executive Order anticipates that result. The Order defines the types of "[i]nformation" that can be classified as including "any knowledge that can be communicated or documentary material, regardless of its physical form or characteristics[.]" Exec. Order. 13,526 § 6.1(t). That definition includes *Glomar* facts because the Order says so specifically. *See id.* § 3.6(a) ("An 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[.]").

So the Executive Order expressly allows for the classification of information that is knowledge, and not just information that is in the form of markable documentary material. The Project recognizes as much. *See* Revised Oral Argument Tr. 19:8–16 (conceding that "the executive order * * * does[not] obligate everything that[is] classified to be reduced to documentary form"). And such information is not required to be "marked to indicate its classified status" to be properly classified under the Order. Exec. Order. 13,526 § 6.1(i).

In short, each agency's determination that it could neither confirm nor deny the existence of any records complied with those substantive and procedural prerequisites for classification raised by the Project.

*****

Because the agencies' *Glomar* responses complied with both the substantive and procedural classification criteria of Executive Order 13,526, the agencies properly declined to respond to the Project's FOIA requests under Exemption 1.

IV

For the foregoing reasons, we affirm the judgment of the district court.

So ordered.

Appendix B

Case 1:20-cv-03657-BAH Document 23
Filed 09/19/22

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PROJECT FOR PRIVACY AND SURVEILLANCE ACCOUNTABILITY, INC., Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, *et al.,* Defendants.	Civil Action No. 20-3657 (BAH) Chief Judge Beryl A. Howell

MEMORANDUM OPINION

Plaintiff Project for Privacy and Surveillance Accountability, Inc. filed this lawsuit against five federal agencies—namely, the U.S. Department of Justice ("DOJ"), Office of the Director of National Intelligence ("ODNI"), National Security Agency ("NSA"), Central Intelligence Agency ("CIA"), and U.S. Department of State ("DOS")—challenging the agencies' responses to plaintiff's record requests, pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, seeking records "on the unmasking and

upstreaming—including requests for unmasking or upstreaming—of [48] current and former members of congressional intelligence committees." Compl. ¶ 26, ECF No. 1. Relying on information leaked to the media regarding the unmasking of U.S. lawmakers in intelligence reports, plaintiff argues that the "frequency of such undisclosed surveillance indicates that unmaskings may have been requested for illegitimate reasons—for example, to gain information to embarrass or compromise members of congressional committees responsible for overseeing the intelligence community." Compl. ¶ 23. All five defendant agencies, as well as DOJ's component, the Federal Bureau of Investigation ("FBI"), issued *Glomar* responses that neither confirmed nor denied the existence of records responsive to plaintiff's request. *See* Defs.' Statement of Material Facts Not in Dispute ("Defs.' SMF") ¶¶ 6–7, 9, 11, 13, 15, 17, 19, ECF No. 11. Plaintiff challenges these *Glomar* responses and further contends that defendants should have conducted searches for non-protected records before issuing their *Glomar* responses. The parties have now cross moved for summary judgment and, for the reasons explained below, defendants' motion for summary judgment, Defs.' Mot. Summ. J. ("Defs.' Mot."), ECF No. 11, is granted and plaintiff's cross-motion for summary judgment, Pl.'s Cross-Mot. Summ. J. ("Pl.'s Cross-Mot."), ECF No. 15, is denied.[1]

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[1] A similar challenge to the same defendants' *Glomar* responses to FOIA requests for records related to the unmasking and upstreaming of certain high-profile individuals made by the instant plaintiff's counsel, Gene C. Schaerr, was previously rejected by another Judge on this Court. In *Schaerr v. U.S. Dep't of Justice*, 435 F. Supp. 3d 99 (D.D.C. 2020), *appeal filed* Case No.

I. BACKGROUND

Set out below is a brief review of plaintiff's FOIA requests and pertinent procedural history, as well as background for the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. §§ 1801–1885c, helpful to understanding the context for both the FOIA requests and responses at issue.

A. Plaintiff's FOIA Requests

On January 27 and 28, 2020, plaintiff, a non-profit corporation that "advocates for greater privacy and civil liberty protections from government surveillance," Compl. ¶ 5, submitted substantially similar FOIA requests to DOJ, FBI, ODNI, NSA, CIA, and DOS. Compl. ¶¶ 27, 33, 38, 44, 50, 55. The FOIA requests sought two categories of "documents, reports, memoranda, or communications" emerging from surveillance under the FISA: (1) "regarding the unmasking—including all unmasking requests—of any [of the 48 listed current and former members of congressional intelligence committees] from January 1, 2008 to January 15, 2020"; and (2) "regarding the upstreaming—including all requests for upstreaming of any [of the same 48 current and former Congress members]" from the same time period. Compl. ¶¶ 27, 33, 38, 44, 50, 55.[2]

21-5165 (D.C. Cir. 2021), Judge Amy Berman Jackson held that the defendants' *Glomar* responses were justified under FOIA Exemptions 1 and 3 and rejected allegations by plaintiff Schaerr that unmaskings may have been requested in bad faith, *id.* at 105–120.

[2] The 48 current and former members of congressional intelligence committees include: Rep. Adam Schiff; Rep. Jim

Four of the six recipients of plaintiff's FOIA requests denied the requests and issued *Glomar* responses before the initiation of this litigation. On Feb. 4, 2020, ODNI provided a *Glomar* response under FOIA Exemptions 1 and 3, indicating that "[t]he fact of the existence or non-existence of the requested records is itself currently and properly classified, and could reveal intelligence sources and methods information that is protected from disclosure pursuant to Section 102A(i)(1) of the National Security Act of 1947, as amended, 50 U.S.C. § 3024(i)(1)." Compl. ¶ 34; *id.*, Ex. G, Letter from Sally A. Nicholson, Chief, FOIA Branch, ODNI, to Gene Schaerr (Feb. 4, 2020) ("ODNI Denial Letter"), ECF No. 1-8. NSA denied the plaintiff's FOIA request under the same exemptions on Feb. 12, 2020, *id.* ¶ 39; *id.*, Ex. M, Letter from John R. Chapman, Chief, NSA FOIA/PA Off., to Gene Schaerr (Feb. 12, 2020) ("NSA Denial Letter"), ECF No. 1-14. DOJ's National Security Division ("NSD")

Himes; Rep. Terri Sewell; Rep. Andre Carson; Rep. Jackie Speier; Rep. Mike Quigley; Rep. Eric Swalwell; Rep. Joaquin Castro; Rep. Denny Heck; Rep. Peter Welch; Rep. Sean Patrick Maloney; Rep. Val Demings; Rep. Raj Krishnamoorthi; Rep. Devin Nunes; Rep. Mike Conaway; Rep. Michael Turner; Rep. Brad Wenstrup; Rep. Chris Stewart; Rep. Rick Crawford; Rep. Elise Stefanik; Rep. Will Hurd; Rep. John Ratcliffe; Sen. James Risch; Sen. Marco Rubio; Sen. Susan Collins; Sen. Roy Blunt; Sen. Tom Cotton; Sen. John Cornyn; Sen. Ben Sasse; Sen. Dianne Feinstein; Sen. Ron Wyden; Sen. Martin Heinrich; Sen. Angus King; Sen. Kamala Harris; Sen. Michael Bennet; Sen. James Lankford; Sen. Mark Warner; Rep. Peter King; former Rep. Frank LoBiondo; former Rep. Trey Gowdy; former Rep. Tom Rooney; former Rep. Ileana Ros-Lehtinen; former Rep. Jeff Miller; former Rep. Lynn Westmoreland; former Rep. Joe Heck; former Rep. Mike Pompeo; former Rep. Luis Gutierrez; and former Rep. Patrick Murphy. Compl. ¶ 26.

denied plaintiff's FOIA request on Feb. 18, 2020, issuing a *Glomar* response under FOIA Exemption 1, *id*. ¶ 29; *id*., Ex. C, Letter from Arnetta Mallory, DOJ Government Information Specialist, to Gene Schaerr (Feb. 18, 2020) ("DOJ Denial Letter"), ECF No. 1-4, while the FBI denied plaintiff's FOIA request on June 22, 2020, issuing a *Glomar* response under FOIA Exemptions 1, 3, 6, 7(C) and 7(E), *id*. ¶ 46; *id.*, Ex. T, Letter from Michael G. Seidel, Acting Section Chief, Record/Information Dissemination Section, Information Management Div., FBI, to Gene Schaerr (June 22, 2020) ("FBI Denial Letter"), ECF No. 1-21.

The denial letters declined to "confirm nor deny the existence of records responsive to [the plaintiff's] request." FBI Denial Letter at 2; ODNI Denial Letter at 2. The NSD elaborated that, for FOIA requests regarding "operational files which document requests for and approvals of authority for the U.S. Intelligence Community to conduct certain foreign intelligence activities," NSD does not search those records when the "confirmation or denial of the existence of responsive records" would reveal classified information. NSD Denial Letter at 3. NSA explained in its denial letter that "NSA collects and provides intelligence derived from foreign communications to policymakers, military commanders, and law enforcement officials" in order to "help these individuals" protect the national security of the United States and its allies. NSA Denial Letter at 3.

Plaintiff timely appealed the NSD, FBI, and ODNI denials of its FOIA requests, and all three denials were affirmed. *See* Decl. of Patrick N. Findlay, General Counsel, NSD ("NSD Decl."), ECF No. 11-5;

Decl. of Michael G. Seidel, Section Chief, Record/Info. Dissemination Section, Info. Mgmt. Div., FBI ("FBI Decl."), ECF No. 11-4; Decl. of Gregory M. Koch, Chief, Info. Mgmt. Off., ODNI ("ODNI Decl."), ECF No. 11-7. Rather than appeal NSA's denial of its January 2020 request, plaintiff submitted another FOIA request to this agency, on August 20, 2020, that attached a letter by then-Acting Director of National Intelligence Richard Grenell to Senate Select Intelligence Committee Vice Chairman Mark Warner, justifying Grenell's decision to declassify the identities of federal officials who sought to unmask the identity of General Flynn in intelligence reports. Compl. ¶ 40; *id.*, Ex. N, Letter from Gene Schaerr, General Counsel, Project for Privacy & Surveillance Accountability, to NSA (Aug. 20, 2020), ECF No. 1-15. NSA declined to process the August 2020 request due to its prior response, but upon plaintiff's appeal of that declination, which was granted, NSA issued a new *Glomar* response to plaintiff's August 2020 request as well. *See id.*, Ex. O, Letter from Sharon C. Linkous, Acting Chief, FOIA/PA Off., NSA, to Schaerr (Sept. 1, 2020), ECF No. 1-16; *id.,* Ex. P, Letter from Schaerr to NSA/CSS FOIA/PA Appeal Authority (Oct. 9, 2020), ECF No. 1-17; Decl. of Linda M. Kiyosaki, Chief of Policy, Info., Performance, and Exports, NSA ("NSA Decl.") ¶¶ 16–17, ECF No. 11-2.

Although DOS and CIA acknowledged receipt of plaintiff's requests, these two agencies did not reply to the plaintiff's requests until May 28, 2021 and May 14, 2021, respectively, after this litigation had been initiated, when they issued *Glomar* responses on the basis of FOIA Exemptions 1 and 3. Compl. ¶¶ 51–53,

56–58; Defs.' SMF ¶¶ 17, 19; Pl.'s Response to Defs.' SMF & Pl.'s Counter-Statement of Material Facts Not in Dispute ("Pl.'s Resp. SMF") ¶¶ 17, 19, ECF No. 15.

B. Incidental Surveillance of U.S. Persons under FISA

FISA provides the Attorney General and Director of National Intelligence with legal authorization for use of surveillance tools for "foreign intelligence purposes." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 402 (2013). The statute is tailored to minimize domestic surveillance, requiring that targets be "foreign power[s] or [] agent[s] of a foreign power," 50 U.S.C. § 1804(a)(3)(A), or, in the case of FISA surveillance authorized by Section 702, targets must be "reasonably believed to be located outside the United States to acquire foreign intelligence information." 50 U.S.C. § 1881a(a).[3] Under Section 702, the Attorney General and DNI may neither intentionally target any person within the United States, nor "United States persons"—defined, *inter alia*, to include citizens and lawful permanent residents, 50 U.S.C. § 1801(i)—outside of the country. *Id.* at § 1881a(b)(1)–(3). Still, information about U.S.

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[3] FISA § 702, enacted as part of the FISA Amendments Act of 2008, 122 Stat. 2436, "supplement[ed] pre-existing FISA authority by creating a new framework under which the Government may seek the [Foreign Intelligence Surveillance Court's] authorization of certain foreign intelligence surveillance targeting the communications of non-U.S. persons located abroad. Unlike traditional FISA surveillance, § 1881a does not require the Government to demonstrate probable cause that the target of the electronic surveillance is a foreign power or agent of a foreign power." *Clapper*, 568 U.S. at 404.

persons may be incidentally collected by surveillance conducted under FISA.

1. *Masking*

Information collected under FISA-authorized surveillance is subject to minimization procedures designed to "minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons." *Id.* at § 1801(h)(1); *see also* § 1881a(e)(1). One of those procedures involves "masking" the identity of U.S. persons included in intelligence reports with generic phrases such as "a named U.S. person." FBI Decl. ¶ 15. Generally, however, government officials may request that an anonymized person be revealed—called "unmasking"—if the information "constitutes foreign intelligence, is necessary for the recipient to understand the foreign intelligence being transmitted, or is evidence of a crime." *Id.* The unmasking process is subject to strict documentation requirements. *See* ODNI, INTEL. CMTY. POL'Y GUIDANCE 107.1, REQUESTS FOR IDENTITIES OF U.S. PERSONS IN DISSEMINATED INTELLIGENCE REPORTS (Jan. 11, 2018), https://www.dni.gov/files/documents/ICPG/ICPG-107.1.pdf.

The first part of plaintiff's FOIA requests seek information about requests to "unmask[]" current and former members of congressional intelligence committees in the context of reports disseminated within the U.S. government and derived from FISA surveillance. Compl. ¶ 17. Plaintiff points to a 2017 article in *The Hill* as evidence of potential abuse by the intelligence community of this unmasking power,

citing information in the article that the communications of U.S. lawmakers and their staff were incidentally collected as often as monthly, and their unmasked names appeared frequently in executive branch intelligence reports. *Id.* ¶ 22. The frequency of the unmasking of U.S. lawmakers has prompted plaintiff to speculate that "unmaskings may have been requested for illegitimate reasons," such as embarrassing members of congressional oversight committees. *Id.* ¶ 23.

2. *Upstreaming*

NSA is authorized, under FISA § 702, *inter alia*, to collect target communications "as they cross the backbone of the internet with the compelled assistance of companies that maintain those networks" in a process called "upstream collection." FBI Decl. ¶ 17.[4] This approach contrasts with "downstream collection," where NSA and other intelligence agencies collect information directly from the U.S. company that services the target account, such as Google or Facebook. In addition to collecting communications sent or received by a target, upstream collection also obtains information merely "about" targets—increasing the likelihood that the NSA may collect communications involving non-consenting U.S. persons who are not themselves surveillance targets nor in communication with them. *Id.*[5]

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[4] According to official public disclosures, only NSA conducts upstream collection. *See* FBI Decl. ¶ 18.

[5] Although NSA publicly announced on April 28, 2017 that "its Section 702 foreign intelligence surveillance activities will no longer include any upstream internet communications that are

Plaintiff describes upstreaming as the process of searching for an individual's name within the vast amount of data that NSA accumulates. Compl. ¶ 21. Defendants, on the other hand, take a broader approach to the concept of upstreaming, interpreting part two of plaintiff's requests as seeking "documents regarding the collection of communications to, from, or about the 48 listed individuals, using the 'Upstream' technique." NSA Decl. ¶ 22.

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 56, "[a] party is entitled to summary judgment only if there is no genuine issue of material fact and judgment in the movant's favor is proper as a matter of law." *Soundboard Ass'n v. Fed. Trade Comm'n*, 888 F.3d 1261, 1267 (D.C. Cir. 2018) (quoting *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 805 (D.C. Cir. 2006)); *see also* FED. R. CIV. P. 56(a). "In FOIA cases, 'summary judgment may be granted on the basis of agency affidavits if they contain reasonable specificity of detail rather than

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solely 'about' a foreign intelligence target," NSA, NSA STOPS CERTAIN SECTION 702 "UPSTREAM" ACTIVITIES (April 28, 2017), https://www.nsa.gov/Press-Room/Press-Releases-Statements/Press-Release-View/Article/1618699/nsa-stops-certain-section-702-upstream-activities/ (last accessed Sept. 13, 2022), the FBI's declaration explaining upstreaming suggests that "about" collection continued as of the date of the declaration. *See* FBI Decl. ¶ 17 (citing document published on April 18, 2017, shortly before ODNI's public announcement of the end of "about" collection). The FBI declarant's reliance on such an outdated, five-year old document to suggest continuation today of the "about" collection may reflect sloppy drafting rather than call into question the accuracy of NSA's public announcement.

merely conclusory statements, and if they are not called into question by contradictory evidence in the record or by evidence of agency bad faith.'" *Aguiar v. Drug Enf't Admin.*, 865 F.3d 730, 734–35 (D.C. Cir. 2017) (quoting *Judicial Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 215 (D.C. Cir. 2013)). Most FOIA cases "can be resolved on summary judgment." *Brayton v. Off. of U.S. Trade Representative*, 641 F.3d 521, 527 (D.C. Cir. 2011).

FOIA was enacted "to promote the 'broad disclosure of Government records' by generally requiring federal agencies to make their records available to the public on request." *DiBacco v. U.S. Army* ("*DiBacco I*"), 795 F.3d 178, 183 (D.C. Cir. 2015) (quoting *Dep't of Justice v. Julian*, 486 U.S. 1, 8 (1988)). Agencies are therefore statutorily mandated to "make . . . records promptly available to any person" who submits a request that "reasonably describes such records" and "is made in accordance with [the agency's] published rules." 5 U.S.C. § 552(a)(3)(A). To balance the public's interest in governmental transparency and "legitimate governmental and private interests [that] could be harmed by release of certain types of information," *Judicial Watch, Inc. v. U.S. Dep't of Def.*, 913 F.3d 1106, 1108 (D.C. Cir. 2019) (quoting *FBI v. Abramson*, 456 U.S. 615, 621 (1982)), FOIA contains nine exemptions, set forth in 5 U.S.C. § 552(b), which "are 'explicitly made exclusive' and must be 'narrowly construed,'" *Milner v. Dep't of Navy*, 562 U.S. 562, 565 (2011) (first quoting *EPA v. Mink*, 410 U.S. 73, 79 (1973); and then quoting *Abramson*, 456 U.S. at 630); *see also Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Justice ("CREW I")*, 746 F.3d

1082, 1088 (D.C. Cir. 2014). "[T]hese limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976).

FOIA authorizes federal courts "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B). When an agency invokes an exemption to disclosure, district courts must "determine *de novo* whether non-disclosure was permissible." *Elec. Priv. Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 777 F.3d 518, 522 (D.C. Cir. 2015). The statute "places the burden 'on the agency to sustain its action,' and the agency therefore bears the burden of proving that it has not 'improperly' withheld the requested records." *CREW. v. U.S. Dep't of Justice ("CREW II")*, 922 F.3d 480, 487 (D.C. Cir. 2019) (first quoting 5 U.S.C. § 552(a)(4)(B); and then quoting *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 n.3 (1989)); *see also U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 171 (1993) ("The Government bears the burden of establishing that the exemption applies."); *DiBacco v. U.S. Dep't of Army* ("*DiBacco II*"), 926 F.3d 827, 834 (D.C. Cir. 2019) ("'An agency withholding responsive documents from a FOIA release bears the burden of proving the applicability of claimed exemptions,' typically through affidavit or declaration." (quoting *DiBacco I*, 795 F.3d at 195)). This burden does not shift even when the requester files a cross-motion for summary judgment because the agency ultimately "bears the burden to establish the applicability of a claimed exemption to

any records or portions of records it seeks to withhold," *Am. Immigr. Laws. Ass'n v. Exec. Off. for Immigr. Rev.*, 830 F.3d 667, 673 (D.C. Cir. 2016), while "[t]he burden upon the requester is merely 'to establish the absence of material factual issues before a summary disposition of the case could permissibly occur,'" *Pub. Citizen Health Rsch. Grp. v. Food & Drug Admin.*, 185 F.3d 898, 904–05 (D.C. Cir. 1999) (quoting *Nat'l Ass'n of Gov't Emps. v. Campbell*, 593 F.2d 1023, 1027 (D.C. Cir. 1978)).

The agency may sustain its burden through a *Vaughn* index, and supporting affidavits or declarations, that "describe[ ] the justifications for withholding the information with specific detail, demonstrate[ ] that the information withheld logically falls within the claimed exemption, and [are] not contradicted by contrary evidence in the record or by evidence of the agency's bad faith." *DiBacco II*, 926 F.3d at 834 (quoting *DiBacco I*, 795 F.3d at 196); *CREW I*, 746 F.3d at 1088; *see also Poitras v. Dep't of Homeland Sec.*, 303 F. Supp. 3d 136, 150 (D.D.C. 2018) ("An agency may carry its burden of showing an exemption was properly invoked by submitting sufficiently detailed affidavits or declarations, a *Vaughn* index of the withheld documents, or both, to demonstrate that the government has analyzed carefully any material withheld and provided sufficient information as to the applicability of an exemption to enable the adversary system to operate."). "Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible." *Judicial Watch, Inc. v. U.S. Dep't of Def.*, 715 F.3d 937, 941 (D.C. Cir. 2013) (per curiam)

(quoting *Am. Civil Liberties Union v. U.S. Dep't of Def. (ACLU/DOD)*, 628 F.3d 612, 619 (D.C. Cir. 2011)).

III. DISCUSSION

Plaintiff challenges all five defendants' comprehensive *Glomar* responses, arguing that each of the four FOIA exemptions relied upon are inadequate to justify either withholding or a refusal to search for responsive records. Following discussion of the use of *Glomar* responses in the legal framework governing disclosure under FOIA, applicability of the exemptions invoked by defendants are analyzed.

A. *Glomar* Responses Generally

"In certain cases, merely acknowledging the existence of responsive records would itself 'cause harm cognizable under [a] FOIA exception.'" *People for the Ethical Treatment of Animals v. Nat'l Insts. of Health*, 745 F.3d 535, 540 (D.C. Cir. 2014) (quoting *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007)). In such cases, "an agency can issue a *Glomar* response, refusing to confirm or deny its possession of responsive documents." *Id.* To determine whether acknowledging the existence or non-existence of responsive records satisfies a FOIA exemption, "courts apply the general exemption review standards established in non-*Glomar* cases." *Wolf*, 473 F.3d at 374; *accord Am. Civil Liberties Union v. CIA (ACLU/CIA)*, 710 F.3d 422, 426 (D.C. Cir. 2013). Thus, the agency bears the burden of showing that the fact of whether the requested records are in the agency's possession is a fact protected from disclosure under a FOIA exemption. *See Wolf*, 473 F.3d at 374. "In *Glomar* cases, courts may grant summary judgment on the basis of agency affidavits

that contain 'reasonable specificity of detail rather than merely conclusory statements, and if they are not called into question by contradictory evidence in the record or by evidence of agency bad faith.'" *Elec. Privacy Info. Ctr. v. NSA*, 678 F.3d 926, 931 (D.C. Cir. 2012) (quoting *Gardels v. CIA*, 689 F.2d 110, 1105 (D.C. Cir. 1982)).

When an agency withholds records requested under FOIA, the supporting affidavits need not justify the agency's withholdings "document-by-document." *CREW I*, 746 F.3d 1082, 1088. Instead, when the process of litigating a FOIA request "threatens to reveal 'the very information the agency hopes to protect' . . . it may be necessary for the agency affidavit to contain only 'brief or categorical descriptions' of the withheld information." *Id.* (quoting *ACLU/CIA*, 710 F.3d at 432). An agency may justify the withholding of records on a categorical basis when the "range of circumstances included in the category characteristically support[s] an inference that the statutory requirements for exemption are satisfied." *Id.* (alteration in original) (quoting *Nation Magazine v. U.S. Customs Serv.,* 71 F.3d 885, 893 (D.C. Cir. 1995)).

A *Glomar* response may be challenged in at least two related ways. First, a plaintiff may challenge the agency's assertion of an exemption, that is, whether confirming or denying the existence of requested records would result in "harm cognizable under [a] FOIA exception." *Wolf*, 473 F.3d at 374 (quoting *Gardels*, 689 F.2d at 1103); *see also, e.g., People for the Ethical Treatment of Animals*, 745 F.3d at 540. Second, a plaintiff may show that not "all of the

responsive records were covered by the [claimed] Exemption." *Elec. Privacy Info. Ctr.*, 678 F.3d at 934; *see also Jefferson v. Dep't of Justice*, 284 F.3d 172, 179–80 (D.C. Cir. 2002) (holding that the Justice Department's Office of Professional Responsibility was not entitled to make a *Glomar* response as to "all records" pertaining to a particular Assistant U.S. Attorney when it did not meet its burden to prove all records were compiled for law enforcement purposes such that they fell within Exemption 7(C)). Plaintiff employs both methods to challenge the agencies' *Glomar* responses here.

Specifically, plaintiff contests the invoked exemptions, arguing that defendants "fail[ed] to meet their burden of justifying their *Glomar*-based refusal even to *search* for responsive records." Pl.'s Mem. Supp. Cross-Mot. Summ. J. & Opp'n Defs.' Mot. Summ. J. ("Pl.'s Opp'n.") at 22, ECF No. 15 (as to Exemption 1); *see also id.* at 32–33 (as to Exemption 3); *id.* at 35 (as to Exemption 7). The D.C. Circuit has repeatedly held, however, that when an agency issues a *Glomar* response, no search for responsive documents needs to be undertaken. A *Glomar* response "narrows the FOIA issue to the existence of records *vel non*." *Wolf*, 473 F.3d at 374 n.4. Thus, in this context, "requiring [the agency] to conduct a search and segregability analysis would be a meaningless—not to mention costly—exercise." *Elec. Privacy Info. Ctr.*, 678 F.3d at 934; *see also Carter v. NSA*, No. 13-5322, 2014 WL 2178708, at *1 (D.C. Cir. 2014) (per curiam); *Schaerr*, 435 F. Supp. 3d at 116 (rejecting plaintiff's argument that defendants "should at least be required to do a search for the documents"

before issuing a *Glomar* response because conducting a search still risks "potential harm caused by merely revealing the records' existence").

Although a search need not be conducted before issuing a *Glomar* response, an agency must "make a threshold showing that the FOIA request seeks records [that fall within the claimed exemption]." *Bartko v. U.S. Dep't of Justice*, 898 F.3d 51, 64 (D.C. Cir. 2018). Whether defendants meet that burden will be addressed within the following discussion of the applicability of each exemption.

B. *Glomar* Responses Properly Invoke Exemption 1.

DOJ (including the FBI), ODNI, NSA, CIA, and State Department each invoked Exemption 1 to support their *Glomar* responses. Exemption 1 protects from disclosure 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); *see Milner*, 562 U.S. at 580 (noting that among the "tools at hand to shield national security information and other sensitive materials," the government has "[m]ost notably, Exemption 1 of FOIA [which] prevents access to classified documents."); *see also Larson v. Dep't of State*, 565 F.3d 857, 861 (D.C. Cir. 2009). Thus, an agency invoking Exemption 1 must show that the withheld information has been classified in compliance with the classification procedures set forth in the relevant executive order and that only information conforming to the executive order's substantive criteria for classification has been

withheld. *See Judicial Watch*, 715 F.3d at 941 (discussing "substantive and procedural criteria for classification"); *Lesar v. Dep't of Justice*, 636 F.2d 472, 483 (D.C. Cir. 1980) ("To be classified properly, a document must be classified in accordance with the procedural criteria of the governing Executive Order as well as its substantive terms.").

"The D.C. Circuit has advised courts to accord substantial deference to an agency's *Glomar* response and avoid 'searching judicial review' when the information requested 'implicat[es] national security, a uniquely executive purview.'" *Schaerr*, 435 F. Supp. 3d at 111 (alteration in original) (quoting *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice,* 331 F.3d 918, 926–27 (D.C. Cir. 2003)); *see also Elec. Privacy Info. Ctr.*, 678 F.3d at 931. Generally, "an agency's justification for invoking a FOIA exemption is sufficient if it appears 'logical' or 'plausible.'" *Wolf*, 473 F.3d at 374–75 (quoting *Gardels*, 689 F.2d at 1105).

In this case, defendants have sufficiently established that the existence or non-existence of responsive records is classified under Executive Order ("E.O.") 13,526, which is "the operative classification order under Exemption 1, [that] sets forth both substantive and procedural criteria for classification." *Judicial Watch*, 715 F.3d at 941; *see also* E.O. 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009). An 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 [the Order] or its predecessors." E.O. 13,526 § 3.6(a). This E.O. sets forth four requirements for the classification of national security information: (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 United States Government," (3) the information pertains to one of eight subject-matter classification categories, and (4) disclosure of the information "reasonably could be expected to result in damage to the national security" that is both describable and identifiable. *Id.* at § 1.1(a)*; see also Judicial Watch, Inc.,* 715 F.3d at 941.

Plaintiff raises both substantive and procedural challenges to defendants' invocation of Exemption 1, which are addressed *seriatim*.

1. *Procedural Requirements*

In plaintiff's view, defendants "cannot refuse to confirm or deny the existence of requested records unless 'the fact of [the records'] existence is itself classified under [E.O. 13,526],'" Pl.'s Opp'n at 24 (first alteration in original) (quoting E.O. 13,526 § 3.6(a)), and here, defendants failed to prove that they completed "all the procedural steps to actually classify [the withheld information] before issuing their *Glomar* response," *id.* at 25. Plaintiff reasons that the intangible nature of what defendants call a "*Glomar* fact," Defs.' Reply Supp. Mot. Summ. J. & Opp'n Pl.'s Cross-Mot. Summ. J. ("Defs.' Opp'n"), at 8, ECF No. 17, does not absolve an agency from Exemption 1's second criterion that the matter be "*in fact properly classified* pursuant" to an executive order, Pl.'s Reply Supp. Cross-Mot. Summ. J. ("Pl.'s Reply") at 10, ECF No. 21 (emphasis in the original) (quoting 5 U.S.C. § 552(b)(1)(A)); *see also id.* at 11 (noting that E.O. 13,526 does not exempt *Glomar* facts from the

procedural requirements of the classification process).[6] Those missing procedural steps, according to plaintiff, include failing to (1) mark the withheld information with declassification instructions, (2) comply with special procedures for classifying information after receiving a FOIA request under E.O. 13,526 § 1.7(d), and (3) comply with unspecified "transparency procedures" required by the Order. Pl.'s Opp'n at 25.[7]

This Court has considered and rejected the plaintiff's exact argument in *Mobley v. CIA*, 924

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[6] The defendants' memorandum is docketed twice, once at ECF No. 17 and once at ECF No. 18. To simplify citation, only the memorandum docketed at ECF No. 17 is cited.

[7] Plaintiff does not challenge that individuals with the proper classification authority under E.O. 13,526 have determined that the information at issue is classified; rather, the plaintiff challenges those "*post hoc* determinations" as failing to follow the "many other procedural requirements scattered throughout the order" to classify that information properly. Pl.'s Opp'n at 24–25. To establish the propriety of their *Glomar* responses, defendants submitted declarations by officials designated as original classification authorities at all six responding agencies. *See* NSA Decl. ¶ 1 (providing an 18-page explanation by the NSA's Chief of Policy, Information, Performance, and Exports, Linda M. Kiyosaki); FBI Decl. ¶ 2 (providing a 22-page explanation by FBI Record/Information Dissemination Section Chief, Michael Seidel); NSD Decl. at 6, n.5 (providing a 10-page explanation by Justice Department National Security Division General Counsel, Patrick Findlay); ODNI Decl. ¶ 3 (providing a 12-page explanation by ODNI Information Management Office Chief Gregory Koch); Decl. of Vanna Blaine, Information Review Officer, CIA ("CIA Decl.") ¶ 2 (providing an 11-page explanation); Decl. of Victor Raphael, Deputy Assistant Secretary for Analysis and Production, Bureau of Intelligence and Research, State Dep't ("DOS Decl.") ¶ 1 (providing a 10-page explanation).

F. Supp. 2d 24, 47–50 (D.D.C. 2013), *aff'd on other grounds*, 806 F.3d 568 (D.C. Cir. 2015), and *Nat'l Sec. Couns. v. CIA*, No. 12-cv-284, 2016 WL 6684182, *19 (D.D.C. Nov. 14, 2016). In *Mobley*, while noting that plaintiff's view that the CIA's *Glomar* response was procedurally unsound found some support in the text of E.O. 13,526, *Mobley*, 924 F. Supp. 2d at 48, the Court ultimately relied on the D.C. Circuit's interpretation of the identical provision in a predecessor Executive Order to hold that "if the agency affidavit plausibly explains the danger of the expected damage to national security or foreign relations from confirming or denying the existence of records, the existence of records *vel non* is properly classified under Executive Order 12958 and justifies the Agency's invocation of Exemption 1," *id.* at 50 (cleaned up) (quoting *Wolf*, 473 F.3d 375–76).

Plaintiff acknowledges that this Court has already thoroughly considered and rejected this argument twice, but urges reconsideration on four grounds. First, plaintiff contends that E.O. 13,526 "pointedly imposes the same classification requirements on [*Glomar*] responses without any hint of exception." Pl.'s Reply at 14 (citing E.O. 13,526 § 3.6(a)). As this Court held in *Mobley,* however, the Order did not appear to contemplate the fundamental nature of a *Glomar* response, which the plaintiff agrees is an "intangible form[] of classified information." Pl.'s Reply at 13 (quoting *Mobley*, 924 F. Supp. 2d at 49). The Executive Order, in interchangeably using the words "document," "record," and "information" to refer to national security information, signaled an "implicit assumption that all

classified information is in a tangible form." *Mobley*, 924 F. Supp. 2d at 49. *See, e.g.,* E.O. 13,526 § 1.6.

Second, plaintiff contends that defendants could comply with the Order's procedural criteria, such as providing necessary markings, because *Glomar* responses do create tangible records—"including, at the very least, either or both of the original FOIA requests . . . and the agency's *Glomar* letter to the requester." Pl.'s Reply at 15. In this argument, plaintiff misses the mark: the Order requires that "each classified document" be marked with information as to the level of classification and portion of the document classified. *See* E.O. 13,526 § 1.6(c). FOIA requests and *Glomar* letters may be tangible, but are not themselves classified documents. Marking them would not satisfy the procedural requirements of the Order; only marking the concededly intangible *Glomar* fact would do so—a metaphysical impossibility.

Third, plaintiff contends that *Mobley* misconstrued the D.C. Circuit's holding in *Wolf v. CIA*, 473 F.3d 370 (D.C. Cir. 2007), because the parties in that case did not contest whether the procedural requirements of the controlling Executive Order were satisfied. Pl.'s Reply at 15. The conclusion in *Mobley*, however, did not rest solely on *Wolf* and, thus, regardless of whether *Wolf* squarely resolved the issue, the "language and structure of the Order [E.O. 13,526] itself," *Mobley*, 924 F. Supp. 2d at 50, was found to support the conclusion.

Finally, plaintiff contends that, where the D.C. Circuit has previously upheld information as properly classified under Exemption 1 despite procedural flaws,

those cases involved relatively "minor" violations of the procedural requirements of E.O. 13,526. Pl.'s Reply at 16. The D.C. Circuit has held that defects in the original classification procedure do not necessitate release, because such a rule "could have intolerable consequences for national security interests." *Lesar*, 636 F.2d at 484–85 (holding that some "procedural violations . . . may be of such importance to reflect adversely on the agency's overall classification decision, requiring a remand to the district court for *in camera* inspection; while others may be insignificant, undermining not at all the agency's classification decision"). Although "this does not mean that only conformity with the EO's substantive requirements is required . . . [s]o long as procedural violations do not undermine the agency's decision to classify—as when, for example, a procedural violation suggests that, contrary to the EO, classification was undertaken in order to conceal a violation of law—the Court will not order documents to be released on that ground." *Judicial Watch, Inc. v. U.S. Dep't of Defense*, 857 F. Supp. 2d 44, 58–59 (D.C. Cir. 2012). Plaintiff does not allege that any failure of the agencies to follow E.O. 13,526's procedural requirements indicates a cover-up "to conceal a violation of law," and therefore falls short of establishing that a procedural failure here obviates reliance on Exemption 1, when any procedural failings of the classification of the *Glomar* facts at issue in this case result instead from the peculiarities of *Glomar* responses. *See generally* Pl.'s Reply at 10–16.

2. *Substantive Requirements*

The crux of plaintiff's substantive challenge to defendants' *Glomar* responses turns on the fourth requirement of § 1.1(a) of E.O. 13,526, that "the declarations [of the government] establish the requisite level of harm." *Judicial Watch*, 715 F.3d at 941; *see also* E.O. 13,526 § 1.1(a)(4) (requiring that "unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, which includes defense against transnational terrorism, and the original classification authority is able to identify or describe the damage").[8] Defendants have submitted six declarations describing the potential harm to national security that would arise from the disclosure of the existence or non-existence of documents related to the unmasking or upstreaming of the 48 identified lawmakers. Each declarant explained that acknowledging the existence of records related to unmasking and upstreaming of the named individuals would reveal both whether those individuals' communications were intercepted

[8] Plaintiff does not contest defendants' assertion that the third element of E.O. 13,526 § 1.1(a), requiring that "the information falls within one or more of the categories of information listed in section 1.4," is satisfied. The agencies' declarants rely on section 1.4(c) of E.O. 13,526, which permits classification of information "pertain[ing] to…intelligence activities (including covert action), intelligence sources or methods, or cryptology," to establish that the requested records are properly classified and exempt under Exemption 1 of FOIA. *See* DOS Decl. ¶ 9; CIA Decl. ¶ 13 (also citing a category including "foreign relations or foreign activities of the United States, including confidential sources" (quoting E.O. 13,526 § 1.4(d))); NSA Decl. ¶ 20; FBI Decl. ¶ 26; NSD Decl. ¶ 14; ODNI Decl. ¶ 23.

through FISA surveillance, and whether they were identified in intelligence reports during the requested time period. Disclosing such information would tip off the intelligence community's adversaries to its "priorities, capabilities, activities, and methods." Decl. of Vanna Blaine, Information Review Officer, CIA ("CIA Decl.") ¶ 16. *See also* NSA Decl. ¶ 24; FBI Decl. ¶ 36; NSD Decl. ¶ 20; Decl. of Victor Raphael, Deputy Assistant Secretary for Analysis and Production, Bureau of Intelligence and Research, State Dep't ("DOS Decl.") ¶ 9; ODNI Decl. ¶ 25.

As to plaintiff's requests for records regarding the unmasking of the named lawmakers, the confirmation of the existence (or not) of any of these records would reveal whether information about the named individuals has been collected pursuant to FISA and appeared in subsequent, FISA-sourced intelligence reports. *See* Defs.' Mem. Supp. Mot. Summ. J. ("Defs.' Mem.") at 15, ECF No. 11. This information would, "in effect, tend to confirm the existence or nonexistence of broader U.S. Government intelligence interest in and/or activity regarding a particular subject." CIA Decl. ¶ 16. Further, acknowledging that these individuals were the target or otherwise had their communications incidentally targeted by FISA surveillance "could give targets, their cohorts, foreign intelligence agencies, and others intent on interfering with NSD's and its partner's investigative efforts information necessary to take defensive actions to conceal criminal activities, develop and implement countermeasures to elude detection." NSD Decl. ¶ 20. At the same time, confirming the non-existence of unmasking records about a particular individual could

"identif[y] an area in which ODNI and the [intelligence community] have a lack of interest in the subjects or an inability to obtain information on the individuals or entities of interest and potentially confirms the success of any evasive techniques." ODNI Decl. ¶ 24.

Defendants' declarants identified many of the same risks in confirming or denying upstreaming-related records about the named lawmakers pursuant to the second part of the plaintiff's requests. Such records would similarly identify whether the individuals' communications were collected pursuant to FISA-authorized surveillance and whether the intelligence community took a particular interest—or lack of interest—in the individual. Further, confirming or denying the existence of records regarding the upstreaming of any of the named individuals would "plainly reveal whether the [NSA] had collected communications to, from, or about the 48 specific individuals listed in the requests, using 'Upstream' collection, a particular intelligence method." NSA Decl. ¶ 22. As a result, disclosure "reasonably could be expected to cause exceptionally grave damage to the national security by providing . . . adversaries a guide or 'road map' that instructs them on which communication modes or personnel remain secure and which are susceptible to NSA's capabilities." *Id.* ¶ 25. As to the non-NSA defendants, responding to the upstreaming request would require confirmation or denial that these agencies even utilize information derived from upstream collection at all, since "[o]fficial public disclosures by the [ODNI] acknowledge only that NSA engages in upstream

collection." FBI Decl. ¶ 18; *see also* DOS Decl. ¶ 14 (further noting that a response to the upstreaming information requests would "provide information about how intelligence is shared, analyzed, and used throughout the [intelligence community]").

Notwithstanding the agencies' thorough explanations of the national security risks, plaintiff contends, to the contrary, that the disclosure of the existence of at least some of the requested records "cannot reasonably be expected to cause identifiable and describable damage to national security." Pl.'s Opp'n at 25. More specifically, plaintiff argues that defendants may possess *some* disclosable records responsive to its requests that are "not animated by national security concerns at all," and thus, defendants must search for records that cannot fall within the protection of a blanket *Glomar* response. Pl.'s Reply at 21. To support this claim, plaintiff relies on: (1) the intelligence community's systematized disclosures of congressional unmaskings to certain members of Congress, (2) news reports of intelligence community members spying on lawmakers, and (3) the 2020 declassification of the names of officials who sought to unmask former National Security Advisor Michael Flynn in intelligence reports. *See* Pl.'s Opp'n at 25–32; Pl.'s Reply at 19–21.

For the reasons already stated, *see supra* § III.A, plaintiff's arguments that defendants are required to search for responsive documents before issuing a *Glomar* response fail under clear D.C. Circuit precedent. *See, e.g., People for the Ethical Treatment of Animals*, 745 F.3d at 540 ("[T]o the extent the circumstances justify a *Glomar* response, the agency

need not conduct any search for responsive documents or perform any analysis to identify segregable portions of such documents." (first citing *Wolf*, 473 F.3d at 374 n.4; then citing *Elec. Privacy Info. Ctr.*, 678 F.3d at 934)).

Equally unavailing is plaintiff's assertion that some responsive records to the FOIA requests may fall outside of the protection of Exemption 1 because the records may not endanger national security if disclosed. On this question, "[i]n light of the substantial weight accorded agency assertions of potential harm made in order to invoke the protection of FOIA Exemption 1," the agencies' declarations are sufficiently "logical[]" and "plausibl[e]" to overcome the plaintiff's speculation. *Wolf*, 473 F.3d at 376. To be sure, summary judgment is only appropriate "if this information [provided by an agency's affidavit] is not contradicted in the record, and if there is no evidence in the record of agency bad faith . . . . The sufficiency of the affidavits is not undermined by a mere allegation of agency misrepresentation or bad faith, nor by past agency misconduct in other unrelated cases." *Hayden v. NSA*, 608 F.2d 1381, 1387 (D.C. Cir. 1979). Plaintiff's examples of what it contends to be bad behavior on the part of the intelligence community—such as the CIA's reported 2014 hacking into the Senate Intelligence Committee's network while the latter prepared a report on the agency's detention and interrogation program, *see* Pl.'s Opp'n at 31—constitute unrelated past agency misconduct, failing to cast into doubt the plausibility of the agencies' declarations in this case.

With those arguments aside, plaintiff's remaining challenges to the substantive requirements of Exemption 1 may be easily dispatched. Plaintiff argues that disclosure of the responsive records would not harm national security because "since at least 1991, the fact of the IC's ongoing acquisition and dissemination of so-called 'Congressional identity information' has been repeatedly acknowledged and widely publicized." Pl.'s Opp'n at 26. As examples, plaintiff cites procedures originally drafted by CIA Director Robert Gates in 1992 that governed the unmasking of members of Congress or their staff in intelligence reports, which procedures have subsequently been revised, incorporated into formal intelligence community policy, and declassified. *See id.*; Pl.'s Opp'n., Ex. 3, Announcement of Gates Procedures Declassification, ECF No. 15-3 (declassifying and explaining the Gates Memo). The thrust of this argument is that the government has already "repeatedly acknowledged and widely publicized" the existence of the requested information, compelling disclosure even over an otherwise valid exemption claim. Pl.'s Opp'n at 26. This argument overstates the situation here. The mere "[p]rior disclosure of similar information does not suffice." *Wolf*, 473 F.3d at 378. Instead, "the information requested must be as specific as the information previously released; [and] the information requested must match the information previously disclosed . . . ." *ACLU/DOD*, 628 F.3d at 620–621 (first citing *Wolf*, 473 F.3d at 378; then citing *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990)). Further, in order to fall within this exception, the requested information must be "in the public domain." *ACLU/DOD*, 628 F.3d at

621 (quoting *Wolf*, 473 F.3d at 378). Plaintiff has not sought records that would reveal the intelligence community's *procedures* governing the dissemination of intelligence reports containing unmasked identities of members of Congress; rather, the plaintiff seeks records about the unmasking of specific lawmakers over a specific period of time, revealing whether these lawmakers in particular had communications collected through FISA surveillance. The information that the plaintiff seeks neither "match[es]" nor is "as specific" as the information previously released in the Gates Memo and its subsequent iterations. *Id.* at 620.

Relatedly, plaintiff cites the Gates Memo's multi-factor balancing test governing the disclosure of unmasking requests to Congress as proof undermining "any categorical assertion that confirming or denying the mere existence of even a single responsive record would necessarily cause damage to national security." Pl.'s Opp'n at 27. The argument goes that, if the intelligence community considers informing Congress sometimes necessary when its members are unmasked in intelligence reports, then the publication of information regarding the unmasking of these named lawmakers cannot be a threat to national security. Defendants correctly criticize this argument for failing to distinguish between Congress and the public. *See* Defs.' Opp'n at 17. Disclosure of incidences of unmasking to a select set of members of Congress does not place that information into the "public domain." *See Students Against Genocide v. Dep't of State*, 257 F.3d 828, 836 (D.C. Cir. 2001) (holding that the display of photographs to members of the U.N. Security Council did not constitute "release[] to the general

public"); *Niagara Mohawk Power Corp. v. U.S. Dep't of Energy*, 169 F.3d 16, 19 (D.C. Cir. 1999) (equating information "in the public domain" with information that is "publicly available").

Another problem with this argument is that the Supreme Court has held that "members of the Intelligence Community have the 'power to withhold superficially innocuous information on the ground that it might enable an observer to discover the identity of an intelligence source.'" *Shapiro v. Dep't of Justice*, No. 12-cv-313 (BAH), 2020 WL 3615511, *24 (D.D.C. July 2, 2020) (quoting *CIA v. Sims*, 471 U.S. 159, 178 (1985)). "Minor details of intelligence information may reveal more information than their apparent insignificance suggests because, 'much like a piece of jigsaw puzzle, [each detail] may aid in piecing together other bits of information even when the individual piece is not of obvious importance in itself.'" *Agility Public Warehousing Co. K.S.C. v. Nat'l Sec. Agency*, 113 F. Supp. 3d 313, 328–29 (D.D.C. 2015) (quoting *Larson*, 565 F.3d at 864).

Next, plaintiff points to former Acting Director of National Intelligence Richard Grenell's decision to declassify the identifies of federal officials who requested the unmasking of former National Security Advisor Michael Flynn as evidence that "it is possible to both acknowledge and even publicize unmasking records without damaging national security." Pl.'s Opp'n at 28. As a result, plaintiff contends, at least some of the records responsive to its FOIA requests must fall within the same category of declassifiable records. Here, too, the already-disclosed information does not "match," *ACLU/DOD*, 628 F.3d at 620, the

information that plaintiff seeks. Grenell revealed the identities of those who sought to unmask one particular governmental official over the course of about three months on the basis of the particularized context of "serious unanswered questions about the potential misuse of intelligence for partisan purposes following the 2016 election." Defs.' Opp'n at 18 (quoting Pl.'s Opp'n, Ex. 9, Letter from Richard Grenell, Acting Dir. of Nat'l Intel., to Hon. Mark Warner, Vice Chairman, Senate Select Comm. on Intel. (May 25, 2020) ("Grenell Letter") at 1, ECF No. 15-9). By contrast, plaintiff seeks records that would reveal whether 48 individuals were unmasked over the course of about twelve years. The obvious mismatch speaks for itself.

In sum, all defendants properly relied on Exemption 1 for their *Glomar* responses.

C. *Glomar* Responses under Exemption 3.

All defendants, except DOJ, also justify their *Glomar* responses under FOIA Exemption 3, which covers "matters 'specifically exempted from disclosure by statute,' provided that such statute leaves no discretion on disclosure or 'establishes particular criteria for withholding or refers to particular types of matters to be withheld.'" *Larson,* 565 F.3d at 861 (quoting 5 U.S.C. § 552(b)(3)). The defendant agencies' declarations identified the statute excluding the requested information as the National Security Act of 1947, 50 U.S.C. § 3024. CIA Decl. ¶ 12; NSA Decl. ¶ 33; ODNI Decl. ¶ 28; DOS Decl. ¶ 21; FBI Decl. ¶¶ 38–44. This provision protects "intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 3024(i)(1). Plaintiff's challenges to Exemption 3

mirror the arguments made in opposition to Exemption 1, and fail for the same reasons.[9]

D. *Glomar* Responses under Exemptions 7(A), 7(C), and 7(E)

In addition to Exemption 1, DOJ alternatively relied on Exemption 7 to justify its *Glomar* response, with component FBI invoking Exemption 7(E), NSD invoking 7(A), and both invoking 7(C).[10] Although

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[9] NSA also relies on two additional statutory provisions as support for withholding under Exemption 3: (1) Section 6 of the National Security Act of 1959 (codified at 50 U.S.C. § 3605), which provides that "[n]othing in this chapter or any other law . . . shall be construed to require the disclosure of the organization or any function of the National Security Agency, or any information with respect to the activities thereof . . ."; and (2) a criminal statute, 18 U.S.C. § 798, which prohibits a person from knowingly and willfully disclosing "any classified information . . . concerning the communication intelligence activities of the United States . . . or . . . obtained by the processes of communication intelligence from the communications of any foreign government, knowing the same to have been obtained by such processes." Both statutes qualify as Exemption 3 statutes. *See Larson*, 565 F.3d at 868; *Linder v. NSA*, 94 F.3d 693, 698 (D.C. Cir. 1996). NSA argues that, with respect to Section 6 of the National Security Act, revealing the existence of the requested records would "reveal information about NSA's mission and activities, including its sensitive sources and methods." Defs.' Mem. at 19. As to 18 U.S.C. § 798, acknowledging the existence of the requested records would "reveal the exact type of information (i.e., communications intelligence) that Section 798 was intended to protect." *Id.* at 19–20; *see* 18 U.S.C. § 798. The sufficiency of these alternative bases need not be addressed since Section 102A(i)(1) of the National Security Act provides ample support for the propriety of the NSA's invocation of Exemption 3.

[10] The FBI also invokes Exemption 6, which protects "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5

defendants' invocation of Exemptions 1 and 3 suffice to merit summary judgment in their favor, plaintiff's challenges to Exemption 7 are considered in turn, beginning with the applicability of the exemption, which concerns "records or information compiled for law enforcement purposes," 5 U.S.C. § 552(b)(7), to plaintiff's FOIA requests.

As a threshold issue, plaintiff contends that the requested records do not qualify as protected law enforcement records. *See* Pl.'s Opp'n at 35–36. This argument is also the plaintiff's sole challenge to the NSD's invocation of Exemption 7(A), which shields law enforcement records the disclosure of which "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). *See* Pl.'s Opp'n at 38–39.

In determining whether records fall within Exemption 7, the D.C. Circuit applies the "law-enforcement-purpose inquiry," which "focuses 'on how and under what circumstances the requested files were compiled,' and 'whether the files sought relate to anything that can fairly be characterized as an enforcement proceeding.'" *Bartko v. U.S. Dep't of Justice*, 898 F.3d 51, 64 (D.C. Cir. 2018) (quoting

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U.S.C. § 552(b)(6); *see* Defs.' Opp'n at 23. As defendants acknowledged in their opposition, Defs.' Opp'n at 23, "[w]hen information is claimed to be exempt from disclosure under both provisions, courts 'focus ... on Exemption 7(C) because it provides broader privacy protection than Exemption 6 and thus establishes a lower bar for withholding material.'" *Citizens for Responsibility and Ethics in Wash. v. U.S. Dep't of Justice*, 854 F.3d 675, 681 (D.C. Cir. 2017) (quoting *CREW I*, 746 F.3d at 1091 n.2). As a result, Exemption 6 need not be addressed.

Jefferson v. U.S. Dep't of Justice, 284 F.3d 172, 177 (D.C. Cir. 2002)); *see also Eddington v. U.S. Dep't of Justice*, 581 F. Supp. 3d 218, 234 (D.D.C. 2022) ("The term 'law enforcement' encompasses 'the enforcement of national security laws.'" (quoting *Strang v. U.S. Arms Control & Disarmament Agency*, 864 F.2d 859, 862 (D.C. Cir. 1989))). DOJ, and particularly its components FBI and NSD, "is an agency 'specializ[ing] in law enforcement,' [and so] its claim of a law enforcement purpose is entitled to deference." *Ctr. for Nat. Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 926 (D.C. Cir. 2003) (quoting, *inter alia*, *Campbell v. Dep't of Justice*, 164 F.3d 20, 32 (D.C. Cir. 1998)); *cf. Bartko*, 898 F.3d at 64 (holding that the DOJ's Office of Professional Responsibility, as an office with internal supervisory functions rather than any specialization in law enforcement, merits no deference in its attempts to shield documents under Exemption 7); *Jefferson*, 284 F.3d at 177–78 (same).

Generally, *Glomar* responses issued by law enforcement agencies, including the FBI, satisfy the prerequisite that any responsive records, if they exist, would be investigative in nature. *See, e.g., Lindsey v. FBI*, 490 F. Supp. 3d 1, 17 (D.D.C. 2020) (holding that the records, if they existed, were compiled for law enforcement purposes upon FBI's declaration that any such records "would logically be investigative in nature"); *Reporters Comm. for Freedom of Press v. FBI*, 369 F. Supp. 3d 212, 220 (D.D.C. 2019) (holding that, where the sought-after records related to a "law enforcement technique…any investigative record related to the use of the technique would necessarily have been compiled for a law enforcement purpose");

Valdez v. U.S. Dep't of Justice, 474 F. Supp. 2d 128, 131–32 (D.D.C. 2007) (holding that, given the "descriptions of the [Drug Enforcement Administration] systems of records where responsive records likely would be located, the Court concludes that any responsive records would be law enforcement records").

Defendants' declarations establish a "rational nexus," *Bartko*, 898 F.3d at 64, between DOJ's law enforcement duties and any investigation that may be reflected in responsive records in the agency's possession. As the FBI declarant affirms, "[t]he only circumstance under which the FBI can request—and the Department of Justice can and would seek on the FBI's behalf—a FISA surveillance order is when the FBI is conducting an authorized, predicated investigation within the scope of its law enforcement and foreign intelligence responsibilities." FBI Decl. ¶ 47 (citation omitted). Any records in DOJ's possession would arise in the context of a federal law enforcement investigation. *See* FBI Decl. ¶ 47; *see also* NSD Decl. ¶ 20 (implying that no responsive records would exist at the Justice Department if NSD did not have any pending investigations related to the subjects of this FOIA request); Defs.' Opp'n. at 24.

Plaintiff criticizes defendants for failing to identify "a connection between the assertedly exempt records and an inquiry into a possible security risk or violation of federal law." Pl.'s Reply at 24 (quoting *Clemente v. FBI*, 867 F.3d 111, 119 (D.C. Cir. 2017)). To be sure, an agency should normally "be able to identify a particular individual or a particular incident as the object of its investigation and the connection

between that individual or incident and a possible security risk or violation of federal law." *Pratt v. Webster*, 673 F.2d 408, 420 (D.C. Cir. 1982). Yet, in the context of a *Glomar* response by an agency specializing in law enforcement and entitled to deference, the requirement that the agency show that the records, of which it cannot confirm the existence, concern a particular individual or incident does not apply. *See, e.g., Lindsey*, 490 F. Supp. 3d at 16–17 (deferring to FBI declaration in the context of a *Glomar* response, without requiring a specific showing about the connection between an "individual or incident" and violation of law). The only case that plaintiff cites purportedly to the contrary is *Bartko v. U.S. Dep't of Justice*, but this case is inapposite because the DOJ component that issued the *Glomar* response at issue found to be insufficient in "showing on a case-by-case basis that any requested records were actually compiled for law-enforcement, rather than [other], purposes" did not specialize in law enforcement—unlike NSD and FBI. 898 F.3d at 65.

DOJ has met its threshold burden of showing that the records at issue were compiled for law enforcement purposes. For the same reason, absent other arguments from plaintiff, NSD's invocation of Exemption 7(A) is appropriate.[11] The FBI's remaining two invocations of Exemption 7 are discussed next.

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[11] Plaintiff does not challenge whether NSD "demonstrate[d] that disclosure (1) could reasonably be expected to interfere with (2) enforcement proceedings that are (3) pending or reasonably anticipated." *CREW I*, 746 F.3d at 1096 (citation omitted). NSD explains that the disclosure of FISA surveillance-derived records would permit "hostile intelligence services…to acquire

1. *Exemption 7(C)*

"Under Exemption 7(C), 'records or information compiled for law enforcement purposes' may be withheld 'to the extent that' disclosure 'could reasonably be expected to constitute an unwarranted invasion of personal privacy.'" *Am. Civil Liberties Union v. U.S. Dep't of Justice*, 655 F.3d 1, 6 (D.C. Cir. 2011) (quoting 5 U.S.C. § 552(b)(7)(C)). "Where the privacy concerns addressed by Exemption 7(C) are present, the exemption requires the person requesting the information to establish a sufficient reason for the disclosure . . . [by] show[ing] that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake . . . [and that] the information is likely to advance that interest." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004); *see also Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 893 (D.C. Cir. 1995) ("The courts have construed [Exemption 7(C)] as permitting exemption if the privacy interest at stake outweighs the public's interest in disclosure."). The relevant public interest for purposes of this balancing "focuses on the citizens' right to be informed about 'what their government is up to,'" which includes "[o]fficial information that sheds light on an agency's performance of its statutory

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information about United States intelligence investigations," NSD Decl. ¶¶ 15–18, which is sufficient to support invocation of the exemption. *See Buzzfeed, Inc. v. Dep't of Justice*, 344 F. Supp. 3d 396, 403–05 (D.D.C. 2018) (finding Exemption 7(A) justified withholding where details of surveillance techniques would tip off individuals involved in criminal activity as to ways to avoid detection).

duties." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773 (1989).

The privacy interests at issue held by the 48 named individuals is not trivial. The D.C. Circuit has recognized the "'substantial' privacy interest held by 'the targets of law-enforcement investigations . . . in ensuring that their relationship to the investigations remains secret.'" *People for the Ethical Treatment of Animals*, 745 F.3d at 541 (quoting *Roth v. U.S. Dep't of Justice*, 642 F.3d 1161, 1174 (D.C. Cir. 2011). *See also Fitzgibbon v. CIA*, 911 F.2d 755, 767 (D.C. Cir. 1990) (holding it "beyond dispute that 'the mention of an individual's name in a law enforcement file will engender comment and speculation and carries a stigmatizing connotation,'" even when that individual is not the investigation's target (quoting *Branch v. FBI*, 658 F. Supp. 204, 209 (D.D.C. 1987))).

Plaintiff fairly describes the named individuals to be "nationally prominent public-office holders," whose privacy interests may be diminished in certain contexts by dint of their public office. Pl.'s Opp'n at 37. Indeed, the D.C. Circuit has held "that public officials 'may have a somewhat diminished privacy interest' in the Exemption 7(C) balancing analysis." *Elec. Privacy Info. Ctr. v. U.S. Dep't of Justice*, 18 F.4th 712, 719 (D.C. Cir. 2021) (quoting *CREW I,* 746 F.3d at 1092). Nevertheless, "public officials do not surrender all rights to personal privacy when they accept a public appointment." *CREW I,* 746 F.3d at 1092 (quoting *Quinon v. FBI*, 86 F.3d 1222, 1230 (D.C. Cir. 1996)) (cleaned up).

Correctly weighing the public interest in disclosure here is more a more vexing undertaking.

"[W]here there is a privacy interest protected by Exemption 7(C) and the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, the requester must establish more than a bare suspicion in order to obtain disclosure. Rather, the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." *Favish*, 541 U.S. at 174; *see also Elec. Privacy Info. Ctr.*, 18 F.4th at 718. Plaintiff's evidence for the impropriety it seeks to ferret out via FOIA requests—the "potential abuse of [the intelligence community's] surveillance powers against its congressional overseers," Pl.'s Reply at 25—consists of public reporting that lawmakers' identities are frequently unmasked in intelligence reports without the lawmakers being informed, as well as reports of spying on intelligence committee members in an unrelated context. The problem with plaintiff's evidentiary showing is merely because members of Congress's identities are unmasked in intelligence reports does not mean that the intelligence community is engaging in abuse. *See* Defs.' Opp'n at 26. As plaintiff concedes, this type of unmasking is governed by long-existing policy guidelines. *See* Pl.'s Resp. SMF, at ¶¶ 21-41. Plaintiff attempts to bridge this gap by alleging that the "frequency of such undisclosed surveillance indicates that unmaskings may have been requested for illegitimate reasons." Compl. ¶ 23. Even recognizing that plaintiff finds itself in a catch-22—in which sufficient evidence is lacking of governmental misconduct to justify obtaining any such evidence—this is too slim a reed to "warrant a belief by a

reasonable person that the alleged Government impropriety might have occurred." *Favish*, 541 U.S. at 174. Plaintiff has failed to advance anything more than speculation that the requested records would serve the public interest of monitoring potential abuses by the intelligence community. As a result, the balance of the named lawmakers' privacy interest outweighs the public interest in disclosure, meriting the protection of Exemption 7(C).

2. *Exemption 7(E)*

Finally, to earn the protection of Exemption 7(E), the FBI must demonstrate that acknowledgement of the existence or non-existence of the law enforcement records "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). "Exemption 7(E) sets a relatively low bar for the agency to justify withholding: 'Rather than requiring a highly specific burden of showing how the law will be circumvented, exemption 7(E) only requires that the [agency] demonstrate logically how the release of the requested information might create a risk of circumvention of the law.'" *Blackwell v. FBI*, 646 F.3d 37, 42 (D.C. Cir. 2011) (quoting *Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1194 (D.C. Cir. 2009)) (alteration in original).

The FBI explains that, although the existence of surveillance under FISA is undeniably public information, the existence of records linking that surveillance to particular individuals is an entirely different matter. "Acknowledging when and under

what circumstances the FBI relies upon this authorized law enforcement technique would provide targets and other adversaries with insight into the activities likely to attract—or not attract—the FBI's attention. Individuals and adversaries would then be able [to] alter their behavior to avoid attention by law enforcement, making it more difficult for the FBI to be proactive in assessing and investigating national security threats." FBI Decl. ¶ 50. Foreign intelligence officers and other adversaries that have communicated with the lawmakers referenced in the FOIA requests at issue would learn whether those communications were subject to covert surveillance—and likely alter their behavior accordingly—if the agency were to confirm whether the requested records exist. *See* Defs.' Mem. at 24.

Plaintiff dismisses the FBI's articulated concern, arguing that revealing the existence of unmasking or upstreaming records "rings hollow in the face of the ODNI's…express rationale for disclosing details related to the unmasking of Michael Flynn." Pl.'s Opp'n at 40. In Grenell's disclosure of the identities of those officials who requested Flynn's unmasking, he wrote that the disclosure posed "absolutely no risk" to national security. *Id.* (quoting Grenell Letter at 1). Plaintiff rehashes its search-based argument that, "[i]f actual disclosure of surveillance records can be 'absolutely' safe, then clearly it is possible to merely *search* for responsive records without triggering the harms the FBI vaguely invokes." Pl.'s Opp'n. at 40 (emphasis in original); *see also* Pl.'s Reply at 27–28.

These arguments against applicability of Exemption 7(E) are unavailing. For the reasons

stated, *see supra* § III.A, plaintiff's contention that the FBI must search for responsive records before issuing a *Glomar* response is foreclosed by D.C. Circuit precedent. Further, the FBI has adequately demonstrated that confirming the existence or non-existence of the particular records sought by the plaintiff "could risk 'circumvention of the law.'" *Mayer Brown*, 562 F.3d at 1190 (quoting 5 U.S.C. § 552(b)(7)(E)). That the unmasking and upstreaming of lawmakers' identities generally is "publicly known," as plaintiff contends, does not undermine the risk created by acknowledging whether the FBI maintains records concerning the unmasking or upstreaming of the *particular* 48 individuals named in plaintiff's FOIA requests. *See also Buzzfeed, Inc. v. Dep't of Justice*, 344 F. Supp. 3d 396, 407 (D.D.C. 2018) (distinguishing the public's awareness that the FBI uses aerial surveillance from the FBI's confirmation that it does or does not use specific aircraft). Exemption 7(E) is satisfied as an alternative basis for the FBI's *Glomar* response.

IV. CONCLUSION

For the reasons set forth above, defendants' motion for summary judgment, ECF No. 11, is **GRANTED**, and plaintiff's cross-motion for summary judgment, ECF No. 15, is **DENIED**.

An Order consistent with this Memorandum Opinion will be filed contemporaneously.

Date: September 19, 2022

/s/ Beryl A. Howell
BERYL A. HOWELL
Chief Judge

Appendix C

Case 1:20-cv-03657-BAH Document 2
Filed 12/14/20

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

PROJECT FOR PRIVACY AND SURVEILLANCE ACCOUNTABILITY, INC.
1101 Connecticut Ave. NW,
Ste. 450, Washington, DC 20036

Plaintiff,

v.

UNITED STATES DEPARTMENT OF JUSTICE,
950 Pennsylvania Avenue, NW
Washington, DC 20530,

OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE,
Washington, DC 20511,

NATIONAL SECURITY AGENCY,
9800 Savage Road
Fort Meade, MD 20755,

CENTRAL INTELLIGENCE AGENCY,
Washington, D.C. 20505,

COMPLAINT

1:20-cv-3657

UNITED STATES
DEPARTMENT OF STATE,
2201 C St NW
Washington, DC 20520,

Defendants.

Introduction

1. This Freedom of Information Act (FOIA) suit seeks records from Defendants the United States Department of Justice, the Office of the Director of National Intelligence, the National Security Agency, the Central Intelligence Agency, and the United States Department of State. *See* 5 U.S.C. § 552. These records and the information they contain are necessary to answer a question of national significance: Whether government agencies abused foreign intelligence surveillance powers against American citizens charged with oversight of those same agencies.

2. To answer this pressing question more fully, the Project for Privacy and Surveillance Accountability, Inc. ("PPSA"), the Plaintiff in this action, requested records under FOIA as early as January 27, 2020. But it has not received a substantive response from any of the six agencies as required by law. PPSA brings suit to compel that response.

Jurisdiction and Venue

3. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B)

and 28 U.S.C. § 1331. It may grant declaratory relief pursuant to 28 U.S.C. § 2201, *et seq.*, and award costs and attorneys' fees pursuant to 28 U.S.C. § 2412 and 5 U.S.C. § 552(a)(4)(E).

4. Venue lies in this District under 5 U.S.C. § 552(a)(4)(B).

Parties

5. Plaintiff PPSA is a Delaware non-profit corporation with its principal place of business in Washington, DC. As part of its mission, PPSA advocates for greater privacy and civil liberty protections from government surveillance, and seeks to hold such programs accountable to constitutional and statutory limitations.

6. Defendant the Department of Justice is a Department of the Executive Branch of the United States Government. The Department has possession, custody, and control of records to which Plaintiff seeks access. Additionally, the Federal Bureau of Investigation (FBI) is an agency within Defendant the Department of Justice. The FBI has possession, custody, and control of records to which Plaintiff seeks access.

7. Defendant Office of the Director of National Intelligence (DNI Office) is, as its name suggests, the office of the Director of National Intelligence. The Director is a cabinet-level position within the Executive Branch. The Office has possession, custody, and control of records to which Plaintiff seeks access.

8. Defendant National Security Agency (NSA) is an agency within the Department of Defense within

the Executive Branch. The NSA has possession, custody, and control of records to which Plaintiff seeks access.

9. Defendant Central Intelligence Agency (CIA) is an agency of the Executive Branch. The CIA has possession, custody, and control of records to which Plaintiff seeks access.

10. Defendant the Department of State is a Department of the Executive Branch. The Department has possession, custody, and control of records to which Plaintiff seeks access.

Facts

11. FOIA requires federal agencies, including Defendants, to "promptly" release agency records upon request to any member of the public. 5 U.S.C. § 552(a)(3); *see also* 5 U.S.C. § 552(f)(1) (definition of agency). If the records fall under a statutory exemption or are excluded from FOIA, the agency may deny the request. *See* 5 U.S.C. § 552(b)(1)-(9) (exemptions); *id.* § 552(c)(1)-(3) (exclusions).

12. Plaintiff's requests in this case concern the Defendants' use of the Foreign Intelligence Surveillance Act of 1978 (FISA).[1] Section 702 of FISA ("Section 702") empowers the Attorney General and the Director of National Intelligence to jointly authorize "the targeting of persons reasonably believed to be located *outside* the United States to acquire foreign intelligence information." 50 U.S.C. § 1881a(a) (emphasis added). Section 702 expressly

[1] P.L. 95-511, 92 Stat. 1783 as amended by the FISA Amendments Act of 2008, P.L. 110-261, 122 Stat. 2436.

forbids use of this surveillance process to target persons who are either "United States persons" or located "inside the United States." *Id.* at 1881a(b).

13. The principal agencies that collect and use Section 702 surveillance information are the FBI, the NSA, and the CIA. Those three agencies have distinct areas of responsibility.

14. The FBI collects data on outgoing communications (*i.e.*, from persons in the United States to persons outside the United States).

15. The NSA collects data on incoming communications (*i.e.*, from persons outside the United States to persons inside the United States).

16. The CIA, like the FBI and NSA, analyzes the information that comes from the FBI's and NSA's data collection. Unlike the other agencies, the CIA uses the information to engage in international intelligence operations.

17. The Departments of Justice and State receive reports from the FBI, NSA, and CIA, based on those agencies' data and analysis.

18. Section 702 also requires that foreign intelligence surveillance be conducted consistently with "minimization procedures." *Id.* § 1881a(e)(1). These procedures are designed to "minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons," but in a manner still "consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information." *Id.* § 1801(h)(1). As

relevant here, minimization procedures must be designed to ensure the anonymity of United States persons who may be incidentally surveilled. *Id.* § 1801(h)(1), (2).

19. Generally, original raw intelligence is not circulated to other agencies; instead, intelligence reports are created and circulated internally. *See*, *e.g.*, Gregory Korte, *What is 'unmasking?' How intelligence agencies treat U.S. citizens*, USA Today, (Apr. 4, 2017; 2:14 p.m.), https://www.usatoday.com/story/news/politics/2017/04/04/what-unmasking-how-intelligence-agencies-treat-us-citizens/100026368/. In the process of summarizing the intelligence, agencies exclude the names of U.S. citizens from the reports, referring to them instead with identifiers like "U.S. Person 1." *Id.*

20. Approximately twenty individuals within the NSA—and others in the FBI and CIA—have authority to "unmask" the concealed identities, making an individual's previously masked name available in intelligence summaries. *See Id.* In that circumstance, anyone authorized to see the summaries will know the names of the United States persons involved. While the unmasking itself is done only by members of the agencies who handle raw intelligence, many of the individuals who have access to intelligence summaries have the authority to request unmasking if they deem the masked information important to understanding the intelligence. *Id.*

21. The NSA also has the ability to search the internet data it collects by entering the name of an individual into a database search tool. This process is known as "upstreaming" and has the effect of creating

additional raw intelligence that may contain the names of American persons. Such intelligence is also subject to the usual masking requirements and procedures.

22. In 2017, anonymous intelligence community sources confirmed that U.S. lawmakers' names may frequently appear in executive branch intelligence reports, but that lawmakers often don't learn about such unmaskings unless they involve a hacking or security threat. *See*, *e.g.*, Mark Hensch, *US spy agencies routinely unmask lawmakers: report*, The Hill, (Apr. 6, 2017; 7:54 a.m.), https://thehill.com /policy/national-security/intelligence/327538-spy-agencies-routinely-unmask-lawmakers-report/.

23. The alleged frequency of such undisclosed surveillance indicates that unmaskings may have been requested for illegitimate reasons—for example, to gain information to embarrass or compromise members of congressional committees responsible for overseeing the intelligence community. Whatever the reasons, unmasking a U.S. citizen absent a national security justification violates internal regulations, federal law, and the Fourth Amendment.

24. News reports—as well as a declassified Foreign Intelligence Surveillance Court (FISC) opinion—also note that some Americans had their names upstreamed, in violation of internal policies, during the 2016 election cycle, which the opinion described as a "serious Fourth Amendment issue." *See* Declassified FISC Court opinion at 19-20, available at http://bit.ly/FISCopApril2017; *see also, e.g.*, Andrew McCarthy, *Explosive Revalation of Obama*

Administration Illegal Surveillance of Americans, May 25, 2017), https://www.nationalreview.com/2017/05/nsa-illegal-surveillance-americans-obama-administration-abuse-fisa-court-response/.

25. The intelligence agencies have adopted procedures to self-regulate their activities. On information and belief, at least two departments within the NSA handle complaints regarding the improper use of intelligence. These departments are known publicly by the codes "S12," a code name apparently referring to the agency's Information Sharing Services authority, and "SV," a code name apparently referring to the agency's Oversight and Compliance authority.

Plaintiff's efforts to obtain records via FOIA

26. Plaintiff has attempted to obtain records from each of the Defendants—and the Federal Bureau of Investigation, a part of Defendant Department of Justice—via FOIA. As described more fully below, plaintiff sought records from all Defendants on the unmasking and upstreaming—including requests for unmasking or upstreaming—of the following current and former members of congressional intelligence committees:

a. Rep. Adam Schiff
b. Rep. Jim Himes
c. Rep. Terri Sewell
d. Rep. Andre Carson
e. Rep. Jackie Speier
f. Rep. Mike Quigley
g. Rep. Eric Swalwell
h. Rep. Joaquin Castro

i. Rep. Denny Heck
j. Rep. Peter Welch
k. Rep. Sean Patrick Maloney
l. Rep. Val Demings
m. Rep. Raj Krishnamoorthi
n. Rep. Devin Nunes
o. Rep. Mike Conaway
p. Rep. Michael Turner
q. Rep. Brad Wenstrup
r. Rep. Chris Stewart
s. Rep. Rick Crawford
t. Rep. Elise Stefanik
u. Rep. Will Hurd
v. Rep. John Ratcliffe
w. Sen. James Risch
x. Sen. Marco Rubio
y. Sen. Susan Collins
z. Sen. Roy Blunt
aa. Sen. Tom Cotton
bb. Sen. John Cornyn
cc. Sen. Ben Sasse
dd. Sen. Dianne Feinstein
ee. Sen. Ron Wyden
ff. Sen. Martin Heinrich
gg. Sen. Angus King
hh. Sen. Kamala Harris
ii. Sen. Michael Bennet
jj. Sen. James Lankford
kk. Sen. Mark Warner
ll. Rep. Peter King
mm. Former Rep. Frank LoBiondo
nn. Former Rep. Trey Gowdy
oo. Former Rep. Tom Rooney
pp. Former Rep. Ileana Ros-Lehtinen

qq. Former Rep. Jeff Miller
rr. Former Rep. Lynn Westmoreland
ss. Former Rep. Joe Heck
tt. Former Rep. Mike Pompeo
uu. Former Rep. Luis Gutierrez
vv. Former Rep. Patrick Murphy

U.S. Department of Justice

27. On January 27, 2020, Plaintiff sent a letter, attached to this complaint as Exhibit A, to Defendant Department of Justice's FOIA office. The letter requested any information Defendant may have regarding the unmasking or upstreaming of members of congressional intelligence committees. Accordingly, the letter requested:

> **1. All documents, reports, memoranda, or communications regarding the unmasking—including all unmasking requests—of any person listed below from January 1, 2008 to January 15, 2020:**
>
> **<list of names in Paragraph 26, *supra*>**
>
> **2. All documents, reports, memoranda, or communications regarding the upstreaming—including all requests for upstreaming—of any individual listed in Question 1 above, from Jan. 1, 2008 to Jan. 15, 2020.**

28. By letter dated January 29, 2020 (Exhibit B), the Department advised Plaintiff that his FOIA request had been received and forwarded to the NSD.

29. By letter dated February 18, 2020, the NSD advised Plaintiff that its FOIA request (now assigned

Number 20-193) had been denied, issuing a so-called Glomar response under FOIA Exemption 1. (Exhibit C).

30. Plaintiff timely appealed its request on May 18, 2020. (Exhibit D). By letter dated September 21, 2020, the DOJ acknowledged receipt of that appeal on September 11, 2020. (Exhibit E). Thus, under 5 U.S.C. § 552(a)(6)(A) and 5 U.S.C. § 552(a)(6)(C), which require the DOJ to respond to an appeal within twenty business days, Plaintiff has exhausted the applicable administrative remedies.

31. As of the date of this complaint, the DOJ has failed to produce the requested records or demonstrate, on appeal, that the requested records are lawfully exempt from production.

32. Plaintiff has a right of prompt access to the requested records under 5 U.S.C. § 552(a)(3)(A), but the DOJ has wrongfully withheld them.

Office of Director of National Intelligence

33. On January 28, 2020, Plaintiff sent a letter, attached to this complaint as Exhibit F, to the FOIA office of the DNI Office. The letter requested any information Defendant may have regarding the unmasking or upstreaming of members of congressional intelligence committees. Accordingly, the letter requested:

1. All documents, reports, memoranda, or communications regarding the unmasking—including all unmasking requests—of any person listed below from January 1, 2008 to January 15, 2020:

<list of names in Paragraph 26, *supra*>

2. All documents, reports, memoranda, or communications regarding the upstreaming—including all requests for upstreaming—of any individual listed in Question 1 above, from Jan. 1, 2008 to Jan. 15, 2020.

34. By letter dated February 4, 2020, the Office advised Plaintiff that its FOIA request (assigned tracking number DF-2020-000109) had been denied, issuing a so-called Glomar response under FOIA Exemptions 1 and 3. (Exhibit G).

35. Plaintiff timely appealed his request on May 4, 2020 (Exhibit H) and filed a supplemental letter on July 18, 2020 (Exhibit I). The supplemental letter attached a May 25, 2020 letter from then-Acting Director of National Intelligence Richard Grenell regarding his declassification of documents related to the unmasking of Michael Flynn (the "Grenell Letter"; Exhibit J), and discussed the Grenell Letter's significance to PPSA's own request for information about unmasking. By letter dated July 29, 2020 (Exhibit K)—more than twenty business days after receipt of PPSA's appeal—the Office denied the appeal. Thus, under 5 U.S.C. § 552(a)(6)(A) and 5 U.S.C. § 552(a)(6)(C), Plaintiff has exhausted the applicable administrative remedies. *See Spannaus v.*

U.S. Dep't of Justice, 824 F.2d 52, 59 (D.C. Cir. 1987) (agency's failure to respond to administrative appeal within statutory deadline resulted in constructive exhaustion at that time, despite subsequent disposition of that appeal).

36. As of the date of this complaint, the Office has failed to produce the requested records or demonstrate, on appeal, that the requested records are lawfully exempt from production.

37. Plaintiff has a right of prompt access to the requested records under 5 U.S.C. § 552(a)(3)(A), but the Office has wrongfully withheld them.

National Security Agency

38. On January 28, 2020, Plaintiff sent a letter, attached to this complaint as Exhibit L, to Defendant NSA's FOIA office. The letter requested any information Defendant may have regarding the unmasking or upstreaming of members of congressional intelligence committees. Accordingly, the letter requested:

> **1. All documents, reports, memoranda, or communications regarding the unmasking—including all unmasking requests—of any person listed below from January 1, 2008 to January 15, 2020:**
>
> **<list of names in Paragraph 26, *supra*>**
>
> **2. All documents, reports,memoranda, or communications regarding the upstreaming—including all requests for upstreaming—of any individual listed in**

Question 1 above, from Jan. 1, 2008 to Jan. 15, 2020.

39. By letter dated February 12, 2020, the Office advised Plaintiff that its FOIA request (assigned tracking number 108990) had been denied, issuing a so-called Glomar response under FOIA Exemptions 1 and 3. (Exhibit M).

40. On August 20, 2020, after public dissemination of the Grenell Letter, PPSA sent a letter to Defendant NSA's FOIA office (Exhibit N), again requesting the unmasking and upstreaming materials described in Paragraph 38. By letter dated September 1, 2020, the Office advised Plaintiff that its new FOIA request (assigned tracking number 110225) would not be processed because of the agency's prior response to request number 108990. Exhibit O.

41. Plaintiff timely appealed request number 110225 on October 9, 2020. (Exhibit P). By email dated October 16, 2020, the NSA acknowledged receipt of that appeal on October 9, 2020. (Exhibit Q). Thus, under 5 U.S.C. § 552(a)(6)(A) and 5 U.S.C. § 552(a)(6)(C), which require the NSA to respond to an appeal within twenty business days, Plaintiff has exhausted the applicable administrative remedies.

42. As of the date of this complaint, the NSA has failed to produce the requested records or demonstrate, on appeal, that the requested records are lawfully exempt from production.

43. Plaintiff has a right of prompt access to the requested records under 5 U.S.C. § 552(a)(3)(A), but the NSA has wrongfully withheld them.

Federal Bureau of Investigation

44. On January 27, 2020, Plaintiff sent a letter (Exhibit R) to the FBI's FOIA office. The letter requested any information Defendant may have regarding the unmasking or upstreaming of members of congressional intelligence committees. Accordingly, the letter requested:

> **1. All documents, reports, memoranda, or communications regarding the unmasking—including all unmasking requests—of any person listed below from January 1, 2008 to January 15, 2020:**
>
> **<list of names in Paragraph 26, *supra*>**
>
> **2. All documents, reports, memoranda, or communications regarding the upstreaming—including all requests for upstreaming—of any individual listed in Question 1 above, from Jan. 1, 2008 to Jan. 15, 2020.**

45. By letter dated February 10, 2020 (Exhibit S), the FBI advised Plaintiff that his FOIA request had been received and assigned Number 1459381-000.

46. By letter dated June 22, 2020, the FBI advised Plaintiff that its FOIA request had been denied, issuing a so-called Glomar response under FOIA Exemptions 1, 3, 6, 7(C) and 7(E). (Exhibit T).

47. Plaintiff timely appealed its request on September 8, 2020. (Exhibit U). By letter dated September 22, 2020, the FBI acknowledged receipt of that appeal on September 11, 2020. (Exhibit V). Thus, under 5 U.S.C. § 552(a)(6)(A) and 5 U.S.C.

§ 552(a)(6)(C), which require the FBI to respond to an appeal within twenty business days, Plaintiff has exhausted the applicable administrative remedies.

48. As of the date of this complaint, the FBI has failed to produce the requested records or demonstrate, on appeal, that the requested records are lawfully exempt from production.

49. Plaintiff has a right of prompt access to the requested records under 5 U.S.C. § 552(a)(3)(A), but the FBI has wrongfully withheld them.

Central Intelligence Agency

50. On January 28, 2020, Plaintiff sent a letter (Exhibit W) to Defendant CIA's FOIA office. The letter requested any information Defendant may have regarding the unmasking or upstreaming of members of congressional intelligence committees. Accordingly, the letter requested:

> **1. All documents, reports, memoranda, or communications regarding the unmasking—including all unmasking requests—of any person listed below from January 1, 2008 to January 15, 2020:**
>
> **<list of names in Paragraph 26, *supra*>**
>
> **2. All documents, reports, memoranda, or communications regarding the upstreaming—including all requests for upstreaming—of any individual listed in Question 1 above, from Jan. 1, 2008 to Jan. 15, 2020.**

51. By letter dated January 31, 2020 (Exhibit X), the CIA advised Plaintiff that his FOIA request had been received on January 29, 2020 and assigned Number F-2020-00795.

52. As of the date of this complaint, the CIA has failed to: (i) produce the requested records or demonstrate that the requested records are lawfully exempt from production; (ii) notify Plaintiff of the scope of any responsive records the CIA intends to produce or withhold and the reasons for any withholdings; or (iii) inform Plaintiff that he may appeal any adequately specific adverse determinations.

53. Although more than thirty business days have passed since the CIA received Plaintiff's FOIA request, the CIA has not notified Plaintiff as to whether it will fully comply with that request. Thus, under 5 U.S.C. § 552(a)(6)(A) and 5 U.S.C. § 552(a)(6)(C), Plaintiff has exhausted the applicable administrative remedies.

54. Plaintiff has a right of prompt access to the requested records under 5 U.S.C. § 552(a)(3)(A), but the CIA has wrongfully withheld them.

U.S. Department of State

55. On January 28, 2020, Plaintiff sent a letter (Exhibit Y) to Defendant Department of State's FOIA office. The letter requested any information Defendant may have regarding the unmasking or upstreaming of members of congressional intelligence committees. Accordingly, the letter requested:

1. All documents, reports, memoranda, or communications regarding the unmasking—including all unmasking requests—of any person listed below from January 1, 2008 to January 15, 2020:

<list of names in Paragraph 26, *supra*>

2. All documents, reports, memoranda, or communications regarding the upstreaming—including all requests for upstreaming—of any individual listed in Question 1 above, from Jan. 1, 2008 to Jan. 15, 2020.

56. By letter dated February 6, 2020 (Exhibit Z), the Department advised Plaintiff that his FOIA request had been received on January 29, 2020 and assigned Number F-2020-03458.

57. As of the date of this complaint, the Department has failed to: (i) produce the requested records or demonstrate that the requested records are lawfully exempt from production; (ii) notify Plaintiff of the scope of any responsive records the Department intends to produce or withhold and the reasons for any withholdings; or (iii) inform Plaintiff that he may appeal any adequately specific adverse determinations.

58. Although more than thirty business days have passed since the Department received Plaintiff's FOIA request, the Department has not notified Plaintiff as to whether it will fully comply with that request. Thus, under 5 U.S.C. § 552 (a)(6)(A) and 5 U.S.C. § 552 (a)(6)(C), Plaintiff has exhausted the applicable administrative remedies.

59. Plaintiff has a right of prompt access to the requested records under 5 U.S.C. § 552 (a)(3)(A), but the State Department has wrongfully withheld them.

Count One: Freedom of Information Act

Defendants are required to disclose all non-exempt records responsive to Plaintiff's Freedom of Information Act requests

60. Plaintiff hereby incorporates by reference all preceding paragraphs of this Complaint.

61. FOIA's administrative exhaustion requirement required Defendants to determine whether to comply with Plaintiff's requests within the time limits set by FOIA—namely, within twenty business days or, in "unusual circumstances," within thirty business days. 5 U.S.C. § 552(a)(6)(A)–(B). Accordingly, the CIA's and State Department's determinations were due, at the latest, on March 12, 2020.

62. At a minimum, Defendants were obligated to: (i) gather and review the requested records; (ii) determine and communicate to Plaintiff the scope of any responsive records Defendants intended to produce or withhold and the reasons for any withholdings; and (iii) inform Plaintiff that it may appeal any adequately specific adverse determinations. See, e.g., *Citizens for Responsibility and Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 188-89 (D.C. Cir. 2013).

63. With respect to the Plaintiffs' FOIA requests noted above, Defendants did not perform any of the

required activities by the applicable statutory deadlines.

64. With respect to the four appeals, the DOJ, FBI, NSA, and ODNI all failed to evaluate Plaintiff's appeals within twenty business days. Although the ODNI ultimately denied Plaintiff's appeal on July 29, 2020, its response was due on approximately June 2, resulting in the constructive exhaustion of Plaintiff's administrative remedies at that time. *See Spannaus*, 824 F.2d at 59 (failure to respond to administrative appeal within statutory deadline resulted in constructive exhaustion at that time). Likewise, responses to the three outstanding appeals were due prior to the filing of this suit—the DOJ's and FBI's on approximately October 9, and the NSA's on approximately November 9. 5 USC 552(a)(6)(A)(ii), (C)(i).

65. Consequently, Plaintiff is deemed to have exhausted his administrative appeal remedies. 5 U.S.C. § 552(a)(6)(A), (C)(i), (ii).

66. Defendants' failure to release responsive non-exempt records violates FOIA, 5 U.S.C. § 522(a)(3)(A), as well as the regulations implementing FOIA.

67. Plaintiff is entitled to receive all responsive non-exempt records from Defendants forthwith.

PRAYER FOR RELIEF

Plaintiff respectfully requests that the Court:

A. Order Defendants to conduct searches immediately for any and all records responsive to Plaintiff's FOIA requests and demonstrate that they employed search methods reasonably likely to lead to

the discovery of records responsive to Plaintiff's FOIA request.

B. Order Defendants to produce, by dates certain, any and all non-exempt records to Plaintiff's FOIA requests, and Vaughn indices of any responsive records withheld under claim of exemption;

C. Enjoin Defendants from continuing to withhold any and all non-exempt records responsive to Plaintiff's FOIA requests;

D. Grant Plaintiff an award of attorneys' fees and other litigation costs reasonably incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and

E. Grant Plaintiff such other relief as the Court deems just and proper.

Respectfully submitted,

/s/ Gene C. Schaerr

GENE C. SCHAERR (D.C. Bar No. 416638)
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Appendix D

5 U.S.C. § 552

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public--

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection in an electronic format--

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

(C) administrative staff manuals and instructions to staff that affect a member of the public;

(D) copies of all records, regardless of form or format--

(i) that have been released to any person under paragraph (3); and

(ii)(I) that because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; or

(II) that have been requested 3 or more times; and

(E) a general index of the records referred to under subparagraph (D);

unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D). However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. Each agency shall also maintain and make available for public

inspection in an electronic format current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if--

> **(i)** it has been indexed and either made available or published as provided by this paragraph; or
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> **(ii)** the party has actual and timely notice of the terms thereof.

(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if

any), and procedures to be followed, shall make the records promptly available to any person.

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

(D) For purposes of this paragraph, the term "search" means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.

(E) An agency, or part of an agency, that is an element of the intelligence community (as that term is defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4))) shall not make any record available under this paragraph to--

(i) any government entity, other than a State, territory, commonwealth, or district of the United States, or any subdivision thereof; or

(ii) a representative of a government entity described in clause (i).

(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

(ii) Such agency regulations shall provide that--

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable

standard charges for document search and duplication.

In this clause, the term "a representative of the news media" means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term "news" means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of "news") who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if

disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section--

(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii)(II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely

fashion, or the agency has determined that the fee will exceed $250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: *Provided*, That the court's review of the matter shall be limited to the record before the agency.

(viii)(I) Except as provided in subclause (II), an agency shall not assess any search fees (or in the case of a requester described under clause (ii)(II) of this subparagraph, duplication fees) under this subparagraph if the agency has failed to comply with any time limit under paragraph (6).

(II)(aa) If an agency has determined that unusual circumstances apply (as the term is defined in paragraph (6)(B)) and the agency provided a timely written notice to the requester in accordance with paragraph (6)(B), a failure described in subclause (I) is excused for an additional 10 days. If the agency fails to comply with the extended time limit, the agency may not assess any search fees (or in the case of a requester described under clause (ii)(II) of this subparagraph, duplication fees).

(bb) If an agency has determined that unusual circumstances apply and more than 5,000 pages are necessary to respond to the request, an agency may charge search fees (or in the case of a requester described under clause (ii)(II) of this subparagraph, duplication fees) if the agency has provided a timely written notice to the requester in accordance with paragraph (6)(B) and the agency has discussed with the requester via written mail, electronic mail, or telephone (or made not less than 3 good-faith attempts to do so) how the requester could effectively limit the scope of the request in accordance with paragraph (6)(B)(ii).

(cc) If a court has determined that exceptional circumstances exist (as that term is defined in paragraph (6)(C)), a failure described in subclause (I) shall be excused for the length of time provided by the court order.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly

withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

[**(D)** Repealed. Pub.L. 98-620, Title IV, § 402(2), Nov. 8, 1984, 98 Stat. 3357]

(E)(i) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(ii) For purposes of this subparagraph, a complainant has substantially prevailed if

the complainant has obtained relief through either--

(I) a judicial order, or an enforceable written agreement or consent decree; or

(II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.

(F)(i) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(ii) The Attorney General shall--

(I) notify the Special Counsel of each civil action described under the first sentence of clause (i); and

(II) annually submit a report to Congress on the number of such civil actions in the preceding year.

(iii) The Special Counsel shall annually submit a report to Congress on the actions taken by the Special Counsel under clause (i).

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall--

(i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of--

(I) such determination and the reasons therefor;

(II) the right of such person to seek assistance from the FOIA Public Liaison of the agency; and

(III) in the case of an adverse determination--

(aa) the right of such person to appeal to the head of the agency, within a period determined by the head of the agency that is not less than 90 days after the date of such adverse determination; and

(bb) the right of such person to seek dispute resolution services from the FOIA Public Liaison of the agency or the Office of Government Information Services; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

The 20-day period under clause (i) shall commence on the date on which the request is first received by the appropriate

component of the agency, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency's regulations under this section to receive requests under this section. The 20-day period shall not be tolled by the agency except--

(I) that the agency may make one request to the requester for information and toll the 20-day period while it is awaiting such information that it has reasonably requested from the requester under this section; or

(II) if necessary to clarify with the requester issues regarding fee assessment. In either case, the agency's receipt of the requester's response to the agency's request for information or clarification ends the tolling period.

(B)(i) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.

(ii) With respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A), the agency shall notify the person making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. To aid the requester, each agency shall make available its FOIA Public Liaison, who shall assist in the resolution of any disputes between the requester and the agency, and notify the requester of the right of the requester to seek dispute resolution services from the Office of Government Information Services. Refusal by the person to reasonably modify the request or arrange such an alternative time frame shall be considered as a factor in determining whether exceptional circumstances exist for purposes of subparagraph (C).

(iii) As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular requests--

> **(I)** the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(iv) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for the aggregation of certain requests by the same requestor, or by a group of requestors acting in concert, if the agency reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances specified in this subparagraph, and the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated.

(C)(i) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions

of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(ii) For purposes of this subparagraph, the term "exceptional circumstances" does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.

(iii) Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing a request (or a modified request) under clause (ii) after being given an opportunity to do so by the agency to whom the person made the request shall be considered as a factor in determining whether exceptional circumstances exist for purposes of this subparagraph.

(D)(i) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for multitrack processing of requests for records based on the amount of work or time (or both) involved in processing requests.

(ii) Regulations under this subparagraph may provide a person making a request that does not qualify for the fastest multitrack processing an opportunity to limit the scope of the request in order to qualify for faster processing.

(iii) This subparagraph shall not be considered to affect the requirement under subparagraph (C) to exercise due diligence.

(E)(i) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records--

(I) in cases in which the person requesting the records demonstrates a compelling need; and

(II) in other cases determined by the agency.

(ii) Notwithstanding clause (i), regulations under this subparagraph must ensure--

(I) that a determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making

the request, within 10 days after the date of the request; and

(II) expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing.

(iii) An agency shall process as soon as practicable any request for records to which the agency has granted expedited processing under this subparagraph. Agency action to deny or affirm denial of a request for expedited processing pursuant to this subparagraph, and failure by an agency to respond in a timely manner to such a request shall be subject to judicial review under paragraph (4), except that the judicial review shall be based on the record before the agency at the time of the determination.

(iv) A district court of the United States shall not have 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.

(v) For purposes of this subparagraph, the term "compelling need" means--

(I) that a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(II) 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.

(vi) A demonstration of a compelling need by a person making a request for expedited processing shall be made by a statement certified by such person to be true and correct to the best of such person's knowledge and belief.

(F) In denying a request for records, in whole or in part, an agency shall make a reasonable effort to estimate the volume of any requested matter the provision of which is denied, and shall provide any such estimate to the person making the request, unless providing such estimate would harm an interest protected by the exemption in subsection (b) pursuant to which the denial is made.

(7) Each agency shall--

(A) establish a system to assign an individualized tracking number for each request received that will take longer than ten days to process and provide to each person making a request the tracking number assigned to the request; and

(B) establish a telephone line or Internet service that provides information about the status of a request to the person making the request using the assigned tracking number, including--

(i) the date on which the agency originally received the request; and

(ii) an estimated date on which the agency will complete action on the request.

(8)(A) An agency shall--

(i) withhold information under this section only if--

(I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b); or

(II) disclosure is prohibited by law; and

(ii)(I) consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible; and

(II) take reasonable steps necessary to segregate and release nonexempt information; and

(B) Nothing in this paragraph requires disclosure of information that is otherwise prohibited from disclosure by law, or otherwise exempted from disclosure under subsection (b)(3).

(b) This section does not apply to matters that are--

(1)(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;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute--

(A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or

information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) 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, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after

deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

(c)(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and–

> **(A)** the investigation or proceeding involves a possible violation of criminal law; and
>
> **(B)** there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings,

the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

> **(2)** Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's

status as an informant has been officially confirmed.

(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

(d) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(e)(1) On or before February 1 of each year, each agency shall submit to the Attorney General of the United States and to the Director of the Office of Government Information Services a report which shall cover the preceding fiscal year and which shall include--

(A) the number of determinations made by the agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(B)(i) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information; and

(ii) a complete list of all statutes that the agency relies upon to authorize the agency to withhold information under subsection (b)(3), the number of occasions on which each statute was relied upon, a description of whether a court has upheld the decision of the agency to withhold information under each such statute, and a concise description of the scope of any information withheld;

(C) the number of requests for records pending before the agency as of September 30 of the preceding year, and the median and average number of days that such requests had been pending before the agency as of that date;

(D) the number of requests for records received by the agency and the number of requests which the agency processed;

(E) the median number of days taken by the agency to process different types of requests, based on the date on which the requests were received by the agency;

(F) the average number of days for the agency to respond to a request beginning on the date on which the request was received by the agency, the median number of days for the agency to respond to such requests, and the range in number of days for the agency to respond to such requests;

(G) based on the number of business days that have elapsed since each request was originally received by the agency--

(i) the number of requests for records to which the agency has responded with a determination within a period up to and including 20 days, and in 20-day increments up to and including 200 days;

(ii) the number of requests for records to which the agency has responded with a determination within a period greater than 200 days and less than 301 days;

(iii) the number of requests for records to which the agency has responded with a determination within a period greater than 300 days and less than 401 days; and

(iv) the number of requests for records to which the agency has responded with a determination within a period greater than 400 days;

(H) the average number of days for the agency to provide the granted information beginning on the date on which the request was originally filed, the median number of days for the agency to provide the granted information, and the range in number of days for the agency to provide the granted information;

(I) the median and average number of days for the agency to respond to administrative appeals based on the date on which the appeals originally were received by the agency, the highest number of business days taken by the agency to respond to an administrative appeal, and the lowest number of business days taken

by the agency to respond to an administrative appeal;

(J) data on the 10 active requests with the earliest filing dates pending at each agency, including the amount of time that has elapsed since each request was originally received by the agency;

(K) data on the 10 active administrative appeals with the earliest filing dates pending before the agency as of September 30 of the preceding year, including the number of business days that have elapsed since the requests were originally received by the agency;

(L) the number of expedited review requests that are granted and denied, the average and median number of days for adjudicating expedited review requests, and the number adjudicated within the required 10 days;

(M) the number of fee waiver requests that are granted and denied, and the average and median number of days for adjudicating fee waiver determinations;

(N) the total amount of fees collected by the agency for processing requests;

(O) the number of full-time staff of the agency devoted to processing requests for records under this section, and the total amount expended by the agency for processing such requests;

(P) the number of times the agency denied a request for records under subsection (c); and

(Q) the number of records that were made available for public inspection in an electronic format under subsection (a)(2).

(2) Information in each report submitted under paragraph (1) shall be expressed in terms of each principal component of the agency and for the agency overall.

(3) Each agency shall make each such report available for public inspection in an electronic format. In addition, each agency shall make the raw statistical data used in each report available in a timely manner for public inspection in an electronic format, which shall be made available--

(A) without charge, license, or registration requirement;

(B) in an aggregated, searchable format; and

(C) in a format that may be downloaded in bulk.

(4) The Attorney General of the United States shall make each report which has been made available by electronic means available at a single electronic access point. The Attorney General of the United States shall notify the Chairman and ranking minority member of the Committee on Oversight and Government Reform of the House of Representatives and the Chairman and ranking minority member of the Committees on Homeland Security and Governmental Affairs and the Judiciary of the Senate, no later than March 1 of the year in which each such report is issued, that such reports are available by electronic means.

(5) The Attorney General of the United States, in consultation with the Director of the Office of Management and Budget, shall develop reporting and performance guidelines in connection with reports required by this subsection by October 1, 1997, and may establish additional requirements for such reports as the Attorney General determines may be useful.

(6)(A) The Attorney General of the United States shall submit to the Committee on Oversight and Government Reform of the House of Representatives, the Committee on the Judiciary of the Senate, and the President a report on or before March 1 of each calendar year, which shall include for the prior calendar year--

(i) a listing of the number of cases arising under this section;

(ii) a listing of--

(I) each subsection, and any exemption, if applicable, involved in each case arising under this section;

(II) the disposition of each case arising under this section; and

(III) the cost, fees, and penalties assessed under subparagraphs (E), (F), and (G) of subsection (a)(4); and

(iii) a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(B) The Attorney General of the United States shall make--

(i) each report submitted under subparagraph (A) available for public inspection in an electronic format; and

(ii) the raw statistical data used in each report submitted under subparagraph (A) available for public inspection in an electronic format, which shall be made available--

(I) without charge, license, or registration requirement;

(II) in an aggregated, searchable format; and

(III) in a format that may be downloaded in bulk.

(f) For purposes of this section, the term--

(1) "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency; and

(2) "record" and any other term used in this section in reference to information includes--

(A) any information that would be an agency record subject to the requirements of this

section when maintained by an agency in any format, including an electronic format; and

(B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.

(g) The head of each agency shall prepare and make available for public inspection in an electronic format, reference material or a guide for requesting records or information from the agency, subject to the exemptions in subsection (b), including--

(1) an index of all major information systems of the agency;

(2) a description of major information and record locator systems maintained by the agency; and

(3) a handbook for obtaining various types and categories of public information from the agency pursuant to chapter 35 of title 44, and under this section.

(h)(1) There is established the Office of Government Information Services within the National Archives and Records Administration. The head of the Office shall be the Director of the Office of Government Information Services.

(2) The Office of Government Information Services shall--

(A) review policies and procedures of administrative agencies under this section;

(B) review compliance with this section by administrative agencies; and

(C) identify procedures and methods for improving compliance under this section.

(3) The Office of Government Information Services shall offer mediation services to resolve disputes between persons making requests under this section and administrative agencies as a nonexclusive alternative to litigation and may issue advisory opinions at the discretion of the Office or upon request of any party to a dispute.

(4)(A) Not less frequently than annually, the Director of the Office of Government Information Services shall submit to the Committee on Oversight and Government Reform of the House of Representatives, the Committee on the Judiciary of the Senate, and the President--

(i) a report on the findings of the information reviewed and identified under paragraph (2);

(ii) a summary of the activities of the Office of Government Information Services under paragraph (3), including--

(I) any advisory opinions issued; and

(II) the number of times each agency engaged in dispute resolution with the assistance of the Office of Government Information Services or the FOIA Public Liaison; and

(iii) legislative and regulatory recommendations, if any, to improve the administration of this section.

(B) The Director of the Office of Government Information Services shall make each report submitted under subparagraph (A) available for public inspection in an electronic format.

(C) The Director of the Office of Government Information Services shall not be required to obtain the prior approval, comment, or review of any officer or agency of the United States, including the Department of Justice, the Archivist of the United States, or the Office of Management and Budget before submitting to Congress, or any committee or subcommittee thereof, any reports, recommendations, testimony, or comments, if such submissions include a statement indicating that the views expressed therein are those of the Director and do not necessarily represent the views of the President.

(5) The Director of the Office of Government Information Services may directly submit additional information to Congress and the President as the Director determines to be appropriate.

(6) Not less frequently than annually, the Office of Government Information Services shall conduct a meeting that is open to the public on the review and reports by the Office and shall allow interested persons to appear and present oral or written statements at the meeting.

(i) The Government Accountability Office shall conduct audits of administrative agencies on the implementation of this section and issue reports detailing the results of such audits.

(j)(1) Each agency shall designate a Chief FOIA Officer who shall be a senior official of such agency (at the Assistant Secretary or equivalent level).

(2) The Chief FOIA Officer of each agency shall, subject to the authority of the head of the agency--

(A) have agency-wide responsibility for efficient and appropriate compliance with this section;

(B) monitor implementation of this section throughout the agency and keep the head of the agency, the chief legal officer of the agency, and the Attorney General appropriately informed of the agency's performance in implementing this section;

(C) recommend to the head of the agency such adjustments to agency practices, policies, personnel, and funding as may be necessary to improve its implementation of this section;

(D) review and report to the Attorney General, through the head of the agency, at such times and in such formats as the Attorney General may direct, on the agency's performance in implementing this section;

(E) facilitate public understanding of the purposes of the statutory exemptions of this section by including concise descriptions of the exemptions in both the agency's handbook issued under subsection (g), and the agency's

annual report on this section, and by providing an overview, where appropriate, of certain general categories of agency records to which those exemptions apply;

(F) offer training to agency staff regarding their responsibilities under this section;

(G) serve as the primary agency liaison with the Office of Government Information Services and the Office of Information Policy; and

(H) designate 1 or more FOIA Public Liaisons.

(3) The Chief FOIA Officer of each agency shall review, not less frequently than annually, all aspects of the administration of this section by the agency to ensure compliance with the requirements of this section, including--

(A) agency regulations;

(B) disclosure of records required under paragraphs (2) and (8) of subsection (a);

(C) assessment of fees and determination of eligibility for fee waivers;

(D) the timely processing of requests for information under this section;

(E) the use of exemptions under subsection (b); and

(F) dispute resolution services with the assistance of the Office of Government Information Services or the FOIA Public Liaison.

(k)(1) There is established in the executive branch the Chief FOIA Officers Council (referred to in this subsection as the "Council").

(2) The Council shall be comprised of the following members:

(A) The Deputy Director for Management of the Office of Management and Budget.

(B) The Director of the Office of Information Policy at the Department of Justice.

(C) The Director of the Office of Government Information Services.

(D) The Chief FOIA Officer of each agency.

(E) Any other officer or employee of the United States as designated by the Co-Chairs.

(3) The Director of the Office of Information Policy at the Department of Justice and the Director of the Office of Government Information Services shall be the Co-Chairs of the Council.

(4) The Administrator of General Services shall provide administrative and other support for the Council.

(5)(A) The duties of the Council shall include the following:

(i) Develop recommendations for increasing compliance and efficiency under this section.

(ii) Disseminate information about agency experiences, ideas, best practices, and innovative approaches related to this section.

(iii) Identify, develop, and coordinate initiatives to increase transparency and compliance with this section.

(iv) Promote the development and use of common performance measures for agency compliance with this section.

(B) In performing the duties described in subparagraph (A), the Council shall consult on a regular basis with members of the public who make requests under this section.

(6)(A) The Council shall meet regularly and such meetings shall be open to the public unless the Council determines to close the meeting for reasons of national security or to discuss information exempt under subsection (b).

(B) Not less frequently than annually, the Council shall hold a meeting that shall be open to the public and permit interested persons to appear and present oral and written statements to the Council.

(C) Not later than 10 business days before a meeting of the Council, notice of such meeting shall be published in the Federal Register.

(D) Except as provided in subsection (b), the records, reports, transcripts, minutes, appendices, working papers, drafts, studies, agenda, or other documents that were made available to or prepared for or by the Council shall be made publicly available.

(E) Detailed minutes of each meeting of the Council shall be kept and shall contain a record of the persons present, a complete and accurate

description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by the Council. The minutes shall be redacted as necessary and made publicly available.

(l) FOIA Public Liaisons shall report to the agency Chief FOIA Officer and shall serve as supervisory officials to whom a requester under this section can raise concerns about the service the requester has received from the FOIA Requester Center, following an initial response from the FOIA Requester Center Staff. FOIA Public Liaisons shall be responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.

(m)(1) The Director of the Office of Management and Budget, in consultation with the Attorney General, shall ensure the operation of a consolidated online request portal that allows a member of the public to submit a request for records under subsection (a) to any agency from a single website. The portal may include any additional tools the Director of the Office of Management and Budget finds will improve the implementation of this section.

(2) This subsection shall not be construed to alter the power of any other agency to create or maintain an independent online portal for the submission of a request for records under this section. The Director of the Office of Management and Budget shall establish standards for interoperability between the portal required under paragraph (1) and other request processing software used by agencies subject to this section.