UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMPETITIVE ENTERPRISE INSTITUTE 1899 L Street NW, 12th Floor WASHINGTON, DC 20036	)	
ENERGY & ENVIRONMENT LEGAL INSTITUTE 2020 Pennsylvania Avenue, NW #186 Washington, DC 20006	)	
FREE MARKET ENVIRONMENTAL LAW CLINIC 9033 Brook Ford Road Burke, Virginia, 22015	)	
Plaintiffs,	)	
v.	)	Civil Action No. 14-975
UNITED STATES NATIONAL SECURITY AGENCY 9800 Savage Road STE 6248 Fort George G. Meade, MD 20755-6248	)	
Defendant.	)	

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs COMPETITIVE ENTERPRISE INSTITUTE ("CEI"), ENERGY & ENVIRONMENT LEGAL INSTITUTE ("E&E Legal"), and FREE MARKET ENVIRONMENTAL LAW CLINIC ("FME Law") for their complaint against Defendant United States National Security Agency ("NSA" or "the Agency"), allege as follows:

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to compel production under two requests for records held by the NSA regarding the Environmental Protection Agency ("EPA"), a separate federal agency.
2. The requests sought records from the NSA about work-related communications by EPA employees. EPA is required to preserve most or all of this information by the Federal

Records Act (FRA), 44 U.S.C. 3101 *et seq*. Instead EPA failed to obtain, ignored, or acquiesced in, the destruction of these federal records.

3. The information plaintiff CEI sought is "metadata" (which includes duration and time of the communication, sender and recipient, etc.) from communications made by phone, email and text message by EPA Administrator Gina McCarthy. Plaintiffs E&E Legal and FME Law sought information from a Verizon account used by McCarthy's predecessor, former EPA Administrator Lisa Jackson. This account became subject to FOIA and FRA due to her use of it to correspond with lobbying interests (*e.g.,* Sierra Club and Siemens).
4. Fortunately, in the course of its data collection programs, NSA captured and preserved these federal records. Although NSA refuses to process the requests at issue in this matter on the basis that confirming or denying the existence of this information and the relevant collection program would pose a threat to national security, it has already acknowledged the program's existence, which is of great public interest. Similarly, in the past two years EPA's electronic correspondence and recordkeeping ("transparency") practices have become the subject of great controversy and public, congressional and media interest.
5. EPA officials' decisions to use non-official accounts for official or work-related correspondence made this information and these accounts subject to FOIA and FRA. Whether EPA (or NSA) failed to maintain or preserve such information does not change whether it constituted agency records under FOIA, or federal records subject to the FRA.
6. Similarly, when NSA obtained records, particularly of federal agency activity such as information EPA was not preserving, they became "agency records" under FOIA, which has the broadest definition of "records" of any applicable statute, and became federal records subject to the FRA.

7. "FOIA directs that 'each agency, upon any request for records . . ., shall make the records promptly available to any person' for 'public inspection and copying,' unless the records fall within one of the exclusive statutory exemptions." *Judicial Watch v. Dep't of Justice*, 365 F.3d 1108, 1112 (D.C. Cir. 2004) (quoting 5 U.S.C. § 552(a)(2), (a)(3)(A)). "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *N.L.R.B. v. Robbins Tire & Rubber Co*., 437 U.S. 214, 242 (1978); *see also N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975) (concluding that FOIA "represents a strong congressional aversion to secret (agency) law, and represents an affirmative congressional purpose to require disclosure of documents which have the force and effect of law."). FOIA is broadly conceived to permit access to "official information" as part of a "general philosophy of full agency disclosure," *EPA v. Mink*, 410 U.S. 73, 80 & n. 6 (1973), such that "the Government's activities be opened to the sharp eye of public scrutiny." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 774 & n.20 (1989). "FOIA thus mandates that an agency disclose records on request, unless they fall within one of nine exemptions. These exemptions are 'explicitly made exclusive,' and must be 'narrowly construed,'" *Milner v. Dep't of Navy*, 131 S. Ct. 1259, 1262 (2011), and it is the government's burden to prove that a given exemption applies. *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 30 (D.C. Cir. 1998).
8. The NSA's program of collecting phone and text message metadata is widely known, and has been acknowledged by the President, by the Inspector General of the NSA, and by Verizon, one of the companies which provided metadata to the NSA.

9. Despite these numerous acknowledgements, the NSA has neither provided the federal records sought by plaintiffs' FOIA requests nor denied these records are in its possession. Instead the NSA refuses to confirm or deny the existence of these records. This is known as a "Glomar" response. A Glomar response, as recognized in *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976), permits an agency to "neither confirm nor deny" the existence of the records sought. However, the use of a Glomar response is limited. It can only be invoked when the material's nature justifies secrecy and the agency provides "as much information as possible" to justify its claim. Further, an agency cannot give a Glomar response when it has already disclosed the existence of the records being sought.
10. Here there have been clear public admissions that the NSA has collected telephone and text message metadata, the very records requesters have sought.
11. The requested metadata is of significant public interest as it will shed light on ongoing controversies over widespread use by senior officials of non-official email accounts for work-related correspondence; the increased use of text messaging as an alternative to email which, like non-official accounts, are generally not searched in response to FOIA or congressional requests seeking work-related "records"; and the admitted widespread destruction of such text correspondence.[1]

[1] *See, e.g., Landmark Legal Foundation v. EPA*, 959 F.Supp.2d 175, 181 (D.D.C. 2013) ("EPA did not search the personal email accounts of the Administrator, the Deputy Administrator, or the Chief of Staff" despite "evidence that upper-level EPA officials conducted official business from their personal email accounts"); *Answer* in *CEI v. EPA,* D.D.C. No. 13-779 (filed 7/19/2013) at ¶21 (admitting EPA provides such officials "with personal digital assistants that have text messaging capability"), ¶¶14, 33 (EPA currently unable to locate such records); Email from Michelle Lo, EPA counsel, to Chris Horner & Hans Bader (CEI counsel), at 9/9/2013 3:46 PM (admitting "Ms. McCarthy uses text messaging," but arguing "they were not required to be preserved by the Agency"); Email from Lo to Horner & Bader, at 8/1/2013 7:25 PM (conceding "Ms. McCarthy used the texting function on her EPA phone," and "none of her texts over the period encompassing the 18 specific dates at issue in CEI's FOIA request . . . were preserved").

12. A Glomar response to a FOIA request is considered a constructive denial of the request. Defendant has given a Glomar response to the initial request and the appeal of both the FOIA requests made. This has exhausted all of requesters' administrative remedies.
13. NSA failed to respond to the appeal of the initial determinations by FME Law and E&E Legal within the 20 day period mandated under FOIA, and under § 552(a)(6)(A)(ii)(VIII) NSA has waived the opportunity to seek fees for the request. The NSA has failed to respond entirely to the administrative appeal made by CEI, and therefore under § 552(a)(6)(A)(ii)(VIII) NSA has waived the opportunity to seek fees for the request.
14. Defendant is now legally obligated to produce records responsive to plaintiffs' requests.

PARTIES

12. Plaintiff CEI is a public policy research and educational institute in Washington, D.C., dedicated to advancing responsible regulation and in particular economically sustainable environmental policy. CEI's programs include research, investigative journalism and publication, as well as a transparency initiative seeking public records relating to environmental policy and how policymakers use public resources.
13. Plaintiff E&E Legal is a nonprofit research, public policy and public interest litigation center incorporated in Virginia with Washington, D.C. offices. It is dedicated to advancing responsible regulation and especially economically sustainable environmental policy. Its programs include analysis, publication, and a transparency initiative seeking public records relating to environmental and energy policy and how policymakers use public resources.
14. Plaintiff FME Law is a nonprofit research, public policy, and public interest litigation center based in Virginia and dedicated to advancing responsible regulation and in

particular economically sustainable environmental policy. FME Law's programs include research, publication and litigation, and a transparency initiative seeking public records relating to environmental and energy policy and how policymakers use public resources. It regularly and broadly disseminates responsive public information to the public at large.

15. Defendant NSA is a federal agency which engages in intelligence gathering activities.

JURISDICTION AND VENUE

16. This Court has jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B), because this action is brought in the District of Columbia, and 28 U.S.C. § 1331, because the resolution of disputes under FOIA presents a federal question.

17. Venue is proper in this Court under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e) because Plaintiff CEI resides in the District of Columbia, and defendant is a federal agency.

FACTUAL BACKGROUND

18. Transparency in government is the subject of high-profile promises from the president and attorney general of the United States arguing forcefully against agencies failing to live up to their legal recordkeeping and disclosure obligations. Attorney General Holder states, inter alia, "On his first full day in office, January 21, 2009, President Obama issued a memorandum to the heads of all departments and agencies on the Freedom of Information Act (FOIA). The President directed that FOIA 'should be administered with a clear presumption: In the face of doubt, openness prevails.'" OIP Guidance, *President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines, Creating a "New Era of Open Government,"* www.justice.gov/oip/foiapost/2009foiapost8.htm.

19. Lisa P. Jackson is EPA's former Administrator. Previous FOIA requests revealed that she used an EPA.gov email in a false identity of "Richard Windsor" for certain official correspondence. Plaintiff CEI has also demonstrated that she used her personal Verizon email and an (ATT) Blackberry email address for EPA-related correspondence, without following the legal requirement to forward such correspondence to her official EPA accounts. Such communications involving EPA business remained federal records subject FOIA regardless of which account on which they were performed, and the decision to use this account as her means of corresponding on Agency-related issues with select lobbyists also made this account subject to FOIA and FRA.

20. Gina McCarthy is the current Administrator of the EPA. She was provided with text message capabilities in order to conduct agency business. She subsequently engaged in thousands of text message communications. CEI later submitted FOIA requests for those text messages. It did so after information came to light showing that agency business had been communicated by text message.[2] However, EPA provided a "no records" response to CEI's requests for text messages on eighteen specific dates and then for all text messages over an approximately three-year period, claiming that all text messages had been personal, and that all had been deleted or destroyed.[3] CEI later demonstrated that Ms. McCarthy's text correspondents in fact included her EPA senior staff, including Joe

[2] See, e.g., Complaint in CEI v. EPA, D.D.C. Civil Action No. 13-1074.

3 See Answer in CEI v. EPA, D.D.C. No. 13-779 (filed 7/19/2013) at ¶ 8 (conceding that such texts were sent by EPA Assistant Administrator Gina McCarthy), ¶21 (conceding that EPA provides such officials "with personal digital assistants that have text messaging capability"), ¶¶14, 33 (EPA currently unable to locate such records); Email from Michelle Lo, counsel for EPA, to Chris Horner and Hans Bader, counsel for CEI, at 9/9/2013 3:46 PM (admitting that "Ms. McCarthy uses text messaging," but arguing that "they were not required to be preserved by the Agency."); Email from Michelle Lo, counsel for EPA, to Chris Horner and Hans Bader, counsel for CEI, at 8/1/2013 7:25 PM (conceding that "Ms. McCarthy used the texting function on her EPA phone," and that "none of her texts over the period encompassing the 18 specific dates at issue in CEI's FOIA request (July 9, 2009, to June 29, 2012) were preserved").

Goffman, Peter Tsirigotis, Steven Page, and eight others. CEI sought their copies of such text messages but EPA has refused to provide those. *See CEI v. EPA*, D.D.C. No. 14-582 (KBJ) (re FOIA request # EPA-HQ-2014-002006). EPA further claimed that it still possesses only several months of metadata regarding Ms. McCarthy's text messages.

21. In addition to EPA acknowledging destroying the entire class of Ms. McCarthy's text messages and those sent to or from Ms. Jackson that plaintiff CEI learned of and requested, plaintiffs and others have exposed other practices by many executive branch employees frustrating the public's ability to "know what their government is up to." *Reporters Committee*, 489 U.S. at 773. These include using non-official email accounts to conduct official or work-related correspondence; falsely claiming work related correspondence was personal; and using unofficial email accounts to covertly communicate with former colleagues and their contacts, who share an interest in what is now the employee's official business, without creating the official record required by federal statute and regulation (*e.g.,* the FRA, the E-Government Act of 2002, 36 C.F.R. Subchapter B, Records Management, and National Archives and Records Administration (NARA) mandated guidance).[4]

[4] For example plaintiff has learned of 18 senior EPA officials engaging in this practice, as well as former or current officials in the Departments of Energy and Treasury, and OSTP. *See, e.g.,* Judson Berger, *EPA official scrutinized over emails to resign*, FoxNews.com, February 19, 2013, www.foxnews.com/politics/2013/02/19/epa-official-scrutinized-over-emails-to-resign/; Jim Snyder, *Brightsource Warned Of Embarrassment To Obama In Loan Delay*, Bloomberg, June 6, 2012, www.bloomberg.com/news/2012-06-06/brightsource-warned-of-embarrassment-to-obama-from-loan-delays.html; Eric Lichtblau, *Across From White House, Coffee With Lobbyists*, New York Times, June 24, 2010, at A18, www.nytimes.com/2010/06/25/us/politics/25caribou.html (lobbyists "routinely get e-mail messages from White House staff members' personal accounts rather than from their official White House accounts, which can become subject to public review"); Senate EPW Committee, Minority Report, *A Call for Sunshine: EPA's FOIA and Federal Records Failures Uncovered* (Sept. 9, 2013) at 8, www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=513a8b4f-abd7-40ef-a43b-dec0081b5a62; August 14, 2012 Letter from U.S. House Committee on Oversight and Government Reform Chairman Darrell Issa and subcommittee Chairmen Jim Jordan and Trey Gowdy to Energy

22. Such efforts to circumvent the FRA and FOIA by using personal email or phone systems, or by claiming official messages are personal, do not alter the legal character of these communications. They are and remain federal records. Efforts to keep such records from being preserved by agencies frustrates federal record-keeping and disclosure laws. *See Landmark Legal Foundation v. E.P.A.*, 2013 WL 4083285, *6 (D.D.C. Aug. 14, 2013).

23. The NSA is known to have a program to collect metadata from telephone, text message and email records from certain telephony carriers including Verizon. NSA has revealed that it collects such information under its Business Records FISA, Section 215 program.[5] The NSA Inspector General further admitted the NSA gathers this type of information.[6] Verizon has acknowledged it provided the NSA with this type of metadata. The President of the United States has stated that the NSA collects metadata of this type as well. [7]

FOIA Request by CEI — NSA FOIA 75854

24. On December 16, 2013 CEI submitted a FOIA request to the NSA.

25. The request sought:

> "copies of 1) all text message data, and 2) particularly all metadata (date, duration and time of the communication, sender and recipient, *etc*.) of text messaging activity using Verizon voice and/or data accounts in NSA's possession for the

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Secretary Steven Chu, http://oversight.house.gov/wp-content/uploads/2012/08/2012-08-14-DEI-Gowdy-Jordan-to-Chu-re-loan-program-emails.pdf ("at least fourteen DOE officials used non-government accounts to communicate about the loan guarantee program and other public business"); *Promises Made, Promises Broken: The Obama Administration's Disappointing Transparency Track Record*, report by the U.S. House of Representatives Committee on Energy and Commerce, Vol. 1, Issue 3, July 31, 2012, http://republicans.energycommerce.house.gov/Media/file/PDFs/20120731WHTransparencyStaffReport.pdf.

[5] National Security Agency, Statement, "NSA: Missions, Authorities, Oversight and Partnerships," Aug. 9, 2013 (www.nsa.gov/public_info/_files/speeches_testimonies/2013_08_09_the_nsa_story.pdf).

[6] The NSA has revealed in a letter to Senator Charles Grassley that this same type of metadata was collected and reviewed. Letter from Dr. George Ellard, Inspector General, Natl. Security Agency, to Senator Charles Grassley, Ranking Member, S. Comm. on the Judiciary, Sept. 11, 2013, available at www.nsa.gov/public_info/press_room/2013/grassley_letter.pdf.

[7] http://www.whitehouse.gov/the-press-office/2013/06/07/statement-president.

> phone/PDA/text/instant message account(s) associated with the number (202) 596-0247, a number assigned by Verizon to the U.S. Environmental Protection Agency (note: for most or all of the relevant period this account was held in the name of 'F. Rusincovitch/Eon 8344' but provided over the time period relevant to this request to then- Assistant Administrator for Air and Radiation, and now-Administrator, Regina "Gina"McCarthy). Responsive records will be for billing periods ending, and/or will be dated, during the period from July 1, 2009 through April 2011 (inclusive), at which time EPA switched providers for these relevant offices, from Verizon to AT&T."

26. The NSA received this request December 17, 2013, and assigned it FOIA Case Number 75854.

27. On December 20, 2013 the NSA responded with an initial determination, in which it declined to provide the requested information, and instead refused to confirm or deny that it possessed the request records- a "Glomar" response. The NSA further claimed the authority to give such a response under the First and Third exceptions to FOIA.

28. In its Glomar response the NSA stated, in pertinent part:

> "Although these two programs have been publicly acknowledged, details about them remain classified and/ or protected from release by statutes to prevent harm to the national security of the United States. To the extent that your request seeks any information on all text message data and particularly all metadata of text messaging activity for the number (202) 596-0247 in relation to NSA intelligence programs, or in relation to any specific methods or means for conducting the programs, we cannot acknowledge the existence or non-existence of such information. Any positive or negative response on a request by-request basis would allow our adversaries to accumulate information and draw conclusions about NSA's technical capabilities, sources, and methods. Our adversaries are likely to evaluate all public responses related to these programs. Were we to provide positive or negative responses to requests such as yours, our adversaries' compilation of the information provided would reasonably be expected to cause exceptionally grave damage to the national security. Therefore, your request is denied because the fact of the existence or non-existence of responsive records is a currently and properly classified matter in accordance with Executive Order 13526, as set forth in Subparagraph (c) of Section 1.4. Thus, your request is denied pursuant to the first exemption of the FOIA, which provides that the FOIA does not apply to matters that are specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign relations and are properly classified pursuant to such Executive Order. Moreover, the third exemption of the FOIA provides for the withholding of information specifically protected from disclosure by statute. Thus, your request is also denied because the fact of the existence or non-

existence of the information is exempted from disclosure pursuant to the third exemption. The specific statutes applicable in this case are: Title 18 U.S. Code 798; Title 50 U.S. Code 3024(i) (formerly Title 50 U.S. Code 403-1(i)); and Section 6, Public Law 86-36 (50 U.S. Code 3605, formerly 50 U.S. Code 402 note)."

29. The FOIA request never sought details about the NSA programs or activities. Instead it merely sought metadata about communications which were already federal records by virtue of having been used by Gina McCarthy, Administrator of the EPA to engage in work-related business.

30. On February 10, 2014 CEI administratively appealed the initial determination, noting that the existence of the NSA program to collect metadata had already been made public, thus waiving the right of the agency to issue a Glomar response, and that no classified details regarding the program had been sought or requested.

31. On March 27, 2014 the NSA's appeal authority for FOIA requests rejected the appeal, and reissued the Glomar response, stating "I have concluded that the appropriate response is to continue to neither confirm nor deny the existence or nonexistence of any intelligence material" relating to the identified phone number in CEI's request. This response exhausted all administrative remedies requesters could pursue.

32. The NSA failed to respond to CEI's administrative appeal within the 20 day time limit established under 5 U.S.C.S. § 552(a)(6)(A). As a consequence of failing to meet the legally mandated timeframe for issuing a response, the NSA has waived any right to seek fees under § 552(a)(6)(A)(ii)(VIII)

FOIA Request by E&E Legal and FME Law — NSA FOIA 74398

33. On August 16, 2013, E&E legal and FME Law submitted a FOIA request to the NSA.

34. The request sought:

"copies of all metadata (duration and time of the communication, sender and recipient, etc.) from Verizon voice and/or data accounts in NSA's possession2 for the phone/PDA/text/instant message and/or email account(s) held by Lisa P. Jackson. To properly identify the individual at issue in this matter, one such email account associated with Ms. Jackson's Verizon account and which was used to conduct public business is LisaPJackson@Verizon.net. Due to the dates of this account's activity we expect the telephone account likely carries an area code assigned to Washington, DC; however, it is possible it bears one of the New Jersey area codes."

35. The NSA received this request August 19, 2013, and assigned it FOIA Case Number 74398.

36. On August 23, 2013 the NSA responded with an initial determination, in which it declined to provide the requested information, and instead refused to confirm or deny that it possessed the request records- a "Glomar" response. The NSA further claimed the authority to give such a response under the First and Third exceptions to FOIA.

37. In its Glomar response the NSA stated, in pertinent part, essentially the same passage quoted above in paragraph 28. For example, it likewise contained the statement,

"Although these two programs have been publicly acknowledged, details about them remain classified and/or protected from release by statutes to prevent harm to the national security of the United States."

It contained the same quoted passage set forth in paragraph 28, except for one sentence: in lieu of the second sentence in that quoted passage,[8] it contained this sentence instead:

"To the extent that your request seeks any information on Lisa P. Jackson in relation to NSA intelligence programs, or in relation to any specific methods or means for conducting the programs, we cannot acknowledge the existence or non-existence of such information."

[8] That second sentence read, "To the extent that your request seeks any information on all text message data and particularly all metadata of text messaging activity for the number (202) 596-0247 in relation to NSA intelligence programs, or in relation to any specific methods or means for conducting the programs, we cannot acknowledge the existence or non-existence of such information."

38. The FOIA request never sought details about the NSA programs or activities. Instead it merely sought metadata about communications which were already federal records by virtue of having been used by Lisa P. Jackson to engage in work-related business while Administrator of the EPA.

39. On October 23, 2013 FME Law and E&E Legal administratively appealed the initial determination, noting that the existence of the NSA program to collect metadata had already been made public, thus waiving the agency's right to issue a Glomar response, and that no classified details regarding the program had been sought or requested.

40. On March 27, 2014 the NSA's appeal authority for FOIA requests rejected the appeal, and reissued the Glomar response, stating "I have concluded that the appropriate response is to continue to neither confirm nor deny the existence or nonexistence of any intelligence material." This response exhausted all administrative remedies requesters could pursue.

41. NSA failed to respond to requesters' appeal within the 20 day time limit established under 5 U.S.C.S. § 552(a)(6)(A). As a consequence of failing to meet the legally mandated timeframe for issuing a response, the NSA has waived any right to seek fees under § 552(a)(6)(A)(ii)(VIII).

Legal Discussion

42. FOIA has the broadest definition of "record" among the relevant federal statutes. "The definition of a record under the Freedom of Information Act (FOIA) is broader than the definition under the Federal Records Act." *See, e.g.,* EPA, *What Is a Federal Record?*, www.epa.gov/records/tools/toolkits/procedures/part2.htm. It covers emails in an employee's personal email account if their subject relates to official business. *See, e.g.*,

Senate Committee on Environment and Public Works, Minority Report, *A Call for Sunshine: EPA's FOIA and Federal Records Failures Uncovered* (Sept. 9, 2013) at 8 www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=513a8b4f-abd7-40ef-a43b-dec0081b5a62.

43. The status of a record, whether it be email, telephone, or text message, is not dictated by the account on which it is created or received.

44. Agencies are increasingly called to search an employee's private accounts and equipment. For example, plaintiff has recently confronted this issue in other instances involving EPA Regional Administrators. Defendant ultimately produced former Region 8 Administrator James Martin's work-related ME.com emails to and from the environmentalist pressure group Environmental Defense (previously Environmental Defense Fund) addressing work-related issues. *See CEI v. EPA*, D.D.C., C.A. No. 12-1497 (ESH)(FOIA 08-FOI-00203-12).

45. With regard to private accounts "Agencies are also required to address the use of external e-mail systems that are not controlled by the agency (such as private e-mail accounts on commercial systems such as Gmail, Hotmail, Mac, etc.). Where agency staff have access to external systems, agencies must ensure that federal records sent or received on such systems are preserved in the appropriate recordkeeping system and that reasonable steps are taken to capture available transmission and receipt data needed by the agency for recordkeeping purposes." United States Government Accountability Office, "Report to the Ranking Member, Committee on Finance, U.S. Senate: NATIONAL ARCHIVES AND RECORDS ADMINISTRATION. Oversight and Management Improvements

Initiated, but More Action Needed," GAO-11-15, October 2010, www.gao.gov/assets/320/310933.pdf, p. 37.

46. The records created by Lisa P. Jackson which reflect public business were federal records despite her decision to use a private account to correspond with lobbyists on EPA-related matters. The records created by Gina McCarthy while using an EPA provided device to engage in text messaging were likewise public records.

47. The NSA's acquisition of metadata regarding these communications resulted in the NSA acquiring federal records regarding correspondence by EPA employees, and which should have been preserved by the EPA. Regardless, the NSA's acquisition of these metadata records did not diminish the status of this information but made NSA's copies records under the FRA and FOIA, subject to release, public scrutiny and transparency.

48. The NSA failed to give a proper response to plaintiffs' requests for records. FOIA provides that a requesting party is entitled to a substantive agency response both to requests and administrative appeals within 20 working days, affirming the agency is processing the request made and intends to comply. It must rise to the level of indicating "that the agency is exercising due diligence in responding to the request...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." 5 U.S.C.§ 552(a)(6)(C)(i). Alternately, the agency must cite "exceptional circumstances" and request, and make the case for, an extension that is necessary and proper to the specific request. *See also Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976).

49. A substantive agency response means that a covered agency must provide particularized assurance that it is reviewing some quantity of records with an eye toward production on

some estimated schedule, so as to establish some reasonable belief that it is processing our request. 5 U.S.C.A. § 552(a)(6)(A)(i). *See also Muttitt v. U.S. Central Command*, 813 F. Supp.2d 221, 227 (D.D.C. 2011) (noting "statutory requirement that [agencies] provide estimated dates of completion"). Defendant must at least gather, review, and inform a requesting party of the scope of potentially responsive records, including the scope of the records it plans to produce and the scope of documents that it plans to withhold under any FOIA exemptions. *See CREW v. FEC*, 711 F.3d 180, 186 (D.C. Cir. 2013) ("*CREW*").

50. The decision by NSA to provide a Glomar response, to neither confirm its possession of the records and provide them (subject to any legitimate withholdings under FOIA exceptions), nor deny its possession of them, was not a legitimate or proper response.

51. A Glomar response is ordinarily appropriate where confirming or denying the existence of records would reveal the existence of a program not know to the public. Here, however, the existence of a data collection program designed to gather metadata has been acknowledged by the President, and by the NSA itself and its Inspector General.

52. An agency may not issue a Glomar response when the program such a response is attempting to keep secret has already been publicly acknowledged. The President of the United States has ultimate authority over executive matters. His admission that such an NSA program exists[9] definitively waives the secrecy of such a program. It is well established that once the secrecy of the existence of data has been waived, a Glomar response is not appropriate.[10]

[9] *See* http://www.whitehouse.gov/the-press-office/2013/06/07/statement-president.

[10] *See Nat'l Sec. Archive*, No. 99-1160, slip op. at 15-16, 19 (D.D.C. July 31, 2000) (CIA waived Glomar response as to request for CIA biographies of former leaders of Eastern European countries through previous admissions that agency compiles "biographies on all heads of state").

53. Plaintiffs have not sought records which would give away details regarding how such a data collection program operates. Such information justifiable remains secret and not subject to FOIA. Plaintiffs have only sought metadata records regarding communications made by another federal agency, which that agency had an obligation to preserve. EPA and its employees have no expectation of privacy with regard to federal records, and did not gain such an expectation by destroying instead of preserving these federal records and the metadata regarding these federal records.

54. As a result, defendant issuing a Glomar response to plaintiffs' FOIA requests was not an adequate or appropriate response, and defendant still owes a proper and substantive agency response to the requests.

First Claim for Relief
Release of FOIA Records Requested in NSA FOIA 74398 — Declaratory Judgment

55. Plaintiffs re-allege paragraphs 1-54 as if fully set out herein.

56. Plaintiffs are owed an adequate, non-conflicted search and production responsive to the request for federal records created by, for or relating to EPA business and in the possession of the NSA.

57. NSA's Glomar response to plaintiffs' FOIA requests was not appropriate given that there was prior disclosure of the NSA's program to collect metadata and that plaintiffs did not seek classified details regarding this program.

58. Plaintiffs have exhausted all administrative remedies.

59. Plaintiffs ask this Court to enter a judgment declaring that:

a. the metadata records sought by plaintiffs in the possession of defendant are federal records subject to FOIA;

b. The Glomar response issued by defendant was not a proper response;

c. Defendant has failed to adequately respond to the FOIA request;

d. Defendants failure to properly respond to the FOIA request seeking the described records is not reasonable, and does not satisfy its obligations under FOIA;

e. Defendant's refusal to produce the requested records is unlawful; and

f. Defendant must release the requested records.

Second Claim for Relief

Release of FOIA Records Requested in NSA FOIA 74398 — Injunctive Relief

60. Plaintiffs re-allege paragraphs 1-59 as if fully set out herein.

61. Plaintiffs are entitled to injunctive relief compelling defendant to produce all records responsive to its request described, *supra*.

62. Plaintiffs ask this Court to enter an injunction pursuant to 5 U.S.C. § 552(a)(4)(B) enjoining defendant from further withholding responsive records and ordering the defendant to produce to plaintiffs within 10 business days of the date of the order the requested records, or a detailed Vaughn index claiming FOIA exemptions applicable to the withheld information.

63. Further, that this Court shall retain jurisdiction to enforce the terms of the order as well as retain jurisdiction to conduct such further proceedings and award relief as may be necessary to resolve any breach of the order and to retain jurisdiction over any motions seeking judicial review of some or all withheld and/or redacted documents.

Third Claim for Relief

Release of FOIA Records Requested in NSA FOIA 75854 — Declaratory Judgment

64. Plaintiffs re-allege paragraphs 1-63 as if fully set out herein.

65. Plaintiffs are owed an adequate, non-conflicted search and production responsive to the request for federal records created by, for or relating to EPA business and in the possession of the NSA.

66. NSA's Glomar response to plaintiffs FOIA request was not appropriate given that there was prior disclosure of the NSA's program to collect metadata and that plaintiffs did not seek classified details regarding this program.

67. Plaintiffs have exhausted all administrative remedies.

68. Plaintiffs ask this Court to enter a judgment declaring that:

a. the metadata records sought by plaintiffs in the possession of defendant are federal records subject to FOIA;

b. The Glomar response issued by defendant was not a proper response;

c. Defendant has failed to adequately respond to the FOIA request;

d. Defendants failure to properly respond to the FOIA request seeking the described records is not reasonable, and does not satisfy its obligations under FOIA;

e. Defendant's refusal to produce the requested records is unlawful; and

f. Defendant must release the requested records

Fourth Claim for Relief
Release of FOIA Records Requested in NSA FOIA 75854 — Injunctive Relief

69. Plaintiffs re-allege paragraphs 1-68 as if fully set out herein.

70. Plaintiffs are entitled to injunctive relief compelling defendant to produce all records responsive to its request described, *supra*.

71. Plaintiffs ask this Court to enter an injunction pursuant to 5 U.S.C. § 552(a)(4)(B) enjoining defendant from further withholding responsive records and ordering the defendant to produce to plaintiffs within 10 business days of the date of the order the

requested records, or a detailed Vaughn index claiming FOIA exemptions applicable to the withheld information.

72. Further, that this Court shall retain jurisdiction to enforce the terms of the order as well as retain jurisdiction to conduct such further proceedings and award relief as may be necessary to resolve any breach of the order and to retain jurisdiction over any motions seeking judicial review of some or all withheld and/or redacted documents.

Fifth Claim for Relief
Costs And Fees – Injunctive Relief

73. Pursuant to 5 U.S.C. § 552(a)(4)(E), 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.

74. This Court should enter an injunction ordering defendant to pay reasonable attorney fees and other litigation costs reasonably incurred in this case.

75. Plaintiffs have a statutory right to the records that they seek, defendant has not fulfilled its statutory obligations to provide them, and there is no legal basis for withholding them.

WHEREFORE, Plaintiffs request the declaratory and injunctive relief herein sought, and an award of attorney fees and costs, and such other and further relief as the Court shall deem proper.

Respectfully submitted this 9th day of June, 2014,

Hans Bader

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Hans Bader, D.C. Bar No. 466545
Sam Kazman, D.C. Bar No. 946376
1899 L St., NW, Floor 12, Washington, D.C. 20036
(202) 331-2278
Counsel for Plaintiff Competitive Enterprise Institute

Christopher C. Horner, D.C. Bar # 440107
1489 Kinross Lane, Keswick, VA 22947
(202) 262-4458
Counsel for All Plaintiffs