IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	Case No. 18-CV-01050-ABJ
UNITED STATES DEPARTMENT OF JUSTICE,	)	
	)	
Defendant.	)	
	)	

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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

Dated: August 30, 2018

Respectfully Submitted,

CHAD A. READLER
Acting Assistant Attorney General

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UNITED STATES DEPARTMENT OF JUSTICE,	)	
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Defendant.	)	
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STATEMENT OF MATERIAL FACTS IN SUPPORT OF
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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

1. This matter arises from a FOIA request submitted to the Department of Justice for "transcripts of hearings before the Foreign Intelligence Surveillance Court regarding applications for or renewals of Foreign Intelligence Surveillance Act ("FISA") warrants relating to Carter Page and/or Michael Flynn." *See* Declaration of Patrick Findlay, ¶ 4 & Ex. A. The request is dated February 16, 2018, and was received by DOJ on February 26, 2018. *Id*. It was later referred to the National Security Division. *Id*. ¶ 5.

2. By letter dated June 18, 2018, NSD made a final determination. The letter described NSD's operational files and responded that "with respect to your request relating to Michael Flynn, we can neither confirm nor deny the existence of records in these files responsive to your request." Findlay Decl. ¶ 6 & Ex. B. NSD further determined that "based on declassification decisions . . . we are able to respond to your request relating to Carter Page," and confirmed that NSD found no records responsive to the request. *Id*.

3. On February 2, 2018, Congress released a memorandum, hereinafter referred to as the "Nunes Memorandum." The President declassified the Congressional memorandum, which included references to the existence of FISA material related to Carter Page. A letter from White House counsel clarified that it was declassified "in light of the significant public interest" in the matter and noted that the memorandum "reflects the judgments of its congressional authors." On February 24, 2018, HPSCI's Democratic Members released a redacted memorandum authored by Adam Schiff, ranking member of HPSCI, to "correct the record" following release of the Nunes Memorandum (hereafter "the Schiff Memorandum"). In light of the declassification of the Nunes Memorandum and subsequent publication of the Schiff Memorandum, the Department officially acknowledged the existence of FISA applications related to Carter Page after his separation from the Trump campaign. Findlay Decl. ¶¶ 7-8.

4. Other than the declassification of portions of these Carter Page materials, Department has not official confirmed or denied the existence of any other FISA material related to the Trump campaign or the investigation of Russian election interference. Findlay Decl. ¶¶ 9, 19.

5. With respect to the portion of the request related to Carter Page, NSD searched the locations likely to contain responsive records and reasonably determined that there are no responsive records. Findlay Decl. ¶¶ 13-15.

6. Specifically, FOIA staff consulted with knowledgeable subject matter experts in the Office of Intelligence. Those experts confirmed that, as is typical in proceedings before the FISC, no hearings were held with respect to the acknowledged Carter Page FISA applications, and thus no responsive transcripts exist. *Id.* ¶ 14.

7. Patrick Findlay is an original classification authority. *Id.* ¶ 2.

8. With respect to the portion of the request related to Michael Flynn, Mr. Findlay determined that the existence or nonexistence of responsive records is a currently and properly classified fact and therefore properly withheld under Exemption One. Findlay Decl. ¶¶ 16-33.

9. Mr. Findlay determined that the information withheld pursuant to Exemption 1 is under control of the United States Government, and contains information pertaining to intelligence activities, sources or methods. *See* Executive Order 13526 §§ 1.4(c); Findlay Decl. ¶¶ 26-28.

10. Mr. Findlay determined that disclosure of the existence or non-existence of responsive records with respect to this portion of the request would cause harm to national security, and has articulated the harm that could be expected to occur. Findlay Decl. ¶¶ 28-32.

11. No authorized Executive Branch official has disclosed the information withheld in this matter. *Id.* ¶¶ 9, 11, 19

Dated: August 30, 2018

Respectfully Submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	)	Case No. 18-CV-01050-ABJ

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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Table of Contents

Table of Authorities

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION

Using the Freedom of Information Act, Plaintiff seeks information about certain types of surveillance activity allegedly related to an ongoing investigation. More specifically, they seek transcripts of hearings before the Foreign Intelligence Surveillance Court ("FISC") related to alleged surveillance of two specific individuals: Carter Page or Michael Flynn. The Department of Justice ("DOJ") National Security Division ("NSD") confirmed that there are no records related to Carter Page subject to the Freedom of Information Act ("FOIA"). Otherwise, NSD properly refused to confirm or deny the existence of responsive records, and no authorized Executive Branch official has disclosed the specific information at issue – namely, the existence or non-existence of FISC transcripts (or applications) related to Michael Flynn.

The partial "no records" response is proper. The Government's supporting declarations establish that the FISC typically considers FISA warrant applications based on written submissions and may decide matters without holding a hearing. In light of recent public disclosures about Carter Page, NSD confirms that it has conducted a reasonable search and that no such hearings were held with respect to the acknowledged FISA applications. Accordingly, no responsive hearing transcripts exist, and the partial "no records" response was proper.

With respect to Michael Flynn, the Glomar response, in which DOJ does not confirm or deny the existence of responsive transcripts, is proper. Providing a substantive response as to whether or not responsive hearing transcripts exist would reveal classified information protected by FOIA Exemption 1, including whether or not the Government sought a FISA warrant for Michael Flynn. NSD's declaration establishes that this information is currently and properly classified, and its disclosure would cause harm to national security. The Court should defer to Defendant's determination in this regard and grant the Government summary judgment.

BACKGROUND

Administrative Background.

This matter arises from a FOIA request submitted to the Department of Justice for "transcripts of hearings before the Foreign Intelligence Surveillance Court regarding applications for or renewals of Foreign Intelligence Surveillance Act ("FISA") warrants relating to Carter Page and/or Michael Flynn." *See* Declaration of Patrick Findlay, attached hereto, ¶ 4 & Ex. A. The request is dated February 16, 2018, and was received by DOJ on February 26, 2018. *Id*. The Mail Referral Unit referred it to NSD.[1] Findlay Decl. ¶ 5.

By letter dated June 18, 2018, NSD described its operational files and responded that "with respect to your request relating to Michael Flynn, we can neither confirm nor deny the existence of records in these files responsive to your request." Findlay Decl. ¶ 6 & Ex. B. NSD further determined that "based on declassification decisions . . . we are able to respond to your request relating to Carter Page," and confirmed that NSD found no records responsive to the request. *Id*.

On May 3, 2018, before NSD had made a final determination on the FOIA request, Plaintiff filed a Complaint, seeking production of documents, fees and costs. Compl., Dkt. No. 1.

[1] Rather than being directed to any particular component, the request was sent to the Department Mail Referral Unit. *See* Findlay Decl. ¶ 4; *see generally* 28 C.F.R. §16.3(a)(1), (2); DOJ FOIA Reference Guide, Pt. III: Where to Make a FOIA Request (Jan. 30, 2017), available at https://www.justice.gov/oip/department-justice-freedom-information-act-reference-guide#where (permitting submission of requests to the Mail Referral Unit "[i]f you believe that DOJ maintains the records you are seeking, but you are uncertain about which component has the records"). The regulations advise that "[a] request will receive the quickest possible response if it is addressed to the FOIA office of the component that maintains the records sought." 28 C.F.R. §16.3(a)(1).

Russia Investigation and FISA Applications Related to Carter Page

Plaintiff's FOIA request arises in a factual context in which there is an ongoing, acknowledged official investigation related to the Trump campaign. Specifically, the FBI has acknowledged a counterintelligence investigation of "the Russian government's efforts to interfere in the 2016 presidential election[, including] the nature of any links between individuals associated with the Trump campaign and the Russian government and whether there was any coordination between the campaign and Russia's efforts [and] an assessment of whether any crimes were committed." *See* Transcript of the House Permanent Select Committee on Intelligence Hearing on Russian Interference in the 2016 U.S. Election, March 20, 2017, https://www.washingtonpost.com/news/post-politics/wp/2017/03/20/full-transcript-fbi-director-james-comey-testifies-on-russian-interference-in-2016-election/?utm_term=.b9f19a0cf9cf (last accessed 8/27/2018). That investigation is now under the direction of Special Counsel Robert Mueller. *See* Office of the Dep. Att'y General, Order No. 3915-2017, Appointment of Special Counsel to Investigate Russian Interference with the 2016 Presidential Election and Related Matters (May 17, 2017), https://www.justice.gov/opa/press-release/file/967231/download. Multiple guilty pleas have resulted from that investigation, including that of Michael Flynn. *See generally U.S. v. Flynn*, Case No. 1:17-cr-00232-RC (D.D.C.).

On February 2, 2018, Congress released a memorandum, hereinafter referred to as the "Nunes Memorandum." The President declassified the Congressional memorandum, which included references to the existence of FISA applications and orders related to Carter Page. Findlay Decl. ¶ 7. A letter from White House counsel clarified that it was declassified "in light of the significant public interest" in the matter and noted that the memorandum "reflects the judgments of its congressional authors." On February 24, 2018, HPSCI's Democratic Members

released a redacted memorandum authored by Adam Schiff, ranking member of HPSCI, to "correct the record" following release of the Nunes Memorandum (hereafter "the Schiff Memorandum"). *Id*. In light of the declassification of the Nunes Memorandum and subsequent publication of the Schiff Memorandum, the Department officially acknowledged the existence of FISA applications and orders related to Carter Page after his separation from the Trump campaign.[2] *Id*. ¶¶ 8-9. Other than the declassification of portions of these Carter Page materials, DOJ has not official confirmed or denied the existence of any other FISA applications and orders related to other individuals in connection with the investigation of Russian election interference.

ARGUMENT

I. Statutory Standards.

A. The Freedom of Information Act

The "basic purpose" of FOIA reflects a "general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (citation omitted). "Congress recognized, however, that public disclosure is not always in the public interest . . . ." *CIA v. Sims*, 471 U.S. 159, 166–67 (1985). Accordingly, in passing FOIA, "Congress sought 'to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy.'" *John Doe Agency*, 493 U.S. at 152 (quoting H.R. Rep. No. 89-1497, at 6 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2423). As the D.C. Circuit has recognized, "FOIA represents a balance struck by Congress between the public's right to know and the [G]overnment's legitimate

[2] Those applications and orders have since been processed and released by the Department in response to several pending FOIA requests.

interest in keeping certain information confidential." *Ctr. for Nat'l Sec. Studies v. Dep't of Justice*, 331 F.3d 918, 925 (D.C. Cir. 2003) (citing *John Doe Agency*, 493 U.S. at 152).

FOIA mandates disclosure of government records unless the requested information falls within one of nine enumerated exemptions. *See* 5 U.S.C. § 552(b). "A district court only has jurisdiction to compel an agency to disclose improperly withheld agency records," *i.e.* records that do "not fall within an exemption." *Minier v. CIA*, 88 F.3d 796, 803 (9th Cir. 1996); *see also* 5 U.S.C. § 552(a)(4)(B) (providing the district court with jurisdiction only "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant"); *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980) ("Under 5 U.S.C. § 552(a)(4)(B)[,] federal jurisdiction is dependent upon a showing that an agency has (1) 'improperly'; (2) 'withheld'; (3) 'agency records.'"). While narrowly construed, FOIA's statutory exemptions "are intended to have meaningful reach and application." *John Doe Agency*, 493 U.S. at 152; *accord DiBacco v.U.S. Army*, 795 F.3d 178, 183 (D.C. Cir. 2015).

The courts resolve most FOIA actions on summary judgment. *See Judicial Watch, Inc. v. Dep't of the Navy*, 25 F. Supp. 3d 131, 136 (D.D.C. 2014). The Government bears the burden of proving that the withheld information falls within the exemptions it invokes. *See* 5 U.S.C. § 552(a)(4)(B); *King v. Dep't of Justice*, 830 F.2d 210, 217 (D.C. Cir. 1987). A court may grant summary judgment to the Government based entirely on an agency's declarations, provided they articulate "the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981); *accord Gov't Accountability Project v.*

Food & Drug Admin., 206 F. Supp. 3d 420, 430 (D.D.C. 2016). Such declarations are accorded "a presumption of good faith, which cannot be rebutted by purely speculative claims[.]" *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991).

B. Special Considerations in National Security Cases

The issues presented in this case directly "implicat[e] national security, a uniquely executive purview." *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 926–27. While courts review *de novo* an agency's withholding of information pursuant to a FOIA request, "*de novo* review in FOIA cases is not everywhere alike . . . ." *Ass'n of Retired R.R. Workers, Inc. v. U.S. R.R. Ret. Bd.*, 830 F.2d 331, 336 (D.C. Cir. 1987). Indeed, the courts have specifically recognized the "propriety of deference to the executive in the context of FOIA claims which implicate national security." *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 927; *see Ray v. Turner*, 587 F.2d 1187, 1194 (D.C. Cir. 1978) ("[T]he executive ha[s] unique insights into what adverse [e]ffects might occur as a result of public disclosure of a particular classified record."). "[A]ccordingly, the government's 'arguments needs only be both "plausible" and "logical" to justify the invocation of a FOIA exemption in the national security context.'" *Unrow Human Rights Litig. Clinic v. Dep't of State*, 134 F. Supp. 3d 263, 272 (D.D.C. 2015) (quoting *ACLU v. Dep't of Def.*, 628 F.3d 612, 624 (D.C. Cir. 2011)).

For these reasons, the courts have "consistently deferred to executive affidavits predicting harm to the national security, and have found it unwise to undertake searching judicial review." *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 927; *see Larson v. Dep't of State*, 565 F.3d 857, 865 (D.C. Cir. 2009) (citation omitted) ("Today we reaffirm our deferential posture in FOIA cases regarding the 'uniquely executive purview' of national security."); *accord Unrow Human Rights Impact Litig. Clinic*, 134 F. Supp. 3d at 272. Consequently, a reviewing court must afford

"substantial weight" to agency declarations "in the national security context." *King*, 830 F.2d at 217; *see Fitzgibbon v. CIA*, 911 F.2d 755, 766 (D.C. Cir. 1990) (holding that the district court erred in "perform[ing] its own calculus as to whether or not harm to the national security or to intelligence sources and methods would result from disclosure . . . ."); *Frugone v. CIA*, 169 F.3d 772, 775 (D.C. Cir. 1999) (because "courts have little expertise in either international diplomacy or counterintelligence operations, we are in no position to dismiss the CIA's facially reasonable concerns" about the harm that disclosure could cause to national security). FOIA "bars the courts from prying loose from the government even the smallest bit of information that is properly classified or would disclose intelligence sources or methods." *Afshar v. Dep't of State*, 702 F.2d 1125, 1130 (D.C. Cir. 1983).

C. The Glomar Response.

A Glomar response allows the Government to "refuse to confirm or deny the existence of records where to answer the FOIA inquiry would cause harm cognizable under an FOIA exception." *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007) (quoting *Gardels v. CIA*, 689 F.2d 1100, 1103 (D.C. Cir. 1982)); *accord Wilner v. NSA*, 592 F.3d 60, 68 (2d Cir. 2009) ("The Glomar doctrine is well settled as a proper response to a FOIA request because it is the only way in which an agency may assert that a particular FOIA statutory exemption covers the 'existence or non-existence of the requested records[.]'" (quoting *Phillippi v. CIA*, 546 F.2d 1009, 1012 (D.C. Cir. 1976)). In support of a Glomar response, the asserting agency "must explain why it can neither confirm nor deny the existence of responsive records." *James Madison Project v. Dep't of Justice*, 208 F. Supp. 3d 265, 283 (D.D.C. 2016) (quoting *Parker v. EOUSA*, 852 F. Supp. 2d 1, 10 (D.D.C. 2012)). The agency can satisfy this obligation by providing "public affidavit[s] explaining in as much detail as is possible the basis for its claim that it can be

required neither to confirm nor to deny the existence of the requested records." *Phillippi*, 546 F.2d at 1013.

The courts in this Circuit have consistently upheld Glomar responses where, as here, confirming or denying the existence of records would reveal classified information protected by FOIA Exemption 1. *See, e.g.*, *Frugone*, 169 F.3d at 774–75 (finding that CIA properly refused to confirm or deny the existence of records concerning the plaintiff's alleged employment relationship with CIA pursuant to Exemptions 1 and 3); *Larson*, 565 F.3d at 861–62 (upholding the National Security Agency's use of the Glomar response to the plaintiffs' FOIA requests regarding past violence in Guatemala pursuant to Exemptions 1 and 3); *Wheeler v. CIA*, 271 F. Supp. 2d 132, 140 (D.D.C. 2003) (ruling that CIA properly invoked a Glomar response to a request for records concerning the plaintiff's activities as a journalist in Cuba during the 1960s pursuant to Exemption 1).

II. NSD Conducted a Reasonable Search and Properly Made a Partial No-Records Response With Respect to FISC Transcripts Related to Carter Page.

An agency is entitled to summary judgment in a FOIA case with respect to the adequacy of its search if it shows "'that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.'" *Clemente v. FBI*, 867 F.3d 111, 117 (D.C. Cir. 2017) (quoting *Oglesby v. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)); *DiBacco*, 795 F.3d at 188. "[T]he issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the *search* for those documents was *adequate*." *Weisberg v. DOJ*, 745 F.2d 1476, 1485 (D.C. Cir. 1984) (emphasis in original). The search is thus gauged "not by the fruits of the search, but by the appropriateness of the methods used to carry out the search." *Ancient*

Coin Collectors Guild v. Dep't of State, 641 F.3d 504, 514 (D.C. Cir. 2011) (quoting *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003)).

In short, "[a] search need not be perfect, only adequate, and adequacy is measured by the reasonableness of the effort in light of the specific request." *DiBacco*, 795 F.3d at 194-95 (quoting *Meeropol v. Meese*, 790 F.2d 942, 956 (D.C. Cir. 1986)). An agency can establish the reasonableness of its search by "reasonably detailed, nonconclusory affidavits describing its efforts." *Baker & Hostetler LLP v. Dep't of Commerce*, 473 F.3d 312, 318 (D.C. Cir. 2006). Such affidavits are sufficient if they "set[] forth the search terms and the type of search performed, and aver[] that all files likely to contain responsive materials (if such records exist) were searched." *Chambers v. Dep't of Interior*, 568 F.3d 998, 1003 (D.C. Cir. 2009) (quoting *McCready v. Nicholson*, 465 F.3d 1, 14 (D.C. Cir. 2006)). This standard is not demanding. "[I]n the absence of countervailing evidence or apparent inconsistency of proof, affidavits that explain in reasonable detail the scope and method of the search conducted by the agency will suffice . . . . " *Perry v. Block*, 684 F.2d 121, 127 (D.C. Cir. 1982). "Agency affidavits are accorded a presumption of good faith, which cannot be rebutted by 'purely speculative claims about the existence and discoverability of other documents.'" *SafeCard Servs., Inc.*, 926 F.2d at 1200 (citation omitted); *see also Wilbur v. CIA*, 355 F.3d 675, 678 (D.C. Cir. 2004) ("[M]ere speculation that as yet uncovered documents might exist[] does not undermine the determination that the agency conducted an adequate search for the requested records.").

The Findlay Declaration demonstrates that NSD has conducted a reasonable search for records responsive to Plaintiff's FOIA request insofar as it relates to the acknowledged Carter Page FISA applications. As the declaration explained, the Office of Intelligence within NSD is the office in DOJ responsible for representing the Government before the FISC. Findlay Decl. ¶

13. Accordingly, NSD FOIA consulted with the Office of Intelligence, whose subject matter experts are familiar with these types of records generally and specifically familiar with the proceedings related to Carter Page. *Id*. ¶¶ 13-14. Those supervisors reviewed their records and confirmed that, as is typical in proceedings before the FISC, no hearings were held with respect to the acknowledged Carter Page FISA applications, and thus no responsive transcripts exist. *Id*. ¶14.[3] The Findlay Declaration thus confirms that NSD searched the only location reasonably likely to contain responsive records and confirmed that none exist. *Id*. ¶15. This strategy – identifying the personnel responsible for the requested FISC information, and asking them to search their records – is a "method[] which can be reasonably expected to produce the information requested." *Oglesby*, 920 F.2d at 68. Therefore, DOJ is entitled to summary judgment on this issue.

III. NSD Properly Refused to Confirm or Deny the Existence of Other Responsive Records Related to Michael Flynn Pursuant to Exemption One.

FOIA Exemption 1 exempts from disclosure information that is "specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy" and "are in fact properly classified pursuant to such Executive Order." 5 U.S.C. § 552(b)(1). Under Executive Order No. 13,526, an agency may withhold information that an official with original classification authority has determined to be classified because its "unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security[.]" Exec. Order No. 13,526 § 1.4, 75 Fed. Reg. 707, 709 (Dec. 29, 2009). The information must also "pertain[] to" one of the categories of information specified in the Executive Order, including "intelligence activities (including covert action), intelligence

[3] The FISC Rules of Procedure, as well as an explanatory letter to Congress, are available on the FISC website. *See* http://www.fisc.uscourts.gov/about-foreign-intelligence-surveillance-court; Findlay Decl. ¶ 14.

sources or methods." Exec. Order No. 13,526 §§ 1.4(c); *see also Judicial Watch, Inc. v. DOD*, 715 F.3d 937, 941 (D.C. Cir. 2013) (citation omitted) ("'[P]ertains' is 'not a very demanding verb.'"). As discussed above, a court "accord[s] substantial weight to an agency's affidavit concerning the details of the classified status of the disputed records because the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse [e]ffects might occur as a result of a particular classified record." *Larson*, 565 F.3d at 864 (citation omitted).

Defendant invoked the Glomar response in order to safeguard currently and properly classified information involving categories of information set forth in Section 1.4 of Executive Order 13,526. *See* Findlay Decl. at ¶¶ 16-33. First, the existence or non-existence of responsive records implicates "intelligence activities (including covert action), intelligence sources or methods, or cryptology." Exec. Order 13,526 §1.4(c). The supporting declaration establishes that disclosing whether or not the defendant agencies possessed responsive records related to Michael Flynn would disclose intelligence activities, sources, and methods, including the existence or non-existence of a particular type of intelligence operations regarding a particular target. Findlay Decl. ¶¶ 28-29. Surveillance authorized by the FISC under any of its authorities is itself an intelligence method, and thus its use in any particular matter thus "pertains to" an intelligence source or method. *Cf. Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401-07 (2013) (describing FISA authorities).

The Findlay Declaration further demonstrates that confirming whether or not Defendants possessed responsive records reasonably could be expected to cause damage to the national security of the United States by disclosing the existence or non-existence of intelligence sources and methods. *See* Findlay Decl. ¶¶ 28-32. As explained in the Findlay Declaration, if FISC

transcripts related to Michael Flynn did exist, disclosure of that information would suggest that he may have been the target of a particular type of intelligence operation, or at a minimum, that the U.S. Government believed it had sufficient information to target him based on then-existing intelligence that met the standards for a FISA warrant. *Id.* ¶ 28. If FISC transcripts related to Michael Flynn did not exist, disclosure of that information could suggest that the U.S. Government lacked sufficient information or interest to target him using that particular method. *Id.*

Findlay further explains that acknowledging the existence or non-existence of records responsive to this portion of Plaintiff's request "would be tantamount to confirming whether or not the Department was pursuing particular intelligence operations against a particular target" and reveal "otherwise non-public information regarding the nature and scope of the Department's supervision of intelligence interests, priorities, activities, and methods—information that is desired by hostile actors who seek to thwart the Department's supervision of intelligence-gathering missions." Findlay Decl. ¶ 31. This is valuable information to adversaries seeking to thwart U.S. intelligence collection. "Once an intelligence activity – or the fact of its use or non-use in a certain situation – is discovered, its continued successful use is seriously jeopardized." *Id.* ¶ 29. Moreover, U.S. adversaries review publicly available information to deduce intelligence methods, catalogue information, and take countermeasures; accordingly the U.S. Government must take to prevent even indirect references to sensitive sources and methods to preserve their utility and effectiveness. *See id.* ¶¶ 30-31.

NSD reasonably concluded that to confirm or deny the existence of responsive records (to the portion of plaintiff's FOIA request seeking transcripts of hearings before the FISC pertaining to Michael Flynn) "could risk compromising intelligence activities, methods, or

sources, and thus would pose at least a serious risk to the national security." Findlay Decl. ¶ 32. As discussed *supra*, this declaration is entitled to substantial weight.

The Government routinely makes Glomar responses to similar requests for information about particular surveillance subjects, and courts routinely uphold such responses. *See, e.g.*, *Marrera v. DOJ*, 622 F. Supp. 51, 53–54 (D.D.C. 1985) ("[T]his Court finds that OIPR's refusal to confirm or deny the existence of FISA records pertaining to this particular plaintiff to be justified in the interests of national security as part of an overall policy of [the Executive Order] with respect to *all* FISA FOIA requests."); *Schwarz v. Dep't of Treasury*, 131 F. Supp. 2d 142, 149 (D.D.C. 2000) ("The Office properly refused to confirm or deny that it had any responsive records maintained under the Foreign Intelligence Surveillance Act of 1978 (FISA) and in non-FISA files relating to various intelligence techniques."), *aff'd*, No. 00-5453, 2001 WL 674636 (D.C. Cir. May 10, 2001); *Competitive Enter. Inst. v. NSA*, 78 F. Supp. 3d 45, 60 (D.D.C. 2015) (upholding NSA Glomar response to request for metadata records with respect to two particular individuals); *Agility Pub. Warehousing Co. K.S.C. v. NSA*, 113 F. Supp. 3d 313, 329 (D.D.C. 2015) (upholding NSA Glomar in response to request for particular surveillance records); s*ee also Carter v. NSA*, No. 1:12-CV-00968-CKK, 2014 WL 2178708, at *1 (D.C. Cir. Apr. 23, 2014) (upholding Glomar response to request for records related to alleged NSA surveillance of plaintiff); *Moore v. Obama*, No. 09-5072, 2009 WL 2762827, at *1 (D.C. Cir. Aug. 24, 2009) (same); *Wilner*, 592 F.3d at 65 ("Glomar responses are available, when appropriate, to agencies when responding to FOIA requests for information obtained under a 'publicly acknowledged' intelligence program, such as the [Terrorist Surveillance Program], at least when the existence of such information has not already been publicly disclosed.").

Accordingly, the partial Glomar response was proper pursuant to Exemption One.

IV. The Government Has Not Waived Exemption One By Official Acknowledgment.

As a general matter, under FOIA, "when an agency has officially acknowledged otherwise exempt information through prior disclosure, the agency has waived its right to claim an exemption with respect to that information." *ACLU v. CIA*, 710 F.3d 422, 426 (D.C. Cir. 2013). This "official acknowledgement" principle applies to the Glomar context, so a requester "can overcome a Glomar response by showing that the agency has already disclosed the fact of the existence (or non-existence) of responsive records, since that is the purportedly exempt information that a Glomar response is designed to protect." *Id.* at 427. But the plaintiff "must bear the initial burden of pointing to specific information in the public domain that appears to duplicate that being withheld." *Id.* (quoting *Wolf*, 473 F.3d at 378).

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

disclosure that plaintiff had "'created a problem' in U.S.-Iranian relations" was too general to justify releasing documents detailing the nature of that problem).

"Second, the information requested must match the information previously disclosed." *Wolf*, 473 F.3d at 378 (quoting *Fitzgibbon*, 911 F.2d at 765). If there are "substantive differences" between the two, an official-acknowledgment claim must fail. *ACLU v. DOD*, 628 F.3d at 621. That is true even if the previous disclosures are on the same topic. *See, e.g.*, *Competitive Enter. Inst.*, 78 F. Supp. 3d at 57 (a Presidential statement that "the intelligence community . . . is looking at phone numbers and durations of calls," was not adequately congruent with a request seeking the companies that had provided that data to U.S. intelligence agencies); *Wolf*, 473 F.3d at 379 (holding that CIA could not claim Glomar protection when it had previously read excerpts from materials sought into the record during congressional hearing).

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

Plaintiff cannot meet its burden of pointing to an official disclosure of the information they seek. The Findlay Declaration establishes that no authorized government official has disclosed the precise information withheld. *See* Findlay Decl. ¶¶ 9, 11, 19. Neither the Complaint nor the request point to any statements that could constitute official acknowledgment, and nothing in Michael Flynn's guilty plea and associated documents confirms or denies the existence of FISA applications. Accordingly, Plaintiff cannot establish official acknowledgment.

CONCLUSION

For the foregoing reasons, the Court should grant the Government's motion for summary judgment.

Dated: August 30, 2018

Respectfully Submitted,

CHAD A. READLER
Acting Assistant Attorney General

ELIZABETH J. SHAPIRO
Deputy Director, Federal Programs Branch

/s/Amy E. Powell
AMY E. POWELL
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Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	Case No. 18-CV-01050-ABJ
UNITED STATES DEPARTMENT OF JUSTICE,	)	
	)	
Defendant.	)	

[PROPOSED] ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Having considered the submissions of the parties, the Court hereby ORDERS that the Defendant's Motion for Summary Judgment is GRANTED.

_____
U.S. DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC., Plaintiff v. U.S. DEPARTMENT OF JUSTICE, Defendant	Civil Action No. 18-cv-1050

DECLARATION OF PATRICK N. FINDLAY

I, Patrick N. Findlay, do hereby state and declare as follows:

1. I am the Acting Chief and Special Counsel of the Office of Strategy Management and Development ("OSMD") of the National Security Division ("NSD" or "the Division") of the United States Department of Justice ("DOJ" or "the Department"). NSD is a component of the Department. *See* 72 FR 10064. I have served as the Acting Chief since July 2018, and as a Special Counsel in OSMD since June 2016. Prior to my positions with NSD, I served as an Associate General Counsel for the Federal Bureau of Investigation from July 2012 until June 2016.

2. Among other responsibilities, in my capacity as the Acting Chief of OSMD, I serve as the Acting Director of the Freedom of Information Act and Declassification Unit ("NSD FOIA"), which is responsible for responding to requests for access to NSD records and information pursuant to the *Freedom of Information Act* ("FOIA"), *codified at* 5 U.S.C. § 552, and the *Privacy Act of 1974*, as well as processing the NSD records which are responsive to FOIA requests received by other Executive Branch agencies. As Acting Director of NSD FOIA, I have been delegated authority from the Attorney General as an

Original Classification Authority ("OCA"). Through the exercise of my official duties, I have become familiar with this action and the underlying FOIA request at issue. The statements contained herein are based upon my personal knowledge of the subject of plaintiff's FOIA request, as well as information provided to me in the course of my official duties. In particular, I have consulted with NSD's Office of Intelligence (OI) regarding plaintiff's FOIA request.

3. I submit this declaration in support of the Department's Motion for Summary Judgment in this proceeding.

Plaintiff's FOIA Request

4. In its initial FOIA request addressed to the FOIA/PA Mail Referral Unit (MRU), dated February 16, 2018, plaintiff requested "[a]ny and all transcripts of hearings before the Foreign Intelligence Surveillance Court [FISC] regarding applications for or renewals of Foreign Intelligence Surveillance Act [FISA] warrants relating to Carter Page and/or Michael Flynn." A copy of plaintiff's FOIA request, dated February 16, 2018, is attached hereto as Exhibit A.

5. On June 1, 2018, NSD FOIA received plaintiff's FOIA request as a referral from MRU. NSD FOIA subsequently assigned plaintiff's FOIA request administrative tracking number FOIA/PA 18-221.

6. By letter dated June 18, 2018, NSD FOIA issued its final response to plaintiff's FOIA request, informing plaintiff that "based on declassification decisions made by the President and the Intelligence Community… [NSD FOIA was] able to respond to [plaintiff's] request relating to Carter Page." NSD FOIA's search "did not identify any records responsive to [plaintiff's] request." Additionally, NSD FOIA informed plaintiff that "with respect to [plaintiff's] request relating to Michael Flynn, [NSD] can neither confirm nor deny the existence of records in these files responsive to [plaintiff's] request pursuant to

FOIA Exemption 1, 5 U.S.C. 552(b)(1)." A copy of NSD FOIA's final response letter, dated June 18, 2018, is attached hereto as Exhibit B.

Declassification Decisions

7. The United States House of Representatives Permanent Select Committee on Intelligence (HPSCI) Majority Staff's memorandum entitled "Foreign Intelligence Surveillance Act Abuses at the Department of Justice and the Federal Bureau of Investigation," dated January 18, 2018, ("Majority Memo") included information classified at the time it was written, including that DOJ and the FBI had sought and obtained authority pursuant to FISA to conduct surveillance of Carter Page. In a letter dated February 2, 2018, the Counsel to the President noted that President Trump declassified the Majority Memo.[1] The declassification of the Majority Memo and the subsequent release of the HPSCI Minority's January 29, 2018, memorandum entitled "Correcting the Record – The Russia Investigation,"[2] prompted the Department to review the Page FISA records for potential release of segregable information in response to FOIA requests seeking these materials.

8. On July 20, 2018, in response to several FOIA requests (that are distinct from plaintiff's instant FOIA request), the Department released in part, pursuant to the FOIA, 412 pages of FISA applications and orders related to Carter Page.

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[1] *See* Letter from Donald F. McGahn II, Counsel to the President, to the Honorable Devin Nunes, Chairman of the House Permanent Select Committee on Intelligence (February 9, 2018), *available at* https://intelligence.house.gov/uploadedfiles/memo_and_white_house_letter.pdf (visited August 30, 2018).

[2] *See* Correcting the Record – The Russia Investigation from the House Permanent Select Committee on Intelligence Minority, to All Members of the House of Representatives (January 29, 2018), *available at* https://intelligence.house.gov/uploadedfiles/hpsci_redacted_minority_memo.pdf (visited August 30, 2018).

9. NSD has concluded that as a result of prior declassification decisions made by the President acknowledging the existence of FISA applications and orders regarding Carter Page, a Glomar response regarding transcripts of hearings before the FISC pertaining to Carter Page was no longer appropriate, and thus by letter dated June 18, 2018, NSD FOIA informed plaintiff that it did not possess any such records. However, other than these extraordinary public acknowledgements concerning the FISA applications and orders regarding Carter Page, the Executive Branch has not publicly confirmed or denied the existence of FISA applications regarding other individuals, such as Michael Flynn. Accordingly, as to the existence of any transcripts of hearings before the FISC relating to Michael Flynn, if any, NSD asserts a Glomar response based on FOIA Exemption 1.

NSD Response to Plaintiff's FOIA Request

10. In cases such as this, where a Glomar response is warranted and appropriate, NSD does not conduct a search for the requested records. Conducting a search for these records is unnecessary because NSD's response to the requester is not dependent on the results of a search. Rather, regardless of the results of a records search, the existence or nonexistence of the requested records will neither be confirmed nor denied, because to do either would tend to reveal information properly protected from disclosure by Exemption 1.

11. Accordingly, as to the question of whether FISC transcripts do or do not exist relating to Michael Flynn, NSD will neither confirm nor deny the existence or non-existence of such materials. Thus, NSD is maintaining its Glomar response in this regard, and has not conducted a search for responsive records with regard to Michael Flynn.

12. Because the existence of FISA warrant applications and orders targeting Carter Page has been officially and publicly disclosed, however, NSD conducted a search for records responsive to the portion of plaintiff's request seeking transcripts of hearings before the FISC relating to Carter Page.

NSD Search for Records Responsive to Plaintiff's Request

13. The Office of Intelligence (OI) would be the NSD component most likely to maintain records responsive to plaintiff's FOIA request concerning transcripts of hearings before the FISC relating to Carter Page. OI handles NSD's intelligence operations, including representing the government before the FISC, and had specific knowledge of the FISC proceedings related to Carter Page. If responsive transcripts existed within NSD, one would expect them to be located in OI's files. Accordingly, NSD FOIA coordinated with OI regarding plaintiff's FOIA request and sent plaintiff's FOIA request to OI for their review.

14. NSD FOIA consulted OI – whose subject-matter experts were familiar with the relevant subject of plaintiff's FOIA request – to identify and locate records responsive to plaintiff's FOIA request concerning transcripts of hearings before the FISC relating to Carter Page. OI determined, based on familiarity with the types of records at issue in this matter and specific familiarity with the Carter Page matter in particular, that there were no records, electronic or paper, responsive to plaintiff's FOIA request with regard to Carter Page. OI further confirmed that the FISC considered the Page warrant applications based upon written submissions and did not hold any hearings. The FISC typically considers FISA warrant applications based on written submissions and may decide matters without holding a hearing.[3] Accordingly, no responsive transcripts pertaining to Carter Page exist.

15. No other component or records repositories within the Division would likely maintain records responsive to plaintiff's request seeking transcripts of hearings before the FISC pertaining to Carter Page. Accordingly, NSD searched the only location likely to

[3] *See* Letter from the Honorable Reggie B. Walton, Presiding Judge of the United States Foreign Intelligence Surveillance Court, to the Honorable Patrick J. Leahy, Chairman of the Committee on the Judiciary (July 29, 2013), *available at* http://www.fisc.uscourts.gov/sites/default/files/Leahy.pdf (visited August 30, 2018).

contain responsive records and determined that no responsive records exist with respect to this portion of the request.

NSD Glomar Response

16. NSD relies on a Glomar response in instances in which simply acknowledging the existence or nonexistence of responsive records would result in a harm protected against by one or more FOIA exemptions. To be credible and effective, NSD must use a Glomar response in all similar cases, regardless of whether responsive records actually exist. If NSD were to invoke a Glomar response only when it actually possessed responsive records, the Glomar response would be interpreted as an admission that responsive records exist.

17. NSD has determined that merely acknowledging the existence or non-existence of records responsive to plaintiff's FOIA request other than those pertaining to Carter Page could reasonably be expected to trigger harm under FOIA Exemption 1.

18. NSD's determination that a Glomar response is necessary here flows from the subject matter of plaintiff's FOIA request and the context in which the request was made.

19. Aside from the Department's public acknowledgment of the warrant applications to the FISC seeking to surveil Carter Page, there have been no such similar acknowledgments of any other aspects covered by plaintiff's FOIA request. Assuming for purposes of explanation that such surveillance applications existed, they would fall within the purview of FISA operational files, the existence of which are classified in the interests of national security pursuant to 13526 §§ 1.4(c)-(d). Similarly, disclosing whether or not NSD sought authority for intelligence collection concerning particular topics would, by itself, risk revelation of intelligence sources and methods.

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

U.S.C. § 552(b)(1). Executive Order 13526 currently governs classification and provides for the protection of intelligence activities, sources, and methods, among other things. *See* 13526 § 1.4(c).

21. The records that plaintiff seeks, if they exist, would be part of applications for intelligence collection overseen by NSD. The existence of such operations is properly classified under E.O. 13526 § 1.4(c). Thus, NSD must refuse to confirm or deny whether or not responsive records exist here, subject to the exceptions discussed herein resulting from official, public disclosures.

22. E.O. 13526 establishes four substantive requirements for classification: (1) that an OCA classifies the information; (2) that the United States Government owns, produces, or controls the information; (3) that the information is within one of eight protected categories listed in section 1.4 of the Order; and (4) that the OCA determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to U.S. national security, and identifies or describes that damage. *Id.* at § 1.1(a).

23. The categories of information listed in section 1.4 include information that "pertains to intelligence activities (including covert action), intelligence sources or methods, or cryptology." *Id.* § 1.4(c).

24. E.O. 13526 further provides that "[a]n agency may refuse to confirm or deny the existence or nonexistence of requested records whenever the fact of their existence or nonexistence is itself classified under this order or its predecessors." *Id.* § 3.6(a).

25. As an OCA, I have determined that the existence or nonexistence of records responsive to the portions of plaintiff's FOIA request that are subject to NSD's Glomar response is a classified fact because any such acknowledgment would tend to confirm or disprove that the Department is seeking or sought authority for intelligence operations of particular targets or activities. *Cf. id.* § 1.1(a)(1).

26. Any records responsive to the portions of plaintiff's FOIA request subject to NSD's Glomar response, assuming they exist, would necessarily be held by NSD, and would therefore be "under the control of the United States Government." *Id.* § 1.1(a)(2).

27. The existence or nonexistence of such records "pertains to . . . intelligence activities… or intelligence sources or methods." *Id.* § 1.4(c). An intelligence activity or method includes any intelligence action or technique utilized by the Department against a targeted individual or organization that has been determined to be of national security interest, and includes any procedure (human or non-human) utilized to obtain information concerning such individual or organization.

28. If the Department sought authority for FISA-related intelligence collection regarding Michael Flynn, as specified in plaintiff's FOIA request, that piece of information would pertain to intelligence activities, sources, or methods. *See id.* at 1.4(c). Specifically, it would reveal an intelligence activity – *i.e.*, – the existence or non-existence of a particular type of intelligence operations regarding a particular target during the specified period. If FISC transcripts related to Michael Flynn did exist, disclosure of that information would suggest that he may have been the target of a particular type of intelligence operation, or at a minimum, that the U.S. Government believed it had sufficient information to target him based on then-existing intelligence that met the standards for a FISA warrant. If FISC transcripts related to Michael Flynn did not exist, disclosure of that information could suggest that the U.S. Government lacked sufficient information or interest to target him at that time.[4] Either disclosure would reveal sensitive information about the particular

[4] Alternatively, the nonexistence of records could suggest that no hearings were held, as the FISC typically considers FISA warrant applications based on written submissions and may decide matters without holding a hearing. However, as discussed above, NSD must use a Glomar response in all similar cases, regardless of whether responsive records actually exist in order for the Glomar response to be effective.

intelligence activities, sources, and methods of the U.S. Government with respect to a particular target.

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

30. The U.S. Government must do more than prevent explicit references to an intelligence activity, method, or source; it must also prevent indirect references to them. One vehicle for gathering information about the U.S. Government's capabilities is the review of officially-released information. Terrorist organizations and other hostile or foreign intelligence groups have the capacity and ability to gather information from myriad sources, analyze it, and deduce means and methods from disparate details to defeat the U.S. Government's collection efforts. Thus, even seemingly innocuous, indirect references to an intelligence activity, source, or method could have significant adverse effects when combined with other publicly-available data.

31. Here, acknowledging the existence or non-existence of records responsive to the portions of plaintiff's FOIA request that are subject to NSD's Glomar response would be tantamount to confirming whether or not the U.S. Government was pursuing particular intelligence operations against a particular target. This would reveal further sensitive information about the U.S. Government's capabilities or vulnerabilities by informing those with nefarious intent whether the U.S. Government has or has not discovered their actions, and by implication, whether the U.S. Government has or does not have the capability of

doing so. If it were revealed that the U.S. Government had discovered the nefarious actors' activities, these adversaries could then alter their methods to employ undiscovered tactics to avoid further discovery. Such an acknowledgement would reveal otherwise non-public information regarding the nature and scope of the Department's supervision of intelligence interests, priorities, activities, and methods—information that is desired by hostile actors who seek to thwart the Department's supervision of intelligence-gathering missions.

32. Accordingly, to confirm or deny that NSD possesses records responsive to the portion of plaintiff's FOIA request seeking transcripts of hearings before the FISC pertaining to Michael Flynn would risk compromising intelligence activities, methods, or sources, and thus, would pose at least a serious risk to the national security. *See id.* at § 1.2(2) (defining the SECRET level of classification as "information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security").

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

Conclusion

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

Executed this 30th day of August 2018, Washington, D.C.

PATRICK N. FINDLAY

EXHIBIT A

Judicial Watch®
Because no one is above the law!

February 16, 2018

VIA CERTIFIED MAIL

FOIA/PA Mail Referral Unit
Department of Justice
LOC Building, Room 115
Washington, DC 20530-0001

Re: Freedom of Information Act Request

Dear Freedom of Information Officer:

Judicial Watch, Inc. ("Judicial Watch") hereby requests that the Department of Justice ("DOJ") produce the following records pursuant to the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"):

> **Any and all transcripts of hearings before the Foreign Intelligence Surveillance Court regarding applications for or renewals of Foreign Intelligence Surveillance Act ("FISA") warrants relating to Carter Page and/or Michael Flynn.**

Please determine whether to comply with this request within the time period required by FOIA and notify us immediately of your determination, the reasons therefor, designee. 5 U.S.C. § 552(a)(6)(i). Please also produce all responsive records in an electronic format ("pdf" is preferred), if convenient. We also are willing to accept a "rolling production" of responsive records if it will facilitate a more timely production.

Judicial Watch also hereby requests a waiver of both search and duplication fees. We are entitled to a waiver of search fees because we are a "representative of the news media." *See* 5 U.S.C. § 552(a)(4)(A)(ii)(II); *see also Cause of Action v. Federal Trade Comm.*, 799 F.3d 1108 (D.C. Cir. 2015); *Nat'l Sec. Archive v. U.S. Dep't of Defense*, 880 F.2d 1381 (D.C. Cir. 1989). For more than twenty years, Judicial Watch has used FOIA and other investigative tools to gather information about the operations and activities of government, a subject of undisputed public interest. We submit over 400 FOIA requests annually. Our personnel, which includes experienced journalists and professional writers on staff and under contract, use their editorial skills to turn this raw information into distinct works that are disseminated to the public via our monthly newsletter, which has a circulation of over 300,000, weekly email update, which has over 600,000 subscribers, investigative bulletins, special reports, www.judicialwatch.org website, *Corruption Chronicles* blog, and social media, including Facebook and Twitter, among other

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FAX: (202) 646-5199 • Email: info@JudicialWatch.org • www.JudicialWatch.org

distribution channels. We have authored several books, including *Corruption Chronicles* by Tom Fitton (Threshold Editions, July 24, 2012), and another book, *Clean House* by Tom Fitton (Threshold Editions, Aug. 30, 2016), is forthcoming. In 2012, we produced a documentary film, "District of Corruption," directed by Stephen K. Bannon. Our "news media" status has been confirmed in court rulings. *See, e.g., Judicial Watch, Inc. v. U.S. Dep't of Defense*, 2006 U.S. Dist. LEXIS 44003, *1 (D.D.C. June 28, 2006); *Judicial Watch, Inc. v. U.S. Dep't of Justice,* 133 F. Supp.2d 52 (D.D.C. 2000). As a tax exempt, 501(c)(3) non-profit corporation, we have no commercial interests and do not seek the requested records for any commercial use. Rather, we intend to use the requested records as part of our on-going investigative journalism and public education efforts to promote integrity, transparency, and accountability in government and fidelity to the rule of law.

Judicial Watch also is entitled to a waiver of both search fees and duplication fees because "disclosure of the information is in the public interest." 5 U.S.C. § 552(a)(4)(A)(iii). Disclosure of the requested records undoubtedly will shed light on "the operations or activities of the government." *Cause of Action*, 799 F.3d at 1115 (*quoting* 5 U.S.C. § 552(a)(4)(A)(iii)). Disclosure also is "likely to contribute significantly to the public understanding" of those operations or activities because, among other reasons, Judicial Watch intends to disseminate both the records and its findings to "a reasonably broad audience of persons interested in the subject" via its newsletter, email updates, investigative bulletins, website, blog, and its other, regular distribution channels. *Cause of Action*, 799 F.3d at 1116 (*quoting Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 815 (2d Cir. 1994)). Again, Judicial Watch does not seek the requested records for any commercial benefit or for its own "primary" benefit, but instead seeks them as part of its ongoing investigative journalism and public education efforts to promote integrity, transparency, and accountability in government and fidelity to the rule of law.

In the event our request for a waiver of search and/or duplication costs is denied, Judicial Watch agrees to pay up to $300.00 in search and/or duplication costs. Judicial Watch requests that it be contacted before any such costs are incurred, in order to prioritize search and duplication efforts.

If you do not understand this request or any portion thereof, or if you feel you require clarification of this request or any portion thereof, please contact us immediately at 202-646-5172 or bmarshall@judicialwatch.org.

Thank you for your cooperation.

Very respectfully,

William F. Marshall
Judicial Watch, Inc.

EXHIBIT B

U.S. Department of Justice

National Security Division

Washington, D.C. 20530

William Marshall
425 Third St., SW, Suite 800
Washington, DC 20024
bmarshall@judicialwatch.org

Re: FOIA/PA # 18-221

18 June 2018

Dear Mr. Marshall:

This is our final response to your FOIA (FOIA)/Privacy Act (PA) request dated February 16, 2018 requesting, *"[a]ny and all transcripts of hearings before the Foreign Intelligence Surveillance Court regarding applications for or renewals of Foreign Intelligence Surveillance Act ("FISA") warrants relating to Carter Page and/or Michael Flynn."* Our FOIA office received your Freedom of Information request on June 1, 2018.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. *See* 5 U.S.C. § 552(c) (2006 & Supp. IV (2010). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

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

We do not search these records in response to requests regarding the use or non-use of such techniques in cases where the confirmation or denial of the existence of responsive records would, in and of itself, reveal information properly classified under Executive Order 13526. To confirm or deny the existence of such materials in each case would tend to reveal properly classified information regarding whether particular surveillance techniques have or have not been used by the U.S. Intelligence Community. Accordingly, with respect to your request relating to Michael Flynn, we can neither confirm nor deny the existence of records in these files responsive to your request pursuant to 5 U.S.C. 552(b)(1).

Based on declassification decisions by the President and the Intelligence Community, however, we are able to respond to your request relating to Carter Page. A search of NSD's records did not identify any records responsive to your request.

As this request is in litigation, we are omitting our standard administrative appeal paragraph.

Sincerely,

Kevin G. Tiernan
Records and FOIA Unit