

AMERICAN CENTER FOR LAW & JUSTICE



FREEDOM OF INFORMATION ACT

QUARTERLY FOIA

R E P O R T

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A MESSAGE FROM CHIEF COUNSEL JAY SEKULOW



In 2016, I mobilized a dedicated team of attorneys and staff to launch our Government Accountability Project. This project aimed at shedding light on burgeoning corruption in the bureaucracy that controls our government agencies and implements our laws. We are fighting to hold this ever-expanding “Deep State” accountable to the American people. Thanks to your support, our efforts have been a resounding success.

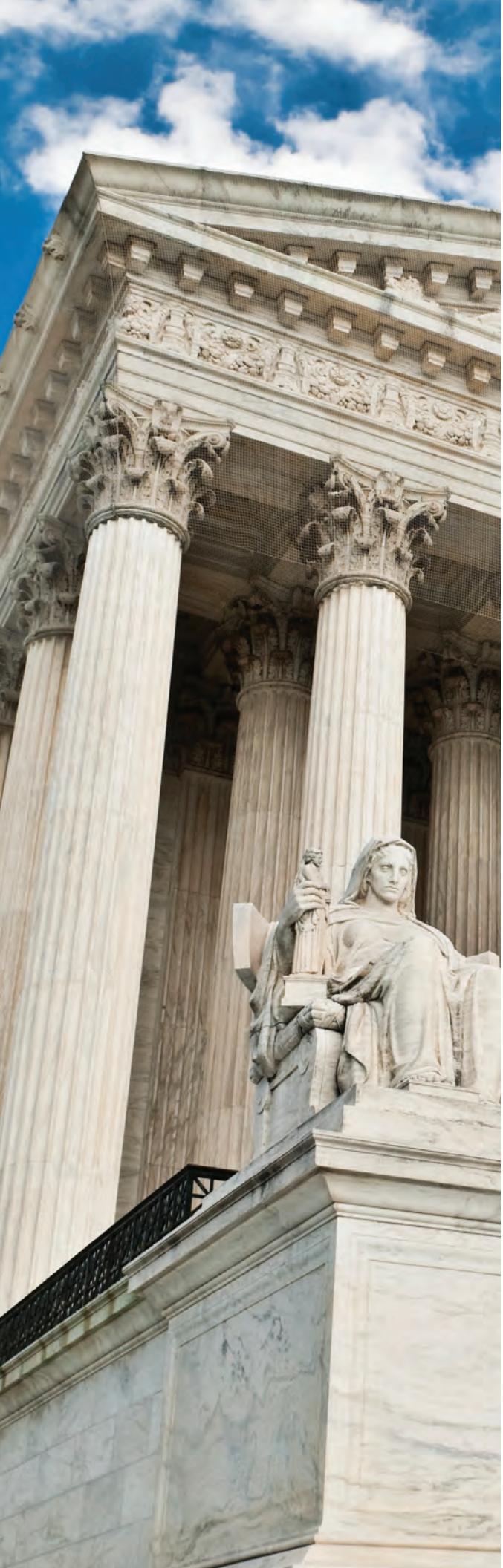
As part of this effort, we have issued at least seventy-five Freedom of Information Act (FOIA) requests. The law requires government agencies to respond to these lawful requests. Yet, the bureaucracy fights tooth and nail to protect its secrets, often refusing to comply with our requests or the law. So, we have been forced to bring them to account – in court. To that end, we have filed more than a dozen federal lawsuits against five different bureaucratic agencies. We are fighting every day to expose the truth.

Over the course of the last several years, we have exposed corruption, lawlessness, influence peddling, and deception in our government. We have ensured that numerous Deep State bureaucrats are no longer in positions of power. We have dug into the Obama Administration and the Deep State’s funding of anti-Israel causes – including an attempt to unseat the government of Israel – exposed major corruption and collusion surrounding the infamous Clinton-Lynch tarmac meeting, revealed the “purposeful” deletion of an official State Department briefing video to hide when the Iran nuclear deal negotiations began, and exposed extreme bias among outgoing Obama Administration officials who were unmasking Americans.

The goal of our Government Accountability Project is clear: ensure the United States Government remains of the People, dedicated to the People, and run for the People and not just entrenched Washington elites, the ever-expanding bureaucratic Deep State, and corrupting special interest groups. We have recently expanded this project to include corruption and an anti-life agenda at the state level. The following is the latest in a long line of quarterly reports that the ACLJ has been issuing to Members of Congress and the general public to update and empower those with a voice to make a difference and hold the government accountable.

After a review of the report’s findings, I encourage the appropriate congressional committees to provide oversight, hold hearings, and take whatever corrective action is necessary, including new legislation. I also encourage you, the American people, to remain ever vigilant, as your voice makes a crucial difference.

Jay Sekulow
ACLJ Chief Counsel



ABOUT THE ACLJ

Founded in 1990 with the mandate to protect religious and constitutional freedoms, the American Center for Law and Justice (ACLJ) engages legal, legislative, and cultural issues by implementing an effective strategy of advocacy, education, and litigation that includes representing clients before the Supreme Court of the United States and international tribunals around the globe.

As ACLJ Chief Counsel Jay Sekulow continued to build his legal and legislative team, the ACLJ experienced tremendous success in litigating cases at all levels of the judiciary – from the federal district court level to the U.S. Supreme Court.

Over the last two decades, Sekulow has appeared before the U.S. Supreme Court on numerous occasions, successfully arguing precedent-setting cases before the High Court: protecting the free speech rights of pro-life demonstrators; safeguarding the constitutional rights of religious groups to have equal access to public facilities; ensuring that public school students can form and participate in religious organizations, including Bible clubs, on campus; and, guaranteeing that minors can participate in the political process by protecting their free speech rights in the political setting.

Headquartered in Washington, D.C., the ACLJ's work reaches across the globe with affiliated offices in Israel, Russia, France, Pakistan, and Zimbabwe. In addition to its religious liberties work, the ACLJ also focuses on constitutional law involving the issues of national security, human life, judicial nominations, government corruption, and protecting patriotic expressions such as our National Motto and the Pledge of Allegiance.

OUR FOIA PRACTICE:

The ACLJ has litigated and pursued governmental accountability for decades. Over the past several years, the ACLJ has intensified its advocacy in this area, focusing on identifying and countering the dangers of the unelected bureaucratic morass known as the “fourth branch of government.” In recent years, the ACLJ has responded to troubling reports of the ever-growing “Deep State” – an out-of-control, unelected, unaccountable bureaucracy – by throwing back the curtain and shedding light on the ongoing government corruption and lawlessness. To that end, the ACLJ launched its Government Accountability Project.

One of the ACLJ’s most useful tools in this fight is the Freedom of Information Act (FOIA) and similar state-based statutes. This law requires federal government agencies and departments, when asked by appropriately concerned citizens, to turn over unclassified documents, records, and more as they relate to particular governmental activities. FOIA requests are almost never as simple as they sound. They require the requesting party to provide a detailed contextual background forming the basis of the request, define the parameters of the search, and regularly engage in a back-and-forth battle with an unwilling department that will use every possible technicality to reject, delay, or otherwise impede the release of information.

Thankfully, the ACLJ has extensive experience filing FOIA requests, and the necessary legal and media resources to make sure that these requests are seen, heard, and responded to. In the past several years, the ACLJ has issued at least seventy-five FOIA requests to more than twenty different federal and state agencies and their component entities. Due to the repeated refusal of these agencies to comply with the ACLJ’s requests, the ACLJ has filed lawsuits to compel compliance in the U.S. District Court for the District of Columbia in over a dozen cases. Thus far, the ACLJ has been successful in every single case.

To date, the ACLJ has obtained nearly 20,000 pages of records. These documents shed light on corruption at the highest levels of our government, exposing lies, cover-ups, influence peddling, and even attempts to unseat the duly-elected government of one of our closest allies. In addition, our discoveries have been prominently featured in the media and have led to significant policy and personnel changes in the federal bureaucracy.

The ACLJ will continue to remain ever vigilant and carry out its obligation to hold the government accountable for its actions. The ACLJ will continue to be on the front lines in this fight, issuing more requests and, if necessary, taking the government to court to get to the truth.

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QUARTERLY REPORT

EXECUTIVE SUMMARY:

In response to troubling reports of the ever-growing “Deep State” – an out-of-control, unelected, unaccountable bureaucracy, the ACLJ has utilized the Freedom of Information Act (FOIA) to request documents and records from federal government agencies with the intent of then using that information to shed light on and curb the ongoing government corruption and lawlessness. The ACLJ has also engaged various state governments with state-equivalents to the FOIA to uncover information in our fight for life, Israel, and religious freedom. The ACLJ has issued at least seventy-five FOIA requests to more than twenty different federal or state agencies and their components.

As we have said many times, Deep State corruption is extensive and federal agencies and departments have repeatedly refused to provide the requested information to the ACLJ as required by FOIA. As a result, the ACLJ has been forced to file lawsuits in federal court to compel compliance in nearly a dozen cases. Currently, the ACLJ is involved in five federal FOIA lawsuits. The ACLJ has been successful in obtaining documents in every single case – but not until we were willing to take the agencies to federal court. To date, we have obtained nearly 20,000 pages of records, and all but approximately 1,000 pages have been obtained through litigation.

This Quarterly Report provides updates on some of our FOIA requests and lawsuits.

Standing Up to the Deep State

As we indicated in our previous FOIA Quarterly Report, the ACLJ issued a series of FOIA requests to federal agencies seeking records to reveal exactly what happened when, according to bombshell reports, fired-FBI Director James Comey planted spies in the White House. As has become customary for the FBI, the agency failed to comply with the law’s requirements and the ACLJ was forced to file a federal lawsuit in Washington, D.C.: ACLJ v. FBI, 19-cv-2643 (D.D.C. 2019). In addition to the ordinary allegations seeking enforcement of the FOIA requiring timely production of documents responsive to our request, the ACLJ brought a “pattern and practice” claim against the FBI, urging the court to hold the FBI accountable for its routine practice of flouting the law unless and until we file a lawsuit. Of course, the FBI moved to dismiss that claim, and the ACLJ defended its claim against the FBI. While the parties await a decision on that motion, the ACLJ has obtained an initial production of documents responsive to our FOIA request. While the processing of our FOIA request has been delayed due to the COVID-19 shutdown and reduction in government employees working in the office, the ACLJ remains engaged and will continue to press the FBI to comply with the law and produce the documents to which we and the American people are entitled.

As the ACLJ reported in our previous FOIA Quarterly Reports, on our website, www.ACLJ.org, and on our radio program, we also filed two lawsuits in 2017 against the State Department and the National Security Agency (NSA) to force production of agency records regarding outrageous unmasking efforts in the waning days of the Obama Administration targeting Americans affiliated with now-President Donald Trump. Those lawsuits were consolidated, and our legal battle continues in court: ACLJ v. NSA, 17-cv-1425 (D.D.C.) and ACLJ v. Department of State, 17-cv-1991 (D.D.C.). Currently before the court are competing motions for summary judgment regarding the agencies’ “Glomar responses” – responses refusing to admit or deny that certain records we requested even existed – and whether other redactions and withholdings are proper under the law. The parties completed briefing on this matter with the filing of the ACLJ’s Reply brief in May 2020.

While our briefing was underway, shocking news broke when the government declassified and released information showing that former U.N. Ambassador Samantha Power, former Director of National Intelligence (DNI) James Clapper, President Obama’s Chief of Staff Denis McDonough, and even Vice President Joe Biden were directly involved in unmasking requests involving Lt. Gen. Michael Flynn. Emails obtained by the ACLJ in our lawsuits provided valuable insight into what really happened – including an email we obtained wherein, after the November 2016 election, President Obama’s Chief of Staff told Samantha Power that President Obama was going to go away and that she should too. We have obtained documents that prove Power harbored strong political bias and dislike for President Trump at the time she engaged in her unmasking activity – which is again the subject of international news headlines. Other emails obtained by the ACLJ in our lawsuit against the Office of the Director of National Intelligence (ODNI) and the NSA, ACLJ v. National Security Agency & Office of the Director of National Intelligence, 17-cv-645 (D.D.C.), revealed that former DNI James Clapper and his colleagues were taking critical steps to expand access to raw intelligence while engaging in these unmaskings – all in the final days of the Obama Administration. The ACLJ will continue to pursue the truth and expose the Deep State’s efforts to thwart the will of the American people.

Standing Up for Religious Freedom for Our Military

The ACLJ has always focused its efforts on protecting and preserving religious freedom, including but not limited to military servicemembers’ religious freedom. Accordingly, when the ACLJ learned that branches of the U.S. military had suddenly revoked a private organization’s ability to engrave servicemembers’ dog tags with Bible verses alongside their military insignias – apparently in response to an anti-religion group’s pressure, the ACLJ took action. Expanding the scope of its FOIA practice area, the ACLJ sent FOIA requests to the Army and to the Marines to get to the bottom of what happened. The military offices have confirmed receipt of our requests and are cooperating with our requests for information. While processing of the requests has been slowed due to the COVID-19 situation, the ACLJ remains engaged with the relevant military offices; and once documents are provided, we will update our members – and the public – with what we find.

Standing Up for the Unborn

In March 2020, in response to the COVID-19 pandemic, state governments across the nation took steps to shut down business operations in apparent attempts to slow the spread of the virus. However, while businesses and medical care providers deemed non-essential struggled under the weight of shutdown orders, in some states, one particular type of business enjoyed favor and protection: the abortion industry. In response, the ACLJ issued state-level record requests to Michigan and Illinois in our effort to expose the abortion industry's influence over the government officials in those states. We intend to find out who was involved and what was said and done to protect the abortion industry's ability to make money in those states and continue with their non-essential business of killing babies, while other businesses, medical care providers, and churches were shut down.

In addition to those identified above and addressed in this FOIA Quarterly Report, we continue to litigate several other federal lawsuits against reticent government agencies to enforce compliance with the FOIA. In one case, ACLJ v. Dept. of State, 16-cv-1355 (D.D.C.), we await a court decision on a motion for summary judgment challenging the State Department's excessive redactions in the documents finally produced. The FOIA request at issue in the case sought information relating to the Obama Administration's secret bilateral talks with Iran and lies to cover up those talks - all which we helped uncover by obtaining internal documents proving the State Department's intentional deletion of part of a press conference briefing.

In others, like our lawsuit to expose the Clinton Foundation's cozy relationship with Hillary Clinton's State Department, ACLJ v. Dept. of State, 16-cv-1975 (D.D.C.), and our lawsuit to uncover details regarding the infamous Uranium One scandal, ACLJ v. Dept. of State, DOJ, FBI, and Dept. of Treasury, 18-cv-374 (D.D.C.), court-supervised monthly productions by the agencies are ongoing.

As these lawsuits and new FOIA requests proceed, the ACLJ will continue to provide updates both on our website, www.ACLJ.org, and through our FOIA Quarterly Reports.

As always, the ACLJ will remain ever vigilant and carry out its obligation to hold those in government accountable for their actions and provide that information to the American people.

**THE ACLJ FILES NEW LAWSUIT AGAINST THE FBI TO ENFORCE THE LAW
AND FORCE THE PRODUCTION OF DOCUMENTS REGARDING FIRED-FBI
DIRECTOR JAMES COMEY'S SPIES IN THE WHITE HOUSE:**

ACLJ v. FBI, 19-cv-2643 (D.D.C.)

I. EXECUTIVE SUMMARY

As the ACLJ covered extensively, fired-FBI director James Comey reportedly conducted his own “covert operation” against President Trump by inserting FBI agents – *i.e.*, spies – inside the White House. Their job was to secretly collect information and report back to Comey’s office on the President and his Administration. In response to this alarming news, the ACLJ took action to expose this unprecedented spying, bias, and corruption and issued FOIA requests to the FBI and DOJ to find out exactly what occurred, who was involved, and what information was shared.

Unsurprisingly, the deadline for the FBI to comply with the FOIA passed and the FBI failed to respond as required under the FOIA. In response, the ACLJ filed a federal lawsuit against the FBI in Washington, D.C., seeking court compliance and alleging a “pattern or practice” claim to address the FBI’s continued practice of ignoring the law’s clear requirement for the timely response and production of documents. The FBI moved to dismiss our “pattern or practice” claim and the ACLJ defended the claim in court. We await the court’s decision on the issue. If these Deep State agencies will not comply with the law unless and until a federal court forces them to, then we will keep filing federal lawsuits to enforce compliance. Once we got the court involved, the FBI began to cooperate. While processing, negotiations, and court dates have been delayed due to the COVID-19 pandemic, the ACLJ continues to engage the FBI in this lawsuit, and we are confident we will prevail in obtaining the documents we demanded.

II. BACKGROUND

Since his firing by President Trump, Comey has tried to present himself to the American people as a victim worthy of sympathy, especially as he peddled his book. But now information has come to light that seems to expose the real James Comey to be a deceptive schemer against the Trump Administration.

Comey repeatedly told the President, on at least three occasions, that he was not the subject of an investigation.¹ Yet according to bombshell reports, the reality is:

¹ Allan Smith, *Comey Told Trump 3 Times That He Wasn't Under Investigation, but His Refusal to Publicly Say So Infuriated Trump*, BUSINESSINSIDER.COM (June 7, 2017, 3:12 PM), <https://www.businessinsider.com/comey-told-trump-he-wasnt-under-investigation-2017-6>.

Even as he repeatedly assured Trump that he was not a target, the former director was secretly trying to build a conspiracy case against the president, while at times acting as an investigative agent.

Two U.S. officials briefed on the inspector general's investigation of possible FBI misconduct said Comey was essentially "running a covert operation against" the president, starting with a private "defensive briefing" he gave Trump just weeks before his inauguration. They said Horowitz has examined high-level FBI text messages and other communications indicating Comey was actually conducting a "counterintelligence assessment" of Trump during that January 2017 meeting in New York.²

Comey even testified before a Senate Intelligence Committee that he had lied to the President. Meanwhile, the truth was that Comey was mounting his own investigation in furtherance of his personal mission to hamper the Administration:

At the same time Comey was personally scrutinizing the president during meetings in the White House and phone conversations from the FBI, he had an agent inside the White House working on the Russia investigation, where he reported back to FBI headquarters about Trump and his aides, according to officials familiar with the matter.

The agent, Anthony Ferrante, who specialized in cybercrime, left the White House around the same time Comey was fired and soon joined a security consulting firm, where he contracted with BuzzFeed to lead the news site's efforts to verify the Steele dossier, in connection with a defamation lawsuit.

Knowledgeable sources inside the Trump White House say Comey carved out an extraordinary new position for Ferrante, which allowed him to remain on reserve status at the FBI while working in the White House as a cybersecurity adviser.

"In an unprecedented action, Comey created a new FBI reserve position for Ferrante, enabling him to have an ongoing relationship with the agency, retaining his clearances and enabling him to come back in [to bureau headquarters]," said a former National Security Council official who requested anonymity.³

According to that same report: "Between the election and April 2017, when Ferrante finally left the White House, the Trump NSC division supervisor was not allowed to get rid of Ferrante." In other words, Comey tried to ensure that the White House had no authority to remove Ferrante.

² Paul Sperry, *Justice Dept. Watchdog Has Evidence Comey Probed Trump, on the Sly*, REALCLEARINVESTIGATIONS.COM (July 22, 2019), https://www.realclearinvestigations.com/articles/2019/07/22/comey_under_scrutiny_for_own_inquiry_and_misleading_trump_119584.html.

³ *Id.*

Somehow the director of the FBI superseded the authority of the President of the United States, implanting an unremovable agent.

To make matters worse, the reports indicate that “Ferrante was replaced in the White House by another FBI official, Jordan Rae Kelly, who signed security logs for Ferrante to enter the White House while he was contracted by BuzzFeed. Kelly left the White House last year and also joined FTI Consulting” – the same firm Ferrante works for.

Now we know even more about the depths of Comey’s corruption. A stunning Inspector General’s report has detailed the leaks, violations of FBI policy, and subversion.

This is all simply too big to be ignored. This behavior cannot be allowed in a constitutional republic. The ACLJ determined to get to the bottom of this.

III. THE ACLJ’S WORK TO ACHIEVE TRANSPARENCY

On July 25, 2019, the ACLJ submitted FOIA requests to the FBI and the DOJ demanding all records, including emails, memorandums, briefs, electronic messages, etc., pertaining to Ferrante’s time within the White House and beyond. Specifically, we requested records and emails between or about Comey and Ferrante and others.

We also demanded records related to this spying effort and what the ACLJ has long called Comey’s “circle of corruption.” These are Comey’s closest advisors, including: FBI General Counsel James Baker; Deputy Director/Acting Director Andrew McCabe; Deputy Assistant Director of Counterintelligence Peter Strzok; McCabe’s Deputy Counsel, Lisa Page; Comey’s Chief of Staff, James Rybicki; David Bowdich (Director’s Office - DO); Michael Steinbach (Director’s Office - DO); Trisha Anderson (OGC); E.W. Bill Priestap (Counterintelligence Division - CD); and Jonathan Moffa (Counterintelligence Division - CD). Finally, we requested “All of James Comey’s emails from April 1, 2016, to May 31, 2017.”

The deadline for compliance came and went, and the FBI failed to follow the law. Accordingly, on September 4, 2019, the ACLJ filed suit against the FBI in federal court in Washington, D.C. A copy of the ACLJ’s FOIA request, and its Complaint against the FBI, is provided in Appendix I-A below.

In this lawsuit, in addition to seeking enforcement of the FOIA and timely production of documents, the ACLJ also brought a second claim against the FBI, alleging that the FBI operates under a “pattern or practice” of unlawfully ignoring FOIA requests until the requestor takes legal action. We will give the court an opportunity to rein in this bureaucratic abuse – the type of abuse, unfortunately, contributing to the FBI’s bad reputation. Predictably, on November 20, 2019, the FBI filed a motion to dismiss our pattern and practice claim. The ACLJ briefed the issue and defended the claim, submitting a response on December 4, 2019. In that response, we said:

The FBI is engaged in a pattern and practice of intentional delay and improper withholding of factual information to impair the ACLJ’s lawful and timely access

to information. As the ACLJ’s prior lawsuits against the FBI demonstrate, the filing of a lawsuit to obtain all requested records is “an empty gesture in preventing future delays, much less obtaining future relief,” *Judicial Watch, Inc. v. Department of Homeland Security*, 895 F.3d 770, 782 (D.C. Cir. 2018), because the FBI will moot the litigation and escape judicial review of its compliance with FOIA by complying with the requirements of FOIA only after the ACLJ filed its lawsuit or – like it did in one of those cases – on the eve of its summary judgment briefing deadline. Unfortunately, the FBI’s unapologetic refusal to abide by FOIA is not an isolated event, but rather, a pattern and practice. As such, in this third FOIA lawsuit against this Defendant, Plaintiff alleged a pattern and practice claim articulated as Count II.

A copy of the ACLJ’s brief opposing the FBI’s motion to dismiss is provided in Appendix I-B below. The parties await a decision from the court on this issue.

In the meantime, the FBI has been forced to comply with FOIA and begin processing and producing responsive records to the ACLJ. It is too early to draw conclusions from the FBI’s first production which, of course, was heavily redacted in an attempt to continue to conceal information from the public.

The next production is expected to be produced as soon as government employees within the FBI resume their regular work schedules and in-office duties following the COVID-19 pandemic.

IV. CONCLUSION & NEXT STEPS

The ACLJ will continue to pursue the expedient release of documents and litigate any attempts by the FBI to hinder this process. As the news about the Obama-era tactics of James Comey and his cohorts attempting to subvert the incoming Trump Administration continues to break and develop, the ACLJ will do its part to help expose the corruption.

THE ACLJ CONTINUES TO LITIGATE ACTIVE FOIA LAWSUITS AGAINST THE STATE DEPARTMENT AND THE NATIONAL SECURITY AGENCY, SEEKING MORE RECORDS OF DEEP STATE UNMASKING AND POLITICAL BIAS IN THE FINAL DAYS OF THE OBAMA ADMINISTRATION – WHILE INFORMATION OBTAINED IN PREVIOUS ACLJ FOIA LAWSUITS PROVIDE VALUABLE INFORMATION IN LIGHT OF RECENT BREAKING NEWS OF OBAMA-ERA UNMASKING:

ACLJ v. Department of State, 17-cv-1991 (D.D.C.)

- consolidated with *ACLJ v. U.S. National Security Agency*, 17-cv-1425 (D.D.C.) – & *ACLJ v. U.S. National Security Agency & U.S. Office of the Director of National Intelligence*, 17-cv-645 (D.D.C)

I. EXECUTIVE SUMMARY

The ACLJ filed two lawsuits in 2017 against the State Department and the NSA to force compliance with FOIA and obtain documents responsive to our requests regarding outrageous unmasking efforts in the waning days of the Obama Administration targeting Americans affiliated with now-President Donald Trump. Shortly after the filing of those two lawsuits, they were consolidated: *ACLJ v. NSA*, 17-cv-1425 (D.D.C.) and *ACLJ v. Department of State*, 17-cv-1991 (D.D.C.). In response to our FOIA requests, both agencies asserted what is known as a “Glomar response” – stating that they neither admit nor deny the existence of records responsive to our requests. In addition to these Glomar responses, the State Department attempted to withhold certain other information contained within documents it produced. Over the past few months, the parties have filed competing motions for summary judgment over whether the agencies may rely on their Glomar responses and whether the other redactions, specifically (b)(5) exemptions allegedly comprising deliberative process information, and withholdings were proper under the law.

While our briefing was underway, the Acting Director of National Intelligence, Richard Grenell, released a formerly classified Memorandum from the National Security Agency (NSA) which identified that former U.N. Ambassador Samantha Power, former DNI James Clapper, President Obama’s Chief of Staff Denis McDonough, and even Vice President Joe Biden were directly involved in unmasking requests involving Lt. Gen. Michael Flynn. Emails obtained by the ACLJ in our unmasking lawsuits provided valuable insight into what really happened – including an email we obtained wherein, after the November 2016 election, President Obama’s Chief of Staff told Samantha Power that President Obama was going to go away and that she should too.

Other emails obtained by the ACLJ in our lawsuit against the ODNI and the NSA, *ACLJ v. U.S. National Security Agency & U.S. Office of the Director of National Intelligence*, 17-cv-645 (D.D.C), revealed that former DNI James Clapper and his colleagues (e.g., O’Sullivan and Dempsey) were taking critical steps to expand access to raw intelligence while engaging in these unmaskings – all in the final days of the Obama Administration. The ACLJ will continue to pursue the truth and expose the Deep State’s efforts to thwart the will of the American people.

II. BACKGROUND

In 2017, we received reports of the unprecedented unmasking of U.S. citizens by senior Obama official Ambassador Samantha Power in the final days of the Administration – on average, more than one unmasking a day. The ACLJ sent a FOIA request to the State Department for any records surrounding Power’s unmasking activities. After the State Department refused to comply with the law, the ACLJ filed a lawsuit. In this lawsuit, we uncovered evidence of significant political bias during the same time period Power was unmasking Americans. Accomplished investigative reporter John Solomon picked up the story and published a thoughtful piece in *The Hill*.⁴

There were also news reports and indications that Obama-era senior officials like Susan Rice (and possibly others like Cheryl Mills, Valerie Jarrett, Loretta Lynch, and Ben Rhodes) were involved in unmasking Americans associated with President Trump’s campaign and transition. Accordingly, the ACLJ submitted a FOIA request to the NSA seeking records connected to any such activity. The ACLJ took the NSA to court in order to enforce the law and get answers. This lawsuit was consolidated with our lawsuit against the State Department, and then a lengthy process of record production – and withholdings – began. After years of litigation, the agencies filed their motion for summary judgment on February 21, 2020. The ACLJ responded to that motion and filed its own motion for summary judgment on March 20, 2020. A copy of the ACLJ’s response and motion are provided in Appendix II-A. The agencies opposed our motion with a brief filed on April 20, 2020. Then, on May 18, 2020, the ACLJ filed its reply in that series of briefings to the court. A copy of the ACLJ’s Reply brief is provided in Appendix II-B. The parties’ motions are ripe for ruling and we await the court’s decision.

While the ACLJ was litigating these cases in court, something extraordinary happened. On May 4, 2020, the Acting Director of National Intelligence submitted to Senators Ron Johnson and Charles Grassley a document issued by Defendant NSA containing “a revised list of identities of any officials who submitted requests to the National Security Agency at any point between 8 November 2016 and 31 January 2017, to unmask the identity of former National Security Advisor, Lieutenant General Michael T. Flynn (USA-Ret).” This memorandum was declassified and publicly released May 13, 2020. A copy is provided in Appendix II-B as Exhibit 2, attached to our Reply brief. According to the NSA Memorandum, “[i]n this case, **16 authorized individuals requested unmaskings for [redacted] different NSA intelligence reports for select identified principals**. While the principals are identified below, we cannot confirm they saw the unmasked information. This response does not include any requests outside of the specified time-frame.”

The NSA Memorandum identifies 39 individuals involved in making the unmasking requests. The named officials included Vice President Joe Biden, President Obama’s Chief of Staff Denis McDonough, Director of National Intelligence James Clapper, CIA Director John Brennan,

⁴ John Solomon, ‘*Unmasker in Chief*’ Samantha Power Spewed Anti-Trump Bias in Government Emails, THE HILL (June 26, 2019, 4:15 PM), <https://thehill.com/opinion/white-house/450490-unmasker-in-chief-samantha-power-spewed-anti-trump-bias-in-government>.

FBI Director James Comey, Treasury Secretary Jacob Lew, Deputy Secretary of Energy Elizabeth Sherwood-Randall, and **Ambassador Samantha Power** – along with at least six other State Department officials, including Deputy Chief of Mission Kelly Deglan, U.S. Ambassador to Italy and the Republic of San Marino John R. Phillips, U.S. Ambassador to Russia John Tefft, U.S. Deputy Chief of U.S. Mission to NATO (USNATO) Mr. Litzenberger, U.S. Permanent Representative (PermRep) to NATO Ambassador Douglas Lute, and U.S. Ambassador to Turkey - Ambassador Bass. To be clear, this NSA acknowledgment identifies unmasking activities concerning Flynn of at least seven State Department officials.

Importantly, Lt. Gen. Flynn was one of the specifically named individuals in the ACLJ's FOIA requests to both the NSA and State Department. And the dates of the unmasking requests recorded in the NSA Memorandum correspond with the date range provided in our FOIA requests (January 20, 2016 to January 20, 2017). *As such, the NSA has now officially acknowledged multiple unmaskings of at least one named individual (Flynn) during the timeframe of our FOIA requests to both Defendants.*

Further, as addressed above, the NSA's official acknowledgement identifies Samantha Power in connection with Flynn unmasking requests on **seven** occasions and on six different dates (two on one date). *See Exhibit 2, at 3.* Again, Ambassador Power was identified as a relevant communicant in the ACLJ's FOIA request to the State Department, where the other communicant was any "NSA official or employee."⁵

III. THE ACLJ'S WORK TO ACHIEVE TRANSPARENCY

The ACLJ brought the information in the NSA Memorandum and released by the ODNI to the court's attention in our brief filed on May 18, 2020. We explained to the court that, as is made clear by the NSA acknowledgment, records of the unmasking activity concerning Lt. Gen. Flynn and Ambassador Power and at least six additional State Department officials exist. NSA and/or State Department records of Power's unmasking activity and communications with others (of which the NSA has acknowledged as at least six additional State Department officials with whom Power would have logically interacted) about the unmasking activity must now be identified and produced. We explained that the agencies' Glomar responses now fail in light of what the NSA has acknowledged.

⁵ For example, item # 1 requests:

All records, communications or briefings created, generated, forwarded, transmitted, sent, shared, saved, received, or reviewed *by any DOS official or employee, where one communicant was Ambassador Samantha Power, including any communications, queries or requests made under an alias or pseudonym, and where another communicant was the Director of the National Security Agency, the Chief of the Central Security Service, SIGINT production organization personnel, the Signals Intelligence Director, Deputy Signals Intelligence Director, or the Chief/Deputy/Senior Operations Officers of the National Security Operations Center, or any other NSA official or employee*

As we argued in our brief:

In light of Defendant NSA’s official acknowledgment, there is nothing of which its existence is left to admit or to deny. The NSA has acknowledged that unmasking and SIGINT report access of a Trump-affiliated person identified on Plaintiff ACLJ’s FOIA Requests occurred – including the unmasking activity and SIGINT report access by Samantha Power, an agency actor of Defendant State Department specifically identified by Plaintiff ACLJ, and at least six additional State Department officials in Power’s orbit. Because the NSA Memorandum “establishes the existence (or not) of records responsive to the FOIA request, the prior disclosure necessarily matches both the information at issue—the existence of records—and the specific request for that information,” and the plaintiff is entitled to disclosure. *Wolf v. CIA*, 473 F.3d 370, 379 (D.C. Cir. 2007). See e.g., *Mobley*, 924 F. Supp. 2d at 46.

We contended:

Official acknowledgment may overcome a Glomar response in two scenarios:

(1) where the existence of responsive records is plain on the face of the official statement, e.g., *Wolf*, 473 F.3d at 370, and (2) where the substance of an official statement and the context in which it is made permits the inescapable inference that the requested records in fact exist, e.g., *ACLU*, 710 F.3d at 422.

James Madison Project, 302 F. Supp. 3d at 22. Either way, a Glomar response is insufficient and overcome here.

We also showed the court how Ambassador Power’s previously classified House Intelligence Committee testimony – now declassified and publicly released – further undercuts the agencies’ Glomar responses. As we explained in our brief:

Further supporting the existence of records responsive to Plaintiff’s FOIA Requests, in testimony before the House Permanent Select Committee on Intelligence in an Executive Session held October 17, 2017, according to a transcript **just released by that committee on May 8, 2020, having been declassified by NSA Director Grenell**, Power testified that she engaged in unmasking:

MS. POWER: . . . You know, I do not know what number of requests I made related to U.S. persons or U.S. entities. I can’t tell what you [sic] that number is over the life of my time in New York or over the last year. But I can tell you that the number is nowhere near the number that I’m reading in the press. . . .

See Exhibit 3, at 26 (emphasis added).

And, again, I cannot explain the number which, if what you're working on the basis of is what I'm seeing in the press, is a startling number, but it is not my number. **I did not personally make that number of requests that I'm seeing in the press.**

Id. at 28 (emphasis added).

I think is [*sic*] likely predicated on perhaps, you know, something that came out of my mission, surely, I mean, because I have the utmost respect for the Intelligence Community. I don't think anybody is – **I mean, I trust that the number represents a number of something.**

Id. at 30 (emphasis added).

But certainly when I - **any time I did make requests I was not doing so for political reasons.** I was doing so in order to be equipped to perform my dual roles. And so I would have never had any kind of political motivation or - it wasn't nice to know. I personally would only ask when I really felt it was need to know.

Id. at 35. When Mr. Schiff stated, “But in terms of the Russia investigation and the leaking allegation, I would assume that if your number of requests went up, [redacted] that would have had nothing to do with the incoming Administration,” Power responded, “**No. Again, I was representing the United States.**” *Id.* at 35-36 (emphasis added).

In fact, Power denies recollection of making a request related to Lt. Gen. Flynn: “MS. POWER: Yes. I have no recollection of making a request related to General Flynn,” *id.* at 37, – something the NSA’s official acknowledgment undercuts. Ms. Power was asked:

In particular, do you recall how many times you requested information related specifically to the Trump campaign, something that you read about the Trump campaign or activities with Russians and the Trump campaign? Can you recall specifically any time that you circled a U.S. person and requested a name and that name popped back with somebody who was a part of the campaign?

Id. at 54-56 (emphasis added). Power responded:

MS. POWER: [redacted] providing me, again, with material that they believe that I needed to know, me deferring to their judgment, **and then me asking questions about that intelligence.**

But my motive was never political. I wasn't interested in what the Trump administration was going to do

Id. at 56 (emphasis added).

Another exchange in the transcript provides as follows:

MR. GOWDY: All right. And I asked specifically about Candidate Trump. **Would the answer be the same for those that were part of his official campaign but not the candidate himself?** Independent evidence of collusion, coordination, conspiracy between the Russian Government and official members of the campaign that would not otherwise be known by others.

MS. POWER: Again, **I am not in possession of anything - I am not in possession and didn't read or absorb information that came from outside the Intelligence Community** [redacted].

Id. at 61 (emphasis added). According to Power, in response to a question about a request made in her name on January 18, 2017, Power states:

And so, you know, again, I don't think that my number of requests would've increased materially in the transition period. It would surprise me if my personal requests had, because, again, I was looking at foreign governments. **But it is possible that, you know, the number of things that came back to me in that form increased, you know, commensurate with the vast surge in collection that we were doing.**

Id. at 70 (emphasis added). And further:

MR. SWALWELL: So [redacted] If we go to 2016, the year that you made the most requests, can you tell me how many reports [redacted] produced in that year?

MS. POWER: [redacted] -it looks like the - yeah, I guess that's it for 2016.

MR. SWALWELL: And then the 10 years that are accounted for in this chart, what year has the most [redacted] reports produced?

MS. POWER: 2016.

MR. SWALWELL: And so it's clear that there's a -- as the [redacted] has produced more reports, you have requested more what the majority calls unmaskings? You have more access -- you're requesting more unmaskings?

MS. POWER: Yeah. . . . But even your numbers, which are news to me, that you have provided, I can't tell you with certainty that I made that number or a different number. I just have no recollection, and, again, I was focused on another task not on tabulating this.

Id. at 82-83 (emphasis added). The transcript also records this exchange between Power and Conaway:

MS. POWER: Yeah. And that is why, when I would see a U.S. person or U.S. entity, I would very rarely make a request to understand. I would only do it if it just didn't make sense without it.

MR. CONAWAY: Well, it got made on your behalf [redacted] times.

MR. CONAWAY: It got made on your behalf [redacted] times.

MS. POWER: I can't speak to what others were doing without my knowledge.

MR. CONAWAY: No, no, no. Those people worked directly for you, and they used your name to justify the unmask. That's how we got that list.

Id. at 103-104 (emphasis added).

In her testimony, Power concedes that, during her tenure and specifically during 2016 (the time period relevant to Plaintiff's FOIA requests at issue), she made unmasking requests, and that unmasking requests were made in her name. She admitted this included persons affiliated with the Trump Campaign and the incoming Trump Administration. She assured the committee that in doing so, she did not request unmaskings for political reasons, and that her motive was never political.

This information acknowledged by Power, taken together with the NSA's official acknowledgment dated May 4, 2020, and released publicly May 13, 2020, leaves no doubt that responsive records exist and that their existence is in the public domain. Taken together, it is as specific as, and matches, the thing the Defendants refuse to admit or deny, *i.e.*, whether records of that exact activity exist. Power's denial of political *motive* for the activity she engaged in [is] material insofar as it underscores that she in fact admitted to engaging in the underlying activity at issue in Plaintiff's FOIA requests.

As we had shown the court in prior briefing on this issue, former National Security Advisor Susan Rice confirmed that the specific unmasking occurred; and pursuant to Rice's own description of the process, records of those requests and records of the process of those requests exist. "Former Obama adviser Susan Rice reportedly admitted 'unmasking,' or asking to know the identities of, numerous Trump campaign officials whose communications had been 'incidentally' captured by intel agencies."⁶ On May 12, 2020, ABC News reported: "Former Obama national security adviser Susan Rice has openly acknowledged unmasking the identities of some senior

⁶ Sharyl Attkisson, *Was President Trump Spied on as Part of Carter Page Wiretapping?*, THE HILL (Mar. 2, 2020, 9:30 AM), <https://thehill.com/opinion/white-house/485072-was-president-trump-spied-on-as-part-of-carter-page-wiretapping>.

Trump officials during the presidential transition but has strenuously denied ever leaking any identities and said nothing she did was politically motivated.”⁷

The ACLJ did not have to rely only on media reports or speculation. Here is what Rice actually admitted publicly in April 2017, in her own words:

SUSAN RICE: The allegation is that somehow Obama administration officials utilized intelligence for political purposes. That's absolutely false. . . . [E]very morning, to enable us to do that, we received from the intelligence community a compilation of intelligence reports that the IC, the intelligence community, has selected for us on a daily basis to give us the best information as to what's going on around the world.

I received those reports, as did each of those other officials, and there were occasions when I would receive a report in which a U.S. person was referred to. Name not provided, just a U.S. person. **And sometimes in that context, in order to understand the importance of the report, and assess its significance, it was necessary to find out, or request the information, as to who the U.S. official was.**⁸

More specifically:

RICE: So when that occurred, what I would do, or what any official would do, is to ask their briefer whether the intelligence committee would go through its process -- and there's a long-standing, established process -- to decide whether that information as to who the identity of the U.S. person was could be provided to me. So they'd take that question back, they'd put it through a process, and the intelligence community made the determination as to whether or not the identity of that American individual could be provided to me.

That is what I and the Secretary of State, Secretary of Defense, CIA director, DNI, would do when we received that information.

ANDREA MITCHELL: Within that process, and within the context of the Trump campaign, the Trump transition, did you seek the names of people involved in -- to unmask the names of people involved in the Trump transition, the Trump campaign, people surrounding the president-elect --

RICE: Let me begin --

⁷ Martha Raddatz, *Any Obama Officials Involved in Flynn 'Unmasking' Declassified: Source*, ABC NEWS (May 12, 2020, 2:21 PM), <https://abcnews.go.com/Politics/obama-officials-involved-flynn-unmasking-declassified-source/story?id=70624372>.

⁸ Tim Hains, *Susan Rice: "I Leaked Nothing To Nobody"*, REALCLEAR POLITICS (Apr. 4, 2017), https://www.realclearpolitics.com/video/2017/04/04/susan_rice_i_leaked_nothing_to_nobody.html.

MITCHELL: -- in order to spy on them, in order to expose them.

RICE: Absolutely not for any political purposes, to spy, expose, anything. . .⁹

Rice's statements confirm that she and others requested unmasking of Trump associates *during the time identified by Plaintiff's FOIA request. Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007) (noting Circuit opinion rejecting "plaintiff's argument that congressional testimony establishing the existence of a CIA station in the 1960s waived Exemption 3's protection of records about the station in the 1950s because the time period specified in the plaintiff's FOIA request did not match the time period of the prior disclosure.").

But Rice confirmed more than just the occurrence of unmasking during the relevant time. When specifically pointed to unmasking "within the context of the Trump campaign" and "Trump transition," Rice responded "absolutely *not for any political purpose, to spy, expose, anything.*" Importantly, however, to be responsive to Plaintiff's FOIA requests, the purpose (whether political or otherwise) of the unmasking is not relevant. Rice confirmed that the specific unmasking occurred, and pursuant to Rice's own description of the process,¹⁰ records of those requests and records of the process of those requests exist.

With briefing now complete, we await the court's ruling.

When Viewed Alongside the NSA Memorandum, Emails Obtained by the ACLJ Connect Power's Expressions of Political Bias to Her Unmasking Activity.

There's another noteworthy development resulting from the release of the NSA Memorandum. In our lawsuit, the ACLJ has obtained documents that prove Power harbored strong political bias and dislike for President Trump *at the time* she engaged in her unmasking activity – which is again the subject of international news headlines. The dates of Power's emails and comments showing her political bias coincide with the dates we now know she engaged in unmasking. As we reported in a previous Quarterly Report:

In one of the more disturbing emails, **on December 14th**, Steinberg [Power's counsel] replies to an email Power sent under the subject line "tom friedman today – see last para quote by larry diamond" (this email appears from the production to contain no other information). However, Steinberg's reply to Power contains a December 9th article from *The Atlantic* by Larry Diamond entitled, "Russia and the Threat to Liberal Democracy," which furthers a narrative questioning the legitimacy of the election.

⁹ *Id.*

¹⁰ Rice publicly described that she and others would "ask their briefer whether the intelligence committee would go through its process -- and there's a long-standing, established process -- to decide whether that information as to who the identity of the U.S. person was could be provided to me." *Id.*

His commentary with the article simply states, “Indeed. Saw it and read Diamond’s piece Monday when doing some research. It’s a solid piece. Pasted it below and will have it added to your book.”

This occurred during the height of Power’s “unmasking” and calls into question what “research” and “book” he was putting together for her.

Indeed, it was on this very date, December 14, 2016, that Power was identified *twice* for unmasking activity in the NSA Memorandum just released by Acting Director Grenell.

Then, as we also reported in our previous Quarterly Report:

On **December 22, 2016**, in an email to Ben Rhodes (Obama’s Deputy National Security Advisor for Strategic Communications) who was also implicated in the unmasking requests, Power forwards an article entitled, “Applied pressure: Donald Trump isn’t even president yet and he’s already making waves at the U.N.” The article discusses President-Elect Trump’s diplomatic efforts to kill the U.N. draft resolution calling for Israel to return to pre-1967 borders. Power’s words to Rhodes: “This reflects the lack of understanding of history.”

Later that night, Steinberg adds Power to an email chain sharing a similar Reuters article about President Trump’s expression of support for Israel to the President of Egypt, and snarkily quips, “So much for one President at a time.”

This further confirms what we told you at the time, that the Obama Administration was intentionally attempting to undermine the State of Israel through a cowardly act at the U.N. Now we know, they were at the same time displaying their disdain for the incoming President.

The very next day, on December 23, 2016, the NSA Memorandum shows Power made *another* one of her unmasking requests.

The information obtained by ACLJ in its FOIA lawsuits, combined with information released in the NSA Memorandum, supports our suspicion that **Power’s unmasking activities were indeed politically motivated**. Power’s political bias was palpable and calls into severe question any suggestion that Power’s unprecedented unmasking requests against U.S. citizens were done with anything other than political animus.

The ACLJ Uncovered Obama Chief of Staff’s Email to Power and Rice: President Obama “Is Going to Go Away” in December and “You Should Go Away.”

The ACLJ obtained an email in our unmasking lawsuits that now, in light of all the news that has been reported, is clearer than it was before: *Two days after President Trump’s election, President Obama’s Chief of Staff Denis McDonough emailed a reply to Samantha Power, copying*

Susan Rice, and tells her President Obama “is going to go away” in December, and that she “should go away” as well.

On November 10, 2016, two days after the election, Power sends an “SBU” [Sensitive but Unclassified] email to President Obama’s Chief of Staff Denis McDonough under subject line “2 Questions”:

“Hi Denis - great to see you last night Thank you for being such a great leader for us. Two quick questions: I) do you happen to know what the December plans of you and the President and the senior staff are? I’m wondering if we will be going strong through the tape including the holiday, or whether people there plan to take some time away despite the short time left for us? I wasn’t planning on going anywhere given the fleeting calendar, but the UN kind of shuts down, so I was wondering if I was making a bad call .. 2) anything you can share about POTUS’ **sense of Trump the person? Looking for rays of light here amid the clouds.** Warmest, Samantha”

A little over an hour later, President Obama’s Chief of Staff McDonough replies to Power, and copies Susan Rice on her NSC email address, and says:

“Thanks, Sam. It was very nice to see you and Cass last night.

In December, the President is going to go away. That is not public so please hold close. My own view is that you should go away.”

[REDACTED].¹¹

Now we know President Obama’s Chief of Staff McDonough and Power – along with multiple other Obama officials and even Vice President Biden, engaged in unmasking efforts against the incoming Administration. And now we know McDonough told Power and Rice that President Obama was going to “go away” and that Power should “go away.” We will let you draw your own conclusions from this startling revelation.

James Clapper and His ODNI Made Unmasking Requests While He Rushed to Change the Rules to Expand Access to Intelligence.

As we previously reported, the ACLJ obtained records that show that the ODNI, under Director James Clapper, was eager and actively pushing to get its new procedures in place to increase access to raw signal intelligence before the conclusion of the Obama Administration and before President Trump took office. The documents the ACLJ obtained in one of our FOIA lawsuits – this one against the ODNI and the NSA – confirmed what we suspected: Clapper’s ODNI rushed to get the new “procedures signed by the Attorney General before the conclusion of

¹¹ A copy of this email is provided in Appendix II-C.

this administration.” The lawsuit is *ACLJ v. U.S. National Security Agency & U.S. Office of the Director of National Intelligence*, 17-cv-645 (D.D.C.).

With the Acting DNI’s release of the NSA Memorandum showing who made unmasking requests in the last days of the Obama Administration, we now know that Clapper and his colleague Stephanie O’Sullivan actually engaged in unmasking – and when they did so. When viewed alongside documents the ACLJ obtained in our lawsuit, we now know that Clapper’s unmasking took place in close connection to his efforts to increase access to intelligence.

For instance, the ACLJ obtained emails showing that O’Sullivan was involved in Clapper’s efforts to increase access to intelligence. In fact, she was on an email with Clapper dated November 30, 2016 – the same day Power engaged in one of her many unmasking efforts, and just days before Clapper engaged in unmasking (on December 2, 2016). Another email obtained by the ACLJ reveals that, “As per the 2.3 SSC meeting today, and to **confirm that DNI Clapper did, in fact, sign the 2.3 Availability Procedures on 15 Dec.16.**” So Clapper signed the rule change document on December 15, 2016, right between his own two unmasking requests on December 2 and December 28. There can be no doubt that Clapper was pushing expanded access to intelligence while unmasking Lt. Gen. Flynn.

The ACLJ also obtained an email exchanged between Clapper and O’Sullivan, as well as an individual named Michael Dempsey on January 7, 2017. **All 3 of these individuals were identified in the NSA Memorandum and all 3 made an unmasking request on that very date – January 7, 2017.**

Yet another document reveals Clapper’s signature on a January 11, 2017 memo distributing the new intelligence access procedures: “I am pleased to share with you the procedures called for by Section 2.3 of Executive Order 12333.” On that same date, Power engaged in another one of her many unmasking requests.

Recall that this is the same lawsuit in which we uncovered documents revealing that the ODNI hurried to get the new “*procedures signed by the Attorney General before the conclusion of this administration.*” These documents reveal that (1) ODNI’s Robert Litt told the Office of the Undersecretary of Defense’s Director of Intelligence Strategy, Policy, & Integration (and also USDI’s Liaison to ODNI): “**Really want to get this done . . . and so does the Boss**”; and (2) NSA officials discussed that they “*could have a signature from the AG as early as this week, certainly prior to the 20th Jan*” – i.e., before President Trump’s Inauguration.¹²

IV. CONCLUSION AND NEXT STEPS

Many times, in order to obtain the truth, it takes years of litigation and strategic work to gather multiple pieces of information from multiple sources and FOIA requests. The ACLJ is committed to this process. Upon receiving a FOIA request from the ACLJ, government agencies now know that the ACLJ will not tolerate attempts to flout the law and hide information from the

¹² Copies of emails discussed in this section are provided in Appendix II-D.

public in an effort to escape accountability. We will do everything we can to expose Power's political bias in connection with her unprecedented unmasking requests – and to expose any other unmasking abuse and corruption engaged in by Obama officials for political purposes. We await the court's order in these cases, and will file an appeal if necessary to obtain the truth.

**THE ACLJ SENDS FOIA REQUESTS SEEKING ANSWERS SURROUNDING THE
DECISION BY THE ARMY AND THE MARINES TO BAN BIBLE VERSES ON
MILITARY DOG TAGS:**

I. EXECUTIVE SUMMARY

The ACLJ sprang into action when we learned that a company called Shields of Strength (SOS), which engraved Bible verses on dog tags, had its license revoked by the Army and the Marines in response to threatening letters the Army and the Marines had received from an atheist organization. In February 2020, the ACLJ submitted FOIA requests to the Army and the Marines, so we could get to the bottom of why these honorable institutions decided to suddenly cave to the atheist organization's demands and prohibit Shields of Strength from putting Bible verses on military dog tags alongside military insignias – something it had been allowed to do for years.

II. BACKGROUND

Here is a brief background of the company, SOS, taken from its website:

It was December 1998 that the first Shields of Strength were placed in a store. They sold well enough that by 2001, stores across the country were carrying them and on one fateful day they caught the eye of Colonel David Dodd. . . . When he contacted Kenny and Tammie about buying some in bulk they graciously gave Colonel Dodd 500 Shields for his combat-ready troops.

Born that day was a lifelong friendship and relationship between Shields of Strength and the military. The most popular “tag” for most soldiers was emblazoned with the U.S. Flag and engraved with Joshua 1:9. It’s this “tag” that made its way to a young Army Captain named Russell Rippetoe. . . .

In 2003, while serving in Iraq, Captain Rippetoe was killed in action while wearing a Shield of Strength. He was the first American casualty of Operation Iraqi Freedom to be laid to rest at Arlington National Cemetery.

The following month, during the 2003 Memorial Day Ceremony at Arlington National Cemetery, President Bush referenced the dog tag Captain Rippetoe was wearing and read the scripture engraved on it. It was a surreal moment for Kenny and his family and they had no idea and no way to prepare for the media storm to come. . . .

One call Kenny didn’t miss, however, was from Joe Rippetoe, Russell Rippetoe’s father. Joe, who like his son was a veteran of war, was so taken by the Shield of Strength his son had worn that he wanted to make sure that each of the other soldiers from Russell’s unit had one. . . .

Since that time Kenny and Tammie have made over four million of the dog tags and have given hundreds of thousands of them to the U.S. military as well as other ministries. In fact, Stephen Mansfield wrote in his book, *Faith of the American Soldier*, “aside from the official insignias they wear, [the SOS dogtag] is the emblem most often carried by members of the military in Afghanistan and Iraq.”¹³

As we reported at the time, one organization in particular was deeply troubled by the fact that SOS sells religious products that also include the official United States Marine Corps (“USMC”) emblem.

In fact, this past July, this organization, which claims—ironically—to support religious freedom in the Armed Forces, sent a cease and desist letter to the USMC Trademark and Licensing Program Office, demanding that the USMC “immediately revoke and cancel the current approval for ‘Shields of Strength’ to continue using the official USMC emblem on any and/or all of its religious items for sale.”

The organization erroneously relied on the First Amendment’s Establishment Clause, which reads, in part, “Congress shall make no law respecting an establishment of religion.”

What this organization fails to understand, however, is this: If the USMC approved the sale of SOS religious products that include the official USMC emblem and also approved the sale of SOS non-religious products that include the USMC emblem, then there is no First Amendment violation. In fact, in this context, if the USMC were to prohibit the sale of SOS religious products that include the USMC emblem, while permitting the sale of non-religious products with the USMC emblem, the USMC would be in violation of the First Amendment by denigrating religious expression in favor of non-religious expression.

Unfortunately, the USMC has done just that. According to reports, the Marine Corps Trademark Licensing Office pulled the SOS license in response to the organization’s complaint. Not surprisingly, the same anti-Christian organization sent a similar threatening complaint to the Army Trademark Licensing Program Director. Once again, the organization demanded that the Army immediately “cease and desist from [allowing use of] the official Army logo on [SOS] Christian religious proselytizing sales products. . . .”

And similar to the USMC’s response, the Army, according to reports, caved to the organization. In fact, according to reports, on August 12, 2019, the Army Trademark Licensing Program Director sent the following email to Mr. Vaughan, founder of SOS: “You are not authorized to put biblical verses on your Army products. For example Joshua 1:9. Please remove ALL biblical references from all of your Army products.”

¹³ *About Us*, SHIELDS OF STRENGTH, <https://www.shieldsofstrength.com/about-us/> (last visited May 26, 2020).

III. THE ACLJ'S WORK TO ACHIEVE TRANSPARENCY

In light of these unfortunate developments, the ACLJ recently sent a FOIA request to the USMC Headquarters to determine the basis for the USMC's decision. Specifically, the ACLJ requested, among other items, all of the Marine Corps Trademark Licensing Office emails pertaining to Shields of Strength dating back to January 2017 as well as a list of all firms licensed to use the USMC emblem on products they produce.

The ACLJ also sent a FOIA request to the Army and requested similar types of records. These records will help the ACLJ understand what happened behind the scenes that caused the revocation of Shields of Strength's licenses. Copies of our FOIA requests are provided in Appendix III. We will provide copies of the records to our members, the public, and government officials if necessary, in our effort to help restore Shields of Strength's license to ensure its important and meaningful work for our military servicemembers may continue.

IV. CONCLUSION AND NEXT STEPS

Both military agencies have already responded to ACLJ's requests. While we anticipate some delay due to the COVID-19 pandemic, the ACLJ will pursue the matter and obtain the answers we seek. The U.S. military personnel deserve better. The ACLJ stands strong with and will continue to support our military servicemembers and the like-minded businesses that support them. We will provide updates on these FOIA requests on our website and/or publish them in future FOIA Quarterly Reports.

**CONCERNED OVER STATE GOVERNMENTS FAVORING ABORTION PROVIDERS
DURING THE COVID-19 PANDEMIC, THE ACLJ SENDS FOIA REQUESTS TO
MICHIGAN AND ILLINOIS TO EXPOSE WHO AND WHAT IS BEHIND THIS
DISGUSTING PROTECTION OF THE ABORTION INDUSTRY
DURING A NATIONAL CRISIS:**

I. EXECUTIVE SUMMARY

In March 2020, in response to the COVID-19 pandemic, state governments across the nation took steps to shut down business operations in apparent attempts to slow the spread of the virus. However, while businesses and medical care providers deemed non-essential struggled under the weight of shutdown orders, in some states, one particular type of business enjoyed favor and protection: the abortion industry. In response, the ACLJ issued two new state-level record requests to Michigan and Illinois in our effort to expose the abortion industry's influence over the government officials in those states. We intend to find out who was involved and what was said and done to protect the abortion industry's ability to make money in those states, and continue with their non-essential business of killing babies, while other businesses, medical care providers, and churches were shut down.

II. BACKGROUND

Michigan

On March 20, 2020, Governor Whitmer issued Executive Order 2020-17 (COVID-19) restricting all non-essential medical and dental procedures in the State of Michigan until the State of Emergency declared in Executive Order 2020-4 is no longer in effect. The Order defines a non-essential procedure as any procedure that "is not necessary to address a medical emergency or to preserve the health and safety of a patient, as determined by a licensed medical provider."¹⁴ It specifically permits "pregnancy-related visits and procedures; labor and delivery."¹⁵

The Lansing State Journal reported on March 25, 2020:

"It was explicit in the order that pregnancy-related care is included," said Lori Carpenter, Planned Parenthood of Michigan president and CEO. "You can rest assured we didn't leave it up to our own interpretation."¹⁶

¹⁴ Mich. Exec. Order No. 2020-17, ¶ 1.

¹⁵ *Id.* at ¶2.

¹⁶ Carol Thompson, *Michigan Clinics Still Providing Abortion Services During Coronavirus Crisis*, LANSING STATE JOURNAL (Mar. 25, 2020, 5:03 PM), <https://www.lansingstatejournal.com/story/news/2020/03/25/michigan-clinics-still-providing-abortion-services-coronavirus/5080860002/>.

However, Planned Parenthood of Michigan provides neither emergency medical care nor care preserving the health and safety of a patient. For example, the website of its Lansing Health Center says:

Symptoms of COVID-19 (coronavirus) include fever, cough, sore throat, and difficulty breathing. ANYONE WITH THESE SYMPTOMS WILL NOT BE ALLOWED TO ENTER THE HEALTH CENTER. . . .

If you have any of these symptoms, have traveled to an affected area, or have been exposed to a person with a confirmed case, please do not come in to the health center. Call 800-230-7526 to reschedule your appointment. Contact your primary care provider for further assistance.¹⁷

How “pregnancy-related care” came to include abortion and how that was not left to “interpretation” under EO 2020-17 during this pandemic – when the clinics are apparently not providing COVID-19-related healthcare – is certainly a question of public concern.

Illinois

While other states are ceasing elective medical procedures – including elective abortions – during the Coronavirus pandemic, Illinois is keeping its abortion clinics open for business. While many states, including Illinois, are taking the necessary step of halting all elective procedures in order to not only preserve medical equipment but to aid in flattening the curve through social distancing, some states, such as Illinois, are taking the extraordinary step of specifically exempting elective abortions from these regulations, further endangering the public.

On March 20, 2020, Governor Pritzker issued Executive Order 2020-10 (COVID-19 Executive Order No. 8) closing all non-essential businesses in the State of Illinois until April 30, 2020. The Executive Order specifically permits “reproductive health care providers” to remain in operation.¹⁸

While the Order does not stop all elective surgeries, the Illinois Department of Public Health recommended canceling all elective surgeries in order to “immediately decompress the healthcare system during the COVID-19 response ‘Elective’ is defined as those procedures that are pre-planned by both the patient and the physician that are advantageous to the patient but are NOT urgent or emergent.”¹⁹

¹⁷ *Lansing Health Center of Lansing, MI*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/health-center/michigan/lansing/48912/lansing-health-center-2785-90630> (last visited May 26, 2020).

¹⁸ Ill. Exec. Order No. 2020-10, ¶ 7.

¹⁹ *COVID-19 - Elective Surgical Procedure Guidance*, ILL. DEP’T OF PUB. HEALTH, www.dph.illinois.gov/topics-services/diseases-and-conditions/diseases-a-z-list/coronavirus/health-care-providers/elective-procedures-guidance (last visited May 26, 2020).

The reproductive healthcare providers are referring potential COVID-19 patients to other healthcare providers. For example, the website of Planned Parenthood of Illinois says:

We will continue to follow the most current safety guidelines issued by the U.S. Centers for Disease Control and Prevention and the Illinois Department of Public Health. We encourage everyone to observe proper precautions to protect against COVID-19.

As always, consult your health care provider if you have flu-like symptoms and are very sick or believe you may be at risk for serious complications from an underlying condition.²⁰

As a further example, the website of Family Planning Associates states:

Call us at 312-707-8988, if you have a fever of 100.0 or more, a cough, difficulty breathing, muscle pains throughout your body, and/or diarrhea or if you have been exposed to the coronavirus (COVID-19) as we will not be able to see you as a patient at this time.²¹

How the elective services and surgeries provided by those referenced above and other reproductive healthcare providers were given a special status under the Executive Order during this pandemic – while they are apparently not providing COVID-19-related healthcare – is a question of public concern.

III. THE ACLJ'S WORK TO ACHIEVE TRANSPARENCY

The ACLJ's concern over the abortion industry's apparent influence and control over Michigan and Illinois government officials prompted the ACLJ to submit FOIA requests to both of these state governments. We submitted the request in Illinois on behalf of nearly 4,000 of our members residing in Illinois. We submitted the request in Michigan on behalf of approximately 5,000 of our members residing in Michigan.

In our request to the Michigan government, for example, we demanded:

1. All records prepared, generated, forwarded, transmitted, sent, shared, saved, received, or reviewed by any appointee, staff, employee or agent of the Department of the Attorney General, the Michigan Department of Treasury, the Michigan Department of Health and Human Services and the Michigan Department of Licensing and Regulatory Affairs that are or concern in any way communications

²⁰ *Stay Safe. Stay Healthy.*, PLANNED PARENTHOOD OF ILL., <https://www.plannedparenthood.org/planned-parenthood-illinois/stay-smart-stay-healthy> (last visited May 26, 2020).

²¹ *The Coronavirus COVID-19 Outbreak*, FAMILY PLANNING ASSOCS., <https://www.fpachicago.com/covid-19/> (last visited May 26, 2020).

with any person or organization advocating for the inclusion of abortion or “pregnancy-related visits and procedures” under Executive Order 2020-17.

2. All records prepared, generated, forwarded, transmitted, sent, shared, saved, received, or reviewed by any appointee, staff, employee or agent of the Department of the Attorney General, the Michigan Department of Treasury, the Michigan Department of Health and Human Services and the Michigan Department of Licensing and Regulatory Affairs that are or concern in any way communications with any person or organization advocating for the inclusion of abortion or “pregnancy related visits and procedures” under Executive Order 2020-17, its implementation, or the language of any provision contained in the Order at any stage of its development.

3. All records prepared, generated, forwarded, transmitted, sent, shared, saved, received, or reviewed by any appointee, staff, employee or agent of the Department of the Attorney General, the Michigan Department of Treasury, the Michigan Department of Health and Human Services and the Michigan Department of Licensing and Regulatory Affairs that are or concern in any way communications with any person or organization advocating for the inclusion of abortion or “pregnancy related visits and procedures” under Executive Order 2020-17, its implementation, or the language of any provision contained in the Order at any stage of its development. Such advocacy shall include, but is not limited to, all records that contain the following: prochoiceamerica.org, ppmi.org, emilyslist.org, inghamcountydemocraticparty.com, gretchenwhitmer.com, aol.com, yahoo.com, and gmail.com.

4. All records prepared, generated, forwarded, transmitted, sent, shared, saved, received, or reviewed by any appointee, staff, employee or agent of the Department of the Attorney General, the Michigan Department of Treasury, the Michigan Department of Health and Human Services and the Michigan Department of Licensing and Regulatory Affairs that are or concern in any way communications with any person or organization, and that concern or regard the impact that inclusion of abortion or “pregnancy related visits and procedures” under Executive Order 2020-17 could, would, or should have on the health, safety or wellbeing of any woman.

6. All records prepared, generated, forwarded, transmitted, sent, shared, saved, received, or reviewed by any Michigan public body or agency that concern or in any way discuss the Executive appointee, staff, employee or agent, and that concern or regard the impact that inclusion of abortion or “pregnancy related visits and procedures” under Executive Order 2020-17 could, would, or should have on the health, safety or wellbeing of any woman.

Our request to the Illinois government officials contained similar requests. Copies of both of these FOIA requests are provided in Appendix IV.

IV. CONCLUSION AND NEXT STEPS

The Michigan Department of Health and Human Services has responded and granted our requests. It will release its documents to us within thirty days. The Department of the Attorney General, the Michigan Department of Treasury, and the Michigan Department of Licensing and Regulatory Affairs have all claimed that no records exist. If we discover from the Michigan Department of Health and Human Services documents that the three Departments actually have responsive documents, the next step would be to file suit in the Court of Claims to force production of documents by these other agencies.

The Illinois Office of the Governor and Department of Public Health have said that our requests are too voluminous for compliance. We will narrow our requests for information in negotiations. The Lieutenant Governor has not yet replied. The Attorney General's office did reply and said it had no responsive documents.

The ACLJ will press these governments to comply with their respective laws and will take them to court, if necessary. We will post updates on our website or in our next FOIA Quarterly Report. State governments must be held accountable, too, and the ACLJ will continue to expand its FOIA practice and government accountability work to state governments as needed.

American Center for Law and Justice

QUARTERLY FOIA REPORT

APPENDIX I-A



July 25, 2019

Federal Bureau of Investigation
Attn: FOI/PA Request
Record/Information Dissemination Section
170 Marcel Drive
Winchester, VA 22602-4843
Fax: (540) 868-4391/4997

RE: FOIA Request for Records of James Comey and Other FBI Officials' Communications With or About Anthony Ferrante, Jordan Rae Kelly, and/or Tashina Gauhar

Dear Sir or Ma'am:

This letter is a request ("Request") in accordance with the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the corresponding department/agency implementing regulations.

The Request is made by the American Center for Law and Justice ("ACLJ")¹ on behalf of its members. The ACLJ respectfully seeks expedited processing and a waiver of fees related to this Request as set forth in an accompanying memorandum.

To summarize, this Request seeks records pertaining to the Federal Bureau of Investigation's (FBI) former Director, James Comey, and his communications with or about, and/or any records regarding, Anthony Ferrante, Jordan Rae Kelly, and/or Tashina Gauhar; as well as any communications with and/or files regarding Anthony Ferrante, Jordan Rae Kelly, and/or Tashina Gauhar of General Counsel James Baker; Deputy Director/Acting Director Andrew McCabe; Deputy Assistant Director of Counterintelligence Peter Strzok, McCabe's Deputy Counsel, Lisa Page; and Comey's Chief of Staff, James Rybicki, David Bowdich (Director's Office - DO), Michael Steinbach (Director's Office - DO), Trisha Anderson (OGC), E.W. Bill Priestap (Counterintelligence Division - CD), and Jonathan Moffa (Counterintelligence Division - CD).

Background

Pursuant to DOJ FOIA regulation 28 C.F.R. §16.3(b), this Background addresses "the date, title or name, author, recipient, subject matter of the record[s]" requested, to the extent known.

¹The ACLJ is a not-for-profit 501(c)(3) organization dedicated to the defense of constitutional liberties secured by law. The ACLJ regularly monitors governmental activity and works to inform the public of such affairs. The ACLJ and its global affiliated organizations are committed to ensuring governmental accountability and the ongoing viability of freedom and liberty in the United States and around the world.



According to a breaking news report by *RealClearInvestigations*, “Comey had an agent inside the White House who reported back to FBI headquarters about Trump and his aides, according to other officials familiar with the matter.”² According to the report:

At the same time Comey was personally scrutinizing the president during meetings in the White House and phone conversations from the FBI, he had an agent inside the White House working on the Russia investigation, where he reported back to FBI headquarters about Trump and his aides, according to officials familiar with the matter. The agent, Anthony Ferrante, who specialized in cyber crime, left the White House around the same time Comey was fired and soon joined a security consulting firm, where he contracted with BuzzFeed to lead the news site's efforts to verify the Steele dossier, in connection with a defamation lawsuit.

Knowledgeable sources inside the Trump White House say Comey carved out an extraordinary new position for Ferrante, which allowed him to remain on reserve status at the FBI while working in the White House as a cybersecurity adviser.

“In an unprecedented action, Comey created a new FBI reserve position for Ferrante, enabling him to have an ongoing relationship with the agency, retaining his clearances and enabling him to come back in [to bureau headquarters],” said a former National Security Council official who requested anonymity.

“Between the election and April 2017, when Ferrante finally left the White House, the Trump NSC division supervisor was not allowed to get rid of Ferrante,” he added, “and Ferrante continued working — in direct conflict with the no-contact policy between the White House and the Department of Justice.”³

Further:

Another FBI official, Jordan Rae Kelly, who worked closely with Mueller when he headed the bureau, replaced Ferrante upon his White House exit (though she signed security logs for him to continue entering the White House as a visitor while he was working for BuzzFeed). Kelly left the White House last year and joined Ferrante at FTI Consulting.

Working with Comey liaison Ferrante at the NSC in early 2017 was another Obama holdover — Tashina Gauhar, who remains a top national security adviser at the Justice Department.

² Paul Sperry, *Justice Dept. Watchdog Has Evidence Comey Probed Trump, on the Sly*, REALCLEARINVESTIGATIONS (July 22, 2019), https://www.realclearinvestigations.com/articles/2019/07/22/comey_under_scrutiny_for_own_inquiry_and_misleading_trump_119584.html.

³ *Id.*

In January 2017, Gauhar assisted former acting Attorney General Sally Yates in the Flynn investigation. Later, she helped Deputy Attorney General Rod Rosenstein resist, initially, Trump's order to fire Comey. Gauhar also took copious notes during her meetings with White House lawyers, which were cited by Mueller in the section of his report dealing with obstruction of justice.⁴

Records Requested

For purposes of this Request, the term "record" is "any information" that qualifies under 5 U.S.C. § 552(f), and includes, but is not limited to, the original or any full, complete and unedited copy of any log, chart, list, memorandum, note, correspondence, writing of any kind, policy, procedure, guideline, agenda, handout, report, transcript, set of minutes or notes, video, photo, audio recordings, or other material. The term "record" also includes, but is not limited to, all relevant information created, stored, received or delivered in any electronic or digital format, e.g., electronic mail, instant messaging or Facebook Messenger, iMessage, text messages or any other means of communication, and any information generated, sent, received, reviewed, stored or located on a government *or private* account or server, consistent with the holdings of *Competitive Enterprise Institute v. Office of Science and Technology Policy*, No. 15-5128 (D.C. Cir. July 5, 2016) (rejecting agency argument that emails on private email account were not under agency control, and holding, "If a department head can deprive the citizens of their right to know what his department is up to by the simple expedient of maintaining his departmental emails on an account in another domain, that purpose is hardly served.").

For purposes of this Request, the term "briefing" includes, but is not limited to, any meeting, teleconference, electronic communication, or other means of gathering or communicating by which information was conveyed to one or more person(s). For purposes of this Request, all sources, documents, letters, reports, briefings, articles and press releases cited in this Request are incorporated by reference as if fully set forth herein.

For purposes of this Request, and unless otherwise indicated, the timeframe of records requested herein is January 1, 2016, through January 1, 2019.

Pursuant to FOIA, 5 U.S.C. § 552, ACLJ hereby requests that the FBI respond to the following numbered requests and produce all responsive records:

1. All records concerning or relating in any manner to the communications of former FBI Director James Comey with or about, including forwarded email messages or CC or BCC email messages, and/or any records of James Comey regarding, Anthony Ferrante, Jordan Rae Kelly, or Tashina Gauhar.
2. All records concerning or relating in any manner to the communications of General Counsel James Baker; Deputy Director/Acting Director Andrew McCabe; Deputy Assistant Director of Counterintelligence Peter Strzok, McCabe's Deputy Counsel, Lisa Page; and Comey's

⁴ *Id.*

Chief of Staff, James Rybicki, David Bowdich (Director's Office - DO), Michael Steinbach (Director's Office - DO), Trisha Anderson (OGC), E.W. Bill Priestap (Counterintelligence Division - CD), and Jonathan Moffa (Counterintelligence Division - CD), with or about, including forwarded email messages or CC or BCC email messages, and/or any other records ever under the custody or control of these individuals, regarding Anthony Ferrante, Jordan Rae Kelly, or Tashina Gauhar.

3. All of James Comey's emails from April 1, 2016, to May 31, 2017.

CONCLUSION

If this Request is denied in whole or in part, ACLJ requests that, within the time requirements imposed by FOIA, you support all denials by reference to specific FOIA exemptions and provide any judicially required explanatory information, including but not limited to, a *Vaughn* Index.

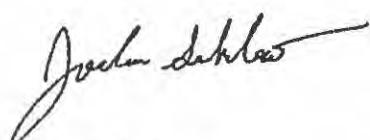
Moreover, as explained in an accompanying memorandum, the ACLJ is entitled to expedited processing of this Request as well as a waiver of all fees associated with it. The ACLJ reserves the right to appeal a decision to withhold any information sought by this request and/or to deny the separate application for expedited processing and waiver of fees.

Thank you for your prompt consideration of this Request. Please furnish all applicable records and direct any responses to:

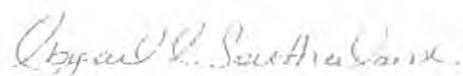
Jordan Sekulow, Executive Director
Abigail Southerland, Senior Litigation Counsel
Benjamin P. Sisney, Senior Litigation Counsel
American Center for Law and Justice
[REDACTED]
[REDACTED]
[REDACTED]

I affirm that the foregoing request and attached documentation are true and correct to the best of my knowledge and belief.

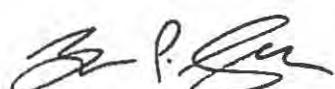
Respectfully submitted,



Jordan Sekulow
Executive Director



Abigail Southerland
Senior Litigation Counsel



Benjamin P. Sisney
Senior Litigation Counsel

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN CENTER FOR LAW AND JUSTICE,)
[REDACTED])
Plaintiff,)
vs.) Case Action No. 1:19-cv-2643
FEDERAL BUREAU OF INVESTIGATIONS)
935 Pennsylvania Avenue, NW) **COMPLAINT FOR DECLARATORY
Washington, DC 20535) AND INJUNCTIVE RELIEF
Defendant.)**

COMPLAINT

Plaintiff American Center for Law and Justice (“ACLJ”), by and through counsel, brings this action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, challenging the failure of the Federal Bureau of Investigation (“FBI”), a component of Defendant Department of Justice (DOJ), to issue a determination as to Plaintiff’s FOIA request within the statutorily prescribed time period, and seeking the disclosure and release of agency records improperly withheld by Defendant. In support thereof, Plaintiff alleges and states as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B), 5 U.S.C. § 552(a)(6)(C)(i), and 28 U.S.C. § 1331, because this action arises under FOIA, and Plaintiff has exhausted its administrative remedies.
2. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e) and 5 U.S.C. § 552(a)(4)(B).

3. This Court has authority to award injunctive relief pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 2202.

4. This Court has authority to award declaratory relief pursuant to 28 U.S.C. § 2201.

PARTIES

5. Plaintiff, with an office at 201 Maryland Avenue, N.E., Washington, DC 20002, is a not-for-profit 501(c)(3) organization dedicated to the defense of constitutional liberties secured by law. Plaintiff's mission is to educate, promulgate, conciliate, and where necessary, litigate, to ensure that those rights are protected under the law. Plaintiff also regularly monitors governmental activity with respect to governmental accountability. Plaintiff seeks to promote integrity, transparency, and accountability in government and fidelity to the rule of law. In furtherance of its dedication to the rule of law and public interest mission, Plaintiff regularly requests access to the public records of federal, state, and local government agencies, entities, and offices, and disseminates its findings to the public.

6. Defendant FBI is an agency of the United States within the meaning of 5 U.S.C. § 552(f)(1), and is a component of the United States Department of Justice (DOJ), which is an agency of the United States within the meaning of 5 U.S.C. § 552(f)(1).

7. Defendant FBI is headquartered at 935 Pennsylvania Avenue, NW, Washington, DC 20535. Defendant is in control and possession of the records sought by Plaintiff.

8. Defendant FBI has possession, custody and control of the records Plaintiff seeks.

FACTUAL ALLEGATIONS

9. On July 25, 2019, Plaintiff issued FOIA requests to the FBI and the DOJ requesting "records pertaining to the Federal Bureau of Investigation's (FBI) former Director, James Comey, and his communications with or about, and/or any records regarding, Anthony Ferrante, Jordan Rae Kelly, and/or Tashina Gauhar"; as well as any records of any communications with and/or files

regarding those individuals within the custody of certain FBI officials including: “General Counsel James Baker; Deputy Director/Acting Director Andrew McCabe; Deputy Assistant Director of Counterintelligence Peter Strzok, McCabe’s Deputy Counsel, Lisa Page; and Comey’s Chief of Staff, James Rybicki, David Bowdich (Director’s Office - DO), Michael Steinbach (Director’s Office - DO), Trisha Anderson (OGC), E.W. Bill Priestap (Counterintelligence Division - CD), and Jonathan Moffa (Counterintelligence Division - CD).” *See* Pl.’s FOIA Request attached hereto as Ex., A at 1.

10. “Pursuant to DOJ FOIA regulation 28 C.F.R. §16.3(b),” Plaintiff set forth a “Background address[ing] ‘the date, title or name, author, recipient, subject matter of the record[s]’ requested, to the extent known.” Pl.’s Ex. A, at 1 (quoting 28 C.F.R. §16.3(b)). Said Background is hereby incorporated as if fully set forth herein.

11. Plaintiff identified, in its FOIA request, the specific records it seeks. Pl.’s Ex. A, at 3-4.

12. In its FOIA request, Plaintiff specified that the term “record” includes “any information” that qualifies under 5 U.S.C. § 552(f), and provided a non-exhaustive list of types of information to be included in the term “record,” including “and information generated, sent, received, reviewed, stored or located on a government *or private* account or server, consistent with the holdings of *Competitive Enterprise Institute v. Office of Science and Technology Policy*, 827 F.3d 145 (D.C. Cir. No. 15-5128, July 5, 2016). *See* Pl.’s Ex. A, at 3.

13. Plaintiff further specified in its FOIA request the applicable definitions of the terms “briefing.” *See* Pl.’s Ex. A, at 3.

14. Plaintiff specified in its FOIA request that “unless otherwise indicated, the timeframe of records requested herein is January 1, 2016, through January 1, 2019.” *See* Pl.’s Ex. A, at 3.

15. In its FOIA request, Plaintiff requested that the FBI support all denials by reference to specific FOIA exemptions and provide any judicially required explanatory information, including but not limited to, a *Vaughn* Index. *See* Pl.'s Ex. A, at 4.

16. In its FOIA request, Plaintiff asserted its entitlement to expedited processing and a waiver of all associated fees, as explained in a memorandum accompanying each request and referenced therein, and reserved its right to appeal any agency withholding of records and/or any agency denial of Plaintiff's requests for expedited processing and a waiver of fees. *See* Pl.'s Ex. A, at 4.

17. Plaintiff sent its FOIA request to the FBI's FOI/PA Request Record/Information Dissemination Section 170 Marcel Drive, Winchester, VA 22602-4843. *See* Pl.'s Ex. A, at 1.

18. By letter dated August 2, 2019, the FBI acknowledged receipt of Plaintiff's FOIA request and assigned FOIPA Request No. 1443553-000 to the request.

19. By separate letter dated August 9, 2019, the FBI denied Plaintiff's request for expedited processing.

20. No other response has been received from the FBI.

21. The FBI failed to "notify [Plaintiff] of [] a determination and the reasons therefor" in accordance with 5 U.S.C. § 552(a)(6)(A)(i).

22. The FBI failed to inform Plaintiff of the scope of the documents that the FBI will produce, as well as the scope of the documents that the FBI plans to withhold under any FOIA exemptions.

23. In fact, the FBI has even failed to state any future intent to produce non-exempt responsive documents.

24. This is not the first instance in which Plaintiff issued a FOIA request to the FBI and, aside from acknowledgment of receipt and assignment of a control number to Plaintiff's

FOIA request, received no further response from the FBI unless and until Plaintiff initiated a lawsuit and raised legal challenges regarding the FBI's unlawful practices under FOIA.

25. On or about July 15, 2016, Plaintiff issued a FOIA request to the FBI seeking information relating to then-Attorney General Lynch's June 27, 2016, meeting with former President Bill Clinton at Sky Harbor International Airport.

26. On October 21, 2016, almost four months after the ACLJ issued its FOIA request, the FBI informed Plaintiff that “[n]o records responsive to your request were located.”

27. Approximately eight months later, on or about July 3, 2017, and pursuant to a lawsuit filed by Plaintiff against the Department of Justice for identical records, Plaintiff discovered – through documents produced by the DOJ – that the FBI did, in fact, have documents responsive to Plaintiff's July 15, 2016, FOIA Request and that the FBI was surely aware of this fact in light of its own redactions within those documents.

28. Only after this fact was made widely known to the public by the media and Plaintiff contacted the Office of Government Information Services (“OGIS”), did the FBI, on or about August 10, 2017, reopen the request and admit that records “potentially responsive to your request may exist.”

29. The FBI has since admitted that it became aware as early as May 23, 2017, that it may have documents responsive to Plaintiff's request. Nonetheless, the FBI took no action until Plaintiff challenged its original determination.

30. The FBI still failed to produce any responsive documents in the time period required by FOIA. Thus, Plaintiff filed suit against the FBI on September 12, 2017, to obtain the documents to which it was entitled.

31. Following six months after the FBI's knowledge that it had documents responsive to Plaintiff's FOIA request, and only after Plaintiff filed suit, did the FBI produce a mere 29 pages of

non-exempt responsive documents containing heavy redactions under Exemptions 5, 6 and 7 of FOIA. *See Complaint, American Center for Law & Justice v. Dep’t of Justice*, No. 1:18-cv-0373 (D.D.C. February 19, 2018), ECF No. 1.

32. Once again, Plaintiff was forced to challenge the FBI’s inadequate search, continued delay and improper withholding of non-exempt responsive documents.

33. Only after Plaintiff presented legal argument challenging the FBI’s inadequate search and improper withholding of information, did the FBI – on the eve of its deadline to respond to Plaintiff’s cross motion for summary judgment – agree to conduct another search for responsive documents.

34. Only through Plaintiff’s persistent legal efforts to require the FBI’s compliance with FOIA did the FBI finally conduct an adequate search and produce additional documents to which Plaintiff was entitled.

35. The FBI continued, however, to withhold non-exempt information contained within talking points – information admittedly consisting purely of factual information. Plaintiff was forced again to challenge the FBI’s unlawful withholding and delay in producing the information in the United States District Court of Appeals of the District of Columbia.

36. Once again, in June 2016, on the eve of the FBI’s deadline to submit its brief and only after months of continued delay by the FBI to first respond with what the FBI represented would be a dispositive motion, then with its opening brief, did the FBI produce the talking points sought by Plaintiff in an effort to moot Plaintiff’s case.

37. On or about September 7, 2017, Plaintiff issued another FOIA request seeking records from the FBI regarding its investigation and decision not to pursue criminal charges against Hillary Rodham Clinton.

38. Just as in the current lawsuit, the FBI acknowledged receipt of Plaintiff's FOIA request and assigned case control numbers, but did not produce all documents responsive to Plaintiff's FOIA request in the time period required by FOIA. *See Complaint, American Center for Law & Justice v. Dep't of Justice*, No. 1:18-cv-0373 (D.D.C. February 19, 2018), ECF No. 1.

39. The FBI failed to "notify [Plaintiff] of [] a determination and the reasons therefor" in accordance with 5 U.S.C. § 552(a)(6)(A)(i).

40. The FBI failed to inform Plaintiff of the scope of the documents that it would produce, as well as the scope of the documents that it planned to withhold under any FOIA exemptions.

41. Only after Plaintiff filed suit to challenge the FBI's non-compliance with FOIA did it begin producing the documents to which Plaintiff was entitled.

42. Upon information and belief, the FBI is engaged in a pattern and practice of intentional delay and improper withholding of factual information to impair Plaintiff's lawful and timely access to information.

43. As Plaintiff's prior lawsuits against the FBI demonstrate, the filing of a lawsuit to obtain all requested records is "an empty gesture in preventing future delays, much less obtaining future relief," *Judicial Watch, Inc. v. Department of Homeland Security*, 895 F.3d 770, 782 (D.C. Cir. 2018), because the FBI will moot the litigation and escape judicial review of its compliance with FOIA by complying with the requirements of FOIA in the final hours of the parties' briefing on the matter.

44. The FBI's practice of prolonged, repeated and unsupported or unexplained delay will continue to harm Plaintiff's mission to inform the public regarding government conduct by unlawfully interfering with its statutory right to promptly obtain non-exempt records upon request.

CAUSES OF ACTION

COUNT I
Violation of the Freedom of Information Act

45. Plaintiff re-alleges and incorporates by reference the preceding paragraphs of this Complaint as if fully stated herein.

46. The federal FOIA establishes a 20-day deadline by which a federal agency must make and issue a decision regarding compliance with a request for records made pursuant to the statute. 5 U.S.C. § 552(a)(6)(A)(i).

47. Pursuant to 5 U.S.C. § 552(a)(6)(A), the FBI was required to determine whether to comply with Plaintiff's request within twenty (20) days, excepting Saturdays, Sundays, and legal public holidays. Pursuant to this same provision, Defendant was also required to notify Plaintiff immediately of the determination, the reasons therefor, and the right to appeal any adverse determination to the head of the agency.

48. Plaintiff sent its FOIA request to the component of Defendant designated by Defendant to receive FOIA requests directed to the FBI, and the FBI acknowledged receipt of the request by letter dated August 2, 2019.

49. Pursuant to 5 U.S.C. § 552(a)(6)(A), the 20-day period commenced on July 26, 2019. Excluding weekends and holidays, the FBI was required to make its determination and provide Plaintiff with the requisite notifications no later than August 26, 2019.

50. As of the date of this Complaint, the FBI has failed to notify Plaintiff of any determination about whether it will comply with Plaintiff's FOIA request, including the scope of records the FBI intends to produce, or the scope of records it intends to withhold, the reasons for any such determination.

51. As of the date of this Complaint, the FBI has failed to produce any records responsive to the request, indicate when (or even whether) any responsive records will be produced, or demonstrate that responsive records are exempt from production.

52. The FBI has not requested information from the Plaintiff that would toll the 20-day period as contemplated by 5 U.S.C. § 552(a)(6)(A)(i)(I).

53. The FOIA permits a federal agency, in unusual circumstances, to extend the 20-day response deadline for a period not to exceed ten (10) additional working days. 5 U.S.C. § 552(a)(6)(B).

54. The FBI has not asserted the existence of “unusual circumstances.” As such, the FBI has not implicated the tolling provision set forth in 5 U.S.C. § 552(a)(6)(B)(i).

55. There are no “unusual circumstances” that justify the FBI’s prolonged delay in responding to Plaintiff’s lawful FOIA request.

56. Plaintiff has a statutory right to have the FBI process Plaintiff’s FOIA request in a timely manner and in accordance with the requirements set forth in 5 U.S.C. § 552(a)(6).

57. The FBI is unlawfully withholding records requested by Plaintiff pursuant to 5 U.S.C. § 552.

58. FOIA provides a cause of action for a complainant from whom a federal agency has withheld requested records. 5 U.S.C. § 552(a)(4)(B).

59. Through its continued delay and outright failure to properly respond to Plaintiff’s lawful request for records, and its improper withholding of such requested records, the FBI has failed to comply with FOIA’s prescribed deadlines for responding to a request for records and has violated Plaintiff’s statutory rights.

60. Pursuant to 5 U.S.C. § 552(a)(6)(C), because the FBI failed to comply with the time limit set forth in 5 U.S.C. § 552(a)(6)(A), Plaintiff is deemed to have exhausted any and all administrative remedies with respect to its FOIA request.

61. Plaintiff is being irreparably harmed by reason of the FBI's unlawful withholding of requested records, and Plaintiff will continue to be irreparably harmed unless the FBI is compelled to conform its conduct to the requirements of the law.

COUNT II

**Impermissible Practice, Pattern and Practice, and/or Policy of Violating
The Freedom of Information Act**

62. Plaintiff re-alleges and incorporates by reference the preceding paragraphs of this Complaint as if fully stated herein.

63. The FBI has adopted and is engaged in a policy and practice of violating FOIA's procedural requirements when processing FOIA requests by intentionally refusing to produce all non-exempt documents in the manner required under 5 U.S.C. § 552(a)(6) and unless and until Plaintiff files suit.

64. The FBI's repeated unreasonable delays and intentional refusals to issue a determination and produce all non-exempt documents violates the intent and purpose of the FOIA.

65. The FBI's repeated and intentional actions have resulted, and will continue to result, in the untimely access to information to which Plaintiff is entitled, and the production of

stale information that is of little value and, yet, more costly than fresh information ought to be. *Payne Enterprises, Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988).

66. The FBI's repeated failures to abide by the terms of FOIA are not attributable to an unpredictable influx in FOIA requests or other reasonable delay.

67. In this case, just as in the two other FOIA cases Plaintiff has filed against the FBI, Plaintiff's FOIA request went unanswered and the FBI refused to respond in the manner required by FOIA and within the deadline(s) mandated by FOIA until Plaintiff sought legal action.

68. The FBI's failure to respond in a manner required under FOIA is not an isolated incident. As detailed above, the FBI has, on at least four other occasions, refused to respond in a manner required under FOIA unless and until Plaintiff raises legal challenges to address the FBI's failures to comply with FOIA.

69. The FBI's impermissible practice, policy, and/or pattern of refusing to issue a determination and/or produce all responsive non-exempt documents unless and until Plaintiff files suit and challenges the FBI's withholding of information, warrants declaratory and injunctive relief under *Payne Enterprises, Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988); *see Muttitt v. United States Cent. Command*, 813 F. Supp. 2d 221, 229-31 (D.D.C. 2011).

70. The FBI's pattern or practice of unlawful conduct in violation of FOIA's clear requirements unless and until this Plaintiff files a lawsuit and challenges the FBI's delay and improper withholding of non-exempt information is likely to recur absent intervention by this Court.

71. The FOIA imposes no limits on courts' equitable powers in enforcing its terms,

and this Court should exercise its equitable powers to compel the FBI to comply with the clear requirements of the FOIA and prevent it from continuing to apply its unlawful FOIA practice or policy.

72. As the numerous incidences outlined above demonstrate, injunctive relief is warranted here because ordinary remedies are inadequate to overcome the FBI's policy or practice of delay and improper withholding of non-exempt factual information impairing Plaintiff's lawful and timely access to information in the future.

PRAYER FOR RELIEF

73. WHEREFORE, Plaintiff respectfully requests that the Court enter judgment against Defendant, and provide Plaintiff with the following relief:

- (a) An Order that Defendant conduct a diligent, expedited search for any and all records responsive to Plaintiff's FOIA request and demonstrate that it employed reasonable search methods most technologically likely to lead to the discovery of records responsive to Plaintiff's FOIA request, selected from among those methods available to Defendant;
- (b) An Order that Defendant produce, by a date certain, any and all non-exempt records responsive to Plaintiff's FOIA request and a *Vaughn* index of any responsive records withheld under claim of exemption;
- (c) An Order enjoining Defendant from continuing to withhold any and all non-exempt records responsive to Plaintiff's FOIA request;
- (d) A declaration that Defendant's actions violated Plaintiff's statutory rights under 5 U.S.C. § 552;
- (e) Relief pursuant to this Court's equitable powers, as recognized in *Payne Enterprises, Inc. v. United States*, 837 F.2d 486, 494 D.C. Cir. 1988) (citing *Renegotiation Bd. v. BannerCraft Clothing Co.*, 415 U.S. 1, 19-20 (1974)), including a Declaration that Defendant has implemented an impermissible pattern, practice or policy of untimely and noncompliant responses to FOIA requests and an Order enjoining Defendant from continuing to implement that pattern, practice or policy

- (f) An Order awarding to Plaintiff its reasonable attorneys' fees and other litigation costs reasonably incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and,
- (g) An Order granting to Plaintiff all further relief to which Plaintiff may be entitled.

Dated: September 4, 2019.

Respectfully submitted,

THE AMERICAN CENTER FOR LAW AND JUSTICE
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QUARTERLY FOIA REPORT

APPENDIX I-B

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN CENTER FOR LAW AND JUSTICE,)
)
)
Plaintiff,)
)
)
v.) Civil Docket No. 1:19-cv-2643 (RC)
)
FEDERAL BUREAU OF INVESTIGATION) ORAL HEARING REQUESTED
)
Defendant.)
)

**PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION
TO DEFENDANT'S PARTIAL MOTION TO DISMISS
AND REQUEST FOR ORAL HEARING PURSUANT TO LCvR 7(f)**

I. INTRODUCTION

In introducing the predecessor of the bill that was enacted as the federal Freedom of Information Act (“FOIA”), its sponsor, Senator Edward Long, clearly identified the principle necessitating such a law: “Knowledge will forever govern ignorance, and a people who mean to be their own governors must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it is but a prolog to a farce or a tragedy or perhaps both.” 111 CONG. REC. 26821 (1965) (quoting James Madison). In keeping with this principle, Plaintiff, the American Center for Law and Justice (ACLJ), attempted to obtain information directly from Federal Bureau of Investigation (FBI) records pertaining to the FBI’s

former Director, James Comey, and his communications with or about, and/or any records regarding, Anthony Ferrante, Jordan Rae Kelly, and/or Tashina Gauhar”; as well as any records of any communications with and/or files regarding those individuals within the custody of certain FBI officials including: “General Counsel James Baker; Deputy Director/Acting Director Andrew McCabe; Deputy Assistant Director of Counterintelligence Peter Strzok, McCabe’s Deputy Counsel, Lisa

Page; and Comey’s Chief of Staff, James Rybicki, David Bowdich (Director’s Office - DO), Michael Steinbach (Director’s Office - DO), Trisha Anderson (OGC), E.W. Bill Priestap (Counterintelligence Division - CD), and Jonathan Moffa (Counterintelligence Division - CD).”

See Pl.’s Complaint, ¶ 9 (quoting Pl.’s FOIA Request, Ex. A to Compl. at 1).

The Defendant, however, flouted the law and utterly ignored FOIA’s clear requirements by refusing to “notify [Plaintiff] of [] a determination and the reasons therefor” in accordance with 5 U.S.C. § 552(a)(6)(A)(i), along with other glaring deficiencies. This is not the first instance in which the ACLJ issued a FOIA request to the FBI and, aside from acknowledgment of receipt and assignment of a control number to the ACLJ’s FOIA request, received no further response from the FBI unless and until the ACLJ initiated a lawsuit and raised legal challenges regarding the FBI’s unlawful practices under FOIA. *See* Complaint, *American Center for Law & Justice v. Dep’t of Justice*, No. 1:18-cv-0373 (D.D.C. February 19, 2018), ECF No. 1; Complaint, *American Center for Law & Justice v. Dep’t of Justice*, No. 1:17-CV-1866 (D.D.C. Sept. 12, 2017), ECF No. 1.

The FBI is engaged in a pattern and practice of intentional delay and improper withholding of factual information to impair the ACLJ’s lawful and timely access to information. As the ACLJ’s prior lawsuits against the FBI demonstrate, the filing of a lawsuit to obtain all requested records is “an empty gesture in preventing future delays, much less obtaining future relief,” *Judicial Watch, Inc. v. Department of Homeland Security*, 895 F.3d 770, 782 (D.C. Cir. 2018), because the FBI will moot the litigation and escape judicial review of its compliance with FOIA by complying with the requirements of FOIA only after the ACLJ filed its lawsuit or – like it did in one of those cases – on the eve of a briefing deadline as it has done on two separate occasions. Unfortunately, the FBI’s unapologetic refusal to abide by FOIA is not an isolated event, but rather,

a pattern and practice. As such, in this third FOIA lawsuit against this Defendant, Plaintiff alleged a pattern and practice claim articulated as Count II.

“A government by secrecy benefits no one. It injures the people it seeks to serve; it injures its own integrity and operation. It breeds mistrust, dampens the fervor of its citizens, and mocks their loyalty.” 111 CONG. REC. at 26823. In enacting FOIA, Congress designated the federal courts as the protectors against such evils, and this Court must not allow the FBI to perpetuate such injuries against the American public, including the ACLJ, by ignoring, with impunity, the clear mandates of FOIA.

II. ARGUMENT

A. Standard of Review

“To survive a motion to dismiss,” a plaintiff need only plead “sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955 (2007)). In essence, the facts pleaded by plaintiff must “allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Twombly*, 550 U.S. at 570; *accord Rudder v. Williams*, 666 F.3d 790, 794 (D.C. Cir. 2012). The Court “must assume all the allegations in the complaint are true (even if doubtful in fact) . . . [and] must give the plaintiff the benefit of all reasonable inferences derived from the facts alleged.” *Nat'l Sec. Counselors v. CIA*, 931 F. Supp. 2d 77, 89 (D.D.C. 2013) (citations and internal quotation marks omitted).

The standard of review applied in *Judicial Watch, Inc. v. Department of Homeland Security*, 895 F.3d 770, 782 (D.C. Cir. 2018), applies here as a FRCP 12(c) motion for judgment on the pleadings is “functionally equivalent” to a motion to dismiss for failure to state a claim under Rule 12(b)(6). *Rollins v. Wackenhut Servs., Inc.* 703 F.3d 122, 129-130 (D.C. Cir. 2012).

B. Defendant is Not Entitled To Dismissal Because Plaintiff Has Sufficiently Alleged A Policy or Practice of Failure to Abide By the Terms of the FOIA.

“FOIA lawsuits generally become moot once an agency has made available requested non-exempt records, whether voluntarily or after court order.” *Judicial Watch*, 895 F.3d at 777 (citing *Perry v. Block*, 684 F.2d 121, 125 (D.C. Cir. 1982)). Of course, mootness is not at issue in the case now before this Court because, more than four months after receiving the ACLJ’s FOIA request, the Defendant still has not provided a single record and did not begin substantively processing the ACLJ’s requests until after it was served with this lawsuit. Regardless, as reinforced in *Judicial Watch*, this Circuit “has recognized an exception to mootness where an agency has a ‘policy or practice’ that ‘will impair the party’s lawful access to information in the future.’” *Id.* (citing *Payne Enterprises, Inc. v. United States*, 837 F.2d 486, 491 (D.C. Cir. 1988)).

To be clear, the “FOIA authorizes a court not only to ‘order the production of any agency records improperly withheld,’ but also to ‘enjoin the agency from withholding agency records.’” *Id.* (quoting 5 U.S.C. § 552(a)(4)(B)). “This injunctive authority does not limit the district court’s inherent injunctive powers.” *Id.* (citing *Renegotiation Bd. v. Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 20, 94 S. Ct. 1028, (1974)).

As the U.S. Court of Appeals for the D.C. Circuit has recently made clear, “a plaintiff states a plausible policy or practice claim under *Payne* [*Enterprises, Inc. v. United States*, 837 F.2d 486 (D.D.C 1998)] by alleging prolonged, unexplained delays in producing non-exempt records that could signal the agency has a policy or practice of ignoring FOIA’s requirements.” *Judicial Watch, Inc.*, 895 F.3d at 780. More specifically, “[a]s in *Payne*, the plaintiff must allege a pattern of prolonged delay amounting to a persistent failure to adhere to FOIA’s requirements and that the pattern of delay will interfere with its right under FOIA to promptly obtain non-exempt records from the agency in the future.” *Id.* Contrary to the FBI’s position, this statement of law contains

no bright line requirements as to the sameness of subject matter of FOIA requests or a particular number of lawsuits. As is generally true in matters of equity and injunctive relief, this Court enjoys a degree of flexibility in fashioning a remedy appropriate to a particular set of facts. All that matters at this stage is whether the ACLJ “alleg[es] prolonged, unexplained delays in producing non-exempt records that could signal the agency has a policy or practice of ignoring FOIA’s requirements.” *Id.* Put differently, “[i]n this circuit it is settled law that informal agency conduct resulting in long delays in making requested non-exempt records available may serve as the basis for a policy or practice claim.” *Judicial Watch*, 895 F.3d at 777-78 (emphasis added).

The ACLJ’s allegations here are facially sufficient to allow this Court to “draw the reasonable inference’ that the [FBI] has adopted a practice of delay, contrary to FOIA’s two-part scheme, by repeatedly standing mute over a prolonged period of time and using [the ACLJ’s] filing of a lawsuit as an organizing tool for setting its response priorities.” *Id.* at 780-81 (quoting *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 570). “The conclusion that such ‘unreasonable delay in disclosing non-exempt documents’ is an ‘abuse of [FOIA’s] scheme’ follows ineluctably from the recognition that ‘Congress did not intend for the [agency] to use the FOIA offensively to hinder the release of non-exempt documents so as to ‘force[] the appellant[] to bring several lawsuits to obtain release of the documents.’” *Id.* at 781 (quoting *Payne*, 837 F.2d at 494; *Long*, 693 F.2d at 910). “And it is long established in this circuit that an agency’s compliance with FOIA depends upon its ‘good faith effort and due diligence . . . to comply with all lawful demands [for records] . . . in as short a time as is possible.’” *Id.* (quoting *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605, 616 (D.C. Cir. 1976)).¹

¹ Defendant does not dispute that a complaint need *not* allege that the pattern, practice or policy is a formal one. *See Muttitt v. U.S. Central Command*, 813 F. Supp. 2d 221, 224 (D.D.C. 2011). Indeed, “[i]n this circuit it is settled law.” *Judicial Watch*, 895 F.3d at 777-78.

1. Plaintiff has sufficiently alleged, and Defendant does not dispute, that it has failed to abide by the terms of the FOIA in this case and two previous cases.

This Case

The FBI does not dispute the relevant underlying factual allegations. *See* Def.'s Mot. Doc. # 11-1, at 5 (conceding that Plaintiff's Count I "is not at issue at this juncture"); *id.* at p. 8 ("That count is not at issue in this motion."). The FBI has not filed an Answer regarding any factual allegations pertaining to Count I and has only filed a partial motion to dismiss as to Count II.

The FBI acknowledged receipt of the ACLJ's FOIA requests within a week after the ACLJ sent the request, and denied expedited processing a week later. Compl., (Dkt. 1) ¶¶ 17-19. The FBI indisputably failed to comply with the FOIA. Compl., (Dkt. 1) ¶21 ("The FBI failed to "notify [Plaintiff] of [] a determination and the reasons therefor" in accordance with 5 U.S.C. § 552(a)(6)(A)(i)"); ¶22 ("The FBI failed to inform Plaintiff of the scope of the documents that the FBI will produce, as well as the scope of the documents that the FBI plans to withhold under any FOIA exemptions."); ¶ 23 ("In fact, the FBI has even failed to state any future intent to produce non-exempt responsive documents.").

Moreover, the FBI does not and cannot dispute the ACLJ's allegation that "[t]he FBI has not requested information from the Plaintiff that would toll the 20-day period as contemplated by 5 U.S.C. § 552(a)(6)(A)(i)(I)." Compl., (Dkt. 1) ¶52. There is no dispute that "[t]he FBI has not asserted the existence of 'unusual circumstances.' As such, the FBI has not implicated the tolling provision set forth in 5 U.S.C. § 552(a)(6)(B)(i)." Compl., (Dkt. 1) ¶54. And there is no dispute over the ACLJ's allegation that, in fact, "[t]here are no 'unusual circumstances' that justify the FBI's prolonged delay in responding to Plaintiff's lawful FOIA request." Compl., (Dkt. 1) ¶55.

But these facts do not reflect the first time the ACLJ received these kinds of non-compliant responses from the FBI. A pattern has emerged.

As to Count II, the ACLJ alleges that the Defendant has a reputation for disregarding its public accountability and FOIA obligations and engages in a pattern and practice of failing to respond in a timely manner to FOIA requests *unless and until a lawsuit is initiated by the requestor.* Compl., (Dkt. 1) ¶ 63 (“The FBI has adopted and is engaged in a policy and practice of violating FOIA’s procedural requirements when processing FOIA requests by intentionally refusing to produce all non-exempt documents in the manner required under 5 U.S.C. § 552(a)(6) and *unless and until Plaintiff files suit.*” (emphasis added)); ¶¶ 68-70. The facts pleaded go far beyond the “naked assertions” or allegation of a single incident — circumstances that would actually justify dismissal.

The Lynch FOIA Request

“On or about July 15, 2016, Plaintiff issued a FOIA request to the FBI seeking information relating to then-Attorney General Lynch’s June 27, 2016, meeting with former President Bill Clinton at Sky Harbor International Airport.” Compl., (Dkt. 1) ¶ 25. “On October 21, 2016, almost four months after the ACLJ issued its FOIA request, the FBI informed Plaintiff that “[n]o records responsive to your request were located.” Compl., (Dkt. 1) ¶ 26.

“Approximately eight months later, on or about July 3, 2017, and pursuant to a lawsuit filed by Plaintiff against the Department of Justice for identical records, Plaintiff discovered – through documents produced by the DOJ – that the FBI did, in fact, have documents responsive to Plaintiff’s July 15, 2016^[62], FOIA Request and that the FBI was surely aware of this fact in light of its own redactions within those documents.” Compl., (Dkt. 1) ¶ 27. “Only after this fact was made widely known to the public by the media and Plaintiff contacted the Office of Government

² As Defendant has observed, Plaintiff’s Complaint contained a typo regarding the year.

Information Services (“OGIS”), did the FBI, on or about August 10, 2017, reopen the request and admit that records ‘potentially responsive to your request may exist.’” Compl., (Dkt. 1) ¶ 28.

“The FBI has since admitted that it became aware as early as May 23, 2017, that it may have documents responsive to Plaintiff’s request. Nonetheless, the FBI took no action until Plaintiff challenged its original determination.” Compl., (Dkt. 1) ¶ 29.

“The FBI still failed to produce any responsive documents in the time period required by FOIA. Thus, Plaintiff filed suit against the FBI on September 12, 2017, to obtain the documents to which it was entitled.” Compl., (Dkt. 1) ¶ 30. “Following six months after the FBI’s knowledge that it had documents responsive to Plaintiff’s FOIA request, and only after Plaintiff filed suit, did the FBI produce a mere 29 pages of non-exempt responsive documents containing heavy redactions under Exemptions 5, 6 and 7 of FOIA.” Compl., (Dkt. 1) ¶ 31 (citing Complaint, *American Center for Law & Justice v. Dep’t of Justice*, No. 1:18-cv-0373 (D.D.C. February 19, 2018), ECF No. 1). “Once again, Plaintiff was forced to challenge the FBI’s inadequate search, continued delay and improper withholding of non-exempt responsive documents.” Compl., (Dkt. 1) ¶ 32.

“Only after Plaintiff presented legal argument challenging the FBI’s inadequate search and improper withholding of information, did the FBI – on the eve of its deadline to respond to Plaintiff’s cross motion for summary judgment – agree to conduct another search for responsive documents.” Compl., (Dkt. 1) ¶ 33.

Unfortunately, the ACLJ’s fight to obtain all non-exempt information to which it was entitled did not end there. The FBI still refused to fully comply fully with its obligations under FOIA by “withhold[ing] non-exemption information . . . consisting purely of factual information. Plaintiff was again forced again to challenge the FBI’s unlawful withholding and delay.” Compl.

(Dkt. 1) ¶35. Once again, and only after several months of further delay, “on the eve of the FBI’s deadline to submit its brief . . . the FBI produce[d] the talking points sought by Plaintiff in an effort to moot Plaintiff’s case.” Compl. (Dkt. 1) ¶36.

“Only through Plaintiff’s persistent legal efforts to require the FBI’s compliance with FOIA did the FBI finally conduct an adequate search and produce additional documents to which Plaintiff was entitled.” Compl., (Dkt. 1) ¶ 34.³

The Clinton FOIA Request

“On or about September 7, 2017, Plaintiff issued another FOIA request seeking records from the FBI regarding its investigation and decision not to pursue criminal charges against Hillary Rodham Clinton.” Compl., (Dkt. 1) ¶ 37. “Just as in the current lawsuit, the FBI acknowledged receipt of Plaintiff’s FOIA request and assigned case control numbers, but did not produce all documents responsive to Plaintiff’s FOIA request in the time period required by FOIA.” Compl., (Dkt. 1) ¶ 38 (citing Complaint, *American Center for Law & Justice v. Dep’t of Justice*, No. 1:18-cv-0[1866⁴] (D.D.C. February 19, 2018), ECF No. 1).

Just like in this case as well as the Lynch FOIA Request case, “[t]he FBI failed to “notify [Plaintiff] of [] a determination and the reasons therefor” in accordance with 5 U.S.C. § 552(a)(6)(A)(i).” Compl., (Dkt. 1) ¶ 39. And again, “[t]he FBI failed to inform Plaintiff of the scope of the documents that it would produce, as well as the scope of the documents that it planned

³ “The FBI continued, however, to withhold non-exempt information contained within talking points – information admittedly consisting purely of factual information. Plaintiff was forced again to challenge the FBI’s unlawful withholding and delay in producing the information in the United States District Court of Appeals of the District of Columbia” Circuit. Compl., (Dkt. 1) ¶ 35. “Once again, in June 2016, on the eve of the FBI’s deadline to submit its brief and only after months of continued delay by the FBI to first respond with what the FBI represented would be a dispositive motion, then with its opening brief, did the FBI produce the talking points sought by Plaintiff in an effort to moot Plaintiff’s case.” Compl., (Dkt. 1) ¶ 36.

⁴ Plaintiff has corrected a typo from its Complaint to reflect the appropriate case number.

to withhold under any FOIA exemptions.” Compl., (Dkt. 1) ¶ 40. And again, “[o]nly after Plaintiff filed suit to challenge the FBI’s non-compliance with FOIA did it begin producing the documents to which Plaintiff was entitled.” Compl., (Dkt. 1) ¶ 41.

It is based upon these facts that the ACLJ now alleges that, “[u]pon information and belief, the FBI is engaged in a pattern and practice of intentional delay and improper withholding of factual information to impair Plaintiff’s lawful and timely access to information.” Compl., (Dkt. 1) ¶ 42. “As Plaintiff’s prior lawsuits against the FBI demonstrate, the filing of a lawsuit to obtain all requested records is ‘an empty gesture in preventing future delays, much less obtaining future relief,’ *Judicial Watch, Inc. v. Department of Homeland Security*, 895 F.3d 770, 782 (D.C. Cir. 2018), because the FBI will moot the litigation and escape judicial review of its compliance with FOIA by complying with the requirements of FOIA in the final hours of the parties’ briefing on the matter.” Compl., (Dkt. 1) ¶ 43. “The FBI’s practice of prolonged, repeated and unsupported or unexplained delay will continue to harm Plaintiff’s mission to inform the public regarding government conduct by unlawfully interfering with its statutory right to promptly obtain non-exempt records upon request.” Compl., (Dkt. 1) ¶ 44. The FBI’s repeated and intentional actions have resulted, and will continue to result, in the untimely access to information to which Plaintiff is entitled, and the production of stale information that is of little value and, yet, more costly than fresh information ought to be. *Payne*, 837 F.2d at 494.

2. The FBI Misunderstands Both the Rationale and Holding of Judicial Watch.

In its motion, the FBI tries hard to distinguish the previous FOIA lawsuits identified in the ACLJ’s Complaint from the instant case. The ACLJ concedes that the previous FOIA lawsuits the FBI forced it to file in order to obtain records as required by the FOIA are *in certain ways* factually distinct. However those cases are characterized, the bottom line inference remains that the ACLJ must file lawsuits against the FBI to receive records, get the FBI to conduct appropriate searches,

or produce all non-exempt information as it is required to do under the FOIA. That is the common “thread” the FBI misses in its motion. *See* Def.’s Mot. (Dkt. # 11-1) at 5.

Importantly, nothing in *Judicial Watch* indicates that a plaintiff-requester’s factual history with an agency must match exactly with the facts in *Judicial Watch* before the relief reinforced by this Circuit in that case is appropriate. To the contrary, the *Judicial Watch* Court rejected the idea of a bright line rule. The Court made clear that the egregious historical facts of *Payne* were not a strict prerequisite when it corrected the District Court for misconceiving the sufficiency of pleadings and wrongly viewing *Payne* as a “floor”:

The district court, however, conceived the issue of sufficiency of pleading differently. First, it treated *Payne* and *Newport* as establishing a floor for a policy or practice claim. In contrast with what it described as the “egregious, intentional agency conduct” in *Payne* and *Newport*, the district court ruled that *Judicial Watch* had alleged “mere delay.” *Judicial Watch*, 211 F. Supp. 3d at 147. . . . This court did not require egregious agency action to state a policy or practice claim.

Judicial Watch, 895 F.3d at 781; *see id.* at 779 (“*Judicial Watch* does not allege agency misconduct in invoking FOIA exemptions as occurred in *Payne*”).

Instead, the *Judicial Watch* Court recognized a “policy or practice claim . . . based on [the agency’s] repeated, unexplained, and ‘prolonged delay in making information available,’” *id.* (quoting *Payne*, 837 F.2d at 491), and “regularly fail[ing] to issue determinations in response to [Judicial Watch’s] travel-related FOIA requests within the time period required by FOIA, causing [Judicial Watch] to bring suit in order to obtain the requested records.” *Id.*

The FBI also suggests that the multiple FOIA requests ignored by an agency must be the same and that a certain number of lawsuits must be filed to make allegations seeking relief under *Judicial Watch* well-plead or plausible.⁵ But the *Judicial Watch* Court did not so hold. To be sure,

⁵ While the FBI admits “FOIA requests do not need to address the same subject to support a pattern or practice claim,” Def.’s Mot. Doc. # 11-1, at 17, it still substantively treats sameness as if it is an

the subject matter of Judicial Watch’s several FOIA requests were the same in that case and that case was Judicial Watch’s sixth lawsuit against that agency. But that was merely factual support for an inference of policy or practice which the Circuit identified *among others*. *See id.* at 780 (“Judicial Watch’s complaint reflects that it has repeatedly been confronted with prolonged, unexplained delays by the same agency with regard to the same type of records” and that six lawsuit “have not produced any change in the Secret Service’s response to its proper requests until after it has filed a lawsuit.”): *id.* (“only at that point has the Secret Service conducted a search to determine whether records can be made available or are exempt from disclosure, or engaged in consultations with Judicial Watch”).

The Court’s focal point on agencies requiring lawsuits is critical: “Our precedent on policy or practice claims disposes of any suggestion that Congress intended the repeated filing of lawsuits to be a practical requirement for obtaining records from an agency flaunting the statute.” *Id.* (citing *Payne*, 837 F.2d at 494). As it explained, “[f]iling a lawsuit hardly ensures ‘prompt[] availab[ility],’ as the instant case and the five other lawsuits against this agency demonstrate.” *Id.* (quoting 5 U.S.C. § 552(a)(3)(A)). Driving home its point, the *Judicial Watch* Court identified additional important considerations: “the chilling effect that litigation costs can have on members of the public much less the burden imposed on the courts.” *Id.*

In explaining how it reached its holding, the Court in *Judicial Watch* also went to great lengths to reemphasize the promptness requirement imposed by Congress and how it is thwarted by agencies requiring lawsuits before complying with the FOIA:

element of the claim or a required factor for analysis. *See id.* (“The first factor supporting that conclusion is that Plaintiff has not alleged that the FOIA requests “all relat[e] to the same subject matter.”). It takes the same approach regarding the number of FOIA requests/lawsuits, *see id.*, but then introduces a sampling exercise standard for plausibility found nowhere in *Judicial Watch*. *Id.* at 18-19.

it is long established in this circuit that an agency's compliance with FOIA depends upon its "good faith effort and due diligence . . . to comply with all lawful demands [for records] . . . in as short a time as is possible." *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605, 616 (D.C. Cir. 1976). Congress reinforced the importance of FOIA's timetables and its overarching mandate of prompt availability when it amended FOIA in 1974. Responding to agencies' concerns about the high volume of requests and lack of resources, Congress allowed agencies only ten additional days to respond where there were "unusual circumstances." See 5 U.S.C. § 552(a)(6)(B). Judge Leventhal has explained:

[T]he 1974 Amendments were deliberately drafted to *force increased expedition* in the handling of FOIA requests: "[E]xcessive delay by the agency in its response is often tantamount to denial. It is the intent of this bill that the affected agencies be required to respond to inquiries and administrative appeals within specific time limits." H. REP. No. 93-876, 93d Cong., 2d Sess. (1974). . . . The Congress even rejected a 30-day extension provision, narrowly drafted to take account of the special exigencies facing agencies.

Judicial Watch, 895 F.3d at 781 (quoting *Open America*, 547 F.2d at 617 (Leventhal, J., concurring in the result)). The *Judicial Watch* Court went further:

Much as Congress has done in adopting "technology-forcing" provisions in other contexts, *see, e.g.*, *Union Elec. Co v. EPA*, 427 U.S. 246, 256-57, 96 S. Ct. 2518 (1976), Congress contemplated that agencies would improve their records management systems to ensure requested records are made "promptly available," 5 U.S.C. § 552(a)(3)(A). No authority has been cited that either the Supreme Court or this court has retreated from this understanding of FOIA's text, purpose, and history. An agency's use of a lawsuit as an organizing tool for prioritizing responses renders FOIA's requirements "insignificant, if not wholly superfluous." *Duncan v. Walker*, 533 U.S. 167, 174, 121 S. Ct. 2120 (2001).

Id. Clearly, this was not a court concerned with technicalities like the number of lawsuits filed or whether one ignored FOIA request is the same as another. This was a court concerned with the plain text and spirit of a statute being abused by agencies and thwarted by delay, and being rendered superfluous by making FOIA requesters file lawsuits to be taken seriously – all at the expense of government transparency. That rationale permeates the entirety of the *Judicial Watch* Court's rationale and holding.

It is also noteworthy that the ACLJ has alleged, and there is no dispute, that the FBI did not take advantage of the statutory provisions which can give an agency more time to comply.⁶ These statutory provisions govern the agency, but they also inure to the agency's benefit – by giving it a *way* to obtain more time and allowing (and requiring) it to identify *why* a delay is necessary. The FBI's repeated failure to utilize or comply with these statutory provisions supports the inference of a practice of flouting the law and makes its ability to satisfy *its* statutory burden more difficult. It is not the plaintiff's burden to allege every possible explanation for the alleged policy or divine the “how” or “why” as the District Court in *Judicial Watch* had incorrectly required, *Judicial Watch*, 895 F.3d at 782 (district court incorrectly “shifted to the requesting party the burden that FOIA places on the agency to explain its delay in making requested records available”); *id.* (district court wrongly “focused on Judicial Watch’s shortcomings in ‘point[ing] to no fact or statement to establish *why* the requests were delayed or *how* the delays were the result’ of an agency policy or practice, ‘rather than an inevitable but unintended delay attributable to a lack of resources’”). But alleging that the agency repeatedly failed to comply with the law in this way reinforces that the ACLJ has satisfied *what is* its burden to allege: a plausible claim. Indeed, the *Judicial Watch* Court rejected as “ironic” that “an agency’s total disregard of the obligations mandated by Congress *and failure to take advantage of provisions allowing additional time to respond*” could not form the basis of a pattern or practice claim – as the District Court in that case had mistakenly ruled. *Judicial Watch*, 895 F.3d at 782 (emphasis added).

⁶ Compl., (Dkt. 1) ¶¶52-55; *see* Complaint, *ACLJ v. DOJ*, No. 1:17-CV-1866 (D.D.C. Sept. 12, 2017), ECF No. 1, ¶¶54-57 (attached as Exh. 1 to Def.’s Mot.); Complaint, *ACLJ v. DOJ*, No. 1:18-cv-0373 (D.D.C. February 19, 2018), ECF No. 1, ¶¶29-30, 37) (attached as Exh. 2 to Def.’s Mot.).

Beyond conflicting with both the obvious principles underlying the *Judicial Watch* rationale and the words used in its actual holding, the imposition of a sameness of subject matter requirement or number of lawsuits requirement (or giving too much weight to those considerations) urged by the FBI does not make sense as a practical matter: An agency's informal practice of waiting until a requester files suit before complying with the statute *still requires needless lawsuits and is just as violative of the FOIA's plain text and spirit regarding promptness regardless of whether the subject matter of more than one request is the same*. Such a result invokes a similar "irony" to that which the *Judicial Watch* Court denounced. *See Judicial Watch*, 895 F.3d at 782

In any event, nothing in the Court's opinion indicates that the sameness of FOIA requests or the number of lawsuits required was or should be a bright line requirement, an especially weighty factor, or even a factor at all, for any other plaintiff seeking judicial relief against an agency's repeated conduct in violation of the FOIA requiring lawsuits. No, to the contrary, the Circuit Court in *Judicial Watch* articulated a fairly simple, straightforward-yet-flexible standard: "a plaintiff states a plausible policy or practice claim under *Payne* by alleging prolonged, unexplained delays in producing non-exempt records that could signal the agency has a policy or practice of ignoring FOIA's requirements." *Id.* at 780 (emphasis added). The ACLJ has alleged facts – facts that must be taken as true (and which the FBI has not substantively disputed) – that satisfy this pleading threshold.⁷

⁷ All that is required of a plaintiff here is well-pleaded facts from which a policy or practice of violating FOIA to the plaintiff's injury could be inferred. Again, the *Judicial Watch* Court rejected the District Court's approach in that case which had incorrectly "shifted to the requesting party the burden that FOIA places on the agency to explain its delay in making requested records available." *Judicial Watch*, 895 F.3d at 782 (citing 5 U.S.C. §§ 552(a)(4)(B), (a)(6)(A)-(C); *ACLU v. United States DOD*, 628 F.3d 612, 619 (D.C. Cir. 2011)).

III. CONCLUSION

Granting Defendant's motion to dismiss will ensure that this Defendant will continue to blatantly disregard the law and ignore FOIA requests unless and until a requestor files a lawsuit in this Court. Beyond the needless drain on judicial resources, this result is contrary to the law. Based on the ACLJ's allegations, this Court has the opportunity to hold the Defendant agency accountable for its pattern and practice of flouting the law.

For the foregoing reasons, this Court should deny Defendant's Partial Motion to Dismiss and allow Plaintiff to proceed with Count II of the Complaint. Pursuant to LCvR 7(f), Plaintiff respectfully requests an oral hearing on Defendant's Motion.

In the event this Court has concerns regarding the sufficiency of Plaintiff's allegations in connection with Count II, Plaintiff stands ready to file a motion seeking leave to amend its Complaint. *See Council on American-Islamic Rels. Action Network, Inc. v. Gaubatz*, 793 F. Supp. 2d 311, 321-22 (D.D.C. 2011) (leave to amend complaint should be freely granted); Fed.R.Civ.P. 15(2).

Dated: December 4, 2019.

Respectfully submitted,

/s/ Benjamin P. Sisney

Benjamin P. Sisney [REDACTED]

Abigail A. Southerland [REDACTED]

THE AMERICAN CENTER FOR LAW & JUSTICE
[REDACTED]

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2019, I caused a true and correct copy of the foregoing document be filed via the U.S. District Court for the District of Columbia's CM/ECF system, which pursuant to LCvR 5.4(d), satisfies the requirement of a certificate of service or other proof of service.

/s/ Benjamin P. Sisney

Benjamin P. Sisney [REDACTED]

THE AMERICAN CENTER FOR LAW & JUSTICE

[REDACTED]
[REDACTED]
[REDACTED]
Counsel for Amicus Curiae

American Center for Law and Justice

QUARTERLY FOIA REPORT

APPENDIX II-A

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN CENTER FOR LAW AND
JUSTICE,

Plaintiff,

v.

No. 1:17-cv-01425-TNM

U.S. NATIONAL SECURITY AGENCY, U.S.
DEPARTMENT OF STATE,

Defendants.

**PLAINTIFF'S MEMORANDUM IN SUPPORT OF CROSS MOTION FOR SUMMARY
JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY
JUDGMENT**

INTRODUCTION

In introducing the predecessor of the bill that was enacted as the federal Freedom of Information Act (“FOIA”), its sponsor, Senator Edward Long, clearly identified the principle necessitating such a law: “Knowledge will forever govern ignorance, and a people who mean to be their own governors must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it is but a prolog to a farce or a tragedy or perhaps both.” 111 CONG. REC. 26821 (1965) (quoting James Madison). The NSA has failed to meet its obligations under FOIA to conduct an adequate search and produce all responsive material to which the Plaintiff, American Center for Law and Justice (ACLJ). Both the NSA and State Department have failed to meet their obligations under FOIA to prove that FOIA Exemptions apply to information and documents withheld from the public.

STATEMENT OF FACTS

In early 2017, information came to light that Susan Rice, former national security advisor under then President Barack Obama, requested “the names of Trump transition officials caught up in surveillance” and that the unmasked names were then sent to various officials at the NSA, Defense Department, then Director of National Intelligence James Clapper, and then-CIA Director John Brennan. Plaintiff’s Statement of Additional Facts Precluding Summary Judgment (hereinafter PSAF), ¶ 19. It was reported that “the names were part of incidental electronic surveillance of candidate and President-elect Trump and people close to him, including family members,” and that these requests were not “routine” and may have been improper. *Id.* Similarly, reports indicated that then-United Nations Ambassador Samantha Power was also believed to have made ““hundreds of unmasking requests to identify individuals . . . related to Trump and his

presidential transition team’ and that such conduct was ‘unprecedented for an official in her position.’” PSAF ¶ 20.

In response to these news reports, Plaintiff sent FOIA requests to both the NSA and the State Department. PSAF ¶ 21. Specifically, on April 13, 2017, Plaintiff sent NSA a FOIA request seeking “records pertaining to any and all requests former National Security Advisor Susan Rice made to National Security Agency (‘NSA’) officials or personnel regarding the ‘unmasking’ of the names and/or any other personal identifying information of then candidate and/or President-elect Donald J. Trump, his family, staff, transition team members, and/or advisors who were incidentally caught up in U.S. electronic surveillance.” *Id.*

On August 14, 2017, Plaintiff issued a FOIA request to the State Department requesting records “pertaining to any and all requests former U.S. Ambassador Samantha Power (“Ambassador Samantha Power”) made to National Security Agency (“NSA”) officials or personnel regarding the “unmasking” of the names and/or any other personal identifying information of then-candidate and/or President-elect Donald J. Trump, his family, staff, transition team members, and/or advisors who were incidentally caught up in U.S. electronic surveillance.” PSAF ¶ 22.

As has become customary for both federal agencies, Plaintiff’s FOIA requests lingered without sufficient responses. After several months passed without sufficient responses from either of the Defendants, Plaintiff ACLJ filed suit alleging that Defendants’ failed to properly respond to Plaintiff’s lawful request for records and were improperly withholding the records requested. PSAF ¶ 23.

As Defendants stated in their motion for summary judgment, both Defendants issued letters in response to Plaintiff’s request and refused to respond to much of Plaintiff’s FOIA request

indicating they could neither confirm nor deny the existence of certain records pursuant to Exemptions 1 and 3 – namely those regarding certain Government officials’ requests to unmask or access unmasked names of 46 individuals listed in Plaintiff’s FOIA Request. The NSA asserted a *Glomar* response to parts 1 and 2 of Plaintiff’s FOIA Request. State Department asserted a *Glomar* response to parts 1, 2, 4 and 5 of Plaintiff’s FOIA Request. The State Department processed and produced some records responsive to parts 3 and 6 of Plaintiff’s request.

Several key government officials, including Samantha Power, James Clapper, Susan Rice and Sally Yates have admitted to the unmasking of Trump officials during their tenure with the Obama Administration. PSAF ¶¶ 24-39. Power acknowledged that numerous unmasking requests were made in her name, but denied that she was the one making the requests. PSAF ¶ 24. Rice has acknowledged, and more than one Congressman has confirmed that, Rice unmasked names of Trump associates who were indeed “swept up in American agencies’ foreign intelligence.” PSAF ¶¶ 25-26, 28. And Clapper and Yates admitted to reviewing classified documents in which Mr. Trump, his associates and members of Congress had been unmasked. PSAF ¶ 27.

LEGAL STANDARD

Many FOIA cases are resolved on summary judgment. *Judicial Watch, Inc. v. U.S. Dep’t of Justice*, 20 F. Supp. 3d 260, 267 (D.D.C. 2014) (hereinafter “Judicial Watch I”) (quoting *Brayton v. Office of the U.S. Trade Rep.*, 641 F.3d 521, 527 (D.C. Cir. 2011)). At the summary judgment stage, the agency has the burden of showing that it has fully complied with the FOIA. In response to a challenge to the adequacy of its search for requested records, the agency must provide “a reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials … were searched.” *Oglesby v. U.S. Dep’t of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990).

Further, “[w]hen an agency’s response to a FOIA request is to withhold responsive records, either in whole or in part, the agency ‘bears the burden of proving the applicability of claimed exemptions.’” *Judicial Watch I*, 20 F. Supp. 3d 267 (quoting *Am. Civil Liberties Union v. U.S. Dep’t of Def.*, 628 F.3d 612, 619 (D.C. Cir. 2011)). The government may sustain its burden through the submission of declarations detailing, with specificity, the reason that a FOIA exemption applies, along with an index, as necessary, describing the materials withheld. *Id.* (citations omitted). See also *Judicial Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 215 (D.C. Cir. 2013) (A grant of summary judgment based on agency affidavits is appropriate only “if they contain reasonable specificity of detail rather than merely conclusory statements, and if they are not called into question by contradictory evidence in the record or by evidence of agency bad faith.”) (Internal citations and quotations omitted). In resolving a summary judgment motion in a FOIA case, however, a court must interpret the statute broadly in favor of public disclosure and construe any exemptions narrowly. *U.S. Dep’t of Justice v. Julian*, 486 U.S. 1, 8 (1988).

ARGUMENT

I. Both NSA and State Department’s Glomar Responses Are Defeated By Officials’ Acknowledgment of the Existence of Documents Requested By Plaintiff.

Under FOIA and in some circumstances, “an agency may refuse to confirm or deny the existence of records where to answer the FOIA inquiry would cause harm cognizable under a FOIA exception.” *Gardels v. CIA*, 689 F.2d 1100, 1103 (D.C. Cir. 1982). This is known as a “Glomar response” (a term that comes from the case *Phillippi v. CIA*, 655 F.2d 1325, 1327 (D.C. Cir. 1981)), and is proper if the existence *vel non* of an agency record is itself exempt from disclosure. *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007). “To justify a Glomar response, the agency must supply the court with a detailed affidavit that explains why it cannot provide a

substantive response pursuant to a FOIA exemption.” *Schaerr v. United States DOJ*, 2020 U.S. Dist. LEXIS 13772, at 14 (D.D.C. Jan. 28, 2020).

A FOIA requestor may compel disclosure of information, and overcome a *Glomar* response, however, where either an official acknowledgment as to the existence of the documents has been made, or by a sufficient showing that the agency did not evaluate the request in good faith. *Minier v. CIA*, 88 F.3d 796, 803 (9th Cir. 1996). *Schaerr v. United States DOJ*, 2020 U.S. Dist. LEXIS 13772, at 17; *ACLU*, 628 F.3d at 620. Where a government agency or appropriate official has “officially acknowledged” otherwise exempt information through prior disclosure, the agency may be found to have waived “its right to claim an exemption with respect to that information,” and may be compelled to disclose it, “even over an agency’s otherwise valid exemption claim.” *ACLU v. CIA*, 710 F. 3d 422, 426-427 (D.C. Cir. 2013). The D.C. Circuit employs the following test: “(1) ‘the information requested [is] as specific as the information previously released,’ (2) the requested information ‘match[es] the information previously disclosed,’ and (3) the requested information was already “made public through an official and documented disclosure.”” *Schaerr*, 2020 U.S. Dist. LEXIS 13772, at 14 (citing *Fitzgibbon v. CIA*, 911 F.2d 755, 765 13 (D.C. Cir. 1990)). The plaintiff bears “the initial burden to point to specific information in the public domain that appears to duplicate that being withheld.” *Schaerr*, 2020 U.S. Dist. LEXIS 13772, at 29. The plaintiff, however, need not show that the contents of the records have been disclosed, only that the agency has acknowledged that the records exist. *Id.* Thus, if the prior disclosure establishes the existence (or not) of records responsive to the FOIA request, the prior disclosure necessarily matches both the information at issue—the existence of records—and the specific request for that information” the plaintiff is entitled to disclosure. *Wolf v. CIA*, 473 F.3d at 379. See e.g., *Mobley v. CIA*, 924 F. Supp. 2d 24, 46 (D.D.C. 2013).

In the instant case, the prior disclosures by Power, Rice, Clapper, and Yates establish the existence of the very records requested by ACLJ in its FOIA requests to the State Department and the NSA. During a Congressional inquiry into whether the unmasking of Trump associates occurred during the Obama Administration, Clapper and Yates both admitted to reviewing such documents:

SEN. CHUCK GRASSLEY: Did either of you ever review classified documents, in which Mr. Trump, his associates, or members of Congress had been unmasked.

JAMES CLAPPER: Well, yes.

GRASSLEY: You have? Can you give us details here?

CLAPPER: Well. No, I can't.

GRASSLEY: Ms. Yates, have you?

SALLY YATES: Yes, and I can't give you details.

GRASSLEY: Did either of you ever share information about **unmasked Trump associates or members of Congress with anyone else?**

CLAPPER: Um. Well, I'm thinking back of six-and-a-half years, **I could have discussed it with either my deputy or my general counsel.**

GRASSLEY: Okay, Ms. Yates?

YATES: In the course of the Flynn matter, I had discussions with other members of the intel community -- I'm not sure if that is responsive to your question.

Rice also admitted to making requests to unmask the names of people involved in the Trump campaign and Trump transition team, but denies that such requests for political purposes. In fact, Rice did not merely confirm the existence of an unmasking process or program, but went so far as to confirm that certain specific methods were used, *i.e.*, actual unmasking requests were made and the unmasked information provided during the specific time, and as for specific persons unmasked,

i.e., “Trump campaign or Trump Transition.” Finally, more than one Congressman who reviewed the intelligence reports for which Rice unmasked names, confirmed Rice’s testimony that Trump associates were indeed “swept up in American agencies’ foreign intelligence.” Similarly, Power did not deny that the unmasking of hundreds of Americans occurred on her watch and under her name.

For purposes of overcoming a *Glomar* response, the reason (whether proper or improper) for the unmasking of Trump associates is not important. What is important is that this fact is now widely known, and, thus, the Defendants’ continued assertion that even the mere admission that these documents do or do not exist will pose harm to national security lacks validity.

II. Defendant NSA Has Failed to Meet its Burden to Show An Adequate Search Was Conducted.

An agency is required to perform more than a perfunctory search in response to a FOIA request. *Ancient Coin Collectors Guild v. Dep’t of State*, 641 F.3d 504, 514 (D.C. Cir. 2011). The agency bears the burden to “demonstrate beyond material doubt that its search was ‘reasonably calculated to uncover all relevant documents.’” *Id.* (quoting *Valencia-Lucena v. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999) (emphasis added)). *See also Chambers v. Dep’t of Interior*, 568 F.3d 998, 1003 (D.C. Cir 2009) (explaining that the agency must be able to aver that all files likely to contain responsive materials were searched). NSA’s search, as detailed in the Kivosaki Declaration, falls short of this standard. *See Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 313-14 (D.C. Cir. 2003) (“In response to a challenge of the adequacy of the search, the agency may meet its burden by providing “a reasonably detailed affidavit . . . averring that all files likely to contain responsive materials . . . were searched.”) (citations omitted) (emphasis added).

Part three of Plaintiff's request for which NSA conducted a search for records requested any communications between NSA personnel and those same Obama Administration officials in which the names of President Trump or any of the 46 individuals were mentioned. First, NSA admits that it limited its search to just three individuals at the NSA, despite the fact that Plaintiff's FOIA request specifically requested communications sent, received by, *etc* a number of NSA officials, including but not limited to "the Director of the National Security Agency, the Chief of the Central Security Service, SIGINT production organization personnel, the Signals Intelligence Director, Deputy Signals Intelligence Director, or the Chief/Deputy/Senior Operations Officers of the National Security Operations Center." Pl. FOIA Request to NSA, ECF 1-1 at 4-5. Plaintiff's request that these individuals' communications and records be searched is entirely reasonable in light of the information requested, especially given the significant narrowing further provided by Plaintiff in its request – *i.e.* that the records must also include one of 5 communicants *and* contain the term "Trump" or a list of 47 names (many of which included the same term "Trump.") *Id.* NSA justifies its limited and inadequate search of just three individuals within the NSA by suggesting that one of these three individuals would have "received or been copied" on correspondence. Absolutely no further explanation, however, is provided by the NSA. Crucially, no citation to a policy or standard practice has been provided by NSA to support such an assertion.

In addition, it remains unclear what search terms were actually utilized by the NSA to locate responsive documents. In the Kivosaki Declaration, the NSA explains that it searched systems using "various permutations of the officials' names to identify an initial subset of records"; however, it gives only three examples: "susan rice, srice, rice susan." *See* Kivoasaki Decl. ¶ 30. The same iteration of these search terms for each official identified by Plaintiff as a communicant would not have produced all records responsive to Plaintiff's FOIA request. For example, Cheryl

Mills reportedly used two emails for official communications: Cheryl.mills@gmail.com and MillsCD@state.gov. PSAF ¶ 29. The same is true for Loretta Lynch who used an alias – Elizabeth Carlisle – to communicate regarding official and other matters and avoid detection. PSAF ¶ 30. Thus, an adequate and reasonable search would necessarily require other permutations of the names of the communicants identified by Plaintiff in its FOIA request. Defendant NSA has failed to provide sufficient information regarding which search terms were used for each communicant to demonstrate an adequate search.

In sum, material doubt exists regarding the adequacy of the NSA’s search.

III. Defendant State Department Fails To Present Sufficient Justification For Many Withholdings Made Pursuant To Exemption 5.

The D.C Circuit has emphasized, time and again, “the narrow scope of Exemption 5 and the strong policy of the FOIA that the public is entitled to know what its government is doing and why.” *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 868-869 (D.C. Cir. 1980). Accordingly, “the exemption is to be applied ‘as narrowly as consistent with efficient Government operation.’ S.Rep.No. 813, 89th Cong., 1st Sess. 9 (1965).” *Id.* Information withheld pursuant to FOIA Exemption 5 must be both pre-decisional and deliberative. *Judicial Watch I.*, 20 F. Supp. 3d at 269. Importantly, under the deliberative process privilege, factual information generally must be disclosed. Only materials embodying officials’ *opinions* are ordinarily exempt. *Coastal States Gas Corp.*, 617 F.2d at 867 (citing *EPA v. Mink*, 410 U.S. 73, 87-91 (1973) (noting that the Supreme Court has considered the privilege on several occasions and established the principle that “the privilege applies only to the ‘opinion’ or ‘recommendatory’ portion of the report, not to factual information which is contained in the document”); *Public Citizen, Inc. v. Office of Management & Budget*, 598 F.3d 865, 876 (D.C. Cir. 2010) (“agencies must disclose those portions of predecisional and deliberative documents that contain factual information that does not inevitably

reveal the government's deliberations."). Further, "an agency may forfeit Exemption 5's protection if it chooses *expressly* to adopt or incorporate by reference in a final opinion material that would have otherwise enjoyed the deliberative process privilege." *Ibrahim v. Dep't of State*, 311 F. Supp. 3d 134, 142 (D.D.C. 2018) (quoting *Abtew v. Dep't of Homeland Sec.*, 808 F.3d 895, 899 (D.C. Cir. 2015)).

With these principles in mind, we turn to the four categories of documents for which Defendant has withheld information under Exemption 5 and pursuant to the deliberative process privilege: (1) email communications regarding the content of speeches Ambassador Power provided between 2016 and 2017, *see Vaughn* Index Entries No. 1-4, 6; (2) email communications regarding the content of a draft memorandum for U.N. Secretary-General Antonio Guterres and the memorandum itself, *see Vaughn* Index Entry No. 5); (3) email communications discussing a "human resources matter, strategy regarding communications with Congress, and the substance of those policy deliberations with Members of Congress" *see Stein Decl.* ¶ 26; *Vaughn* Index Entry No. 7 and (4) email communications "discussing potential courses of action related to protests at the Standing Rock Indian Reservation." *Id.* *See also Vaughn* Index Entry No. 8.

It is crucial to note at the outset that the State Department conveniently fails to detail whether any of the information it has withheld is factual, as opposed to opinion. Instead, Defendant State Department carefully refers to all withheld content as simply "edits and comments." *See generally Vaughn* Index. Avoiding clarification on whether such edits and comments contain facts, as opposed to opinion, allows the State Department to avoid additional and necessary scrutiny regarding whether the withholding of facts is proper and justified. As this Court noted in *Heartland All. for Human Needs & Human Rights v. United States Immigration & Customs Enf't*, 406 F. Supp. 3d 90, 128-29 (D.D.C. 2019), "[u]nder the law of this Circuit, an agency is required both to

provide ‘a statement of its reasons,’ and to ‘describe what proportion of the information in a document is non-exempt and how that material is dispersed throughout the document.’ *Trea Senior Citizens League v. U.S. Dep’t of State*, 923 F. Supp. 2d 55, 70 (D.D.C. 2013).” The court further noted that an agency’s *Vaughn* Index or sworn declaration must establish how non-exempt material withheld is ““inextricably intertwined with deliberative discussion, opinions, and policy recommendations,’ such that ‘[a]ny facts in the withheld portions of responsive records . . . also qualify as privileged.”” *Heartland All. For Human Needs & Human Rights*, 406 F. Supp. 3d at 129. *See also In re Sealed Case*, 121 F.3d 729,737 (D.C. Cir. 1997) (“The deliberative process privilege does not shield documents that simply state or explain a decision the government has already made or protect material that is purely factual, unless the material is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government’s deliberations.”). This distinction is crucial here because federal agencies, including the State Department, are notorious for attempting to shield non-exempt factual information from disclosure under the guise that it is deliberative. *Ctr. for Investigative Reporting v. United States Customs & Border Prot.*, 2019 U.S. Dist. LEXIS 223077, *20-21 (Dec. 31, 2019) (summarizing Congress’s findings that Exemption 5 was “a particularly problematic exemption,” and that “[t]he deliberative process privilege is the most used privilege and the source of the most concern regarding overuse,” by government agencies and noting Congress’s intent to prevent agencies from using Exemption 5 to withhold documents to avoid embarrassment). *See also Trea Senior Citizens League*, 923 F. Supp. 2d at 69 (denying State Department’s motion for summary judgment as to its Exemption 5 withholding of draft talking points); *Judicial Watch, Inc. v. Dep’t of Treasury*, 802 F. Supp. 2d 185, 194-95 (D.D.C. 2011) (concluding portions of a draft talking points withheld by the department contained reasonably segregable material and should have been

released); *Judicial Watch, Inc. v. Dep’t of Energy*, 310 F. Supp. 2d 271, 318 (D.D.C. 2004) (finding the agency failed to adequately support its withholding of talking points under Exemption 5); *News-Press v. Dep’t of Homeland Sec.*, 2005 U.S. Dist. LEXIS 27492 (M.D. Fla. Nov. 4, 2005) (reviewing *in camera* certain talking points withheld under Exemption 5 and concluding that the talking points were neither pre-decisional nor deliberative); *Mapother v. Dep’t of Justice*, 3 F.3d 1533, 1539-40 (D.C. Cir. 1993) (conducting *in camera* review following the FOIA requestors’ challenge to withholdings under Exemption 5 and finding that DOJ’s redactions did indeed fall beyond the scope of the privilege where only the first sentence and footnotes contained opinion and the rest consisted of factual information and ordering that the report, with the exception of the first sentence and footnotes, be produced without redaction, finding that any “relation to any . . . deliberations [was] simply too attenuated to be protected by the deliberative process privilege.”).

In addition to State’s failure to properly identify non-exempt material from exempt material, State’s support for withholding certain other information is insufficient or inconsistent as explained in further detail below.

A. Specific Withholdings

Vaughn Entry 1, Doc. No. C0649731 and C0649731. Defendant asserts that these email exchanges between Samantha Power and Jonathan Finer contain edits or comments on the content of Ambassador Power’s upcoming commencement address at Yale University Class Day on May 22, 2016; however, these emails – unlike those which do appear to contain such discussion, *see* C06497352 – contain a different subject line. Specifically, these emails contain the subject line, “Re: How much grief,” and appear to discuss a current event – not the formation of the speech. In fact, even the search term that made this document responsive to Plaintiff’s FOIA request has been redacted in Document C06497371.

Vaughn Entry 1, Doc. No. C06497351 and C06497352. Defendant State has redacted a single word in the subject line of the emails exchanged between Samantha Power and other State Department officials without sufficient explanation or support as to how a single word could reveal deliberations, etc and be considered exempt material.

Vaughn Entry 3, Doc. No. C06497566. Defendant describes this email exchange of June 17 and 18, 2016, as one containing “edits and comments” on the Ambassador Power’s speech and the version of the speech to be published “*after* she had given it at the ceremony.” Thus, the redacted content is not pre-decisional. *See In re Sealed Case*, 121 F.3d at 737 (“The deliberative process privilege does not shield documents that simply state or explain a decision the government has already made”).

Vaughn Entry 5, Doc. No. C06497581. Defendant describes this email as one containing discussion of the line edits and content of a draft memorandum for U.N. Secretary General Antonio Guterres. The email also contains an attachment that has also been withheld in its entirety entitled “Guterres Transition Memo _ January 2.docx.” Notably, even the search term that flagged this document as responsive has been withheld. Once again, to the extent the material withheld is non-exempt or factual, further information is required of State to support the withholding.

Vaughn Entry 6, Doc No. C06647997. This document consists of 4 pages of email discussion, the majority of which has been withheld. Among the content withheld is a “readout of Moniz-Corker call.” Once again, even the search term that flagged this document as responsive has been withheld as “deliberative.” While Defendant State Department contends the information is pre-decisional because it “pre-dates the outreach to Congress,” no such date or event is identified.

State Department's justifications for refusing to produce information, including many times the very search term that made the document responsive to Plaintiff's FOIA request, pursuant to the deliberative process privilege falls significantly short of providing the "specific and detailed proof that disclosure would defeat, rather than further, the purposes of FOIA," *Morley v. CIA*, 508 F.3d 1108, 1127 (D.C. Cir. 2007) (quoting *Mead Data Cent. v. Dep't of the Air Force*, 566 F.2d 242, 258 (D.C. Cir. 1977)).

B. Defendant State Department Has Not Demonstrated Foreseeable Harm Resulting From Disclosure.

The foreseeable-harm requirement began as an Executive Branch decision in 2009, which emphasized that FOIA reflects a "profound national commitment to ensuring an open Government." Agencies were instructed to "administer FOIA 'with a clear presumption: In the face of doubt, openness prevails.'" *Ctr. for Investigative Reporting*, 2019 U.S. Dist. LEXIS 223077, at *18-19 (quoting Memorandum on the Freedom of Information Act, 74 Fed. Reg. 4683, 4683 (Jan. 21, 2009)). This presumption of openness became law in 2015 when Congress conducted its own investigation into agencies' compliance with FOIA and concluded that Exemption 5 was "a particularly problematic exemption," and that "[t]he deliberative process privilege is the most used privilege and the source of the most concern regarding overuse," *Ctr. for Investigative Reporting*, 2019 U.S. Dist. LEXIS 223077, at *20-21 (quotations omitted). In making these improvements to FOIA, Congress explained its expectation that agencies "not withhold documents based on mere speculative or abstract fears, or fear of embarrassment." *Id.* at 21-22 (internal quotations and citations omitted). Accordingly, "the content of a particular record must now be reviewed and a determination made as to whether the agency reasonably foresees that disclosing a particular document, given its age, content, and character, would harm an interest protected by the applicable exemption." *Id.* (quoting S. REP. NO. 114-4, at 8).

In sum, “FOIA now requires that an agency ‘release a record—even if it falls within a FOIA exemption—if releasing the record would not reasonably harm an exemption-protected interest and if its disclosure is not prohibited by law.’” *Id.* at *22-23 (quoting *Judicial Watch, Inc. v. U.S. Dep’t of Justice (Judicial Watch II)*, 2019 U.S. Dist. LEXIS 163473 (D.D.C. Sept. 24, 2019) (internal quotation mark omitted) (other citations omitted).

Courts have made clear that boilerplate and general explanations will not suffice. *Ctr. for Investigative Reporting*, 2019 U.S. Dist. LEXIS 223077, at 25 (citing *Judicial Watch Inc. v. Dep’t of Corrections*, 375 F. Supp. 3d 93, 100 (D.D.C. 2019)). Specifically, claims of fear of reprisal or that disclosure will “chill open and frank discussions” is precisely the general statement no longer sufficient to justify Exemption 5 withholdings. *Id.* Thus, Defendant State Department’s generic justification for withholding much of the information pursuant to Exemption 5 will not carry the day. *See Vaughn* Index Entry Nos. 1-9 for State’s generic justification – *i.e.* that the disclosure would “impede the ability of responsible Executive Branch officials to discuss outward-facing positions and formulate strategy by inhibiting candid discussion.” State fails to explain and demonstrate how the information and discussions among government officials no longer in office and dating back *four years ago* will cause the type of foreseeable harm *today* sufficient to justify the withholdings.

CONCLUSION

The primary objective of the FOIA is disclosure, not secrecy, and it should never be used to shield information regarding governmental operations that do not call for protection. For the foregoing reasons, Defendants NSA and State Department fall short of meeting their burden to obtain a grant of summary judgment. This Court should deny Defendants’ motion, grant Plaintiff’s cross-motion for summary judgment, and order that (1) NSA and State Department respond to

Plaintiff's FOIA request in full in light of the numerous official acknowledgements; (2) NSA conduct an adequate search for responsive documents and identify all search terms used; (3) State Department produce all challenged withholdings in full.

Dated: March 20, 2020

Respectfully submitted,

JORDAN SEKULOW [REDACTED]
STUART J. ROTH [REDACTED]
COLBY M. MAY [REDACTED]
CRAIG L. PARSHALL*
/s/ Abigail A. Southerland
ABIGAIL SOUTHERLAND [REDACTED]
MATTHEW R. CLARK [REDACTED]
BENJAMIN P. SISNEY [REDACTED]
THE AMERICAN CENTER FOR
LAW & JUSTICE
[REDACTED]

Counsel for Plaintiff

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN CENTER FOR LAW AND
JUSTICE,

Plaintiff,

v.

No. 1:17-cv-01425-TNM

U.S. NATIONAL SECURITY AGENCY, and
U.S. DEPARTMENT OF STATE,

Defendants.

**PLAINTIFF'S RESPONSE TO DEFENDANTS'
STATEMENT OF MATERIAL FACTS**

Pursuant to Local Civil Rule 7(h), Plaintiff submits the following responses to Defendants' statement of material facts it contends are not in dispute.

Plaintiff's Request to NSA

1. Plaintiff submitted a Freedom of Information Act ("FOIA") request to the National Security Agency ("NSA"), dated April 13, 2017. In summary, Part 1 of Plaintiff's request sought records of named Obama administration officials (Susan Rice, Cheryl Mills, Valerie Jarrett, Loretta Lynch, or Ben Rhodes) seeking or attempting to access "SIGINT reports or other intelligence products or reports containing the name(s) or other any personal identifying information related to" 47 named individuals; Part 2 sought records of those same named officials requesting "information of American Citizens contained in . . .intelligence products or reports" including the 47 named individuals; and Part 3 sought communications between the named officials and NSA containing reference to any of the 47 named individuals.

(Declaration of Linda M. Kiyosaki (“Kiyosaki Decl.”) ¶ 11)

Response: Plaintiff objects to Defendant’s summary of Plaintiff’s FOIA Request.

Plaintiff’s FOIA request serves as the best evidence of what was requested. (Pl. FOIA Request to NSA, ECF 1-1).

2. On January 3, 2018, Plaintiff agreed by email to narrow the scope of Part 2 of the request to the 47 named individuals rather than any “American Citizens.” (Kiyosaki Decl. ¶ 11)

Response: Undisputed only for purposes of the instant summary judgment proceedings.

3. NSA provided a final response to Plaintiff’s request on February 2, 2018, indicating the agency could neither confirm nor deny the existence of records responsive to Parts 1 and 2 of the request as doing so would reveal information protected pursuant to Exemptions 1 and 3 of the FOIA, 5 U.S.C. §§ 552(b)(1) and (b)(3), and that a search for records responsive to Part 3 of the request returned no results. (Kiyosaki Decl. ¶ 12)

Response: Undisputed only for purposes of the instant summary judgment proceedings.

4. NSA has explained the basis of the *Glomar* response to Part 1 and Part 2 as amended in the accompanying declaration of Linda Kiyosaki. (Kiyosaki Decl. ¶¶ 13-22)

Response: Undisputed only for the purpose of the instant summary judgment proceedings.

5. With respect to Part 3 of Plaintiff’s request, which sought communications between the named officials and NSA containing reference to any of the 47 named individuals, NSA processed and conducted searches to identify documents potentially responsive to Part 3

of Plaintiff's request. (Kiyosaki Decl. ¶ 29) Personnel from NSA's Office of General Counsel (OGC), in coordination with the FOIA Office, directed and assisted in the search for responsive records. (*Id.*) Part 3 specifically requested records in which one of the named officials (Susan Rice, Cheryl Mills, Valerie Jarrett, Loretta Lynch, or Ben Rhodes) was a direct communicant. (*Id.*) Because certain NSA officials—at least one of the Director, the Deputy Director, or the Executive Director—would have received or been copied on all direct correspondence between the Agency and those named officials due to their senior positions, a search was conducted within the records of those three individuals. (*Id.*) The search was limited to records within the request's time frame (20 January 2016 to 20 January 2017). (*Id.*)

Response: Plaintiff objects to the NSA's fact asserting that any and all emails between any NSA official and those individuals outside the NSA would have included one of three NSA top level officials. Kiosaki has explained that he has only held his current position as Chief of PIPE since 2019. The records in question date back to 2017. Kivosaki lacks the requisite knowledge to attest to the email practices of both NSA officials and government officials outside the NSA in 2017. Further, this fact is disputed. Plaintiff's FOIA request sought "all records, communications or briefings" – not simply "communications." In its FOIA request, Plaintiff provided a definition of "record" that extended beyond communications and included "chart, list memorandum, note correspondence, writing of any kind, policy procedure, guideline, agenda, handout, report, transcript, set of minutes or notes, video," *etc.* (Pl. FOIA Request to NSA (ECF 1-1), at p. 3)

6. NSA worked closely with the records custodians to ensure that all appropriate NSA systems were searched for responsive materials, including systems of archived electronic records. (Kiyosaki Decl. ¶ 30) NSA searched these systems using various permutations of the

officials' names (e.g., susan rice, srice, rice susan) to identify an initial subset of records. Records that were outside of the request's time frame were eliminated. (*Id.*) All records in which one of the officials was a communicant (on the to, from, cc, or bcc line) were identified, and all other results were deemed non-responsive. (*Id.*) The remaining records were then reviewed for responsiveness to Plaintiff's request (i.e. whether they contained any references to any of the 47 listed individuals). (*Id.*) No responsive records were identified. (*Id.*)

Response: Undisputed that the Kivosaki Declaration makes these assertions.

Plaintiff's Request to State

7. Plaintiff submitted a six-part FOIA request to the State Department ("State" or the "Department") by letter dated August 14, 2017, seeking records "pertaining to any and all requests former U.S. Permanent Representative to the United Nations, Ambassador Samantha Power ('Ambassador Samantha Power') made to National Security Agency ('NSA') officials or personnel regarding the 'unmasking' of the names and/or any other personal identifying information of then candidate and/or President-elect Donald J. Trump, his family, staff, transition team members, and/or advisors who were incidentally caught up in U.S. electronic surveillance." (Declaration of Eric F. Stein ("Stein Decl.") ¶ 6; Ex. A to Declaration of Annette Redmond ("Redmond Decl."))

Response: Undisputed.

8. The FOIA request to State, as narrowed by American Center (*see* ECF No. 19, Joint Status Report at ¶¶ 2-3) specified a timeframe of January 20, 2016, through January 20, 2017, and sought records related to the following categories of information:

- (1) Communications between Ambassador Samantha Power and the Director of the

National Security Agency, the Chief of the Central Security Service, SIGINT production organization personnel, the Signals Intelligence Director, Deputy Signals Intelligence Director, or the Chief/Deputy/Senior Operations Officers of the National Security Operations Center, or any other NSA official or employee (hereinafter the “Identified Intelligence Officials”), regarding any communications whereby Power sought access to or attempted to access SIGINT reports or other intelligence products or reports containing the name(s) or any personal identifying information related to 46 specified individuals in addition to Donald Trump;

- (2) Communications from Power in her capacity as a Department official made to the Identified Intelligence Officials requesting the “unmasking” of or access to the “unmasked” names or other personal identifying information of the same 47 specified American citizens contained in SIGINT reports or other intelligence products or reports;
- (3) Communications between Power and any NSA official or employee containing any reference to the term “Trump” or other personal identifying information of the same 47 specified individuals;
- (4) Communications from Power in her capacity as a Department official made to the Identified Intelligence Officials regarding “minimization procedures” in connection with communications from Power regarding the “unmasking” of or access to the “unmasked” names or other personal identifying information of the same 47 specified American citizens contained in SIGINT reports or other intelligence products or reports;

- (5) Communications from Power outside her official Department capacity made to the Identified Intelligence Officials regarding “minimization procedures” in connection with communications from Power regarding the “unmasking” of or access to the “unmasked” names or other personal identifying information of the same 47 specified American citizens contained in SIGINT reports or other intelligence products or reports; and
- (6) All records or communications, generated, forwarded, transmitted, shared, saved, sent, or received by Power, referencing the 47 American citizens listed in Part 5 of the request.

(Stein Decl. ¶ 6; Ex. A to Redmond Decl.)

Response: Disputed. Each item of information requested by Plaintiff included but was not limited to communications. Plaintiff’s FOIA request sought “all records, communications or briefings.” (Pl. FOIA Request to State Department, Def. Ex. A, (ECF 37-2), at 15-17). In its FOIA request, Plaintiff provided a definition of “record” that extended beyond communications and included “chart, list memorandum, note correspondence, writing of any kind, policy procedure, guideline, agenda, handout, report, transcript, set of minutes or notes, video,” etc. *Id.*

9. By letter dated February 1, 2018, the Director of the Office of Information Programs and Services (“IPS”) informed Plaintiff that confirming or denying the existence of records responsive to Parts 1, 2, 4 and 5 of Plaintiff’s request would reveal information protected pursuant to Exemptions 1 and 3 of the FOIA, 5 U.S.C. §§ 552(b)(1) and (b)(3). (Stein Decl. ¶ 8; Ex. B to Redmond Decl.)

Response: Undisputed.

10. State has explained the basis of the *Glomar* response to Parts 1, 2, 4 and 5 of the

request in the accompanying declaration of Annette Redmond. (Redmond Decl. ¶¶ 9-24)

Response: Undisputed that Redmond provides an explanation regarding State's Glomar responses.

11. With respect to Part 3 of the request, and Part 6 of the request as narrowed, IPS conducted a search of the Retired Records Inventory Management System ("RIMS") to identify any retired files of former Ambassador Power reasonably likely to contain records responsive to those items of Plaintiff's request. (Stein Decl. ¶ 18)

Response: Undisputed only for purposes of the instant summary judgment proceedings.

12. IPS searched those records using the names listed by Plaintiff in Part 3 of the FOIA request, which encompassed the names listed in Part 6 of the request as narrowed. (Stein Decl. ¶ 19; *see also* ECF No. 19 at ¶ 3)

Response: Undisputed only for purposes of the instant summary judgment proceedings.

13. In October 2019, State informed Plaintiff that it had completed the processing of Parts 3 and 6 of the FOIA request. (Stein Decl. ¶ 11)

Response: Undisputed only for purposes of the instant summary judgment proceedings.

14. In total, the Department released 243 records in whole or in part responsive to these two parts, with redactions based on Exemptions 1, 5 and 6 of the FOIA, and withheld nine documents in full. (Stein Decl. ¶ 12)

Response: Undisputed only for purposes of the instant summary judgment proceedings.

15. In a status report dated December 5, 2019, American Center stated that, as to State, summary judgment briefing would be necessary to challenge the *Glomar* response to Parts 1, 2, 4 and 5 of the FOIA request to State, as narrowed, and to certain withholdings by State under Exemption 5 with respect to the portions of the FOIA request to State that were not subject to a *Glomar* response. (ECF No. 36 ¶ 3)

Response: Undisputed.

16. By email dated January 10, 2020, Plaintiff provided the following list of documents released in part that contain withholdings under Exemption 5 that Plaintiff is challenging: C06497371; C06497673; C06497642; C06497352; C06497351; C06497346; C06497601; C06497342; C06497566; C06497581; C06497521; C06497472; C06497479; C06647997; and C06497658. (Stein Decl. ¶ 13)

Response: Undisputed.

17. State properly withheld the information redacted under Exemption 5 of FOIA on these documents. (Stein Decl. ¶¶ 26-33)

Response: Plaintiff objects to this statement as it represents Defendant's own conclusory statement and/or legal conclusion, rather than a proper statement of fact.

18. All reasonably segregable, non-exempt responsive documents subject to FOIA have been produced to the Plaintiff. (Stein Decl. ¶ 34)

Response: Plaintiff objects to this statement as it represents Defendant's own conclusory statement and/or legal conclusion, rather than a proper statement of fact.

PLAINTIFF'S STATEMENT OF ADDITIONAL MATERIAL FACTS
PRECLUDING SUMMARY JUDGMENT AND IN SUPPORT OF CROSS-MOTION
FOR SUMMARY JUDGMENT

19. In early 2017, information came to light that Susan Rice, former national security advisor under then President Barack Obama, requested “the names of Trump transition officials caught up in surveillance” and that the unmasked names were then sent various officials at the NSA, Defense Department, then Director of National Intelligence James Clapper and then-CIA Director John Brennan.” (ACLJ’s FOIA Request to NSA, ECF 1-1, 13-15). It was reported that “the names were part of incidental electronic surveillance of candidate and President-elect Trump and people close to him, including family members,” and that these requests were not “routine” and may have been improper. *Id.* Former U.S. officials expressed concerns that Rice’s unmasking requests were not “routine” and even possibly improper. *Id.*

20. Similarly, reports indicated that then-United Nations Ambassador Samantha Power was also believed to have made “‘hundreds of unmasking requests to identify individuals . . . related to Trump and his presidential transition team’ and that such conduct was ‘unprecedented for an official in her position.’” (ACLJ’s FOIA Request to State Department, (ECF 37-2), at 14-15.

21. In response to these news reports, Plaintiff sent a FOIA requests to both the NSA and the State Department. Specifically, on April 13, 2017, Plaintiff sent NSA a FOIA request seeking “records pertaining to any and all requests former National Security Advisor Susan Rice made to National Security Agency (‘NSA’) officials or personnel regarding the ‘unmasking’ of the names and/or any other personal identifying information of then candidate and/or President-elect Donald J. Trump, his family, staff, transition team members, and/or advisors who were incidentally caught up in U.S. electronic surveillance.” (ACLJ’s FOIA Request to NSA, ECF 1-

1).

22. On August 14, 2017, Plaintiff issued a FOIA request to the State Department requesting records “pertaining to any and all requests former U.S. Ambassador Samantha Power (“Ambassador Samantha Power”) made to National Security Agency (“NSA”) officials or personnel regarding the “unmasking” of the names and/or any other personal identifying information of then-candidate and/or President-elect Donald J. Trump, his family, staff, transition team members, and/or advisors who were incidentally caught up in U.S. electronic surveillance.” (ACLJ’s FOIA Request to State, ECF 37-2).

23. After several months passed without sufficient responses from either of the Defendants, Plaintiff ACLJ filed suit alleging that Defendants’ failed to properly respond to Plaintiff’s lawful request for records and were improperly withholding the records requested. (Complaint, *American Center for Law and Justice v. Dep’t of State*, Case No. 1:17-cv-1991 (D.D.C. September 27, 2017)¹, ECF 1; Complaint, *American Center for Law & Justice v. Nat'l Sec. Agency*, Case No. 1:17-cv-01425, ECF 1 (filed on July 18, 2017)).

24. In 2017, following testimony by Power before the U.S. House Oversight & Government Reform Committee it was reported that Power acknowledged that numerous unmasking requests were made in her name, but denied that she was the one making the requests. (Pete Kasperowicz, *Trey Gowdy: Samantha Power Testified that Intel Officials Made Unmasking Requests in her Name*, WASHINGTON EXAMINER (October 17, 2017), <https://www.washingtonexaminer.com/trey-gowdy-samantha-power-testified-that-intel-officials-made-unmasking-requests-in-her-name>)

¹ This case has since been consolidated with *American Center for Law & Justice v. Nat'l Sec. Agency*, Case No. 1:17-cv-01425.

25. Susan Rice has acknowledged that she would

receive from the intelligence community a compilation of intelligence reports that the IC, the intelligence community . . . selected for us on a daily basis to give us the best information as to what's going on around the world" and that there were occasions when [she] would receive a report in which a U.S. person was referred to. Name not provided, just a U.S. person. And sometimes in that context, in order to understand the importance of the report, and assess its significance, it was necessary to find out, or request the information, as to who the U.S. official was.

(Tim Hains, *Susan Rice: "I Leaked Nothing To Nobody*, REALCLEAR POLITICS (April 4, 2017),

https://www.realclearpolitics.com/video/2017/04/04/susan_rice_i_leaked_nothing_to_nobody.html)

26. Rice has also explained that

when that occurred, [i.e. the unmasking request] what I would do, or what any official would do, is to ask their briefer whether the intelligence committee would go through its process -- and there's a long-standing, established process -- to decide whether that information as to who the identity of the U.S. person was could be provided to me. So they'd take that question back, they'd put it through a process, and the intelligence community made the determination as to whether or not the identity of that American individual could be provided to me.

That is what I and the Secretary of State, Secretary of Defense, CIA director, DNI, would do when we received that information.

(*Id.*)

27. In Senate hearings, former DNI James Clapper and former Acting Attorney General Sally Yates testified as follows:

SEN. CHUCK GRASSLEY: Did either of you ever review classified documents, **in which Mr. Trump his associates, or members of Congress had been unmasked.**

JAMES CLAPPER: Well, yes.

GRASSLEY: You have? Can you give us details here?

CLAPPER: Well. No, I can't.

GRASSLEY: Ms. Yates, have you?

SALLY YATES: Yes, and I can't give you details.

GRASSLEY: Did either of you ever share information about **unmasked Trump associates or members of Congress with anyone else?**

CLAPPER: Um. Well, I'm thinking back of six-and-a-half years, **I could have discussed it with either my deputy or my general counsel.**

GRASSLEY: Okay, Ms. Yates?

YATES: **In the course of the Flynn matter, I had discussions with other members of the intel community --** I'm not sure if that is responsive to your question.

(Tim Hains, *Yates & Clapper Admit Viewing “Unmasked” Trump Campaign Communications; Deny Leaking To Press*, REALCLEAR POLITICS (May 8, 2017), https://www.realclearpolitics.com/video/2017/05/08/yates_and_clapper_admit_unmasking_trump_campaign.communications_deny_leaking_to_press.html)

28. More than one Congressman who reviewed the intelligence reports for which Rice unmasked names, confirmed Rice's testimony that Trump associates were indeed "swept up in American agencies' foreign intelligence." (Graham Lanktree, *Susan Rice Explains Why She Unmasked Trump Officials*, NEWSWEEK (September 14, 2017), <https://www.newsweek.com/susan-rices-explains-why-she-unmasked-trump-officials-664726>).

29. Cheryl Mills used two emails during her time at State Department including Mills Cheryl.mills@gmail.com and MillsCD@state.gov. See <https://wikileaks.org/podesta-emails/emailid/31077>; <https://wikileaks.org/clinton-emails/?q=&mto=Cheryl%20Mills> (Mills, Cheryl D).

30. Loretta Lynch sometimes used an alias – Elizabeth Carlisle – to communicate regarding official and other matters. Her email address was ecarlisle@jmd.usdoj.gov. (Douglas Earnest, Loretta Lynch's email alias as Obama's AG revealed: 'Elizabeth Carlisle', WASHINGTON

TIMES (Aug. 7, 2017), [https://www.washingtontimes.com/news/2017/aug/7/loretta-lynchs-used-elizabethe-carlisle-email-alia/.](https://www.washingtontimes.com/news/2017/aug/7/loretta-lynchs-used-elizabethe-carlisle-email-alia/>.))

Dated: March 20, 2020

Respectfully submitted,

JORDAN SEKULOW [REDACTED]
STUART J. ROTH [REDACTED]
COLBY M. MAY [REDACTED]
CRAIG L. PARSHALL*
/s/ Abigail A. Southerland
ABIGAIL SOUTHERLAND [REDACTED]
MATTHEW R. CLARK [REDACTED]
BENJAMIN P. SISNEY [REDACTED]
THE AMERICAN CENTER FOR
LAW & JUSTICE
[REDACTED]

Counsel for Plaintiff

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN CENTER FOR LAW AND
JUSTICE,

Plaintiff,

v.

No. 1:17-cv-01425-TNM

U.S. NATIONAL SECURITY AGENCY, and
U.S. DEPARTMENT OF STATE,

Defendants.

DECLARATION OF ABIGAIL A. SOUTHERLAND

I, Abigail A. Southerland, declare as follows:

1. I am senior litigation counsel for the Plaintiff in the above-captioned case, American Center for Law and Justice (ACLJ). I have been involved in and am familiar with all phases of this litigation.
2. State Department released documents responsive to parts 3 and 6 of Plaintiff's FOIA request, many of which contained redactions based on Exemptions 1, 5 and 6 of the FOIA. Copies of the documents referenced in Defendant State Department's *Vaughn* Index and containing withholdings challenged by Plaintiff are attached hereto as Exhibit 1.

Executed on March 20, 2020.

/s/ Abigail A. Southerland
Abigail A. Southerland
Counsel for Plaintiff

EXHIBIT 1

From: Finer, Jonathan J <FinerJJ@state.gov>
Sent: Thursday, May 19, 2016 12:40 AM
To: Power, Samantha <PowerS@state.gov>
Subject: Re: How much grief

RELEASE IN PART
B5

Wow. Just woke up (Brussels) and saw that too...

From: FinerJJ@state.gov
Sent: Thursday, May 19, 2016 6:33 AM
To: Power, Samantha
Subject: Re: How much grief

[REDACTED]

B5

From: Power, Samantha
Sent: Thursday, May 19, 2016 6:27 AM
To: Finer, Jonathan J
Subject: Re: How much grief

Just heard abt egyptair. Ugh - ignore my previous. So sad

Sent from my BlackBerry 10 smartphone.

From: Power, Samantha
Sent: Wednesday, May 18, 2016 10:20 PM
To: Finer, Jonathan J
Subject: How much grief

[REDACTED]

Sent from my BlackBerry 10 smartphone.

C06497673 U.S. Department of State Case No. F-2017-14553 Doc No. C06497673 Date: 08/27/2018

From: Power, Samantha </O=SBUSTATE/OU=USUN AG/CN=RECIPIENTS/CN=POWERS>
Sent: Thursday, May 19, 2016 12:41 AM
To: Finer, Jonathan J <FinerJJ@state.gov>
Subject: Re: How much grief

RELEASE IN PART
B5

[REDACTED]

B5

Sent from my BlackBerry 10 smartphone.

From: Finer, Jonathan J
Sent: Thursday, May 19, 2016 12:34 AM
To: Power, Samantha
Subject: Re: How much grief

[REDACTED]

From: Power, Samantha
Sent: Thursday, May 19, 2016 6:27 AM
To: Finer, Jonathan J
Subject: Re: How much grief

Just heard abt egyptair. Ugh - ignore my previous. So sad

Sent from my BlackBerry 10 smartphone.
From: Power, Samantha
Sent: Wednesday, May 18, 2016 10:20 PM
To: Finer, Jonathan J
Subject: How much grief

Did S get for that trump ref in the northeastern speech? Giving yale this wknd and trying to thread needle. What's more fun - Sisi or Denis?

Sent from my BlackBerry 10 smartphone.

From: Power, Samantha </O=SBUSTATE/OU=USUN
AG/CN=RECIPIENTS/CN=POWERS>
Sent: Saturday, May 21, 2016 6:32 PM
To: Steinberg, Nikolaus <SteinbergN@state.gov>
Cc: Aguirre, Sergio <AguirreS@state.gov>
Subject: Re: Trump line / Hatch

RELEASE IN PART
B5

Ok

Sent from my BlackBerry 10 smartphone.

From: Steinberg, Nikolaus
Sent: Saturday, May 21, 2016 6:30 PM
To: Power, Samantha
Cc: Aguirre, Sergio
Subject: RE: Trump line / Hatch

[redacted] B5

This email is UNCLASSIFIED.

From: Power, Samantha
Sent: Saturday, May 21, 2016 6:30 PM
To: Steinberg, Nikolaus
Cc: Aguirre, Sergio
Subject: Re: Trump line / Hatch

So ridic. Ok

Sent from my BlackBerry 10 smartphone.

From: Steinberg, Nikolaus
Sent: Saturday, May 21, 2016 6:20 PM
To: Power, Samantha
Cc: Aguirre, Sergio
Subject: RE: Trump line / Hatch

[redacted] B5

SBU

This email is UNCLASSIFIED.

From: Steinberg, Nikolaus
Sent: Saturday, May 21, 2016 5:58 PM
To: Power, Samantha
Cc: Aguirre, Sergio
Subject: Trump line / Hatch



B5

SBU
This email is UNCLASSIFIED.

From: Steinberg, Nikolaus <SteinbergN@state.gov>
Sent: Saturday, May 21, 2016 6:33 PM
To: Power, Samantha <PowerS@state.gov>
Cc: Aguirre, Sergio <AguirreS@state.gov>
Subject: RE: Trump line [REDACTED]

RELEASE IN PART B5

B5

Ok.

This email is UNCLASSIFIED.

From: Power, Samantha
Sent: Saturday, May 21, 2016 6:33 PM
To: Steinberg, Nikolaus
Cc: Aguirre, Sergio
Subject: Re: Trump line [REDACTED]

B5

[REDACTED]

Sent from my BlackBerry 10 smartphone.

From: Steinberg, Nikolaus
Sent: Saturday, May 21, 2016 6:30 PM
To: Power, Samantha
Cc: Aguirre, Sergio
Subject: RE: Trump line [REDACTED]

B5

[REDACTED]

This email is UNCLASSIFIED.

From: Power, Samantha
Sent: Saturday, May 21, 2016 6:30 PM
To: Steinberg, Nikolaus
Cc: Aguirre, Sergio
Subject: Re: Trump line / [REDACTED]

B5

So ridic. Ok

Sent from my BlackBerry 10 smartphone.

From: Steinberg, Nikolaus
Sent: Saturday, May 21, 2016 6:20 PM
To: Power, Samantha
Cc: Aguirre, Sergio

Subject: RE: Trump line /

B5

SBU

This email is UNCLASSIFIED.

From: Steinberg, Nikolaus
Sent: Saturday, May 21, 2016 5:58 PM
To: Power, Samantha
Cc: Aguirre, Sergio
Subject: Trump line /

B5

B5

SBU

This email is UNCLASSIFIED.

From: Steinberg, Nikolaus <SteinbergN@state.gov>
Sent: Monday, June 6, 2016 10:51 AM
To: Power, Samantha <PowerS@state.gov>
Subject: RE: Time sens eu speech

RELEASE IN PART B5

[REDACTED]

SBU
This email is UNCLASSIFIED.

B5

From: Power, Samantha
Sent: Monday, June 06, 2016 10:45 AM
To: Steinberg, Nikolaus
Cc: USUN-SP-COS-DL; Sokoler, Jennifer; Klein, Christopher C; Farid, Omar; Myers, Nathaniel; Sokoler, Jennifer; Gee, Stephen J; Pressman, David; Kris, Robert E; Aguirre, Sergio
Subject: Re: Time sens eu speech

[REDACTED]

Sent from my BlackBerry 10 smartphone.

B5

From: Steinberg, Nikolaus
Sent: Monday, June 6, 2016 10:42 AM
To: Power, Samantha
Cc: USUN-SP-COS-DL; Sokoler, Jennifer; Klein, Christopher C; Farid, Omar; Myers, Nathaniel; Sokoler, Jennifer; Gee, Stephen J; Pressman, David; Kris, Robert E; Aguirre, Sergio
Subject: RE: Time sens eu speech

B5

[Redacted]

B5

SBU

This email is UNCLASSIFIED.

From: Power, Samantha
Sent: Monday, June 06, 2016 10:23 AM
To: USUN-SP-COS-DL; Pressman, David; Sokoler, Jennifer
Subject: Time sens eu speech

[Redacted]

B5

Sent from my BlackBerry 10 smartphone.

From: Power, Samantha </O=SBUSTATE/OU=USUN
AG/CN=RECIPIENTS/CN=POWERS>
Sent: Monday, June 6, 2016 11:07 AM
To: Gee, Stephen J <GeeSJ@state.gov>; Steinberg, Nikolaus
<SteinbergN@state.gov>
Cc: USUN-SP-COS-DL <USUN-SP-COS-DL@state.gov>; Sokoler, Jennifer
<SokolerJ@state.gov>; Klein, Christopher C <KleinCC@state.gov>; Farid, Omar
<FaridO@state.gov>; Myers, Nathaniel <MyersN@state.gov>; Sokoler, Jennifer
<SokolerJ@state.gov>; Pressman, David <PressmanD@state.gov>; Kris, Robert
E <KrisRE@state.gov>; Aguirre, Sergio <AguirreS@state.gov>; Simonoff, Mark
A <SimonoffMA@state.gov>
Subject: Re: Time sens eu speech

RELEASE IN PART
B5

Tks I'm OK w below. Can someone confirm that and other changes coming?
Sent from my BlackBerry 10 smartphone.

From: Gee, Stephen J
Sent: Monday, June 6, 2016 11:05 AM
To: Power, Samantha; Steinberg, Nikolaus
Cc: USUN-SP-COS-DL; Sokoler, Jennifer; Klein, Christopher C; Farid, Omar; Myers, Nathaniel; Sokoler, Jennifer; Pressman, David; Kris, Robert E; Aguirre, Sergio; Simonoff, Mark A
Subject: Re: Time sens eu speech

B5

Sent from my BlackBerry 10 smartphone.

From: Power, Samantha
Sent: Monday, June 6, 2016 10:57 AM
To: Steinberg, Nikolaus
Cc: USUN-SP-COS-DL; Sokoler, Jennifer; Klein, Christopher C; Farid, Omar; Myers, Nathaniel; Sokoler, Jennifer; Gee, Stephen J; Pressman, David; Kris, Robert E; Aguirre, Sergio
Subject: Re: Time sens eu speech

B5

Sent from my BlackBerry 10 smartphone.

From: Power, Samantha
Sent: Monday, June 6, 2016 10:45 AM
To: Steinberg, Nikolaus

C06497601 UNCLASSIFIED U.S. Department of State Case No. F-2017-14553 Doc No. C06497601 Date: 03/05/2018

Cc: USUN-SP-COS-DL; Sokoler, Jennifer; Klein, Christopher C; Farid, Omar; Myers, Nathaniel; Sokoler, Jennifer; Gee, Stephen J; Pressman, David; Kris, Robert E; Aguirre, Sergio
Subject: Re: Time sens eu speech

B5

Sent from my BlackBerry 10 smartphone.

From: Steinberg, Nikolaus.
Sent: Monday, June 6, 2016 10:42 AM
To: Power, Samantha
Cc: USUN-SP-COS-DL; Sokoler, Jennifer; Klein, Christopher C; Farid, Omar; Myers, Nathaniel; Sokoler, Jennifer; Gee, Stephen J; Pressman, David; Kris, Robert E; Aguirre, Sergio
Subject: RE: Time sens eu speech

B5

SBU
This email is UNCLASSIFIED.

From: Power, Samantha
Sent: Monday, June 06, 2016 10:23 AM
To: USUN-SP-COS-DL; Pressman, David; Sokoler, Jennifer
Subject: Time sens eu speech

B5

UNCLASSIFIED U.S. Department of State Case No. F-2017-14553 Doc No. C06497601 Date: 03/05/2018

Sent from my BlackBerry 10 smartphone.

RELEASE IN PART B5,B6

From: Power, Samantha </O=SBUSTATE/OU=USUN
AG/CN=RECIPIENTS/CN=POWERS>
Sent: Saturday, June 18, 2016 4:58 PM
To: Steinberg, Nikolaus <SteinbergN@state.gov>
Cc: USUN-SP-Specials-DL <USUN-SP-Specials-DL@state.gov>
Subject: Re: Silvers / NYRB edits

He said he wld welcome edits this week. I haven't sent him yours yet.

Sent from my BlackBerry 10 smartphone.

From: Steinberg, Nikolaus
Sent: Saturday, June 18, 2016 4:01 PM
To: Power, Samantha
Cc: USUN-SP-Specials-DL
Subject: Re: Silvers / NYRB edits

Hit send too early -- my bad. Perhaps we write back to Silvers to request a bit of time to finish a new intro?

From: Steinberg, Nikolaus
Sent: Saturday, June 18, 2016 3:55 PM
To: Power, Samantha
Cc: USUN-SP-Specials-DL
Subject: Re: Silvers / NYRB edits

In that case, we'll need a new introduction that we refer back to at several points.

From: Power, Samantha
Sent: Saturday, June 18, 2016 3:41 PM
To: Steinberg, Nikolaus
Cc: USUN-SP-Specials-DL
Subject: Re: Silvers / NYRB edits

B5

Sent from my BlackBerry 10 smartphone.

From: Steinberg, Nikolaus
Sent: Saturday, June 18, 2016 3:29 PM
To: Power, Samantha
Cc: USUN-SP-Specials-DL
Subject: Re: Silvers / NYRB edits

B5

B5

From: Power, Samantha
Sent: Saturday, June 18, 2016 2:42 PM
To: Steinberg, Nikolaus
Cc: USUN-SP-Specials-DL
Subject: Re: Silvers / NYRB edits

B5

Sent from my BlackBerry 10 smartphone.

From: Steinberg, Nikolaus
Sent: Friday, June 17, 2016 3:25 PM
To: Power, Samantha
Cc: USUN-SP-Specials-DL
Subject: Silvers / NYRB edits

B5

This email is UNCLASSIFIED.

From: Power, Samantha
Sent: Friday, June 17, 2016 2:38 PM
To: Steinberg, Nikolaus
Subject: Re: msC

Thank you!

Sent from my BlackBerry 10 smartphone.

From: Steinberg, Nikolaus
Sent: Friday, June 17, 2016 2:36 PM
To: Power, Samantha
Subject: RE: msC

Woot woot! Will read his proof now.

This email is UNCLASSIFIED.

From: Power, Samantha
Sent: Friday, June 17, 2016 2:12 PM
To: Steinberg, Nikolaus
Subject: Fw: msC

!!

Sent from my BlackBerry 10 smartphone.

From: Robert Silvers
Sent: Friday, June 17, 2016 2:10 PM
To: Power, Samantha
Subject: msC

B6

Dear Samantha,

How good to see you on the Turtle Bay Terrace. The spirited talk you gave in Berlin has been much on my mind and I arrived at a somewhat shorter version of it that left out the opening remarks that were very much of the occasion, and that concentrates on the central message of the need for attention to the people living in states.

I hope you'll think this shorter version works. We would identify it in the contributor's note as drawn from a speech at the Academy. You'll see some small suggestions here and there. (If all PhDs since 1954 were to be called Doctor, there would be huge numbers of doctors to be acknowledged, and so we say Henry Kissinger, which is surely not objectionable.) If you feel it can't be done in this shorter form of course I would understand, but I'll be hoping we can run it in the Review. Let's be in touch after you've seen this.

My best to you both,
Bob

RELEASE IN PART B5

From: Steinberg, Nikolaus <SteinbergN@state.gov>
Sent: Monday, June 27, 2016 8:46 PM
To: Power, Samantha <PowerS@state.gov>
Cc: Maltz, Gideon <MaltzG@state.gov>; USUN-SP-Specials-DL <USUN-SP-Specials-DL@state.gov>
Subject: response to feedback on speech – *what speech? Date of speech? Don't these comments follow date of speech?*

Ambassador:

Sorry for doing a poor job of noting responses to some of your individual comments and edits on the speech. I haven't lost the thread on them, but should have noted rationale and answers in the text, and informed you of facts we're tracking down.

A few of notes, which I'll also place in comments in the next draft:

B5

I'll note these and other relevant follow-ups in the next draft, and will do a better job of this in the future.

This email is UNCLASSIFIED.

RELEASE IN PART
B5,B6

From: Power, Samantha <PowerS@state.gov>
Sent: Monday, January 2, 2017 11:50 PM
To: USUN-SP-COS-DL <USUN-SP-COS-DL@state.gov>; USUN-SP-Specials-DL <USUN-SP-Specials-DL@state.gov>; Zimmerman, Nicholas F. <ZimmermanNF@state.gov>
Subject: Fw: guterres
Attach: Guterres Transition Memo_January 2.docx

Sent from my BlackBerry 10 smartphone.
Original Message

From: Samantha Power [REDACTED]
Sent: Monday, January 2, 2017 11:47 PM
To: Power, Samantha
Subject: guterres

B5

B6

From: Power, Samantha </O=SBUSTATE/OU=USUN
AG/CN=RECIPIENTS/CN=POWERS>
Sent: Wednesday, January 11, 2017 4:21 PM
To: Cooper, Kurtis A <CooperKA@state.gov>; Barry, Mary-Katherine (Mary-Kate)
<BarryMK@state.gov>
Cc: USUN-SP-COS-DL <USUN-SP-COS-DL@state.gov>; McCarthy, Aoife
<McCarthyA@state.gov>; Degory, John A <DegoryJA@state.gov>; Tomaselli,
Elizabeth <TomaselliE@state.gov>; Sardar, Satrajit <SardarS@state.gov>;
USUN-SP-Scheduling-DL <USUN-SP-Scheduling-DL@state.gov>
Subject: RE: Friday Speech Concerns

RELEASE IN PART

B5

How about Friday at CFR in NY?

Official
UNCLASSIFIED

From: Cooper, Kurtis A
Sent: Wednesday, January 11, 2017 4:15 PM
To: Power, Samantha; Barry, Mary-Katherine (Mary-Kate)
Cc: USUN-SP-COS-DL; McCarthy, Aoife; Degory, John A; Tomaselli, Elizabeth; Sardar, Satrajit; USUN-SP-Scheduling-DL
Subject: RE: Friday Speech Concerns

B5

Official
UNCLASSIFIED

From: Power, Samantha
Sent: Wednesday, January 11, 2017 3:33 PM
To: Cooper, Kurtis A; Barry, Mary-Katherine (Mary-Kate)
Cc: USUN-SP-COS-DL; McCarthy, Aoife; Degory, John A; Tomaselli, Elizabeth; Sardar, Satrajit; USUN-SP-Scheduling-DL
Subject: RE: Friday Speech Concerns

Ah ok – what is the collective set of views?

Official
UNCLASSIFIED

From: Cooper, Kurtis A
Sent: Wednesday, January 11, 2017 3:28 PM

C06497521 IED U.S. Department of State Case No. F-2017-14553 Doc No. C06497521 Date: 03/05/2018

To: Power, Samantha; Barry, Mary-Katherine (Mary-Kate)

Cc: USUN-SP-COS-DL; McCarthy, Aoife; Degory, John A; Tomaselli, Elizabeth; Sardar, Satrajit; USUN-SP-Scheduling-DL

Subject: RE: Friday Speech Concerns

It's a federal holiday and we'll struggle to build an audience or find a venue.

Official

UNCLASSIFIED

From: Power, Samantha

Sent: Wednesday, January 11, 2017 3:26 PM

To: Barry, Mary-Katherine (Mary-Kate); Cooper, Kurtis A

Cc: USUN-SP-COS-DL; McCarthy, Aoife; Degory, John A; Tomaselli, Elizabeth; Sardar, Satrajit; USUN-SP-Scheduling-DL

Subject: RE: Friday Speech Concerns

Why not Monday?

B5

Official

UNCLASSIFIED

From: Barry, Mary-Katherine (Mary-Kate)

Sent: Wednesday, January 11, 2017 2:20 PM

To: Cooper, Kurtis A; Power, Samantha

Cc: USUN-SP-COS-DL; McCarthy, Aoife; Degory, John A; Tomaselli, Elizabeth; Sardar, Satrajit; USUN-SP-Scheduling-DL

Subject: RE: Friday Speech Concerns

Adding scheduling.

Official

UNCLASSIFIED

From: Cooper, Kurtis A

Sent: Wednesday, January 11, 2017 2:10 PM

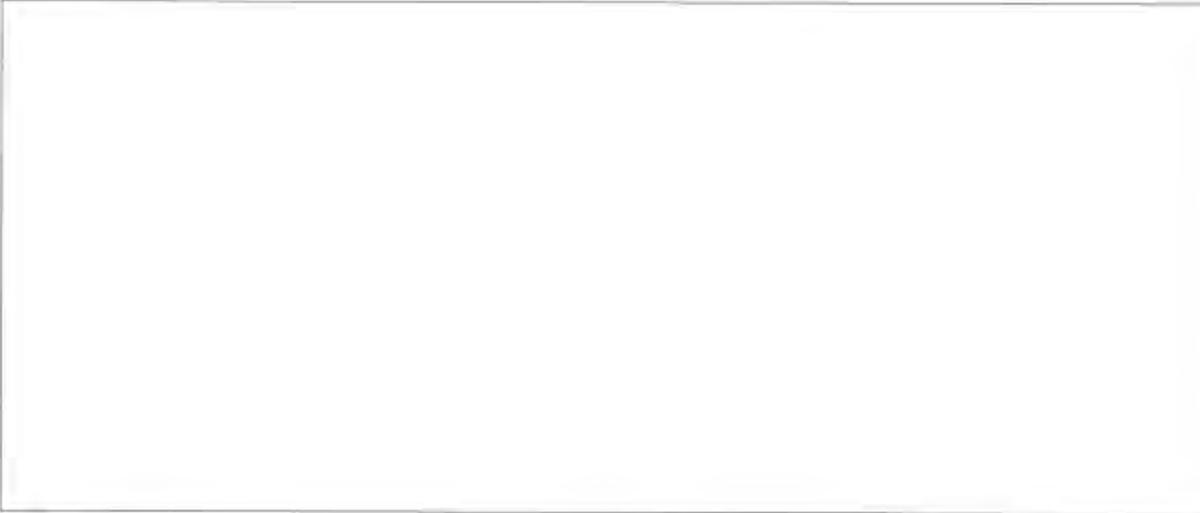
To: Power, Samantha

Cc: USUN-SP-COS-DL; McCarthy, Aoife; Degory, John A; Tomaselli, Elizabeth; Sardar, Satrajit

Subject: Friday Speech Concerns

Ambassador,

B5



Kurtis

Official

UNCLASSIFIED

B5

**RELEASE IN PART
B5,B6**

From: Power, Samantha </O=SBUSTATE/OU=USUN AG/CN=RECIPIENTS/CN=POWERS>
Sent: Tuesday, January 17, 2017 6:02 AM
To: Sam [redacted]
Subject: Fw: PRINT
Attach: Power_redux_v42_clean.docx

B6

Sent from my BlackBerry 10 smartphone.

From: Wexler, Rebecca <WexlerR@state.gov>
Sent: Tuesday, January 17, 2017 5:43 AM
To: Power, Samantha
Cc: Steinberg, Nikolaus
Subject: PRINT

Ambassador,

Please note I do not have the most recent version of this with me if you wish to print at home

Sent from my BlackBerry 10 smartphone.

From: Steinberg, Nikolaus <SteinbergN@state.gov>
Sent: Tuesday, January 17, 2017 1:53 AM
To: USUN-SP-COS-DL; USUN-COMMS-DL
Subject: Fw: Russia speech, 12:50 a.m.

Latest,

From: Steinberg, Nikolaus <SteinbergN@state.gov>
Sent: Tuesday, January 17, 2017 1:08 AM
To: Power, Samantha; Samantha
Subject: Russia speech, 12:50 a.m.

Ambassador,

Attached is the updated version of the remarks.

B5

Official
UNCLASSIFIED

RELEASE IN PART B5,B6

From: Power, Samantha </O=SBUSTATE/OU=USUN
AG/CN=RECIPIENTS/CN=POWERS>
Sent: Tuesday, January 17, 2017 1:45 AM
To: Rhodes, Benjamin J. EOP/WHO
Subject: Re: Russia speech 1am version

B6

Can u read it quickly? (sorry). Trying to make it imp. It is I think what u outlined w nik

Sent from my BlackBerry 10 smartphone.

Original Message

From: Rhodes, Benjamin J. EOP/WHO
Sent: Tuesday, January 17, 2017 1:38 AM
To: Power, Samantha; Rice, Susan E. EOP/NSC; Ried, Curtis R. EOP/NSC; Haines, Avril D. EOP/NSC; SESTravel1, User; DMCOS; Celeste A. Wallander; Blinken, Antony J
Cc: Aguirre, Sergio
Subject: Re: Russia speech 1am version

B5

Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.

Original Message

From: Power, Samantha
Sent: Tuesday, January 17, 2017 1:34 AM
To: Rhodes, Benjamin J. EOP/WHO; Rice, Susan E. EOP/NSC; Ried, Curtis R. EOP/NSC; Haines, Avril D. EOP/NSC; SES Travel, DMCOS; Wallander, Celeste A. EOP/NSC; Blinken, Antony J
Cc: Aguirre, Sergio
Subject: Re: Russia speech 1am version

Ok can reinsert. Cut only for length but 36 mins not so bad

Sent from my BlackBerry 10 smartphone.

Original Message

From: Rhodes, Benjamin J. EOP/WHO
Sent: Tuesday, January 17, 2017 1:30 AM
To: Power, Samantha; Rice, Susan E. EOP/NSC; Ried, Curtis R. EOP/NSC; Haines, Avril D. EOP/NSC; SESTravel1, User; DMCOS; Celeste A. Wallander; Blinken, Antony J
Cc: Aguirre, Sergio
Subject: Re: Russia speech 1am version

Back online here in Cuba

B5

Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.

Original Message

C06497479:ED U.S. Department of State Case No. F-2017-14553 Doc No. C06497479 Date: 04/02/2018

From: Power, Samantha
Sent: Tuesday, January 17, 2017 1:25 AM
To: Rice, Susan E. EOP/NSC; Ried, Curtis R. EOP/NSC; Haines, Avril D. EOP/NSC; SES Travel; DMCOS; Rhodes, Benjamin J. EOP/WHO; Wallander, Celeste A. EOP/NSC; Blinken, Antony J
Cc: Aguirre, Sergio
Subject: Russia speech 1am version

B5

Official
UNCLASSIFIED

C06647997 FIED U.S. Department of State Case No. F-2017-14553 Doc No. C06647997 Date: 07/23/2019

Figueroa, Priscilla C

From: Power, Samantha
Sent: Tuesday, August 02, 2016 7:13 PM
To: Soifer, Halie S; Wexler, Rebecca; USUN-SP-Scheduling-DL
Subject: Re: any update on corker call?

Ok

RELEASE IN PART
B5,B6

Sent from my BlackBerry 10 smartphone.

From: Soifer, Halie S
Sent: Tuesday, August 2, 2016 6:56 PM
To: Wexler, Rebecca; Power, Samantha; USUN-SP-Scheduling-DL
Subject: Re: any update on corker call?

Readout of Moniz-Corker call is enclosed. He would like to connect with you. Assuming you would like to make the call, I will work with scheduling to find a good time.

B5

Sent from my BlackBerry 10 smartphone.

From: Soifer, Halie S
Sent: Tuesday, August 2, 2016 5:40 PM
To: Wexler, Rebecca; Power, Samantha; USUN-SP-Scheduling-DL
Subject: Re: any update on corker call?

Moniz is reaching out to Corker today and they have asked you to follow-up with him tomorrow, on an "if needed" basis.

Scheduling has flagged

B5

C06647997FILED U.S. Department of State Case No. F-2017-14553 Doc No. C06647997 Date: 07/23/2019

that you have little to no office time tomorrow, so it may be an issue, but perhaps the call won't be necessary if the Moniz call goes/went well. I'll inquire and keep you posted.

B5

C06647997 IED U.S. Department of State Case No. F-2017-14553 Doc No. C06647997 Date: 07/23/2019

Sent from my BlackBerry 10 smartphone.

From: Wexler, Rebecca
Sent: Tuesday, August 2, 2016 5:32 PM
To: Power, Samantha; USUN-SP-Scheduling-DL
Cc: Soifer, Halie S
Subject: RE: any update on corker call?

Adding Halie here, who I believe was reaching back out to NSC leg on this.

From: Power, Samantha
Sent: Tuesday, August 02, 2016 5:30 PM
To: USUN-SP-Scheduling-DL
Subject: any update on corker call?

From: Power, Samantha </O=SBUSTATE/OU=USUN
AG/CN=RECIPIENTS/CN=POWERS>
Sent: Friday, November 25, 2016 10:49 PM
To: Maltz, Gideon <MaltzG@state.gov>; USUN-SP-COS-DL <USUN-SP-COS-
DL@state.gov>
Subject: Re: from Gloria Steinem -- an emergency while we're still here

RELEASE IN PART
B6,B7C

Jpsaki@ [redacted]

B6

Sent from my BlackBerry 10 smartphone.

From: Maltz, Gideon
Sent: Friday, November 25, 2016 10:07 PM
To: Power, Samantha; USUN-SP-COS-DL
Subject: Re: from Gloria Steinem -- an emergency while we're still here

[redacted] B5

From: Power, Samantha
Sent: Friday, November 25, 2016 7:07 PM
To: USUN-SP-COS-DL
Subject: Fw: from Gloria Steinem -- an emergency while we're still here

I've done nothing. This really seems to be v grave [redacted]

B5

Sent from my BlackBerry 10 smartphone.

From: [redacted] @aol.com
Sent: Friday, November 25, 2016 7:06 PM
To: Power, Samantha
Subject: from Gloria Steinem -- an emergency while we're still here

B6

Dear Samantha,

Below is a letter I wrote to the President earlier this week in care of Valerie Jarrett.

Below that is more recent information that tells me there is going to be a request for UN Peacekeeping Forces at Standing Rock.

On both counts – and at the risk of telling you what you already know – I wanted you to have all the information that I do.

Standing Rock is truly reaching a crisis -- and all the more so because its such a short time before Trump, a major investor in that pipeline, assumes power.

Please tell me if there is anything at all that I can do.

with hope and friendship,

Gloria

Dear Valerie,
November 24, 2016

It's ironic that I'm writing you this letter just before Thanksgiving -- and tragic that it's just after the election of a President who is himself an investor in the Dakota Access Pipeline.

On both those counts, I ask if you could get this letter in front of President Obama. He may be once again the only hope.

with hope that we will be working together wherever we are.

Gloria

Dear President Obama,

There has been a lot of bad news -- and also some good news in the rebellion and resolution that it is causing -- but right now, I'm writing because of an imminent danger.

In spite of the month delay in the construction of the Dakota Access Pipeline that you so wisely and courageously ordered, there is now a daily escalation of official violence against the many hundreds of peaceful water protectors who oppose that pipeline.

From my research and writing about it, and from friends who are among the protectors, I have come to fear that Standing Rock, the largest demonstration by Indian Country in a century, is about to turn into Wounded Knee.

This is made even more likely by the new confidence of the Pipeline's corporate and state supporters who know that the President Elect is an investor in it.

On Sunday, when protectors tried to remove a blockade that had cut them off from emergency services in nearby Bismarck, the police responded with rubber bullets, mace, hoses, long range acoustic devices, and concussion grenades. Despite freezing temperatures, police also turned water cannon on the protectors. As a result, 200 young people and many Native elders needed medical treatment for hypothermia. One young non-Native woman who was there in support, was hit by a police grenade, and wounded so severely that her arm may have to be amputated.

You are far wiser than I about what actions are possible. If there ever were a case for Federal Marshals to move in as protectors, this seems to be it. Perhaps sheriffs could be asked to stand down. Also the Department of Justice could open an investigation into the Morton County Sheriff's Office on the pattern and practice of using excessive force, as other such offices were asked to do in Chicago, Baltimore and Ferguson. The Army Corps of Engineers could deny the easement permit required of Energy Transfer Partners, the investors

In this pipeline. And there must be other measures.

You are already the President who has done the most for the residents of Indian Country. I'm so grateful for that. We will do our best to preserve and continue your legacy.

I'm just asking: Could there be one more action now?

Whatever the answer, I hope, as so many millions do, that we will have your leadership, grace, courage and kindness in a new form and different place.

with love and gratitude,

Gloria Steinem

B6

United Nation Experts Validate

Standing Rock Sioux Opposition To

Dakota Access Pipeline

Share

4

FOR IMMEDIATE RELEASE

September 23, 2016

Media Contact: Tom Goldtooth

Cannon Ball, North Dakota (23 Sept. 2016) – United Nations Expert, the Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz, released a statement yesterday calling upon the United States to immediately halt the construction of the Dakota Access Pipeline, in recognition of dire and direct threats to the drinking water, burial grounds and sacred sites of the

B6

Standing Rock Sioux people.

The pipeline also directly endangers traditional lifeways and practices, and the health and wellbeing of current and future generations. Members of the Standing Rock Sioux and thousands of allies from across the United States and the world have been taking direct action since April 2016 to call attention to the violation of their Indigenous rights, desecration of their lands and waters and the threats to our global climate engendered by the Dakota Access Pipeline.

The 1,172 mile pipeline, being pushed by the US Army Corps of Engineers and the Energy Transfer LLC Corporation, is proposed to pass under the Missouri river and Lake Oahe, a vital source of the tribes drinking water and ceremonial practice.

In her statement, Ms Tauli-Corpuz drew attention to blatant violation of treaty rights, the United Nations Declaration on the Rights of Indigenous peoples and other international legal standards requiring the free, prior and informed consent of Indigenous peoples before the approval of any project affecting their lands.

She called for immediate attention to the ongoing persecution, intimidation and harassment of the many protectors gathered on the ground in Standing Rock to directly oppose the pipeline and present alternative visions for a just and healthy world.

Ms. Tauli-Corpuz's call for the United States government to take action to halt pipeline was endorsed by other United Nations Experts, including:

- Special Rapporteur on the situation of human rights defenders, Mr. Michel Forst
- Special Rapporteur on the human right to safe drinking water and sanitation, Mr. Léo Heller
- Special Rapporteur on human rights and the environment, Mr. John H. Knox
- Special Rapporteur on the rights to freedom of peaceful assembly and of association, Mr. Maina Kiai

- Special Rapporteur on cultural rights, Ms. Karima Bennoune
- UN Special Rapporteur on human rights and hazardous substances and wastes, Mr. Baskut Tuncak
- Current Chairperson of the Working Group on business and human rights, Mr. Pavel Sulyandziga

During his recent appeal to the United Nations, Standing Rock Sioux Chairman David Archambault II invited Ms Tauli-Corpuz to visit Standing Rock and witness for herself the escalating violations against Indigenous peoples and the land and water of the region.

"The UN Expert got it right," said Tom Goldtooth, the Director of the Indigenous Environmental Network. "What the US calls consultation is not consultation but a statement telling people what they're doing after millions of dollars have been invested, painting Indigenous Peoples as spoilers. The right of free, prior and informed consent begins prior to the planning process, not when their bulldozers are at your doorstep."

American Center for Law and Justice

QUARTERLY FOIA REPORT

APPENDIX II-B

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN CENTER FOR LAW AND
JUSTICE,

Plaintiff,

v.

U.S. NATIONAL SECURITY AGENCY, U.S.
DEPARTMENT OF STATE,

Defendants.

No. 1:17-cv-01425-TNM

**PLAINTIFF'S REPLY IN SUPPORT OF CROSS MOTION
FOR SUMMARY JUDGMENT**

TABLE OF AUTHORITIES

<i>Abtew v. Dep't of Homeland Sec.</i> , 808 F.3d 895, 899 (D.C. Cir. 2015).....	13
<i>ACLU v. CIA</i> , 710 F. 3d 422 (D.C. Cir. 2013)	5, 7
<i>*Ancient Coin Collectors Guild v. Dep't of State</i> , 641 F.3d 504 (D.C. Cir. 2011)	10
<i>*Afshar v. U.S. Dep't of State</i> , 702 F.2d 1125 (D.C. Cir. 1983)	2
<i>DiBacco v. United States Dep't of the Army</i> , 926 F.3d 827 (D.C. Cir. 2019)	10
<i>*Heartland All. for Human Needs & Human Rights v. United States Immigration & Customs Enf't</i> , 406 F. Supp. 3d 90 (D.D.C. 2019)	13
<i>Ibrahim v. Dep't of State</i> , 311 F. Supp. 3d 134 (D.D.C. 2018)	13
<i>James Madison Project v. DOJ</i> , 302 F. Supp. 2d 12 (D.D.C. 2018)	2, 7
<i>*Mobley v. CIA</i> , 806 F.3d 568 (D.C. Cir. 2015)	2-3
<i>Mobley v. CIA</i> , 924 F. Supp. 2d 24 (D.D.C. 2013)	3, 6
<i>Oglesby v. United States Dep't of Army</i> , 920 F.2d 57 (D.C. Cir. 1990)	11
<i>Nation Magazine v. United States Customs Serv.</i> , 71 F.3d 885 (D.C. Cir. 1995)	11
<i>Valencia—Lucena v. U.S. Coast Guard</i> , 180 F.3d 321 (D.C. Cir. 1999)	10, 12
<i>*Wolf v. CIA</i> , 473 F.3d 370 (D.C. Cir. 2007)	3, 6, 7

I. Official Acknowledgment Can, As it Does Here, Overcome Agency Glomar Responses.

Defendants continue to conceal information from the American public by suggesting that prior admissions made by high level government officials in testimony *under oath* before Congress do not constitute “official acknowledgement” simply because the officials have already left office. This is a convenient argument for government agencies, including the NSA and State Department, notorious for their significant delay in responding to and completing productions responsive to FOIA requests – so long in fact that any official with first-hand knowledge and capable of such admissions is long gone. In support of this contention, Defendants cite a single district court case, *James Madison Project v. DOJ*, 302 F. Supp. 2d 12 (D.D.C. 2018). In that case, the court summarily concludes that statements by a government official after leaving government office “do not constitute official statements and, therefore, cannot be treated as an official acknowledgement of the existence of a record.” *Id.* at 27 (citing *Mobley v. CIA*, 806 F.3d 568, 583 (D.C. Cir. 2015); *Afshar v. U.S. Dep’t of State*, 702 F.2d 1125, 1133-34 (D.C. Cir. 1983)). Crucially, neither of the cases relied upon by the court in *James Madison* support such a sweeping exclusion of all admissions made by former officials. In *Afshar*, for example, the court deemed the former official’s comments insufficient as an official acknowledgement because they were contained within a book – not because the official was no longer employed by the agency. 702 F.3d at 1133. The court specifically noted that book reviews of books are far from authoritative announcements and “[p]ublications . . . are not generally treated as official disclosures” because “books [are] frequently written in the first person, are received as the private product of their authors”). Likewise, in *Mobley*, the court declined to find that comments made by a private litigant in a foreign court proceeding constituted official acknowledgement for

purposes of overcoming a Glomar response. 806 F.3d at 583. In stark contrast to these cases, the former officials in this case made admissions under oath in testimony before a Congressional committee. If such admissions are not “official acknowledgements,” what is?

As the lower court explained in *Mobley v. CIA*,

In order to constitute an “official acknowledgement” of information that waives an agency’s ability to issue a Glomar response, “the information requested must be as specific as the information previously released,” the “information requested must match the information previously disclosed,” and “the information requested must already have been made public through an official and documented disclosure.” *Wolf*, 473 F.3d at 378 (quoting *Fitzgibbon v. CIA*, 911 F.2d 755, 765, 286 U.S. App. D.C. 13 (D.C. Cir. 1990)). *In the Glomar context, then, if the prior disclosure establishes the existence (or not) of records responsive to the FOIA request, the prior disclosure necessarily matches both the information at issue—the existence of records—and the specific request for that information.*” *Id.* at 379.

924 F. Supp. 2d 24, 46 (D.D.C. 2013). As demonstrated below, and in light of the disclosures made in recent weeks, there can be no doubt that these requirements have been met and Defendants’ ability to assert a Glomar response have been waived.

A. Defendant NSA Has Officially Acknowledged the Existence of Responsive Records.

Among other contentions that are now moot, Defendants contend “general statements about unmasking by former government officials or members of Congress who cannot speak for the NSA or State—do not satisfy the standard for official acknowledgement.” Defendants’ Reply In Support of Their Motion For Summary Judgment and Opposition To Plaintiff’s Cross-Motion for Summary Judgment (ECF 41) (hereinafter “Defendants’ Reply and Response”), at 7. Since Defendant’s filing, however, Defendant NSA has officially acknowledged the existence of records responsive to Plaintiff’s FOIA Requests to both Defendants.

On May 4, 2020, the Acting Director of National Intelligence submitted to Senators Ron Johnson and Charles Grassley a document issued by Defendant NSA containing “a revised list of identities of any officials who submitted requests to the National Security Agency at any point between 8 November 2016 and 31 January 2017, to unmask the identity of former National Security Advisor, Lieutenant General Michael T. Flynn (USA-Ret).” *See Decl. of Sisney, ¶ 2; Exhibit 2* (hereinafter “NSA Memorandum”). This memorandum was declassified and publicly released May 13, 2020. *Id.* at ¶ 3. According to the NSA Memorandum, “[i]n this case, **16 authorized individuals requested unmaskings for [redacted] different NSA intelligence reports for select identified principals**. While the principals are identified below, we cannot confirm they saw the unmasked information. This response does not include any requests outside of the specified time-frame.” *Id.* at ¶ 2 (emphasis added).

The NSA Memorandum identifies 39 individuals involved in making the unmasking requests. The named officials included Vice President Joe Biden, President Obama’s Chief of Staff Denise McDonough, Director of National Intelligence James Clapper, CIA Director John Brennan, FBI Director Jim Comey, Treasury Secretary Jacob Lew, Deputy Secretary of Energy Elizabeth Sherwood-Randall, and **Ambassador Samantha Power** – along with at least six other State Department officials including Deputy Chief of Mission Kelly Deglan, U.S. Ambassador to Italy and the Republic of San Marino John R. Phillips, U.S. Ambassador to Russia John Tefft, U.S. Deputy Chief of US Mission to NATO (USNATO) Mr. Litzenberger, U.S. Permanent Representative (PermRep) to NATO Ambassador Douglas Lute, and U.S. Ambassador to Turkey - Ambassador Bass. To be clear, this NSA acknowledgment identifies unmasking activities concerning Flynn of at least seven State Department officials.

Importantly, Lt. Gen. Flynn was one of the specifically named individuals in Plaintiff's FOIA requests to Defendant NSA and Defendant State Department. *See* Plaintiff's FOIA Request to NSA, ECF, # 1-1, a 4, 6, 7 (item "o)" on each page); Plaintiff's FOIA Request to State Department, Exh. A to Complaint, *ACLJ v. State Dept.*, Doc. # 1-1, 17-cv-1991, at 4, 6, 7, 9, 10. And the dates of the unmasking requests recorded in the NSA Memorandum correspond with the date range provided in Plaintiff's FOIA requests (January 20, 2016 to January 20, 2017). *ACLJ v. NSA*, 17-cv-1425, Doc. # 1-1, p. 3; *ACLJ v. State Dept.*, 17-cv-1991, Doc. # 1-1, p. 3. ***As such, the NSA has now officially acknowledged multiple unmaskings of at least one named individual (Flynn) during the timeframe of Plaintiff's FOIA requests to both Defendants.*** This NSA acknowledgment is undeniably in the public domain. *ACLU v. CIA*, 710 F. 3d 422, 427 (D.C. Cir. 2013) (plaintiff's burden to show "information in the public domain that appears to duplicate that being withheld").

Further, as addressed above, the NSA's official acknowledgement identifies Samantha Power in connection with Flynn unmasking requests on ***seven*** occasions and on six different dates (two on one date). *See* Exhibit 2, at 3. Again, Ambassador Power was identified as a relevant communicant in Plaintiff's FOIA request to Defendant State Department, where the other communicant was any "NSA official or employee." *See* Item #1, Plaintiff's FOIA Request to State Dept., Exh. A to Complaint, *ACLJ v. State Dept.*, Doc. # 1-1, 17-cv-1991, p. 4; *see pp. 5, 7, 8, 10, 11.*¹

¹ For example, item # 1 requests:

All records, communications or briefings created, generated, forwarded, transmitted, sent, shared, saved, received, or reviewed ***by any DOS official or employee, where one communicant was Ambassador Samantha Power, including any communications, queries or requests made under an alias or pseudonym,***

As is made clear by the NSA acknowledgment, records of the unmasking activity concerning Lt. Gen. Flynn and Ambassador Power and at least six additional State Department officials exist. NSA Memorandum, Exhibit 2, at 3 (“Each individual was an authorized recipient of *the original report and the unmasking was approved through NSA's standard process*, which includes a review of the justification for the request. Only certain personnel are authorized to submit unmasking requests into the NSA system.”) (Emphasis added).

In light of Defendant NSA’s official acknowledgment, there is nothing of which its existence is left to admit or to deny. The NSA has acknowledged that unmasking and SIGINT report access of a Trump-affiliated person identified on Plaintiff ACLJ’s FOIA Requests occurred – including the unmasking activity and SIGINT report access by Samantha Power, an agency actor of Defendant State Department specifically identified by Plaintiff ACLJ, and at least six additional State Department officials in Power’s orbit. Because the NSA Memorandum establishes the existence (or not) of records responsive to the FOIA request, the prior disclosure necessarily matches both the information at issue—the existence of records—and the specific request for that information,” and the plaintiff is entitled to disclosure. *Wolf v. CIA*, 473 F.3d 370, 379 (D.C. Cir. 2007). *See e.g., Mobley*, 924 F. Supp. 2d at 46.

NSA and/or State Department records of Power’s unmasking activity and communications with others (of which the NSA has acknowledged as at least six additional State Department officials with whom Power would have logically interacted) about the unmasking activity must

and where another communicant was the Director of the National Security Agency, the Chief of the Central Security Service, SIGINT production organization personnel, the Signals Intelligence Director, Deputy Signals Intelligence Director, or the Chief/Deputy/Senior Operations Officers of the National Security Operations Center, or any other NSA official or employee

now be produced, or identified and then redacted or withheld if lawfully exempted by the FOIA.

Official acknowledgment may overcome a Glomar response in two scenarios:

- (1) where the existence of responsive records is plain on the face of the official statement, *e.g.*, *Wolf*, 473 F.3d at 370, and (2) where the substance of an official statement and the context in which it is made permits the inescapable inference that the requested records in fact exist, *e.g.*, *ACLU*, 710 F.3d at 422.

James Madison Project, 302 F. Supp. 3d at 22. Either way, a Glomar response is insufficient and overcome here.

B. Ambassador Power's Previously Classified House Intelligence Committee Testimony, Now Declassified and Publicly Released, Further Undercuts Defendants' Glomar Responses.

Further supporting the existence of records responsive to Plaintiff's FOIA Requests, in testimony before the House Permanent Select Committee on Intelligence in an Executive Session held October 17, 2017, according to a transcript **just released by that committee on May 8, 2020, having been declassified by NSA Director Grennell**, Power testified that she engaged in unmasking:

MS. POWER: . . . You know, **I do not know what number of requests I made related to U.S. persons or U.S. entities**. I can't tell what you that number is over the life of my time in New York or over the last year. But I can tell you that the number is nowhere near the number that I'm reading in the press. . . .

See Exhibit 3, at 26 (emphasis added).

And, again, I cannot explain the number which, if what you're working on the basis of is what I'm seeing in the press, is a startling number, but it is not my number. **I did not personally make that number of requests that I'm seeing in the press.**

Id. at 28 (emphasis added).

I think is likely predicated on perhaps, you know, something that came out of my mission, surely, I mean, because I have the utmost respect for the Intelligence Community. I don't think anybody is – **I mean, I trust that the number represents a number of something.**

Id. at 30 (emphasis added).

But certainly when I - **any time I did make requests I was not doing so for political reasons.** I was doing so in order to be equipped to perform my dual roles. And so I would have never had any kind of political motivation or - it wasn't nice to know. I personally would only ask when I really felt it was need to know.

Id. at 35. When Mr. Schiff stated, "But in terms of the Russia investigation and the leaking allegation, I would assume that if your number of requests went up, [redacted] that would have had nothing to do with the incoming Administration," Power responded, "**No. Again, I was representing the United States.**" *Id.* at 35-36 (emphasis added).

In fact, Power denies recollection of making a request related to Lt. Gen. Flynn: "MS. POWER: Yes. I have no recollection of making a request related to General Flynn," *id.* at 37, – something the NSA's official acknowledgment undercuts. Ms. Power was asked:

In particular, do you recall how many times you requested information related specifically to the Trump campaign, something that you read about the Trump campaign or activities with Russians and the Trump campaign? Can you recall specifically any time that you circled a U.S. person and requested a name and that name popped back with somebody who was a part of the campaign?

Id. at 54-56 (emphasis added). Power responded:

MS. POWER: [redacted] providing me, again, with material that they believe that I needed to know, me deferring to their judgment, **and then me asking questions about that intelligence.**

But my motive was never political. I wasn't interested in what the Trump administration was going to do

Id. at 56 (emphasis added).

Another exchange in the transcript provides as follows:

MR. GOWDY: All right. And I asked specifically about Candidate Trump. **Would the answer be the same for those that were part of his official campaign but not the candidate himself?** Independent evidence of collusion, coordination, conspiracy between the Russian Government and official members of the campaign that would not otherwise be known by others.

MS. POWER: Again, I am not in possession of anything - I am not in possession and didn't read or absorb information that came from outside the Intelligence Community [redacted].

Id. at 61 (emphasis added). According to Power, in response to a question about a request made in her name on January 18, 2017, Powers states:

And so, you know, again, I don't think that my number of requests would've increased materially in the transition period. It would surprise me if my personal requests had, because, again, I was looking at foreign governments. **But it is possible that, you know, the number of things that came back to me in that form increased, you know, commensurate with the vast surge in collection that we were doing.**

Id. at 70 (emphasis added). And further:

MR. SWALWELL: So [redacted] If we go to 2016, the year that you made the most requests, can you tell me how many reports [redacted] produced in that year?

MS. POWER: [redacted] -it looks like the - yeah, I guess that's it for 2016.

MR. SWALWELL: And then the 10 years that are accounted for in this chart, what year has the most [redacted] reports produced?

MS. POWER: 2016.

MR. SWALWELL: And so it's clear that there's a -- as the [redacted] has produced more reports, you have requested more what the majority calls unmaskings? You have more access -- you're requesting more unmaskings?

MS. POWER: Yeah. . . . But even your numbers, which are news to me, that you have provided, I can't tell you with certainty that I made that number or a different number. I just have no recollection, and, again, I was focused on another task not on tabulating this.

Id. at 82-83 (emphasis added). The transcript also records this exchange between Power and Conaway:

MS. POWER: Yeah. And that is why, when I would see a U.S. person or U.S. entity, I would very rarely make a request to understand. I would only do it if it just didn't make sense without it.

MR. CONAWAY: Well, it got made on your behalf [redacted] times.

MR. CONAWAY: It got made on your behalf [redacted] times.

MS. POWER: I can't speak to what others were doing without my knowledge.

MR. CONAWAY: No, no, no. Those people worked directly for you, and they used your name to justify the unmask. That's how we got that list.

Id. at 103-104 (emphasis added).

In her testimony, Power concedes that, during her tenure and specifically during 2016 (the time period relevant to Plaintiff's FOIA requests at issue), she made unmasking requests, and that unmasking requests were made in her name. She admitted this included persons affiliated with the Trump Campaign and the incoming Trump Administration. She assured the committee that in doing so, she did not request unmaskings for political reasons, and that her motive was never political.

This information acknowledge by Power, taken together with the NSA's official acknowledgment dated May 4, 2020, and released publicly May 13, 2020, leaves no doubt that responsive records exist and that their existence is in the public domain. Taken together, it is as specific as, and matches, the thing the Defendants refuse to admit or deny, i.e., whether records of that exact activity exist. Power's denial of political *motive* for the activity she engaged in material insofar as it underscores that she in fact admitted to engaging in the underlying activity at issue in Plaintiff's FOIA requests.

II. Material Doubt Certainly Exists Regarding the Adequacy of NSA's Search.

“Summary judgment must be denied ‘if a review of the record raises substantial doubt’ about the search’s adequacy, ‘particularly in view of well-defined requests and positive indications of overlooked materials.’” *DiBacco v. United States Dep’t of the Army*, 926 F.3d 827, 832 (D.C. Cir. 2019) (citing *Valencia—Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999) (other citations omitted). See e.g., *Ancient Coin Collectors Guild v. Dep’t of State*, 641 F.3d 504, 514 (D.C. Cir. 2011) (noting that the agency must “demonstrate beyond material doubt that its search was ‘reasonably calculated to uncover all relevant documents’”). There can be no question

that substantial or material doubt still exists as to whether NSA's search was reasonably calculated to uncover *all* relevant documents. NSA's burden extends beyond the obligation to conduct a search reasonably calculated to find *some* documents. Yet, that is all NSA can avow here.

First, NSA has failed to provide a list of the search terms used. This is not a requirement demanded simply by Plaintiff. *See Defendants' Reply and Response*, at 8 (arguing that Plaintiff attempts to impose requirements beyond that required under FOIA). This is a requirement set forth by courts evaluating the reasonableness of an agency's search for documents. The D.C. Circuit Court of Appeals has explained that "an agency must set forth sufficient information in its affidavits for a court to determine if the search was adequate. The affidavits *must* be 'reasonably detailed ... , *setting forth the search terms* and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched.'" *Id.* (*citing Nation Magazine v. United States Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995) (*citing Oglesby v. United States Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990) (emphasis added).

Despite this clear requirement by the court, NSA still refuses to elaborate regarding the actual search terms it used. Instead, NSA simply continues to aver that it searched "various permutations of the officials' names" to identify records.

Once more, Plaintiff has specifically identified necessary search terms not utilized, as well as communicants and email accounts not yet searched by NSA. NSA does not deny that it failed to search the records of the handful of communicants specifically identified by Plaintiff in its FOIA request. Nor does it deny that the former Attorney General Lynch used an alias email account to communicate regarding official business. Instead, NSA merely asserts it has the unchecked or carte blanche authority and discretion to craft its own search terms and ignore pertinent ones. Courts are clear that while an agency need not search every record system or email, the agency cannot limit

its search to only one record system if there are others that are likely to turn up the information requested. Indeed, while an agency has discretion to conduct a standard search, “it must revise its assessment of what is ‘reasonable’ in a particular case to account for leads that emerge.” *Valencia-Lucena*, 180 F.3d at 325 (citation omitted).

Accordingly, and in light of clearly established law cited above, Plaintiff respectfully requests that this Court require NSA to (1) provide a list of all search terms used so that this Court and Plaintiff can be assured that an adequate search reasonably calculated to local all responsive documents has been completed; and (2) conduct a search of the following individuals’ records and communications: (1) the Director of the National Security Agency, (2) the Chief of the Central Security Service, (3) the Signals Intelligence Director, (4) Deputy Signals Intelligence Director, and (5) the Chief/Deputy/Senior Operations Officers of the National Security Operations Center. *See* Pl. FOIA Request to NSA, at 4-5 (identifying these individuals from the outset). Plaintiff’s request that these individuals’ communications and records be searched is entirely reasonable in light of the information requested, especially given the significant narrowing further provided by Plaintiff in its request – *i.e.* that the records must also include one of 5 communicants *and* contain the term “Trump” or a list of names 47 names (many of which included the same term “Trump”). *Id.*

III. Defendant State Department’s Justifications Remain Insufficient for Withholdings Made Pursuant To Exemption 5.

Defendant State Department, in its Reply and Response finally provides an explanation regarding the withholdings challenged by Plaintiff in an attempt to clarify what was previously boilerplate explanations. Nonetheless, and for the reasons provided by Plaintiff in its Cross-Motion for Summary Judgment, State Department’s continued refusal to identify what of the significant

portions of withheld information constitute non-exempt, factual information, as opposed to opinions, remains problematic. The court’s instruction in *Heartland All. for Human Needs & Human Rights v. United States Immigration & Customs Enf’t*, is clear. 406 F. Supp. 3d 90, 128-29 (D.D.C. 2019). “Under the law of this Circuit, an agency is required both to provide ‘a statement of its reasons,’ and to ‘describe what proportion of the information in a document is non-exempt and how that material is dispersed throughout the document.’ *Trea Senior Citizens League v. U.S. Dep’t of State*, 923 F. Supp. 2d 55, 70 (D.D.C. 2013).”

In addition, the following specific failures are noted. First, as to the withholding of deliberations regarding final speeches, *see Vaughn* Entries No. 1 and 3 (including Doc. No. C06497371 and C06497673; Doc. No. C06497566), State fails to specify what of the “deliberations” withheld were expressly adopted or incorporated in the final speeches, or other material that would have otherwise enjoyed the deliberative process. *See Ibrahim v. Dep’t of State*, 311 F. Supp. 3d 134, 142 (D.D.C. 2018) (“an agency may forfeit Exemption 5’s protection if it chooses *expressly* to adopt or incorporate by reference’ in a final opinion material that would have otherwise enjoyed the deliberative process privilege. *Abtew v. Dep’t of Homeland Sec.*, 808 F.3d 895, 899 (D.C. Cir. 2015).”).

Second, with regards to Vaughn Entry No. 5, Doc. No. C06497581, no such waiver by Plaintiff has occurred with regards to “Guterres Transition Memo” attached to the email. As Defendant specifically notes, the memo attached to the email was withheld in full, including the search term that made the memo responsive to Plaintiff’s FOIA request. The only way for Plaintiff to appropriately identify the memo was to reference the email to which it is attached. Further, the mere fact that the memo withheld is a “draft” does not make all content within the memorandum deliberative and/or justify the withholding of the memo in its entirety.

The same is true for the withholdings made in Vaughn Entry 7, Doc. No. C06647997 (originally numbered by Plaintiff as 6 in its Cross-Motion). Any factual information contained within the discussions should be disclosed.

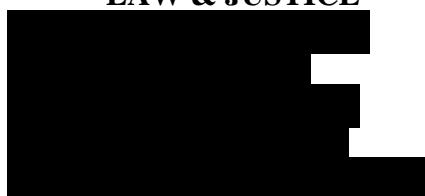
CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court deny Defendants' Motion for Summary Judgment and grant Plaintiff summary judgment.

Dated: May 18, 2020

Respectfully submitted,

JORDAN SEKULOW
STUART J. ROTH
COLBY M. MAY
CRAIG L. PARSHALL*
/s/ Abigail A. Southerland
ABIGAIL SOUTHERLAND
MATTHEW R. CLARK
BENJAMIN P. SISNEY
THE AMERICAN CENTER FOR
LAW & JUSTICE

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Counsel for Plaintiff

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN CENTER FOR LAW AND
JUSTICE,

Plaintiff,

v.

No. 1:17-cv-01425-TNM

U.S. NATIONAL SECURITY AGENCY, and
U.S. DEPARTMENT OF STATE,

Defendants.

DECLARATION OF BENJAMIN P. SISNEY

I, Benjamin P. Sisney, declare as follows:

1. I am senior litigation counsel for the Plaintiff in the above-captioned case, American Center for Law and Justice (ACLJ). I have been involved in and am familiar with all phases of this litigation.
2. On May 4, 2020, the Acting Director of National Intelligence submitted to Senators Ron Johnson and Charles Grassley a document issued by Defendant NSA containing a revised list of identities of any officials who submitted requests to the National Security Agency at any point between 8 November 2016 and 31 January 2017, to unmask the identity of former National Security Advisor, Lieutenant General Michael T. Flynn (USA-Ret). A copy of this Memorandum is attached hereto as Exhibit 2.
3. The NSA Memorandum was declassified and publicly released on May 13, 2020.
4. On May 8, 2020, the House Permanent Select Committee on Intelligence released the

transcript of the testimony provided by former Ambassador Samantha Power before the committee in Executive Session on October 17, 2017. A copy of select pages of the transcript is attached hereto as Exhibit 3. A copy of the full transcript is available at <https://intelligence.house.gov/uploadedfiles/sp40.pdf>.

Executed on May 18, 2020.

/s/ Benjamin P. Sisney

Benjamin P. Sisney
Counsel for Plaintiff

EXHIBIT 2

UNCLASSIFIED

OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE
WASHINGTON, DC

MAY 13 2020

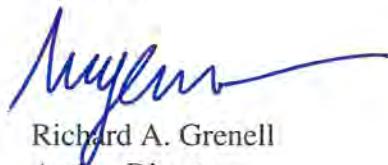
The Honorable Charles E. Grassley
Chairman
Committee on Finance
United States Senate
Washington, DC 20510

The Honorable Ron Johnson
Chairman
Committee on Homeland Security
United States Senate
Washington, DC 20510

Senators Grassley and Johnson,

On 8 May 2020 I declassified the enclosed document, which I am providing to you for your situational awareness.

Sincerely,



Richard A. Grenell
Acting Director

Enclosure

UNCLASSIFIED

Exhibit 2

Declassified by Acting DNI Richard A. Grenell on 8 May 2020

~~SECRET//NOFORN~~



NATIONAL SECURITY AGENCY
FORT GEORGE G. MEADE, MARYLAND 20755-6000

4 May 2020

MEMORANDUM FOR DIRECTOR OF NATIONAL INTELLIGENCE

SUBJECT: ~~(S//NF)~~ Follow-up Unmasking Requests re Former National Security Advisor

~~(S//NF)~~ Per your email request of 3 May 2020, I am providing a revised list of identities of any officials who submitted requests to the National Security Agency at any point between 8 November 2016 and 31 January 2017, to unmask the identity of former National Security Advisor, Lieutenant General Michael T. Flynn (USA-Ret). The original list was in alphabetical order; the revised list is in chronological order, including the date the request was received.

~~(U//FOUO)~~ Consistent with the original response, dated 1 May 2020, this information is provided pursuant to the oversight authorities vested with the Director of National Intelligence, and a copy of this correspondence will be provided to the Secretary of Defense.

PAUL M. NAKASONE
General, U.S. Army
Director

Encl: a/s

~~Classified By: [REDACTED]~~
~~Derived From: NSA/CSSM 1-52~~
~~Dated: 20180110~~
~~Declassify On: 20450401~~

~~SECRET//NOFORN~~

~~SECRET//NOFORN~~

~~(S//NF)~~ Below is a list of recipients who may have received Lt. Gen Flynn's identity in response to a request processed between 8 November 2016 and 31 January 2017 to unmask an identity that had been generically referred to in an NSA foreign intelligence report. Each individual was an authorized recipient of the original report and the unmasking was approved through NSA's standard process, which includes a review of the justification for the request. Only certain personnel are authorized to submit unmasking requests into the NSA system. In this case, 16 authorized individuals requested unmaskings for █ different NSA intelligence reports for select identified principals. While the principals are identified below, we cannot confirm they saw the unmasked information. This response does not include any requests outside of the specified time-frame.

~~(S//NF)~~

U.S. Ambassador to the United Nations - Samantha Power 30-Nov-16 2-Dec-16 7-Dec-16 14-Dec-16 (two requests) 23-Dec-16 11-Jan-17
Director for National Intelligence – James R. Clapper 2-Dec-16 28-Dec-16 7-Jan-17
Deputy Chief of Mission - Kelly Degnan 6-Dec-16
U.S. Ambassador to Italy and the Republic of San Marino - John R. Phillips 6-Dec-16
Director of the CIA – John O. Brennan 14-Dec-16 15-Dec-16
OIA Director - Patrick Conlon 14-Dec-16
Secretary of the Treasury – Jacob Lew 14-Dec-16 12-Jan-17
Acting Assistant Secretary Treasury - Arthur "Danny" McGlynn 14-Dec-16
Acting Deputy Assistant Secretary Treasury - Mike Neufeld 14-Dec-16
Deputy Secretary of the Treasury - Sarah Raskin 14-Dec-16
Under Secretary Treasury - Nathan Sheets 14-Dec-16

~~(S//NF)~~

Classified By: █
 Derived From: NSA/CSSM 1-52
 Dated: 20180110
 Declassify On: 20450501

~~SECRET//NOFORN~~

~~SECRET//NOFORN~~~~(S//NF)~~

Acting Under Secretary Treasury - Adam Szubin
14-Dec-16
USNATO Defense Advisor (DEFAD) - Mr. Robert Bell
15-Dec-16
U.S. Representative to the NATO Military Committee - VADM Christenson
15-Dec-16
Director of the Federal Bureau of Investigation – James Comey
15-Dec-16
Chief Syria Group - [REDACTED]
15-Dec-16
Deputy Assistant Director of NEMC [REDACTED]
15-Dec-16
USNATO Office of the Defense Advisor (ODA) Policy Advisor for Russia - Lt. Col. Paul Geehreng
15-Dec-16
U.S. NATO [REDACTED] Advisor to Ambassador Douglas Lute - [REDACTED]
15-Dec-16
USNATO Deputy DEFAD - Mr. James Hursh
15-Dec-16
Chief Syria Group [REDACTED]
15-Dec-16
US Deputy Chief of US Mission to NATO (USNATO) - Mr. Litzenberger
15-Dec-16
US Permanent Representative (PermRep) to NATO - Ambassador Douglas Lute
15-Dec-16
USA - DOE-IN - Executive Briefe - [REDACTED]
15-Dec-16
USNATO Political Officer [REDACTED] - Mr. Scott Parrish
15-Dec-16
USA - DOE - Deputy Secretary of Energy - Elizabeth Sherwood-Randall
15-Dec-16
USA - DOE-IN - Executive Briefe - [REDACTED]
15-Dec-16
USNATO Political Advisor (POLAD) - Mr. Tamir Waser
15-Dec-16
COS [REDACTED]
16-Dec-16
CMO [REDACTED]
16-Dec-16
DCOS [REDACTED]
16-Dec-16
U.S. Ambassador to Russia - John Tefft
16-Dec-16
CMO [REDACTED]
16-Dec-16

~~(S//NF)~~~~SECRET//NOFORN~~

~~SECRET//NOFORN~~

(S//NF)

U.S. Ambassador to Turkey - Ambassador Bass 28-Dec-16
Chief of Staff to the President of the United States – Denis McDonough 5-Jan-17
Deputy Director of National Intelligence for Intelligence Integration – Michael Dempsey 7-Jan-17
Principal Deputy Director of National Intelligence - Stephanie L. O'Sullivan 7-Jan-17
CIA/CTMC – [REDACTED] 10-Jan-17
Vice President of the United States – Joseph R. Biden 12-Jan-17

(S//NF)

~~SECRET//NOFORN~~

EXHIBIT 3

[REDACTED]

EXECUTIVE SESSION

PERMANENT SELECT COMMITTEE ON INTELLIGENCE,
U.S. HOUSE OF REPRESENTATIVES,
WASHINGTON, D.C.

INTERVIEW OF: SAMANTHA POWER

Friday, October 13, 2017

Washington, D.C.

The interview in the above matter was held in Room HVC-304, the Capitol, commencing at 9:39 a.m.

Present: Representatives Conaway, Rooney, Stewart, Gowdy, Stefanik,

Schiff, Himes, Sewell, Carson, Swalwell, Castro, and Heck.

Appearances:

For the PERMANENT SELECT COMMITTEE ON INTELLIGENCE:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

For SAMANTHA POWER:

MICHAEL J. GOTTLIEB,
BOIES SCHILLER FLEXNER

[REDACTED] Good morning. This is a transcribed interview of Ambassador Samantha Power.

Thank you for speaking to us today.

For the record, I'm [REDACTED] [REDACTED] for the majority for the House Permanent Select Committee on Intelligence. There are also a number of other members and staff here who will introduce themselves as we proceed.

Before we begin, I wanted to state a few things for the record. The questioning will be conducted by members and staff. During the course of this interview, members and staff may ask questions during their allotted time period. Some questions may seem basic, but that is because we need to clearly establish facts and understand the situation. Please do not assume we know any facts you have previously disclosed as part of any other investigation or review.

This interview will be conducted at the Top Secret/SCI level.

During the course of this interview we will take any breaks that you desire.

We ask that you give complete and fulsome replies to answers based on your best recollections. If a question is unclear or you're uncertain in your response, please let us know. If you do not know the answer to a question or cannot remember, simply say so.

You are entitled to have a lawyer present for you during this interview. Though you are not required, I see that you have brought counsel.

For the record, counsel, could you please state your name?

MR. GOTTLIEB: Michael Gottlieb, with the firm of Boies Schiller Flexner.

[REDACTED] Thank you, Mr. Gottlieb.

The interview will be transcribed. There are reporters making a record of

MS. POWER: Sure. Let me say something very, very important, given the premise of your question. You know, I do not know what number of requests I made related to U.S. persons or U.S. entities. I can't tell what you that number is over the life of my time in New York or over the last year. But I can tell you that the number is nowhere near the number that I'm reading in the press.

And so let me now go a little bit deeper into how I received intelligence. So I received a lot of intelligence, as I mentioned, that referenced U.S. persons and U.S. entities. More often than not, I could understand the intelligence I was reading without asking anything about those -- the identities of those persons. I mean, in other words, like, they are not relevant, they are just kind of just almost a cameo in something much more substantive that I can understand, and I'm, again, reading very quickly, trying to do a lot of jobs and negotiate a lot of things on a given day.

Sometimes -- this is very important -- in my book the intelligence would come to me masked -- now that I know this term -- and I would ask [REDACTED]

[REDACTED], "Hey, I don't understand this intelligence."

[REDACTED] [REDACTED]
[REDACTED]

"I can't understand the intelligence. Can you go and ascertain who this is so I can figure out what it is I'm reading. You've made the judgement, intelligence professionals, that I need to read this piece of intelligence, I'm reading it, and it's just got this gap in it, and I didn't understand that."

So I did that and make no apology for wanting to understand what I'm reading so as to retain my edge.

But often I would receive intelligence that I was seeing for the very first time

[REDACTED]

[REDACTED]

and it would be annotated. So there would be similarly a name that had been, say, it was a U.S. person or U.S. entity, and then there would be an asterisk next to it, and at the bottom, the very first time I was seeing it, it would have that individual's identity disclosed, in handwritten. And then other occasions there would be an asterisk and then there would be a typed form attached to the intelligence.

So, again, because this wasn't controversial, because nobody had ever raised questions about this, I'm just reading my intelligence, I am going one from one to the other, I'm thinking about how to make use of the intelligence in my day or whether I need to ask more questions.

But my point, and I really underscore this, is that the number that I'm seeing in the press -- now, I haven't been given access to how that number was derived -- but that is not my number. And my number was not close to that number.

So this was a -- this was a -- the requests that I -- I did make requests. I think it is extremely important for any U.N. Ambassador to be able to ask some of the kinds of questions that I've been asking.

[REDACTED] Five minutes.

MS. POWER: But, you know -- and, again, I don't -- as long as you are making the request for the reason to understand the intelligence, I would want any U.N. Ambassador to be able to ask those questions and for that insight to be provided if they don't understand the intelligence they are reading, and they need that in order to understand it, and they need the intelligence to do their job, which is what the Intelligence Community is, in effect, conveying by providing that intelligence.

[REDACTED]

[REDACTED]

So, I mean, this practice, I think, you know is -- can be -- can be an important ingredient, again, to filling gaps. But I never discussed any name that I received when I did make a request and something came back or when it was annotated and came to me sua sponte. I never discussed one of those names with any other individual. They would come to me from the Intelligence Community. I didn't discuss it with my deputies, you know, many of whom had the same security clearances I did. I didn't -- certainly didn't discuss it with anybody outside the U.S. Government. It was for my understanding.

And, again, I cannot explain the number which, if what you're working on the basis of is what I'm seeing in the press, is a startling number, but it is not my number. I did not personally make that number of requests that I'm seeing in the press.

MR. GOWDY: Did you say time or 5 minutes?

[REDACTED] Five minutes.

MR. GOWDY: I'm as sensitive to what appears in the press as you are and therefore don't rely on it, which is why we asked the Intelligence Community to provide to us the requestor and the number of unmasking requests. And I heard you say better understanding so that you could understand.

That's what I'm look for, is what was -- what was your calculus in your head for whether or not to request, keeping in mind that one of the intelligence agencies, the producer of that product, had already made the determination that the name was not necessary for the reader, the consumer to understand it, so you have to take the affirmative step of requesting it.

MS. POWER: But, Congressman, if I may, what I've just described to you is that, without taking the affirmative step, I received information on -- it's a very --

[REDACTED]

MR. GOWDY: And that is the first -- it's a very important point, and that's the first I've heard that. And that's -- I'm not saying that's the first time I heard that in some nefarious way.

That is something we all need to know. If the ultimate Cabinet-level person is not making the request and yet the name is showing up in the briefing book, that's something our committee needs to know.

But I am sure you can appreciate how at least it warrants questions when the U.N. Ambassador makes exponentially more requests than the CIA Director --

MS. POWER: But, again --

MR. GOWDY: -- than the National Security Advisor, than the Secretary of State. There are lots of people who need to understand intelligence products, but the number of requests they made, Ambassador, don't approach yours.

MS. POWER: But, Congressman, what I'm saying is that the premise, the numbers on which your line of questioning are understandably -- you know, I really understand why you're raising these issues if the number that you're looking at stands out in that way. But it would be very surprising to me if my number of my -- the requests that I made personally were higher than, you know, a similarly situated Ambassador.

Now, did I have a significant appetite for intelligence? I do. And, you know, I'm a big reader. I'm a person who starts working a couple hours before my foreign counterparts start working. As I said, as the U.N. Ambassador, I'm getting, you know, in my book a very large denominator of references to U.S. persons and U.S. entities, and you fairly say: Well, wasn't Ambassador Rice? And I completely take that point.

But what I'm saying to you is the suggestion that I was more than this

[REDACTED]
[REDACTED]
person and that I was more than anybody, I think is likely predicated on perhaps, you know, something that came out of my mission, surely, I mean, because I have the utmost respect for the Intelligence Community. I don't think anybody is -- I mean, I trust that the number represents a number of something. But again, and, you know, maybe your number is different than the suggestions that I've seen --

[REDACTED] One minute.

MS. POWER: -- which is that I was making requests [REDACTED] almost every day that I was in the office, I mean, it is -- that is so far from my experience of how I processed intelligence.

And on your other question, which is, what's your standard, you know, it's very hard to answer that in the abstract. I've given you -- tried to give you a few examples. You know, there are U.S. persons who work at foreign missions, right? So if I'm hearing, you know, [REDACTED]
[REDACTED]

[REDACTED] Time's up.

MS. POWER: -- I'm going to want to know who's doing [REDACTED]

[REDACTED] to which party in the conflict.
[REDACTED]

[REDACTED]

requests, I would find surprising.

But certainly when I -- any time I did make requests I was not doing so for political reasons. I was doing so in order to be equipped to perform my dual roles. And so I would have never had any kind of political motivation or -- it wasn't nice to know. I personally would only ask when I really felt it was need to know.

MR. SCHIFF: You know, and, again, it's perfectly appropriate I think for us in our oversight role to think about what are the processes used for unmasking and is it appropriate to have a name unmasked before you make the request so that those providing the reports don't have to come back later on and do it. Those are perfectly appropriate questions for us to ask in our oversight role.

But in terms of the Russia investigation and the leaking allegation, I would assume that if your number of requests went up, [REDACTED]
[REDACTED], that would have had nothing to do with the incoming administration.

[REDACTED]

[10:39 a.m.]

MS. POWER: No. Again, I was representing the United States. I recognize that I was a political appointee and that my President was a Democrat, but I didn't -- I wasn't even involved in the political campaign. I had the privilege of being in that job, the best job I could conceivably have had. I'm an Irish immigrant getting to represent the United States every day and to represent our people. I am not looking at intelligence with any kind of eye to politics, and it's offensive to think that someone in my position would do that or that I would do that.

MR. SCHIFF: Well, let me then ask you about, sort of, maybe the gravamen of how this came about. And I think it came about over a concern about the leaking of Mike Flynn's name.

Now, the White House has publicly acknowledged that they had to let him go because he didn't disclose a conversation he had with the Russian Ambassador on the subject of sanctions.

None of the reports that I've seen that will be related to you or you'll be asked about today concern the conversation with Mike Flynn and the Russian Ambassador.

So, to your knowledge, did you ever make [REDACTED]

MS. POWER: I don't recall making such a request. I want to just again stress, though, that any time a U.S. person or entity's name came to me disclosed or annotated or where I requested it and it came back, I never discussed it with another member of the human race.

[REDACTED]

So, you know, I don't recall making such a request. I wasn't tabulating when and whether I was making requests. I wasn't thinking about this practice in the fraught way in which we are discussing it. But, certainly, I have nothing to do with the leaking of names that were deminimized in whatever process occurred --

MR. SCHIFF: And I just want to be clear that there's no indication you ever made a request or that there necessarily was even a report on that subject. But I did want to get you on the record on that, because at the end of the day that's sort of where this came from.

MS. POWER: Yes. I have no recollection of making a request related to General Flynn.

MR. SCHIFF: Okay. And I take it you never leaked Mr. Flynn's name in any way, General Flynn's name?

MS. POWER: I have never leaked classified information. I have never leaked names that have come back to me in this highly compartmented process. I have, in fact, never leaked, even unclassified information.

MR. SCHIFF: Thank you.

Mr. Himes.

MR. HIMES: Thank you.

And thank you, Ambassador, for being here.

I'm going to just abstract away a little bit from the ranking member's line of questioning. I think you're here because a narrative has developed, and that narrative is that there were leaks, which is undeniable. And those leaks are absolutely within the purview of this investigation.

There is a supposition that those leaks may be related to unmasking. There has been no evidence offered that that may be the case, but that is a

may not have had. You know, what does she want to get done in New York or in the Washington policy process that is, sort of, distinct to her, and then how do we alter our selection criteria for what we put in her book. You know, who are the kinds of foreign officials she wants to learn more about. And, you know, as soon [redacted], like, let's get her the updated bio.

I mean, they really come to know you,

MS. SEWELL: And I would also assume that -- and just looking at, sort of, was taking place in the world generally during 2014 and 2015 and 2016, you, the political climate was ever-changing, so that, to the point that Congressman Himes was saying, the number of reports may be more voluminous o year versus timeline.

My other question is this, really. And I'm sensitive to the time. In particular, do you recall how many times you requested information related specifically to the Trump campaign, something that you read about the Trump

[REDACTED]

campaign or activities with Russians and the Trump campaign? Can you recall specifically any time that you circled a U.S. person and requested a name and that name popped back with somebody who was a part of the campaign?

MS. POWER: Well, you came around to a point I was going to make, which is, you know, if you see something in intelligence that references a U.S. person or U.S. entity, by definition, you don't know who it is, so, you know, when it comes back -- you wouldn't be asking the question if you actually knew who the individuals were.

MS. SEWELL: Right.

MS. POWER: But I think that goes without saying.

You know, I just want to stress what this period was like. You know, for me, at least, from the fall through January 19th, my last day in the office --

MS. SEWELL: So, through the transition, did you --

MS. POWER: Well, no, if you don't mind --

MS. SEWELL: Sure.

MS. POWER: -- just to finish the point. But what this period was like was: Russia, which, you know, I had been engaging with to get some things done and clashing with routinely since their invasion of Ukraine, their assault on Aleppo, Russia was interfering in our election in all the ways you're probably a lot more familiar with now than I am or certainly than I was at that time. [REDACTED]
[REDACTED]
[REDACTED]

And this is an example of the Intelligence Community making judgments about what I need. I began to engage our highly compartmented Russia election interference policy process later than some of my colleagues. I was brought into

[REDACTED]

the process, I believe, you know -- I don't know, from recollection, like, in late September. And because the process, or the circle, you know, was kept, understandably, at a -- you know, circumscribed.

From the minute I was brought on, suddenly my book had in it, you know, intelligence that I had not needed to know before and that was so sensitive that it was only provided to me, because they understood that, in order to advise the President on how we respond to Russian election interference, in order to be a valuable contributor to the discussion about what we say and how we handle it as a policy matter, that this was information that I needed.

So this is an example, again, [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] One minute.

MS. POWER: -- [REDACTED] providing me, again, with material that they believe that I needed to know, me deferring to their judgment, and then me asking questions about that intelligence.

But my motive was never political. I wasn't interested in what the Trump administration was going to do. I was interested in foreign governments and what they were going to do between the election day and January 20th. I was interested in continuing to do our jobs and protect this country and advance our interests.

And so any questions that I asked were with an eye to understanding what

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

or not you knew something that the FBI did not know, that the NSA did not know, that the CIA did not know. And I have asked every witness the same question.

So maybe I should phrase it differently. Are you in possession of intelligence or evidence that would be unique to you that no one else would have?

MS. POWER: No.

MR. GOWDY: All right. So if there were evidence of collusion, coordination, conspiracy between Candidate Trump and the Russian Government, you would not be in possession of any evidence that would not also be known by someone else in the Intelligence Community.

MS. POWER: I mean, because the intelligence that I received came from the Intelligence Community, I had no -- anything that would have come to me would have been in their possession first. They would have provided that.

MR. GOWDY: And that's what I'm getting at.

MS. POWER: Yeah. So I am not in possession of anything else that -- any other information that came from, for instance, my diplomatic colleagues or from other sources. I am not.

MR. GOWDY: All right.

And I asked specifically about Candidate Trump. Would the answer be the same for those that were part of his official campaign but not the candidate himself? Independent evidence of collusion, coordination, conspiracy between the Russian Government and official members of the campaign that would not otherwise be known by others.

MS. POWER: Again, I am not in possession of anything -- I am not in possession and didn't read or absorb information that came from outside the Intelligence Community. [REDACTED]

[REDACTED]

the end that our jobs had changed in some fashion. Because we were having principals meetings like at 9:00 at night, you know, right up until the very end.

And it was only when I turn in my badge at, you know, whatever it was, you know, late in the night on January 19 and, you know, read out of my compartmented programs that I had been read into and gave up my Blackberry, reintroduced myself to my family -- first time in sometime -- it was only, you know, then that I -- that it was someone else's job.

But I would hope that they also are interrogating what they are reading, you know, with rigor -- to understand the foreign governments though. I mean, if -- I do agree with you that it would be wrong, you know, out of curiosity, oh, I have been wondering, you know, who might be doing this or that or -- I mean -- but nothing could be further from how I read my book and how I process what was being laid down to me.

Like the Trump administration, you could read about them -- there was so much about the Trump administration in the press, you know. We were going to have a Trump administration. But when we have this parallel foreign policy going on, it was a new layer of complexity that I had not anticipated and really was affecting the behavior of my colleagues, you know, at other missions.

And so, you know, again, I don't think that my number of requests would've increased materially in the transition period. It would surprise me if my personal requests had, because, again, I was looking at foreign governments. But it is possible that, you know, the number of things that came back to me in that form increased, you know, commensurate with the vast surge in collection that we were doing.

Because, remember, for the sake of the Trump -- this is really important

[redacted]

produced. [REDACTED] Do you see that?

MS. POWER: Could you repeat that again? I am sorry.

MR. SWALWELL: Looking at the chart that Mr. Gowdy gave you of --

MS. POWER: Oh, 2008, yes, sir. Yes.

MR. SWALWELL: So [REDACTED]

If we go to 2016, the year that you made the most requests, can you tell me how many reports the [REDACTED] produced in that year?

MS. POWER: [REDACTED] – it looks like the -- yeah, I guess that's it for 2016.

MR. SWALWELL: And then the 10 years that are accounted for in this chart, what year has the most [REDACTED] reports produced?

MS. POWER: 2016.

MR. SWALWELL: And so it's clear that there's a -- as the [REDACTED] has produced more reports, you have requested more what the majority calls unmaskings? You have more access -- you're requesting more unmaskings?

MS. POWER: Yeah. I mean, what I can tell you is that the number reflect -- the number that you have appears to reflect that, but I don't -- my intelligence practice didn't change in 2016. I don't recall there being any increase or --

[REDACTED] One minute.

MS. POWER: -- or change in the way that I would've asked questions about intelligence.

So I recognize that your numbers are reflecting an increase, and I recognize that the totality of [REDACTED] reports has [REDACTED] it looks like [REDACTED] in 2016 than 2008.

But even your [REDACTED] numbers, which are news to me, that you have provided, I can't tell you with certainty that I made that number or a different number. I just have no recollection, and, again, I was focused on another task not on tabulating this.

I can only tell you that -- just because this really would be -- [REDACTED]
[REDACTED], that that is wildly different from my recollection of my practice in 2016 and in the other years. I do not recall my practice changing over the time that I was at U.S./U.N.

MR. SWALWELL: Great. Thank you. And I will yield back.

MS. STEFANIK: Ambassador Power, thank you for being here today. Don't worry, I cry every time I talk about my parents in public settings.

MS. POWER: I am so sorry.

MS. STEFANIK: But you were very heartfelt talking about the team surrounding you. And of the [REDACTED] officials, those are nonpolitical jobs. They serve from one administration to the next. They are dedicated, whether it's President Bush, President Obama, or President Trump.

My question to you is, were you served by the same [REDACTED] team as Susan Rice when she was in the role? The same individuals, not the same positions but the same actual individuals.

MS. POWER: Yeah. From what I can recall -- and recall I have a team, [REDACTED], all people who report --

MS. STEFANIK: Yes.

MS. POWER: [REDACTED]
[REDACTED] And I have people who report -- [REDACTED]

[12:47 p.m.]

MR. CONAWAY: Okay.

MS. POWER: And I know that I, in this role, am in this role that very few people occupy. So I wouldn't have had any situational awareness that there was a broad -- you're describing a broader phenomenon.

MR. CONAWAY: Well, I'm just saying, is there a broader phenomenon?

So --

MS. POWER: I don't think I'd be the best person to answer that.

MR. CONAWAY: -- we'd have to go through all [redacted] individually to determine what was going on. But we don't need to do that.

Also, names are only unmasked -- just FYI, they're only unmasked for you. Nobody else on that list would've gotten an unmasking unless --

MS. POWER: I just said that. I just made that point.

MR. CONAWAY: Okay. So -- that's fine. It's just that I was wondering if your other folks that you're aware of within the NSC, your colleagues, didn't understand the masking/unmasking circumstances the way --

MS. POWER: I never discussed -- again, I never knew the word, I never discussed the practice --

MR. CONAWAY: But you understand that there was a reason why it didn't say "John Doe," it said "U.S. person."

MS. POWER: Yeah. And that is why, when I would see a U.S. person or U.S. entity, I would very rarely make a request to understand. I would only do it if it just didn't make sense without it.

MR. CONAWAY: Well, it got made on your behalf [redacted] times.

[REDACTED]

MS. POWER: Pardon me?

MR. CONAWAY: It got made on your behalf [REDACTED] times.

MS. POWER: I can't speak to what others were doing without my knowledge.

MR. CONAWAY: No, no, no. Those people worked directly for you, and they used your name to justify the unmask. That's how we got that list.

MS. POWER: And they did a tremendous job --

MR. CONAWAY: But I have people who work with me --

MS. POWER: -- protecting this country, working 24/7 --

MR. CONAWAY: -- and I own their work as well.

MS. POWER: Well, I don't feel it's appropriate for a policy consumer of intelligence to be meddling in the tradecraft of what --

MR. CONAWAY: It's not tradecraft. You have to justify -- you were supposed to justify --

MS. POWER: What I did was ask questions of my intelligence.

MR. CONAWAY: Right.

MS. POWER: And on occasion --

MR. CONAWAY: And they took it upon themselves to unmask that name on your behalf. That's all I'm saying. Because they had the name, they got --

MS. POWER: But you're suggesting that there's something nefarious. They were providing it to --

MR. CONAWAY: No, no, no, no.

MS. POWER: -- an individual who's a member of the National Security Council, who would never disclose that information --

MR. CONAWAY: Okay.

[REDACTED]

American Center for Law and Justice

QUARTERLY FOIA REPORT

APPENDIX II-C

RELEASE IN PART
B5,B6

From: DMCOS [REDACTED]
Sent: Thursday, November 10, 2016 4:55 PM
To: Power, Samantha <PowerS@state.gov>
Cc: Rice, Susan E. EOP/NSC [REDACTED]
Subject: RE: 2 questions

B6

Thanks, Sam. It was very nice to see you and Cass last night.

In December, the President is going to go away. That is not public so please hold close. My own view is that you should go away.

B5

[REDACTED]
All best -
DM

-----Original Message-----

From: Power, Samantha [mailto:PowerS@state.gov]
Sent: Thursday, November 10, 2016 3:51 PM
To: DMCOS [REDACTED]
Subject: 2 questions

B6

Hi Denis - great to see you last night. Thank you for being such a great leader for us. Two quick questions: 1) do you happen to know what the December plans of you and the President and the senior staff are? I'm wondering if we will be going strong through the tape including the holiday, or whether people there plan to take some time away despite the short time left for us? I wasn't planning on going anywhere given the fleeting calendar, but the UN kind of shuts down, so I was wondering if I was making a bad call. 2) anything you can share about POTUS' sense of Trump the person? Looking for rays of light here amid the clouds. Warmest, Samantha

SBU

This email is UNCLASSIFIED.

American Center for Law and Justice

QUARTERLY FOIA REPORT

APPENDIX II-D

(b) (3)

From: Robert Litt-DNI-
Sent: Wednesday, November 30, 2016 12:15 PM
To: (b) (3)
Subject: FW: 2.3 Procedures
Signed By: (b) (3)

Classification: UNCLASSIFIED//~~FOUO~~

=====

-----Original Message-----

From: (b) (3) -
Sent: Wednesday, November 30, 2016 12:15 PM
To: Stephanie L. OSullivan-DNI- (b) (3); Robert Litt-DNI-
(b) (3)
Subject: FW: 2.3 Procedures

Classification: UNCLASSIFIED//~~FOUO~~

=====

Ma'am/Bob,

I'll keep track of this, but thought I'd share the optimistic news.

(b) (3)

--
(b) (3)
E/A for the Principal Deputy DNI
(b) (3)

=====

-----Original Message-----

From: (b) (6)
[mailto: (b) (6)]
Sent: Wednesday, November 30, 2016 12:09
To: (b) (3)
Cc: (b) (6)
Subject: [AIN] 2.3 Procedures

CLASSIFICATION: UNCLASSIFIED

(b) (3)

(b) (3)

(b) (3)...we spoke to the SD FO. They anticipate tomorrow morning for signature. I'm confident this will be signed prior to departure.

Very Respectfully,

(b)(6)



The following file(s) failed the transfer process:

* smime.p7s - non allowed filetype or file content

=====

Classification: UNCLASSIFIED//~~FOUO~~

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Classification: UNCLASSIFIED//~~FOUO~~

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From: (b) (3)
To: (b) (3)
Cc: (b) (3)
Subject: RE: 2.3 Procedures
Date: Wednesday, November 30, 2016 2:21:57 PM

***** This message has been archived. Double-Click the message to view the contents. *****

Classification: UNCLASSIFIED//~~FOUO~~

=====

(b) (3)

Just FYI, the DNI signed his delegation of authority letter through Tuesday, December 6th. The earliest we would see his approval would probably be Wednesday.

V/R,

(b) (3)

Staff Officer

ODNI / Executive Secretariat, LX-2, (b) (3)

(b) (3)

[REDACTED]

[REDACTED]

-----Original Message-----

From: (b) (3)
Sent: Wednesday, November 30, 2016 2:14 PM
To: (b) (3)
Cc: (b) (3)
[REDACTED]
Subject: RE: 2.3 Procedures

Classification: UNCLASSIFIED//~~FOUO~~

Thanks!

(b) (3) [REDACTED]

Senior Associate General Counsel

ODNI Off. of General Counsel

(b) (3) [REDACTED]
[REDACTED]

-----Original Message-----

From: (b) (3) -

Sent: Wednesday, November 30, 2016 2:07 PM

To: (b) (3)
[REDACTED]

Cc: (b) (3)
[REDACTED]

< <mailto:(b) (3)
[REDACTED]

Subject: RE: 2.3 Procedures

Classification: UNCLASSIFIED//~~FOUO~~

=====

Good Afternoon (b) (3)

Thanks for the heads-up. It shouldn't be an issue to get this through our process since I've already done an initial scrub.

V/R,

(b) (3)

Staff Officer

ODNI / Executive Secretariat, LX-2, (b) (3)

(b) (3)

[REDACTED]

[REDACTED]

-----Original Message-----

From: (b) (3) -

Sent: Wednesday, November 30, 2016 12:27 PM

To: (b) (3)

[REDACTED]

< <mailto:(b) (3)

Subject: FW: 2.3 Procedures

Classification: UNCLASSIFIED//~~FOUO~~

(b) (3)

You previously provided me some comments and edits on this packet for the DNI to sign the 2.3 procedures and transmit them to the AG.

As you can see from below, we expect that the SECDEF will sign the procedures tomorrow. We want to get them before the DNI as soon as possible so that we give ourselves as much time as possible for AG review and approval. My understanding is that the DNI is out until Monday so,

assuming SECDEF signs tomorrow, the goal would be DNI signature on Monday.

We'll be submitting the package tomorrow or Friday in the DAT assuming that SECDEF does in fact sign. But in the interest of time, I wanted to share the documents with you again - they reflect your suggestions, including breaking the DNI-to-AG letter into a shorter cover letter and an info paper.

Happy to discuss.

Vr,

(b) (3)

Senior Associate General Counsel
ODNI Off. of General Counsel

(b) (3)

-----Original Message-----

From: Robert Litt-DNI-

Sent: Wednesday, November 30, 2016 12:15 PM

To: (b) (3)

< <mailto:(b) (3)
<mailto:(b) (3)

Subject: FW: 2.3 Procedures

Classification: UNCLASSIFIED//~~FOUO~~

-----Original Message-----

From:(b) (3) -

Sent: Wednesday, November 30, 2016 12:15 PM

To: Stephanie L. OSullivan-DNI- < [mailto:\(b\) \(3\)](#)
(b) (3) Robert Litt-DNI-

< [mailto:\(b\) \(3\)](#)

Subject: FW: 2.3 Procedures

Classification: UNCLASSIFIED//~~FOUO~~

=====

Ma'am/Bob,

I'll keep track of this, but thought I'd share the optimistic news.

(b) (3)

--

(b) (3)

E/A for the Principal Deputy DNI

(b) (3)

(b) (3)

From: [REDACTED]
To: Murphy Wayne M NSA-X USA CIV.
[REDACTED]

Cc: DL_x_exec (ALTAS) X; [REDACTED]
Subject: (U) FYSA: (U) Current version of 2.3 Procedures, signed by DNI Clapper
Date: Tuesday, December 20, 2016 3:52:36 PM
Attachments: 2016-12-15 Raw SIGINT Procedures ES 2016-00844 S-SI-REL_FVEY-DNI-SIGNED.PDF
2016-12-14 Ltr Raw SIGINT ES 2016-00844 U-FOUO_SIGNED.PDF

Classification: SECRET//SI//REL TO USA, FVEY

(U//FOUO) As I mentioned during our staff meeting, DNI Clapper has signed the 2.3 procedures. Final step would be signature by the AG. First attachment is the current version of the procedures with DNI's signature. Second attachment is DNI's letter to AG Lynch requesting approval.

Regards,

[REDACTED]

(U//FOUO) [REDACTED]
Operations Directorate, National Security Agency [REDACTED] (b) (3) - P.L. 86-36
963-5333 (s) [REDACTED]

From: [REDACTED]
Sent: Tuesday, December 20, 2016 2:52 PM
To: [REDACTED]
[REDACTED]
Morris Paul F NSA-D2 USA CIV [REDACTED]
Richards Rebecca J NSA-D5 USA CIV [REDACTED]
Sherman David J Dr NSA-P1 USA CIV [REDACTED]
[REDACTED]

[Redacted]
Ensor, Leolin K NSA-AS USA CIV

Cc: DL_x_exec (ALIAS) X [Redacted]

Subject: (U) Current version of 2.3 Procedures, signed by DNI Clapper

Classification: ~~SECRET//SI//REL TO USA, FVEY~~

All,

As per the 2.3 SSC meeting today, and to confirm that DNI Clapper did, in fact, sign the 2.3 Availability Procedures on 15 Dec 16 (See attached). Also, FYSA - attached is DNI Clapper's letter to AG Lynch, forwarding the Procedures for approval and requesting the AG's signature. If you have not had the opportunity to read the most current 2.3 document, I'd ask you to review this document prior to the next SSC meeting in January. [Redacted] - Thank You for sending the documents!

Thank you for your excellent support.

V/R,
[Redacted]

(b) (3) - P.L. 86-36

(U//FOOR)

Directorate of Operations
[Redacted]

(NSTS) 966-2522
"Your Life is an Occasion, Rise to it!"

Classified By: [Redacted]

Derived From: NSA/CSSM 1-52

Dated: 20130930

Declassify On: 20411201

(b) (3) - P.L. 86-36

Classification: ~~SECRET//SI//REL TO USA, FVEY~~

Classified By:

Derived From: NSA/CSSM 1-52

Dated: 20130930

Declassify On: ~~20411201~~

Classification: ~~SECRET//SI//REL TO USA, FVEY~~

From: [REDACTED]
To: [REDACTED]
Cc: [REDACTED]
Subject: RE: (U) 2.3
Date: Tuesday, January 03, 2017 3:12:30 PM

Classification: UNCLASSIFIED//~~FOR OFFICIAL USE ONLY~~

[REDACTED]
Happy New Year! Rumint is true:

- The SECDEF signed coordination response on 13 Dec
- DNI Clapper signed on 15 Dec
- We've been coordinating with the ODNI Staff for the Public Release of the 2.3 Procedures.
We could have a signature from the AG as early as this week, certainly prior to the 20th Jan.

The 2.3 Procedures is a good news story – It's all about collaboration and responsible information sharing with our IC partners, focused on the IC Data as a shared asset to enhance our ability to execute our respective missions. By using our collective, unique, and diverse perspectives and missions, we will create (eventually) graduate-level collaboration across the IC to provide better Intel to inform decision making. That said, the implementation will be a very deliberative process from ODNI, SECDEF, NSA and our IC-Partners. The support is there from all parties, along with a very strong sense of ensuring, with confidence, that any IC partner choosing to engage 2.3 Procedures can properly protect raw SIGINT, has appropriately trained personnel (both Compliance and Tradecraft trained), and an ODNI approved Compliance program.

V/R,
[REDACTED]

(U//FOUO)
[REDACTED]

Directorate of Operations
[REDACTED]

(NSTS) 966-2522:
[REDACTED]

"Your Life is an Occasion, Rise to it!"

(b) (3) - P.L. 86-36

From: [REDACTED]
Sent: Tuesday, January 03, 2017 2:29 PM
To: [REDACTED]
Cc: [REDACTED]
Subject: RE: (U) 2.3

Classification: UNCLASSIFIED//~~FOR OFFICIAL USE ONLY~~

Hi [redacted]

Hope you had a chance for a break over the holidays. We've heard some scuttle-butt lately related to 2.3 — that ODNI and SecDef has signed and that the AG has verbally committed to signing? Any truth to that rumor and if so, do you expect any implementation actions in the near term?

Thanks,

[redacted]
(U//FOUO)

[redacted]
910-8344(s)

From: [redacted]
Sent: Thursday, November 10, 2016 4:33 PM
To: [redacted]
Cc: [redacted]
Subject: RE: (U) 2.3
Importance: High

(b) (3) - P.L. 86-36

Classification: UNCLASSIFIED//~~FOR OFFICIAL USE ONLY~~

[redacted]
Yes, that was me. Attached please find the ODNI Availability Procedures. Notice date difference from document and file.name – that how we received it.

V/R,
[redacted]

(U//FOUO)

[redacted]
Directorate of Operations

[redacted]
(NSTS) 966-2522, [redacted]
"Your Life is an Occasion, Rise to it!"

From: [redacted]
Sent: Thursday, November 10, 2016 4:27 PM
To: [redacted]

Cc: [REDACTED]
Subject: RE: (U) 2.3

Classification: UNCLASSIFIED//~~FOR OFFICIAL USE ONLY~~

[REDACTED]
Just sat in on part of the [REDACTED] VTC where 2.3 status was briefed – not sure if it was you who briefed – but the offer was made to provide the August 5th ODNI approved procedures in soft copy and we'd love to have those.

Thanks and have a great weekend,

[REDACTED]
(U//~~FOUO~~)

[REDACTED]
910-8344(s)

(b) (3) - P.L. 86-36

From: [REDACTED]
Sent: Wednesday, November 09, 2016 5:23 PM
To: [REDACTED]
Cc: [REDACTED]
Subject: (U) 2.3

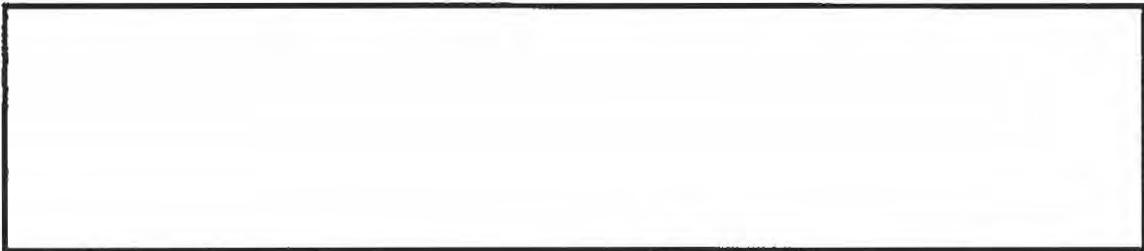
Classification: UNCLASSIFIED//~~FOR OFFICIAL USE ONLY~~

Good afternoon [REDACTED]

Thanks for quickly responding to the Lync chat and verifying your 2.3 lead status. Between [REDACTED] and I, we'll synch with you periodically as we expect that we will begin to receive additional questions on the initiative. For our benefit, we'd appreciate an update on the following when you have the opportunity:

- AG Signature – do we have any insight if the current AG intends to sign?
- [REDACTED]
- [REDACTED]
- [REDACTED]

(b) (3) - P.L. 86-36
(b) (5)

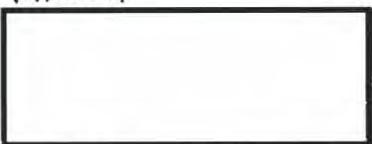


Thanks,



(b) (3) - P.L. 86-36
(b) (5)

(U//~~FOUO~~)



(b) (3) - P.L. 86-36

910-8344(s)

Classification: UNCLASSIFIED//~~FOR OFFICIAL USE ONLY~~

(b) (3)

From: Alexander W. Joel-DNI-
Sent: Thursday, June 29, 2017 1:08 PM
To: (b) (3)
Cc: (b) (3)
Subject: FW: OGC Weekly 1/6/17
Signed By: (b) (3)

Classification: ~~TOP SECRET//SI//NOFORN~~

Classified By: (b) (3)
Derived From: ODNI CG v3.0 31 May 2016
Declassify On: 20421231

Regards,
Alex



Alexander W. Joel
Chief, Office of Civil Liberties, Privacy, and Transparency
(b) (3)

From: James R. Clapper-DNI-
Sent: Saturday, January 07, 2017 12:19 PM
To: Robert Litt-DNI-(b) (3); Stephanie L. OSullivan-DNI-(b) (3) Michael P. Dempsey-DNI-(b) (3)

[REDACTED]

Cc: (b) (3)

Subject: RE: OGC Weekly 1/6/17

Classification: ~~TOP SECRET//SI//NOFORN~~

Classified By: (b) (3)
Derived From: ODNI CG v3.0 31 May 2016
Declassify On: 20421231

Thanks, Bob...

J

From: Robert Litt-DNI-
Sent: Friday, January 06, 2017 4:12 PM
To: James R. Clapper-DNI-(b) (3) [REDACTED]; Stephanie L. OSullivan-DNI-(b) (3) [REDACTED]; Michael P. Dempsey-DNI-(b) (3) [REDACTED]
Cc:(b) (3) [REDACTED]
Subject: OGC Weekly 1/6/17

Classification: ~~TOP SECRET//SI//NOFORN~~

Classified By: (b) (3) [REDACTED]
Derived From: ODNI CG v3.0 31 May 2016
Declassify On: 20421231
=====

Congratulations on today's successful outcome. (J: Went better than expected. Will give you the atmospherics later....)

~~(TS//SI//NF)~~ NSA USPER Query Compliance Incident Update. [REDACTED] non-responsive [REDACTED]

~~(S//NF)~~ CIA Financial Data PCLOB Report. [REDACTED] non-responsive [REDACTED]

(U//FOUO) 2.3 SIGINT Procedures Roll Out. Now that the procedures are at long last final, we plan to roll them out formally next week. Internally, we are staffing a brief memo for you to sign disseminating the procedures to the heads of the IC elements and providing some guidance on implementation. Externally, we will notify our oversight committees and the PCLOB in advance of publicly posting the procedures, with explanatory materials, to *IContheRecord*. (J: Good...)

=====

Classification: ~~TOP SECRET//SI//NOFORN~~

DIRECTOR OF NATIONAL INTELLIGENCE
WASHINGTON, DC 20511

ES 2017-00040

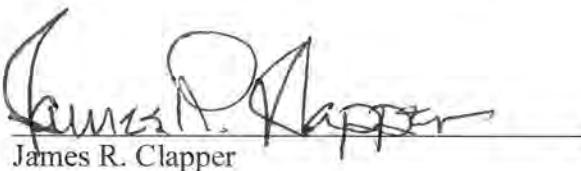
MEMORANDUM FOR: Distribution

SUBJECT: (U) Establishment of the Raw Signals Intelligence Availability Procedures

REFERENCES: A. (U) Executive Order 12333, *United States Intelligence Activities* (U)

(U) I am pleased to share with you the procedures called for by Section 2.3 of Executive Order 12333, *United States Intelligence Activities*. As required by the Executive Order, I have coordinated the "Procedures for the Availability or Dissemination of Raw Signals Intelligence Information by the National Security Agency under Section 2.3 of Executive Order 12333 (Raw SIGINT Availability Procedures)" with the Secretary of Defense, and they have been approved by the Attorney General.

(U) To implement the procedures, my office will issue standards for the required training, compliance, and oversight programs that elements seeking access to raw signals intelligence (SIGINT) must have in place before accessing raw SIGINT. Elements seeking access to raw SIGINT should work with the National Security Agency and the Office of the Director of National Intelligence Civil Liberties, Privacy, and Transparency office, in coordination with the Department of Defense, in developing access requests.


James R. Clapper

11 JAN 2017
Date

Attachments:

1. (U) Procedures for the Availability or Dissemination of Raw Signals Intelligence Information by the National Security Agency under Section 2.3 of Executive Order 12333 (Raw SIGINT Availability Procedures) ~~(S//SI//REL TO USA, FVEY)~~

Classified By: (b) (3)

Derived From: NSA/CSSM 1-52

Declassify On: 20421231

Upon removal of attachment(s), this document is UNCLASSIFIED

~~SECRET//NOFORN~~

Engagement with SECDEF on 2.3 Raw SIGINT Procedures

Talking Points

- (U) As you know, ODNI has been working for several years with OSD staff on procedures that will permit NSA to share raw SIGINT with other Intelligence Community elements. These procedures will go into effect only after you and the Attorney General approve.
- (U) The draft has been fully coordinated with your staff, and all concerned agree that these procedures will close an important information-sharing gap. In addition to these procedures furthering the cause of intelligence integration, numerous leaks have spurred significant public interest in the document.
- (U) The time spent by our staffs on crafting the document, the significance of these procedures to intelligence integration, and the level of public interest in their completion all contribute to my personal interest in having the procedures signed by the Attorney General before the conclusion of this administration.
- (U) I would appreciate it if you would sign the procedures soon, so that my staff can submit them to the Attorney General for her signature. And if you have any questions on the procedures, I would be happy to answer them.

Background

- (U//~~FOUO~~) Under a 2008 amendment to Executive Order 12333, NSA is permitted to disseminate raw SIGINT to IC elements, so long as that information is disseminated in accordance with procedures established by the DNI, coordinated with the Secretary of Defense, and approved by the Attorney General.
- (U//~~FOUO~~) After extensive coordination between ODNI and the Office of the Secretary of Defense, procedures to govern raw SIGINT dissemination were passed to the Department of Defense for SECDEF coordination in August 2016.
- (~~S//NF~~) The procedures, if approved, provide a vehicle for closing an information-sharing gap. The procedures allow elements to request direct access to raw SIGINT in support of important foreign intelligence and counterintelligence missions, enabling those elements to bring to bear their own resources and expertise in evaluating and using raw SIGINT.
- (~~S//NF~~) Several Intelligence Community elements, including the Defense Intelligence Agency and the National Geospatial-Intelligence Agency, have identified missions that would benefit from access to NSA [REDACTED]. NSA also supports the procedures. NGA (b)(1)
- (U//~~FOUO~~) SECDEF recently approved a separate set of Attorney General-approved procedures under E.O. 12333 (DoDM 5240.01 "Procedures Governing Conduct of DoD Intelligence Activities"). These DNI-authored raw SIGINT procedures are different from, but consistent with and complementary to, that recently issued DOD Manual.

~~SECRET//NOFORN~~

000088

(b) (3)

From: [REDACTED] (b)(6)
Sent: Tuesday, November 29, 2016 9:46 AM
To: Robert Litt-DNI-
Subject: RE: 2.3 Procedures

Classification: UNCLASSIFIED//~~FOUO~~

=====
Bob - Got it. Will keep you posted. Best, [REDACTED] (b)(6)

[REDACTED] (b)(6)
Director, Intelligence Strategy, Policy, & Integration
USDI's Liaison to ODNI

[REDACTED] (b)(6)

[REDACTED] (b)(6)

-----Original Message-----

From: Robert Litt-DNI- [mailto:[REDACTED] (b) (3)]
Sent: Tuesday, November 29, 2016 9:03 AM
To: [REDACTED] (b)(6)
Subject: RE: 2.3 Procedures

Classification: UNCLASSIFIED//~~FOUO~~

Thank you [REDACTED] (b)(6). Really really want to get this done . . . and so does the Boss.

-----Original Message-----

From: [REDACTED] (b)(6) , OSD OUSDI [mailto:[REDACTED] (b)(6)]
Sent: Tuesday, November 29, 2016 8:59 AM
To: Robert Litt-DNI-[REDACTED] (b) (3)
Cc: [REDACTED] (b)(6)
Subject: 2.3 Procedures

Classification: UNCLASSIFIED//~~FOUO~~

Bob -

We've confirmed the package is with the Secretary and his front office is tracking. He is in town this week. We will continue to press and hopefully

From: [REDACTED]
To: [REDACTED]
Cc: [REDACTED]
Subject: RE: (U) 2.3
Date: Tuesday, January 03, 2017 3:12:30 PM

Classification: UNCLASSIFIED//~~FOR OFFICIAL USE ONLY~~

[REDACTED]
Happy New Year! Rumint is true:

- The SECDEF signed coordination response on 13 Dec
- DNI Clapper signed on 15 Dec
- We've been coordinating with the ODNI Staff for the Public Release of the 2.3 Procedures.
We could have a signature from the AG as early as this week, certainly prior to the 20th Jan.

The 2.3 Procedures is a good news story – It's all about collaboration and responsible information sharing with our IC partners, focused on the IC Data as a shared asset to enhance our ability to execute our respective missions. By using our collective, unique, and diverse perspectives and missions, we will create (eventually) graduate-level collaboration across the IC to provide better Intel to inform decision making. That said, the implementation will be a very deliberative process from ODNI, SECDEF, NSA and our IC-Partners. The support is there from all parties, along with a very strong sense of ensuring, with confidence, that any IC partner choosing to engage 2.3 Procedures can properly protect raw SIGINT, has appropriately trained personnel (both Compliance and Tradecraft trained), and an ODNI approved Compliance program.

V/R,
[REDACTED]

(U//~~FOUO~~)
[REDACTED]

Directorate of Operations
[REDACTED]

(NSTS) 966-2522:
[REDACTED]

"Your Life is an Occasion, Rise to it!"

[REDACTED] (b) (3) - P.L. 86-36

From: [REDACTED]
Sent: Tuesday, January 03, 2017 2:29 PM
To: [REDACTED]
Cc: [REDACTED]
Subject: RE: (U) 2.3

Classification: UNCLASSIFIED//~~FOR OFFICIAL USE ONLY~~

American Center for Law and Justice

QUARTERLY FOIA REPORT

APPENDIX III



February 27, 2020

U.S. Army Freedom of Information Act Office
Records Management and Declassification Agency
9301 Chapek Rd. Bldg 1458
Fort Belvoir, VA 22060-5605

RE: FOIA Request to the Department of the Army Regarding Information about the Recent Army Decision Ordering the Company, Shields of Strength, to Remove All Biblical References from the Products It Offers to Soldiers.

To Whom it May Concern:

This letter is a request ("Request") in accordance with the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the corresponding department/agency implementing regulations.

The Request is made by the American Center for Law and Justice ("ACLJ")¹ on behalf of its members. The ACLJ respectfully seeks expedited processing and a waiver of fees related to this Request as set forth in an accompanying memorandum.

To summarize, this Request seeks records pertaining to information exchanged between current and/or former Department of the Army ("DA") officials and employees, current and former United States Army ("US Army") officials and employees, current and former Army Trademark Licensing Program officials and employees, current and former Army Judge Advocate General's (JAG) Corps officials and employees, current and former Army Chaplain Corps ("DACH") officials and employees, current and former Army and Air Force Exchange Service ("Exchange") Office of General Counsel, Compliance Division, officials and employees, and/or any other current and/or former Government official(s) and employee(s) concerning the Army's Decision ordering the company, Shields of Strength, to remove all biblical references from the products it offers to soldiers.

¹The ACLJ is a not-for-profit 501(c)(3) organization dedicated to the defense of constitutional liberties secured by law. The ACLJ regularly monitors governmental activity and works to inform the public of such affairs. The ACLJ and its global affiliated organizations are committed to ensuring governmental accountability and the ongoing viability of freedom and liberty in the United States and around the world.

Background

This Background provides certain relevant contextual information, to the extent known, that contributes to the reasonableness of the records sought, as contemplated by DOD FOIA regulation 32 C.F.R. 286.5(a) as well as Army Regulation 25-55(1-507).²

A brief background of the company, Shields of Strength, follows.

It was December 1998 that the first Shields of Strength were placed in a store. They sold well enough that by 2001, stores across the country were carrying them and on one fateful day they caught the eye of Colonel David Dodd. . . . When he contacted Kenny and Tammie about buying some in bulk they graciously gave Colonel Dodd 500 Shields for his combat-ready troops.

Born that day was a lifelong friendship and relationship between Shields of Strength and the military. The most popular “tag” for most soldiers was emblazoned with the U.S. Flag and engraved with Joshua 1:9. It’s this “tag” that made its way to a young Army Captain named Russell Rippetoe. . . .

In 2003, while serving in Iraq, Captain Rippetoe was killed in action while wearing a Shield of Strength. He was the first American casualty of Operation Iraqi Freedom to be laid to rest at Arlington National Cemetery.

The following month, during the 2003 Memorial Day Ceremony at Arlington National Cemetery, President Bush referenced the dog tag Captain Rippetoe was wearing and read the scripture engraved on it. It was a surreal moment for Kenny and his family and they had no idea and no way to prepare for the media storm to come. . . .

One call Kenny didn’t miss, however, was from Joe Rippetoe, Russell Rippetoe’s father. Joe, who like his son was a veteran of war, was so taken by the Shield of Strength his son had worn that he wanted to make sure that each of the other soldiers from Russell’s unit had one. . . .

Since that time Kenny and Tammie have made over four million of the dog tags and have given hundreds of thousands of them to the U.S. military as well as other ministries. In fact, Stephen Mansfield wrote in his book, *Faith of the American Soldier*, “aside from the official insignias they wear, [the SOS dogtag] is the emblem most often carried by members of the military in Afghanistan and Iraq.”³

² *The Department of the Army Freedom of Information Act Program*, DEP’T OF THE ARMY, (Nov. 1, 1997) https://www.rmda.army.mil/foia/docs/r25_55.pdf.

³ *About Us*, SHIELDS OF STRENGTH, <https://www.shieldsofstrength.com/about-us/> (last visited Feb. 4, 2020).

According to reports, in 2012, the Army granted Shields of Strength a license to feature Army trademarks on its products.⁴

On or about July 8, 2019, the Military Religious Freedom Foundation (“MRFF”), sent a letter to the Director of the Army Trademark Licensing Program, demanding, among other things, that the Army “immediately notify this ‘Shields of Strength’ organization to cease and desist from using the official Army logo on its Christian religious proselytizing sales products. . . .”⁵

Also according to reports, on or about August 12, 2019, Paul Jensen, Director of the Army Trademark Licensing Program, sent an email (with the subject line, “Negative Press”) to Mr. Vaughan, founder and president of Shields of Strength, writing: “You are not authorized to put Biblical verses on your Army products. For example Joshua 1:9. Please remove ALL biblical references from all of your Army products.”⁶

Reports indicate that, in response to the August 12, 2019 Army Trademark Licensing Program email to Mr. Vaughan, Shields of Strength could no longer put Biblical verses on its Army products.

To the best of the Requestor’s knowledge and belief, this Request seeks records of which the Department of the Army (DA), the United States Army (US Army), the Army Trademark Licensing Program, the U.S. Army Judge Advocate General’s (JAG) Corps, the U.S. Army Chaplain Corps (DACH), and the Army and Air Force Exchange Service (Exchange) Office of General Counsel, Compliance Division, would most likely be custodians.

Records Requested

For purposes of this Request, the term “record” is “any information” that qualifies under 5 U.S.C. § 552(f), and includes, but is not limited to, the original or any full, complete and unedited copy of any log, chart, list, memorandum, note, correspondence, writing of any kind, policy, procedure, guideline, agenda, handout, report, transcript, set of minutes or notes, video, photo, audio recordings, or other material. The term “record” also includes, but is not limited to, all relevant information created, stored, received or delivered in any electronic or digital format, e.g., electronic mail, instant messaging or Facebook Messenger, iMessage, text messages or any other means of communication, and any information generated, sent, received, reviewed, stored or located on a government *or private* account or server, consistent with the holdings of *Competitive Enterprise Institute v. Office of Science and Technology Policy*, No. 15-5128 (D.C. Cir. July 5, 2016) (rejecting agency argument that emails on private email account were not under agency control, and holding, “If a department head can deprive the citizens of their right to know what his

⁴ Letter from Michael Berry, Chief of Staff, Director of Military Affairs, First Liberty, to Paul Jensen, Director, Army Trademark Licensing Program (Dec. 3, 2019) (available at <https://firstliberty.org/wp-content/uploads/2019/12/Letter-to-Army-Trademark-Licensing-Office-FINAL.pdf>).

⁵ Letter from Michael L. Weinstein, Founder and President, Military Religious Freedom Foundation, to Director, Army Trademark Licensing Program (July 8, 2019) (available at https://www.mrff.org/press-releases/2019/Shields_of_Strength_Army.pdf).

⁶ See Letter from Michael Berry to Paul Jensen, *supra* note 4.

department is up to by the simple expedient of maintaining his departmental emails on an account in another domain, that purpose is hardly served.”).

For purposes of this Request, the term “briefing” includes, but is not limited to, any meeting, teleconference, electronic communication, or other means of gathering or communicating by which information was conveyed to one or more person(s). For purposes of this Request, all sources, documents, letters, reports, briefings, articles and press releases cited in this Request are incorporated by reference as if fully set forth herein.

For purposes of this Request, the term “DA official” includes, but is not limited to, any person who is (1) employed by or on behalf of the DA or the US Army in any capacity; (2) contracted for services by or on behalf of the DA or the US Army in any capacity; or (3) appointed by the President of the United States to serve in any capacity at the DA or the US Army, all without regard to the specific component or office in which that person serves.

For purposes of this Request, and unless otherwise indicated, the timeframe of records requested herein is January 1, 2017, to January 31, 2020.

Pursuant to FOIA, 5 U.S.C. § 552, ACLJ hereby requests that the DA/US Army respond to the following numbered requests and produce all responsive records:

1. All records, communications or briefings created, generated, forwarded, transmitted, sent, shared, saved, received, or reviewed by any DA or US Army official regarding the company, Shields of Strength, including any such records sent to and/or received from the Army Trademark Licensing Program Office and/or any government official outside of DA, as referenced in the Background section above, including but not limited to any record located on backup tapes, archives, any other recovery, backup, storage or retrieval system, DA/US Army electronic mail or message accounts, non-DA/US Army electronic mail or message accounts, personal electronic mail or message accounts, DA/US Army servers, non-DA/US Army servers, and personal servers, as well as any electronic mail or message carbon copied to agency account recipients, any electronic mail or message carbon copied to non-agency account recipients, any electronic mail or message forwarded to agency account recipients, any electronic mail or message forwarded to non-agency account recipients, and attachments to any electronic mail or message.
2. All records, communications or briefings created, generated, forwarded, transmitted, sent, shared, saved, received, or reviewed by any DA/US Army official regarding any employee(s) or former employee(s) of Shields of Strength, including any such records sent to and/or received from the Army Trademark Licensing Program Office and/or any government official outside of DA/US Army, as referenced in the Background section above, including but not limited to any record located on backup tapes, archives, any other recovery, backup, storage or retrieval system, DA/US Army electronic mail or message accounts, non-DA/US Army electronic mail or message accounts, personal electronic mail or message accounts, DA/US Army servers, non-

DA/US Army servers, and personal servers, as well as any electronic mail or message carbon copied to agency account recipients, any electronic mail or message carbon copied to non-agency account recipients, any electronic mail or message forwarded to agency account recipients, any electronic mail or message forwarded to non-agency account recipients, and attachments to any electronic mail or message.

3. All records, communications or briefings created, generated, forwarded, transmitted, sent, shared, saved, received, or reviewed by any DA/US Army official regarding Kenny Vaughan, founder and president of Shields of Strength, and/or his wife, Tammie Vaughan, including any such records sent to and/or received from the Army Trademark Licensing Program Office and/or any government official outside of DA/US Army, as referenced in the Background section above, including but not limited to any record located on backup tapes, archives, any other recovery, backup, storage or retrieval system, DA/US Army electronic mail or message accounts, non-DA/US Army electronic mail or message accounts, personal electronic mail or message accounts, DA/US Army servers, non-DA/US Army servers, and personal servers, as well as any electronic mail or message carbon copied to agency account recipients, any electronic mail or message carbon copied to non-agency account recipients, any electronic mail or message forwarded to agency account recipients, any electronic mail or message forwarded to non-agency account recipients, and attachments to any electronic mail or message.
4. All of the Army Trademark Licensing Program Office emails pertaining to Shields of Strength from January 1, 2017, to January 31, 2020.
5. All of the Army and Air Force Exchange Service (Exchange) Office of General Counsel, Compliance Division,⁷ emails pertaining to Shields of Strength from January 1, 2017, to January 31, 2020.
6. A list of all firms licensed to use the Army emblem on products they produce from January 1, 2017, to January 31, 2020.

CONCLUSION

If this Request is denied in whole or in part, the ACLJ requests that, within the time requirements imposed by FOIA, you support all denials by reference to specific FOIA exemptions and provide any judicially required explanatory information, including but not limited to, a *Vaughn* Index.

Moreover, as explained in an accompanying memorandum, the ACLJ is entitled to a waiver of all fees associated with it. The ACLJ reserves the right to appeal a decision to withhold any information sought by this request and/or to deny the separate application for expedited processing and waiver of fees.

⁷ *Freedom of Information Act*, EXCHANGE, <https://www.aafes.com/about-exchange/public-affairs/FOIA/> (last visited Feb. 4, 2020).

Thank you for your prompt consideration of this Request. Please furnish all applicable records and direct any responses to:

Jordan Sekulow, Executive Director
Abigail Southerland, Senior Litigation Counsel
Benjamin P. Sisney, Senior Litigation Counsel
American Center for Law and Justice

[REDACTED]

[REDACTED]

I affirm that the foregoing request and attached documentation are true and correct to the best of my knowledge and belief.

Respectfully submitted,

Jordan Sekulow

Jordan Sekulow
Executive Director

Abigail Southerland

Abigail Southerland
Senior Litigation Counsel

Benjamin P. Sisney

Benjamin P. Sisney
Senior Litigation Counsel



February 20, 2020

Headquarters US Marine Corps
Attn: FOIA/PA Section (ARSF) Rm 2B289
3000 Marine Corps Pentagon
Washington DC 20350-3000

RE: FOIA Request to the United States Marine Corps Regarding Information about the Recent Marine Corps Decision Ordering the Company, Shields of Strength, to Remove All Biblical References from the Products It Offers to Soldiers.

To Whom it May Concern:

This letter is a request ("Request") in accordance with the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the corresponding department/agency implementing regulations.

The Request is made by the American Center for Law and Justice ("ACLJ")¹ on behalf of its members. The ACLJ respectfully seeks expedited processing and a waiver of fees related to this Request as set forth in an accompanying memorandum.

To summarize, this Request seeks records pertaining to information exchanged between current and/or former United States Marine Corps ("USMC") officials and employees, current and/or former Marine Corps Trademark Licensing Office officials and employees, current and/or former Office of Counsel for the Commandant of the Marine Corps officials and employees, current and/or former Marine Corps Exchange officials and employees, current and/or former Marine Corps Chaplains officials and employees, current and/or former Marine Corps Judge Advocate Division officials and employees, current and/or former Marine Corps System Command officials and employees, current and/or former Marine Corps Logistics Command officials and employees, current and/or former Marine Corps Forces Command officials and employees, current and/or former Marine Corps Forces Central Command, officials and employees, current and/or former Marine Corps Forces, South, officials and employees, current and/or former Marine Corps Forces, Pacific, officials and employees, current and/or former Marine Forces Europe and Africa officials and employees, current and/or former Marine Corps Forces Korea officials and employees, current and/or former Marine Corps Forces Reserve officials and employees, and/or any other current

¹The ACLJ is a not-for-profit 501(c)(3) organization dedicated to the defense of constitutional liberties secured by law. The ACLJ regularly monitors governmental activity and works to inform the public of such affairs. The ACLJ and its global affiliated organizations are committed to ensuring governmental accountability and the ongoing viability of freedom and liberty in the United States and around the world.



and/or former Government official(s) and employee(s) concerning the Marine Corps' Decision ordering the company, Shields of Strength ("SoS"), to remove all biblical references from the products it offers to soldiers.

Background

This Background provides certain relevant contextual information, to the extent known, that contributes to the reasonableness of the records sought, as contemplated by DoD FOIA regulation 32 C.F.R. 286.5(a).

A brief background of the company, SoS, follows.

It was December 1998 that the first Shields of Strength were placed in a store. They sold well enough that by 2001, stores across the country were carrying them and on one fateful day they caught the eye of Colonel David Dodd. . . . When he contacted Kenny and Tammie about buying some in bulk they graciously gave Colonel Dodd 500 Shields for his combat-ready troops.

Born that day was a lifelong friendship and relationship between Shields of Strength and the military. The most popular "tag" for most soldiers was emblazoned with the U.S. Flag and engraved with Joshua 1:9. It's this "tag" that made its way to a young Army Captain named Russell Rippetoe. . . .

In 2003, while serving in Iraq, Captain Rippetoe was killed in action while wearing a Shield of Strength. He was the first American casualty of Operation Iraqi Freedom to be laid to rest at Arlington National Cemetery.

The following month, during the 2003 Memorial Day Ceremony at Arlington National Cemetery, President Bush referenced the dog tag Captain Rippetoe was wearing and read the scripture engraved on it. It was a surreal moment for Kenny and his family and they had no idea and no way to prepare for the media storm to come. . . .

One call Kenny didn't miss, however, was from Joe Rippetoe, Russell Rippetoe's father. Joe, who like his son was a veteran of war, was so taken by the Shield of Strength his son had worn that he wanted to make sure that each of the other soldiers from Russell's unit had one. . . .

Since that time Kenny and Tammie have made over four million of the dog tags and have given hundreds of thousands of them to the U.S. military as well as other ministries. In fact, Stephen Mansfield wrote in his book, *Faith of the American Soldier*, "aside from the official insignias they wear, [the SOS dogtag] is the emblem most often carried by members of the military in Afghanistan and Iraq."²

² About Us, SHIELDS OF STRENGTH, <https://www.shieldsofstrength.com/about-us/> (last visited Feb. 4, 2020).

According to reports, “[i]n 2011, the Marine Corps first notified SoS it would either need to obtain a license in order to continue selling Marine Corps-themed products, or alternatively, SoS could sell products so long as it did not promote those products as being licensed by the Marine Corps.”³

Also according to reports, on or about August 16, 2018, the Marine Corps Trademark Licensing Office “issued a license to SoS, and it began producing Marine Corps-themed items in accordance with its license.”⁴

On or about July 8, 2019, the Military Religious Freedom Foundation (“MRFF”), sent a letter to the office of the USMC Trademark and Licensing Program, demanding, among other things, that the USMC “immediately revoke and cancel the current approval for ‘Shields of Strength’ to continue using the official USMC emblem on any and/or all of its religious items for sale.”⁵

According to reports, on or about July 11, 2019, Mr. Philip Greene, USMC Trademark Counsel, “immediately complied with the MRFF’s demands and sent a cease and desist notice to Mr. Vaughan.”⁶

To the best of the Requestor’s knowledge and belief, this Request seeks records of which the USMC, the Marine Corps Trademark Licensing Office, the Office of Counsel for the Commandant of the Marine Corps, the Marine Corps Exchange, the Marine Corps Chaplains, the Marine Corps Judge Advocate Division, the Marine Corps System Command, the Marine Corps Logistics Command, the Marine Corps Forces Command, the Marine Corps Forces Central Command, the Marine Corps Forces, South, the Marine Corps Forces, Pacific, the Marine Forces Europe and Africa, the Marine Corps Forces Korea, and the Marine Corps Forces Reserve, would most likely be custodians.

Records Requested

For purposes of this Request, the term “record” is “any information” that qualifies under 5 U.S.C. § 552(f), and includes, but is not limited to, the original or any full, complete and unedited copy of any log, chart, list, memorandum, note, correspondence, writing of any kind, policy, procedure, guideline, agenda, handout, report, transcript, set of minutes or notes, video, photo, audio recordings, or other material. The term “record” also includes, but is not limited to, all relevant information created, stored, received or delivered in any electronic or digital format, e.g., electronic mail, instant messaging or Facebook Messenger, iMessage, text messages or any other means of communication, and any information generated, sent, received, reviewed, stored or located on a government *or private* account or server, consistent with the holdings of *Competitive*

³ Letter from Michael Berry, Chief of Staff, Director of Military Affairs, First Liberty, to Jessica O’Haver, Director, Marine Corps Trademark Licensing Office (Jan. 14, 2020) (available at <https://firstliberty.org/wp-content/uploads/2020/01/Letter-to-USMC-Trademark-Licensing-Office-FINAL.pdf>).

⁴ See Letter from Michael Berry to Jessica O’Haver, *supra* note 3.

⁵ Letter from Michael L. Weinstein, Founder and President, Military Religious Freedom Foundation, to the U.S. Trademark & Licensing Program (July 8, 2019) (available at https://www.mrff.org/press-releases/2019/Shields_of_Strength_Marines.pdf).

⁶ See Letter from Michael Berry to Jessica O’Haver, *supra* note 3.

Enterprise Institute v. Office of Science and Technology Policy, No. 15-5128 (D.C. Cir. July 5, 2016) (rejecting agency argument that emails on private email account were not under agency control, and holding, “If a department head can deprive the citizens of their right to know what his department is up to by the simple expedient of maintaining his departmental emails on an account in another domain, that purpose is hardly served.”).

For purposes of this Request, the term “briefing” includes, but is not limited to, any meeting, teleconference, electronic communication, or other means of gathering or communicating by which information was conveyed to one or more person(s). For purposes of this Request, all sources, documents, letters, reports, briefings, articles and press releases cited in this Request are incorporated by reference as if fully set forth herein.

For purposes of this Request, the term “USMC official” includes, but is not limited to, any person who is (1) employed by or on behalf of the USMC in any capacity; (2) contracted for services by or on behalf of the USMC in any capacity; or (3) appointed by the President of the United States to serve in any capacity at the USMC, all without regard to the specific component or office in which that person serves.

For purposes of this Request, and unless otherwise indicated, the timeframe of records requested herein is January 1, 2017, to January 31, 2020.

Pursuant to FOIA, 5 U.S.C. § 552, ACLJ hereby requests that the USMC respond to the following numbered requests and produce all responsive records:

1. All records, communications or briefings created, generated, forwarded, transmitted, sent, shared, saved, received, or reviewed by any USMC official regarding the company, Shields of Strength, including any such records sent to and/or received from the Marine Corps Trademark Licensing Office and/or any government official outside of USMC, as referenced in the Background section above, including but not limited to any record located on backup tapes, archives, any other recovery, backup, storage or retrieval system, USMC electronic mail or message accounts, non-USMC electronic mail or message accounts, personal electronic mail or message accounts, USMC servers, non-USMC servers, and personal servers, as well as any electronic mail or message carbon copied to agency account recipients, any electronic mail or message carbon copied to non-agency account recipients, any electronic mail or message forwarded to agency account recipients, any electronic mail or message forwarded to non-agency account recipients, and attachments to any electronic mail or message.
2. All records, communications or briefings created, generated, forwarded, transmitted, sent, shared, saved, received, or reviewed by any USMC official regarding any employee(s) or former employee(s) of Shields of Strength, including any such records sent to and/or received from the Marine Corps Trademark Licensing Office and/or any government official outside of USMC, as referenced in the Background section above, including but not limited to any record located on backup tapes, archives, any other recovery, backup, storage or retrieval system, USMC electronic mail or message

accounts, non-USMC electronic mail or message accounts, personal electronic mail or message accounts, USMC servers, non-USMC servers, and personal servers, as well as any electronic mail or message carbon copied to agency account recipients, any electronic mail or message carbon copied to non-agency account recipients, any electronic mail or message forwarded to agency account recipients, any electronic mail or message forwarded to non-agency account recipients, and attachments to any electronic mail or message.

3. All records, communications or briefings created, generated, forwarded, transmitted, sent, shared, saved, received, or reviewed by any USMC official regarding Kenny Vaughan, founder and president of Shields of Strength, and/or his wife, Tammie Vaughan, including any such records sent to and/or received from the Marine Corps Trademark Licensing Office and/or any government official outside of USMC, as referenced in the Background section above, including but not limited to any record located on backup tapes, archives, any other recovery, backup, storage or retrieval system, USMC electronic mail or message accounts, non-USMC electronic mail or message accounts, personal electronic mail or message accounts, USMC servers, non-USMC servers, and personal servers, as well as any electronic mail or message carbon copied to agency account recipients, any electronic mail or message carbon copied to non-agency account recipients, any electronic mail or message forwarded to agency account recipients, any electronic mail or message forwarded to non-agency account recipients, and attachments to any electronic mail or message.
4. All of the Marine Corps Trademark Licensing Office emails pertaining to Shields of Strength from January 1, 2017, to January 31, 2020.
5. All of USMC Trademark Counsel Philip Greene's emails pertaining to Shields of Strength from January 1, 2017, to January 31, 2020.
6. All of the Office of Counsel for the Commandant of the Marine Corps emails pertaining to Shields of Strength from January 1, 2017, to January 31, 2020.
7. All of the Marine Corps Exchange, NAF Business and Support Services Division,⁷ emails pertaining to Shields of Strength from January 1, 2017, to January 31, 2020.
8. A list of all firms licensed to use the USMC emblem on products they produce from January 1, 2017, to January 31, 2020.

⁷ MCX TERMS AND CONDITIONS for Resale Merchandise, MCX CORE BRANDS CORPS VALUE (1 May, 2014), <http://www.mymcx.com/myMCX/assets/File/MCX%20Terms%20and%20Conditions%2001%20MAY%202014.pdf>.

CONCLUSION

If this Request is denied in whole or in part, ACLJ requests that, within the time requirements imposed by FOIA, you support all denials by reference to specific FOIA exemptions and provide any judicially required explanatory information, including but not limited to, a *Vaughn* Index.

Moreover, as explained in an accompanying memorandum, the ACLJ is entitled to a waiver of all fees associated with it. The ACLJ reserves the right to appeal a decision to withhold any information sought by this request and/or to deny the separate application for expedited processing and waiver of fees.

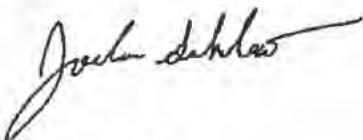
Thank you for your prompt consideration of this Request. Please furnish all applicable records and direct any responses to:

Jordan Sekulow, Executive Director
Abigail Southerland, Senior Litigation Counsel
Benjamin P. Sisney, Senior Litigation Counsel
American Center for Law and Justice



I affirm that the foregoing request and attached documentation are true and correct to the best of my knowledge and belief.

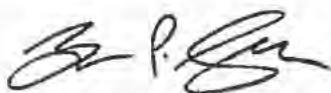
Respectfully submitted,



Jordan Sekulow
Executive Director



Abigail Southerland
Senior Litigation Counsel



Benjamin P. Sisney
Senior Litigation Counsel

American Center for Law and Justice

QUARTERLY FOIA REPORT

APPENDIX IV



April 22, 2020

Via USPS and Email

Office of the Governor
James R. Thompson Center
100 W. Randolph Street,
Chicago, IL 60601
E-mail: gov.foia@illinois.gov

Dartesia A. Pitts
Office of the Illinois Lieutenant Governor
James R. Thompson Center
100 W. Randolph, Suite 15-200
Chicago, IL 60601
E-mail: Dartesia.Pitts@Illinois.gov

William Bryant
Illinois Department of Public Health
Suite 16-100 535 W. Jefferson, Fifth Floor
Springfield, IL 62761 - 0001
DPH.FOIA@illinois.gov

Caitlin Q. Knutte
FOIA Officer
Office of the Illinois Attorney General
500 S. Second Street
Springfield, IL 62701
E-mail: foiaofficer@atg.state.il.us

RE: FOIA Request for: Records Regarding Communications Concerning the inclusion of “reproductive health care providers” in Executive Order 2020-10 (also referred to as: EXECUTIVE ORDER IN RESPONSE TO COVID-19 (COVID-19 EXECUTIVE ORDER NO. 8)) Between the Governor and/or Other Executive Chamber Employees, the Lieutenant Governor, the Illinois Department of Public Health, the Illinois Attorney General, Illinois NARAL, Personal PAC, and Planned Parenthood Illinois Action.

Dear FOIA Officers:

This letter is a request (“Request”) in accordance with the Illinois Freedom of Information Act (“FOIA”), 5 Ill. Comp. Stat. Ann. 140/1, *et seq.*

The Request is made by the American Center for Law and Justice (ACLJ)¹ on behalf of itself and more than 137,000 of its members (nearly 4,000 of whom reside in Illinois) who have signed a petition to ban elective abortions during the pandemic² and who object to, and demand

¹ The ACLJ is a not-for-profit 501(c)(3) organization dedicated to the defense of constitutional liberties secured by law. The ACLJ regularly monitors governmental activity concerning abortion and works to inform the public of such affairs. The ACLJ and its global affiliated organizations are committed to ensuring governmental accountability and the ongoing viability of freedom and liberty in the United States and around the world.

²*Shut Down Planned Parenthood’s Abortions*, ACLJ, <https://aclj.org/pro-life/shut-down-planned-parenthoods-abortions> (last visited April 21, 2020).



April 23, 2020

Page 2 of 6

accountability for, the inclusion of reproductive healthcare providers in Executive Order 2020-10, which will allow abortion during a pandemic, while all other elective procedures are halted.

To summarize, this Request seeks records regarding communications concerning Executive Order 2020-10 between Governor JB Pritzker and/or Lt. Governor Juliana Stratton (or their staff), and the Illinois state legislature, the Illinois Department of Public Health, the Illinois Attorney General, Illinois NARAL, Personal PAC, and Planned Parenthood Illinois Action. This Request also seeks any other records of which the Executive Offices or the Department of Public Health are custodians which concern the inclusion of reproductive healthcare providers in Executive Order 2020-10.

Background

On March 20, 2020, Governor Pritzker issued Executive Order 2020-10 (Covid-19 Executive Order No. 8) closing all non-essential businesses in the State of Illinois until April 30, 2020. The Executive Order specifically permits “reproductive health care providers” to remain in operation.³

It does not stop all elective surgeries but the Illinois Department of Public Health has recommended canceling all elective surgeries in order to “immediately decompress the healthcare system during the COVID-19 response ‘Elective’ is defined as those procedures that are pre-planned by both the patient and the physician that are advantageous to the patient but are NOT urgent or emergent.”⁴

The reproductive healthcare providers are referring potential COVID-19 patients to other healthcare providers. For example, the website of Planned Parenthood of Illinois says:

We will continue to follow the most current safety guidelines issued by the U.S. Centers for Disease Control and Prevention and the Illinois Department of Public Health. We encourage everyone to observe proper precautions to protect against COVID-19.

As always, consult your health care provider if you have flu-like symptoms and are very sick or believe you may be at risk for serious complications from an underlying condition.⁵

As a further example, the website of Family Planning Associates states:

Call us at 312-707-8988, if you have a fever of 100.0 or more, a cough, difficulty breathing, muscle pains throughout your body, and/or diarrhea or if you have been

³ Exec. Order 2020-10, ¶ 7, 44 Ill. Reg. 5857 (Mar. 20, 2020).

⁴ ILL. DEP’T OF PUB. HEALTH, COVID-19 – ELECTIVE SURGICAL PROCEDURE GUIDANCE (2020), www.dph.illinois.gov/topics-services/diseases-and-conditions/diseases-a-z-list/coronavirus/health-care-providers/elective-procedures-guidance.

⁵ Stay Smart. Stay Healthy, PLANNED PARENTHOOD OF ILL, <https://www.plannedparenthood.org/planned-parenthood-illinois/stay-smart-stay-healthy> (last visited Apr. 21, 2020).

exposed to the coronavirus (COVID-19) as we will not be able to see you as a patient at this time.⁶

How the elective services and surgeries provided by those referenced above and other reproductive healthcare providers came to be given a special status under the Executive Order during this pandemic – while they are apparently not providing COVID-19-related healthcare – is a question of public concern and the rationale of these Illinois FOIA requests.

REQUESTS

For purposes of this Request, all terms used herein have the meaning given pursuant to 5 Ill. Comp. Stat. Ann. 140/1, *et seq.* Specifically:

- The term “Public body” means all legislative, executive, administrative, or advisory bodies of the State, state universities and colleges, counties, townships, cities, villages, incorporated towns, school districts and all other municipal corporations, boards, bureaus, committees, or commissions of this State, any subsidiary bodies of any of the foregoing including but not limited to committees and subcommittees.⁷
- The term, “Public records” means all records, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data processing records, electronic communications, recorded information and all other documentary materials pertaining to the transaction of public business, regardless of physical form or characteristics, having been prepared by or for, or having been or being used by, received by, in the possession of, or under the control of any public body.⁸

For purposes of each request described herein, the record requested includes, but is not limited to, any text messages, any record located on backup tapes, archives, any other recovery, backup, storage or retrieval system, state-operated electronic mail or message accounts, non-state-operated electronic mail or message accounts, personal electronic mail or message accounts, agency servers, or non-agency servers, and personal servers, as well as any electronic mail or message carbon copied to agency account recipients, any electronic mail or message carbon copied to non-agency account recipients, any electronic mail or message forwarded to agency account recipients, any electronic mail or message forwarded to non-agency account recipients, and attachments to any electronic mail or message

For purposes of this Request, and unless otherwise indicated, the timeframe of records requested herein is December 1, 2019, through the date of receipt of this Request.

Pursuant to the Illinois Freedom of Information Act, 5 Ill. Comp. Stat. Ann. 140/1, *et seq.*, the ACLJ requests an opportunity to inspect or obtain copies of the following records:

⁶ *The Coronavirus COVID-19 Outbreak*, FAMILY PLANNING ASSOCS., <https://www.fpachicago.com/covid-19/> (last visited Apr. 21, 2020).

⁷ 5 ILL. COMP. STAT. ANN. 140/2(a) (LexisNexis, Lexis Advance through P.A. 101-629 of the 2019 Regular Session of the 101st General Assembly).

⁸ *Id.* § 140/2(c) (Lexis Advance).

1. All records prepared, generated, forwarded, transmitted, sent, shared, saved, received, or reviewed by Governor JB Pritzker or his staff, Lt. Governor Juliana Stratton or her staff, or any other Executive Chamber appointee, staff, employee or agent, that are or concern in any way communications with any person or organization advocating for the inclusion of reproductive healthcare providers in Executive Order 2020-10.
2. All records prepared, generated, forwarded, transmitted, sent, shared, saved, received, or reviewed by any Department of Public Health appointee, staff, employee or agent, that are or concern in any way communications with any person or organization advocating for inclusion of reproductive healthcare providers in Executive Order 2020-10, its implementation, or the language of any provision contained in the Order at any stage of its development in the Executive Chamber.
3. All records prepared, generated, forwarded, transmitted, sent, shared, saved, received, or reviewed by Governor JB Pritzker or his staff, Lt. Governor Juliana Stratton or her staff, or any other Executive appointee, staff, employee or agent, that are from or regard any person at or on behalf of any Planned Parenthood entity; the Illinois NARAL, Personal PAC, and Planned Parenthood Illinois Action – and which relate to Executive Order 2020-10 or its decree in any way.
4. All records prepared, generated, forwarded, transmitted, sent, shared, saved, received, or reviewed by Governor JB Pritzker or his staff, Lt. Governor Juliana Stratton or her staff, or any other Executive appointee, staff, employee or agent, that concern or regard in any way the impact that the inclusion of “reproductive health services” in Executive Order 2020-10 could, would, or should have on the health, safety or wellbeing of any woman.
5. All records prepared, generated, forwarded, transmitted, sent, shared, saved, received, or reviewed by any Department of Public Health appointee, staff, employee or agent, that concern or regard in any way the impact that Executive appointee, staff, employee or agent, that concern or regard in any way the impact that the inclusion of “reproductive health services” in Executive Order 2020-10 could, would, or should have on the health, safety or wellbeing of any woman.
6. All records prepared, generated, forwarded, transmitted, sent, shared, saved, received, or reviewed by any Illinois public body or agency that concern or in any way discuss the Executive appointee, staff, employee or agent, that concern or regard in any way the impact that the inclusion of “reproductive health services” in Executive Order 2020-10 could, would, or should have on the health, safety or wellbeing of any woman.

Conclusion

If this Request is denied in whole or in part, ACLJ requests that, within the time requirements imposed by the FOIA, the custodian agency support all denials by reference to specific FOIA exemptions and provide any statutorily or judicially required explanatory information.

As the General Assembly has recognized:

Pursuant to the fundamental philosophy of the American constitutional form of government, it is declared to be the public policy of the State of Illinois that all persons are entitled to full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees consistent with the terms of this Act. Such access is

necessary to enable the people to fulfill their duties of discussing public issues fully and freely, making informed political judgments and monitoring government to ensure that it is being conducted in the public interest.

The General Assembly hereby declares that it is the public policy of the State of Illinois that access by all persons to public records promotes the transparency and accountability of public bodies at all levels of government. It is a fundamental obligation of government to operate openly and provide public records as expeditiously and efficiently as possible in compliance with this Act.⁹

Accordingly, and with the legislatively pronounced spirit of the FOIA in mind, the ACLJ requests an opportunity to inspect or obtain copies of the public records described herein.

If there are any fees for searching or copying these records, please inform the ACLJ if the cost will exceed \$500. However, the ACLJ respectfully requests a waiver of all fees because the disclosure of the requested information is in the public interest and will contribute significantly to the public's understanding of the process leading to the inclusion of "reproductive health services" in Executive Order 2020-10, as well as the organizations influencing its language and decree. The decree Executive Order 2020-10 is unquestionably the subject of significant media reporting nationwide. The ACLJ will disseminate the records requested to the public via multiple media platforms and, as such, the records are requested for news gathering purposes. This information is not being sought for commercial purposes.

As you know, the Illinois Freedom of Information Act requires a response time of five (5) business days, as set forth in § 140(3)(d). If access to the records requested herein by the ACLJ will take longer than the five (5) business days, pursuant to § 140(3) (f), please contact the undersigned to advise when copies or the opportunity to inspect will be made available.

If you deny any or all of this request, please cite each specific exemption upon which you base the refusal to release the information in whole or in part, and notify me of any specific appeal procedures available by law.

Thank you for your prompt consideration of this Request. Please furnish all applicable records and direct any responses to:

Jordan Sekulow, Executive Director
Abigail Southerland, Senior Litigation Counsel
Benjamin P. Sisney, Senior Litigation Counsel
John A. Monaghan
American Center for Law and Justice

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

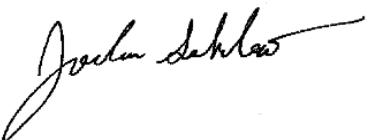
⁹ *Id.* § 140/1 (Lexis Advance).

April 23, 2020

Page 6 of 6

I affirm that the foregoing request and attached documentation are true and correct to the best of my knowledge and belief.

Respectfully submitted,



Jordan Sekulow
Executive Director



Abigail Southerland
Senior Litigation Counsel



Benjamin P. Sisney
Senior Litigation Counsel



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April 30, 2020

Via Email Only

Department of Attorney General
Attn. FOIA Coordinator
P.O. Box 30754
Lansing, MI 48909
AG-FOIA@mi.gov

Via Email Only

Michigan Department of Treasury
Attn. FOIA Coordinator
P.O. Box 30716
Lansing, MI 48909
MISateTreasurer@michigan.gov

Via Website Only

Michigan Dep't of Health and Human Services,
ATTN: FOIA Coordinator,
P.O. Box 30195,
Lansing, Michigan, 48909

Via Website Only

Dep't of Licensing and Regulatory Affairs
c/o FOIA Coordinator
Ottawa Building, 4th Floor
P.O. Box 30004
Lansing, MI 48909

RE: FOIA Request for: Records Regarding Communications Concerning Executive Order 2020-17 (COVID-19) between or among the Department of the Attorney General, the Michigan Department of Treasury, the Michigan Department of Health and Human Services and the Michigan Department of Licensing and Regulatory Affairs including but not limited to any emails ending in prochoiceamerica.org, ppmi.org, emilyslist.org, inghamcountydemocraticparty.com, gretchenwhitmer.com.

Dear FOIA Officers:

This letter is a request (“Request”) in accordance with the Freedom of Information Act, MCL 15.231 *et seq.*

The Request is made by the American Center for Law and Justice (ACLJ)¹ on behalf of itself and more than 137,000 of its members (of whom 5,000 reside in Michigan) who have signed a petition to ban elective abortions during the pandemic² and who object to, and demand accountability for,

¹ The ACLJ is a not-for-profit 501(c)(3) organization dedicated to the defense of constitutional liberties secured by law. The ACLJ regularly monitors governmental activity concerning abortion and works to inform the public of such affairs. The ACLJ and its global affiliated organizations are committed to ensuring governmental accountability and the ongoing viability of freedom and liberty in the United States and around the world.

²*Shut Down Planned Parenthood's Abortions*, ACLJ, <https://aclj.org/pro-life/shut-down-planned-parenthoods-abortions> (last visited April 21, 2020).



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the inclusion of abortion as a an essential service in Executive Order 2020-17, which will allow abortion during a pandemic, while all other elective procedures are halted.

To summarize, this request seeks records regarding Executive Order 2020-17 (COVID-19) among the Department of the Attorney General, the Michigan Department of Treasury, the Michigan Department of Health and Human Services and the Michigan Department of Licensing and Regulatory Affairs, including but not limited to any emails ending in prochoiceamerica.org, ppmi.org, emilyslist.org, inghamcountydemocraticparty.com, gretchenwhitmer.com, aol.com, yahoo.com and gmail.com.

Background

On March 20, 2020, Governor Whitmer issued Executive Order 2020-17 (Covid-19) restricting all non-essential medical and dental procedures in the State of Michigan until the State of Emergency declared in Executive Order 2020-4 is no longer in effect. The Order defines a non-essential procedure as any procedure that “is not necessary to address a medical emergency or to preserve the health and safety of a patient, as determined by a licensed medical provider.” EO 2020-17, ¶1. It specifically permits “pregnancy-related visits and procedures; labor and delivery.” *Id.* at ¶2.

The Lansing State Journal reported on March 25, 2020:

“It was explicit in the order that pregnancy-related care is included,” said Lori Carpentier, Planned Parenthood of Michigan president and CEO. “You can rest assured we didn’t leave it up to our own interpretation.”³

However, Planned Parenthood of Michigan provides neither emergency medical care nor care preserving the health and safety of a patient. For example, the website of its Lansing Health Center says:

Symptoms of COVID-19 (coronavirus) include fever, cough, sore throat, and difficulty breathing. ANYONE WITH THESE SYMPTOMS WILL NOT BE ALLOWED TO ENTER THE HEALTH CENTER. . . .

If you have any of these symptoms, have traveled to an affected area, or have been exposed to a person with a confirmed case, please do not come in to the health center. Call 800-230-7526 to reschedule your appointment. Contact your primary care provider for further assistance.⁴

How “pregnancy-related care” came to include abortion and how that was not left to “interpretation” under EO 2020-17 during this pandemic – when the clinics are apparently not providing COVID-19-related healthcare – is a question of public concern and the rationale of these Michigan FOIA requests.

³Thompson, *Michigan clinics still providing abortion services during coronavirus crisis*, Lansing State Journal (March 25, 2020) available at <<https://www.lansingstatejournal.com/story/news/2020/03/25/michigan-clinics-still-providing-abortion-services-coronavirus/5080860002/>> (accessed April 27, 2020).

⁴ Planned Parenthood, *Lansing Health Center of Lansing, Michigan*, <https://www.plannedparenthood.org/health-center/michigan/lansing/48912/lansing-health-center-2785-90630> (accessed April 27, 2020).

REQUESTS

For purposes of this Request, all terms used herein have the meaning given pursuant to MCL 15.231, *et seq.* Specifically:

- The term “Public body” means all a state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the state government, an agency, board, commission, or council in the legislative branch of the state government., a county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or a board, department, commission, council, or agency thereof, any other body that is created by state or local authority or is primarily funded by or through state or local authority, except that the judiciary, including the office of the county clerk and its employees when acting in the capacity of clerk to the circuit court, is not included in the definition of public body.⁵
- The term, “Public record” means a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created.⁶

For purposes of each request described herein, the record requested includes, but is not limited to, any text messages, any record located on backup tapes, archives, any other recovery, backup, storage or retrieval system, state-operated electronic mail or message accounts, non-state-operated electronic mail or message accounts, personal electronic mail or message accounts, agency servers, or non-agency servers, and personal servers, as well as any electronic mail or message carbon copied to agency account recipients, any electronic mail or message carbon copied to non-agency account recipients, any electronic mail or message forwarded to agency account recipients, any electronic mail or message forwarded to non-agency account recipients, and attachments to any electronic mail or message

For purposes of this Request, and unless otherwise indicated, the timeframe of records requested herein is December 1, 2019, through the date of receipt of this Request.

Pursuant to the Michigan Freedom of Information Act, Freedom of Information Act, MCL 15.231 *et seq.*, the ACLJ requests an opportunity to inspect or obtain copies of the following records:

1. All records prepared, generated, forwarded, transmitted, sent, shared, saved, received, or reviewed by any appointee, staff, employee or agent of the Department of the Attorney General, the Michigan Department of Treasury, the Michigan Department of Health and Human Services and the Michigan Department of Licensing and Regulatory Affairs that are or concern in any way communications with any person or organization advocating for the inclusion of abortion or “pregnancy related visits and procedures” under Executive Order 2020-17.

2. All records prepared, generated, forwarded, transmitted, sent, shared, saved, received, or reviewed by any appointee, staff, employee or agent of the Department of the Attorney General, the Michigan Department of Treasury, the Michigan Department of Health and Human Services and the Michigan Department of Licensing and Regulatory Affairs that are or concern in any way

⁵ MCL 15.232(h)

⁶ MCL 15.232(i)

communications with any person or organization advocating for the inclusion of abortion or “pregnancy related visits and procedures” under Executive Order 2020-17, its implementation, or the language of any provision contained in the Order at any stage of its development.

3. All records prepared, generated, forwarded, transmitted, sent, shared, saved, received, or reviewed by any appointee, staff, employee or agent of the Department of the Attorney General, the Michigan Department of Treasury, the Michigan Department of Health and Human Services and the Michigan Department of Licensing and Regulatory Affairs that are or concern in any way communications with any person or organization advocating for the inclusion of abortion or “pregnancy related visits and procedures” under Executive Order 2020-17, its implementation, or the language of any provision contained in the Order at any stage of its development. Such advocacy shall include, but is not limited to, all records that contains the following: prochoiceamerica.org, ppmi.org, emilyslist.org, inghamcountydemocraticparty.com, gretchenwhitmer.com, aol.com, yahoo.com, and gmail.com.

4. All records prepared, generated, forwarded, transmitted, sent, shared, saved, received, or reviewed by any appointee, staff, employee or agent of the Department of the Attorney General, the Michigan Department of Treasury, the Michigan Department of Health and Human Services and the Michigan Department of Licensing and Regulatory Affairs that are or concern in any way communications with any person or organization, and that concern or regard the impact that inclusion of abortion or “pregnancy related visits and procedures” under Executive Order 2020-17 could, would, or should have on the health, safety or wellbeing of any woman.

6. All records prepared, generated, forwarded, transmitted, sent, shared, saved, received, or reviewed by any Michigan public body or agency that concern or in any way discuss the Executive appointee, staff, employee or agent, that and that concern or regard the impact that inclusion of abortion or “pregnancy related visits and procedures” under Executive Order 2020-17 could, would, or should have on the health, safety or wellbeing of any woman.

Conclusion

If this Request is denied in whole or in part, ACLJ requests that, within the time requirements imposed by the FOIA, the custodian agency support all denials by reference to specific FOIA exemptions and provide any statutorily or judicially required explanatory information.

As the Legislature has recognized:

It is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process.⁷

Accordingly, and with the legislatively pronounced spirit of the FOIA in mind, the ACLJ requests an opportunity to inspect or obtain copies of the public records described herein.

⁷ MCL 15.231.

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As you know, the Michigan Freedom of Information Act requires a response time of five (5) business days, as set forth in MCL 15.235(5)(2). If access to the records requested herein by the ACLJ will take longer than the five (5) business days, pursuant to MCL 15.235(5)(2)(d), please contact the undersigned to advise when copies or the opportunity to inspect will be made available.

If you deny any or all of this request, please cite each specific exemption upon which you base the refusal to release the information in whole or in part, and notify me of any specific appeal procedures available by law.

Thank you for your prompt consideration of this Request. Please furnish all applicable records and direct any responses to:

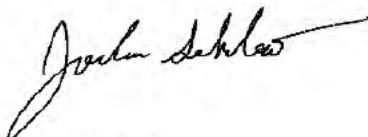
Jordan Sekulow, Executive Director
Abigail Southerland, Senior Litigation Counsel
Benjamin P. Sisney, Senior Litigation Counsel
John A. Monaghan, Senior Litigation Counsel
American Center for Law and Justice

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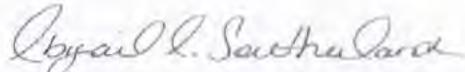
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I affirm that the foregoing request and attached documentation are true and correct to the best of my knowledge and belief.

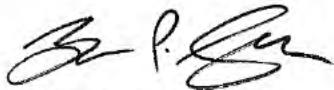
Respectfully submitted,



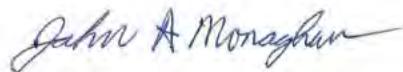
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The ACLJ's Government Accountability

The basic function of the Freedom of Information Act is to ensure informed citizens, vital to the functioning of a democratic society.



ACLJ

QUARTERLY FOIA

REPORT

A digital copy of this report, including appendices, can be downloaded at ACLJ.org/FOIA