AMERICAN CENTER FOR LAW & JUSTICE

ACLJ

FREEDOM OF INFORMATION ACT

QUARTERLY **FOIA**

REPORT

SPRING 2020 - WINTER 2020

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 more than fifty-one 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 entrenched Washington elites, the ever-expanding bureaucratic Deep State, and corrupting special interests. 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; your voice makes a huge 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 expression 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 fifty-one FOIA requests to more than fifteen 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 14,000 pages of records, comprising approximately 4,000 responsive documents. 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.

TABLE OF CONTENTS

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 fights for life, Israel, and religious freedom. The ACLJ has issued at least 76 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 six 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 and have the patience to litigate. To date, we have obtained nearly 30,000 pages of records, and all but approximately 9,000 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

Comey's Spies in the White House

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). *The ACLJ has obtained an initial production of documents responsive to our FOIA requests, which we announced and published for the public – and which we explain in detail in this Report.*

Through this lawsuit, the ACLJ obtained new records from the FBI which reveal the Obama-Biden White House communicating with Comey and his team.

These records revealed that, on January 19, 2017 (the night before President Trump's Inauguration), at 9:52 PM, James Comey emailed his General Counsel James Baker an "FYI" and an attached pdf "Letter." The email, marked TOP SECRET, is a forwarded email that Neil Eggleston, President Obama's White House Counsel, had sent to Comey and FBI Deputy Director Andrew McCabe earlier that day, with the subject line "[TOP SECRET, Record]," and an attached Letter, and says, "Director and Deputy Director – Please see the attached letter." Additional records obtained by the ACLJ show Comey setting a meeting in April 2017 on the 7th Floor of the FBI with a name-redacted person, and more interaction between the Obama-Biden White House with FBI leadership about a "content review."

While the complete processing of our FOIA request continues to be 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.

Unmasking

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 incoming 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.).*

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.

The ACLJ notified the court of this development, and explained how it impacted our case: Agencies are not allowed to maintain "Glomar" responses when the government officially acknowledges that such records exist. That's exactly what happened here and the court rejected the State Department's attempt to continue its Glomar response even after the official acknowledgment of Samantha Power's efforts to unmask Lt. Gen. Flynn. The court also concluded that unmasking efforts undertaken by a subordinate on behalf of a principal (like Samantha Power) were

unmasking efforts undertaken by the principal. The State Department is still in the process of searches it was required to make by the court.

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 the Unborn – and Against Planned Parenthood

In the devastating economic aftermath of the COVID-19 pandemic, Congress passed the CARES Act, and included millions of dollars for small businesses in the form of Paycheck Protection Program (PPP) loans and aid. This COVID-19 relief package specifically included language preventing Planned Parenthood and its regional affiliates from obtaining a single dime of these funds. The reason for this prohibition was simple—Planned Parenthood and its more than 16,000 employees clearly do not qualify for small business loans intended for businesses with less than 500 employees.

Regardless, media reports exposed that at least 37 of Planned Parenthood's 49 affiliates unlawfully obtained a total of approximately $80 million from the Paycheck Protection Program (PPP) – taxpayer funds that were meant to go to small businesses as part of the CARES Act.

The ACLJ took action. In May 2020, we submitted a FOIA request to the Small Business Administration (SBA), the agency component tasked with administering this program. Our goal was to shine light on whether Planned Parenthood fraudulently obtained these funds through the SBA – funds that it had no lawful right to obtain – and, more generally, to find out how this contravention of Congress' limitations in the CARES Act occurred.

We obtained records from the SBA that confirm that Planned Parenthood affiliates did, in fact, apply for and receive CARES Act funds. At least in some cases, it appears loans were canceled. Our investigation continues.

Standing Up for Our School Children

Over two years ago, we told you about a disturbing development: Young elementary school students are being forced to participate in Buddhist-based meditation in public schools. Then, we learned that federal government grant funds have been awarded to implement these so-called mindfulness programs on preschoolers. The ACLJ took action and issued a FOIA request to the U.S. Department of Education to find out about the grants it has awarded for these

programs and how it justifies using federal taxpayer dollars to implement them. We wanted to find out what ethical, moral, and legal considerations the Department has taken into account before giving federal funds for these programs.

The ACLJ received a record production from the Department of Education, totaling nearly 8,000 pages. We continued to review and analyze these records, but we are now ready to report key documents we've uncovered, which include clear evidence that the U.S. Department of Education has been developing and funding these types of curricula for years.

* * * * *

As these lawsuits, record productions, 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. With the new Administration assuming power in Washington, D.C., the ACLJ is preparing an even more vibrant and aggressive FOIA and government accountability practice. In fact, we've already filed a new FOIA lawsuit in Washington against the National Security Agency, the Office of the Director of National Intelligence, and the State Department – our first lawsuit of 2021 and our first against the Biden Administration. In addition, we've already issued new FOIA requests to the Biden State Department, and other new FOIA requests are currently being prepared. The Deep State no longer has to hide in the shadows, yet we suspect many actions will remain in the shadows nonetheless. Through our FOIA practice, the ACLJ will continue to do our part to shine light on our government's actions; and we will focus especially on issues surrounding life and abortion, American policy toward Israel, national security, and religious liberty.

The ACLJ will use every tool available to keep our government leaders, and bureaucracy, accountable. We will provide the information to the American people, along with our analysis of why it matters – and what you can do about it.

.

NEW REVELATIONS UNCOVERED THROUGH THE ACLJ'S LAWSUIT AGAINST THE FBI, FORCING THE PRODUCTION OF RECORDS 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 a FOIA request 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 oversight and supervision. 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.

We received new records from the FBI, which show Obama-Biden White House officials communicating with Comey and his team. These records revealed that on January 19, 2017 (the night before the President Trump's Inauguration), at 9:52 PM, James Comey emailed his General Counsel James Baker an "FYI" and an attached pdf "Letter." The email, marked TOP SECRET, is a forwarded email that Neil Eggleston, President Obama's White House Counsel, had sent to Comey and McCabe earlier that day, with the subject line "[TOP SECRET, Record]," and an attached Letter, and says, "Director and Deputy Director – Please see the attached letter." Additional records obtained by the ACLJ show Comey setting a meeting in April 2017 on the 7th Floor of the FBI with a name-redacted person, and more interaction between the Obama-Biden White House with FBI leadership about a "content review."

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:

> 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. Indeed, 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

---

[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.

[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.

> 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. 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 that employed Ferrante.

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 is 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

[3] *Id.*

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 attached as Appendix I-A.

Coinciding with shocking, yet unsurprising, news that broke about recent revelations revealing that Special Counsel Bob Mueller's team was out to "get Trump," we received records from the FBI in this case which add more details. Here's the story that broke, as reported by accomplished investigative journalist John Solomon:

> An FBI agent who played a lead role investigating Michael Flynn told the Justice Department there was never evidence of wrongdoing by the retired general or Russian collusion by President Trump, but the probe was kept open by Special Counsel Robert Mueller because his team had a "get Trump" goal, according to an explosive interview released Friday.[4]

In spite of the Left and Deep State's efforts to distance and isolate the Obama-Biden White House from James Comey, Andy McCabe, Peter Strzok, Lisa Page, and Bob Mueller's phony investigation meant to "get Trump," we have seen a steady stream of stories and information tying the Obama-Biden White House to the scheme. One of those stories, that Mueller's team accidentally wiped their phones, prompted the ACLJ to submit yet another FOIA request in September 2020.[5]

But new documents turned over to the ACLJ through our FOIA litigation over Comey's spies placed in the White House show that President Obama's own White House Counsel emailed Comey and McCabe the day before Inauguration Day, and

---

[4] John Solomon, *FBI Agent: Never Was Evidence of Russia Collusion but Mueller Team Had 'Get Trump' Goal*, Just the News (Sept. 25, 2020), https://justthenews.com/accountability/russia-and-ukraine-scandals/fbi-agent-never-was-evidence-russia-collusion-mueller.

[5] Jordan Sekulow, *ACLJ Files FOIA Request After Mueller Team "Accidentally" Wiped Their Phones Multiple Times Before Turning Them Over to DOJ*, ACLJ.org (Sept. 24, 2020), https://aclj.org/government-corruption/aclj-files-foia-request-after-mueller-team-accidentally-wiped-their-phones-multiple-times-before-turning-them-over-to-doj. We are awaiting record production in this FOIA and will report updates as we receive them.

attached a letter. The FBI has withheld the actual letter from us, and we will be challenging that in court. Here is what the records we obtained actually show:

- On January 19, 2017, (the night before President Trump's Inauguration) at 9:52 PM, James Comey emails his General Counsel James Baker an "FYI" and an attached pdf "Letter."

- The email is marked TOP SECRET. The email is a forwarded email that Neil Eggleston, President Obama's White House Counsel, had sent to Comey and McCabe earlier that day, with the subject line "[TOP SECRET, Record]," and an attached Letter, and says, "Director and Deputy Director – Please see the attached letter."

To be responsive to our FOIA request, this email and the attached letter must pertain to Comey's communications with or about Anthony Ferrante, Jordan Rae Kelly, or Tashina Gauhar. Remember, this FOIA was premised on a report last summer which indicated that Ferrante and Kelly were Comey's plants in the Trump White House.

The redacted record is attached as Appendix I-B.

More FBI Records

Another FBI record the ACLJ obtained in this FOIA lawsuit shows that a meeting was organized by James Comey with a participant whose name has been redacted. That meeting was set for April 10, 2017, at 1:00 PM, in Room 7062 (the 7th floor). The redacted name of the person with whom Comey set the meeting could only be a communication with, or about, or regarding, Anthony Ferrante, Jordan Rae Kelly, or Tashina Gauhar in order for it to be responsive to the ACLJ's request.

This record is attached as Appendix I-C.

We also received additional documents we believe the American people need to see – FBI records directly tying the Obama-Biden White House to the scheme to take down President Trump. These records also tie former Attorney General Loretta Lynch and former Deputy (and later Acting) Attorney General Sally Yates to the "get Trump" scheme as well. Here is what we obtained.

On September 30, 2016, Obama White House Counsel Neil Eggleston emailed James Comey and Andrew McCabe, and copied Lisa Page and Natalie H. Quillian (*Note: Quillian was advisor to Obama Chief of Staff Denis McDonough, and was the Deputy Campaign Manager for none other than presidential candidate Joe Biden*), a "TOP SECRET" email with no subject line, saying:

> **"Jim and Andy (cc'ing Tash [Tashina Gauhar] to print for Loretta and Sally, both traveling) – This responds to recent outreach from the Federal Bureau of Investigations (FBI) regarding the FBI's proposal to conduct a full-content review of [redacted – marked B7D, which regards disclosure of confidential source]. We have had the opportunity to review a memorandum from Deputy Director McCabe to Deputy Attorney General Yates, shared by your staff with mine, which sets out the scope and justification for the proposed review."**

The next paragraph is marked TS for Top Secret, and redacted. And the next paragraph is redacted as well. The Obama White House's email then reads:

> **"Notwithstanding this concern, we stand ready to work with the FBI and DOJ, as we have previously, to discuss possible ways forward. To that end, we are available to meet with DOJ and FBI leadership to discuss next steps**."

That night, on September 30, 2016, at 8:22 PM, **McCabe forwards the email to Comey, Baker, and James Rybicki** (Comey's Chief of Staff), marked "TOP SECRET// NOFORN" and says:

> "**Interesting response from Neil. I was not aware that <u>we</u> had shared our request to the DAG with the WH… We should discuss where/how we should reach back to set up a meeting**." (*Note: The "<u>we</u>" was underlined in McCabe's original email.)*

Then, a few days later, on October 3, 2016, **McCabe responds to Eggleston in an email marked "TOP SECRET//NOFORN**," **copying Comey, Lisa Page**, and **Quillian**, and says:

> "**Neil, I understand your concerns with our request and am happy to come over with a small team to discuss with you the specifics at your earliest convenience**. Please let me know a POC my staff can contact to set up a meeting."

What was the FBI "full-content review" it proposed to the Obama-Biden White House? (We know the FBI used codenames like this for high profile cases; for example, referring to the Clinton investigation as the "Midyear Exam.")

Why did the Obama-Biden White House express a "concern" but then offer to proceed and cooperate with the FBI anyway?

Why did McCabe tell Comey he wasn't sure they had shared their "request to the DAG [Sally Yates]" with the White House?

So many questions. But also an answer: Obama's White House Counsel was colluding with Comey and McCabe's FBI. What were they up to?

This record is attached as Appendix I-D.

President Trump's Declassification Announcement and Memorandum

On October 6, 2020, President Trump announced to the public, via Twitter:

> "All Russia Hoax Scandal information was Declassified by me long ago. Unfortunately for our Country, people have acted very slowly, especially since it is perhaps the biggest political crime in the history of our Country. Act!!!"[6]

And, and on the same date, he also announced to the public:

> "I have fully authorized the total Declassification of any & all documents pertaining to the single greatest political CRIME in American History, the Russia Hoax. Likewise, the Hillary Clinton Email Scandal. No redactions!"[7]

Given this development, the ACLJ sent a letter to the Department of Justice attorney representing the FBI in this case, pointing out that "[a] number of redactions and/or withholdings in this case have been based on the 'classified' exemption of (b)(1)." We also explained:

> It is well established that the President of the United States possesses the authority to declassify any document. *See Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988) ("[The president's] authority to classify and control access to information bearing on national security . . . flows primarily from this constitutional investment of power in the president and exists quite apart from any explicit congressional grant.").
>
> Accordingly, we requested
>
> that all records previously withheld or redacted based on the (b)(1) classified exemption be produced. As to records withheld or redacted based on (b)(1)

[6] https://twitter.com/realDonaldTrump/status/1313650640699224069.
[7] https://twitter.com/realDonaldTrump/status/1313640512025513984.

> as well as one or more additional exemptions, the ACLJ requests that withholdings be reevaluated without the (b)(1) basis, as the record(s) may now be amenable to public release or contain reasonably segregable information, even if, for example, a legitimate (b)(5) or (b)(6) redaction of part of the record may still be appropriate.
>
> The ACLJ also requests an explanation as to why records in this case were withheld or redacted as classified given the President's announcement that he declassified all Russia Hoax Scandal documents "long ago."

Since then, the Trump White House publicly released a declassification memorandum on January 19, 2021. We continue to analyze what impact these developments might have and to negotiate this issue with the Department of Justice and other agencies in our ongoing FOIA litigation.

The Obama-Biden White House Counsel's letter – and the other records which we now know had been ordered declassified by President Trump – will likely just expose even more Deep State subversion in the Obama-Biden FBI, led by Comey himself. Numerous records have been withheld from us in these cases based on the agencies claiming they were classified. Now we know they are not.

As news continues to break shedding more and more light on the Deep State's attempt to interfere with a U.S. Presidential Election and the will of the people, we will continue to do our part. We expect additional productions in this case in the coming months.

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.

ACLJ DEFEATS DEEP STATE'S REFUSAL TO ADMIT OR DENY THE EXISTENCE OF UNMASKING RECORDS IN IMPORTANT FEDERAL COURT RULING IN OUR FOIA LAWSUIT AGAINST THE U.S. NATIONAL SECURITY AGENCY AND STATE DEPARTMENT:

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.)

I. EXECUTIVE SUMMARY

Back in 2017, the ACLJ filed two lawsuits 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 incoming 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.). These cases were consolidated by the court.

As we analyzed in our previous FOIA Report, 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.

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. In 2020, the parties 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.

In July 2020, the ACLJ obtained a significant victory in court, when the court held that the State Department could no longer refuse to admit or deny the existence of certain

records regarding Samantha Power's efforts to unmask Lt. Gen. Flynn. The court also concluded that unmasking efforts carried out by a subordinate (e.g., a staffer) on behalf of a principal (e.g., Samantha Power), were the same as unmasking efforts undertaken by the principal themselves. The court rejected the State Department's argument to the contrary.

II. BACKGROUND

In 2017, we received reports of 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. Investigative reporter John Solomon picked up the story and published a thoughtful piece in *The Hill*, in which he analyzed records obtained by the ACLJ.[8]

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. Then, on May 18, 2020, the ACLJ filed its reply in that series of briefings to the court.

While the ACLJ was litigating these cases in court, and between the filing of our motion for summary judgment and our reply brief, something extraordinary happened. On May 4, 2020, the Acting Director of National Intelligence, Ric Grenell, 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.

[8] 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.

Flynn (USA-Ret)." 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." This memo is attached as Appendix II-A.

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, 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 Degnan, 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) Earle Litzenberger, U.S. Permanent Representative (PermRep) to NATO Ambassador Douglas Lute, and U.S. Ambassador to Turkey John 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 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."[9]

---

[9] 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 . . . .***

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.

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.

Having reviewed our reply brief and the Defendants' surreply, the court entered an order in June 2020 setting the matter for a hearing, which was conducted by telephone due to COVID-19 restrictions, on July 8, 2020. At the hearing, the parties laid out the arguments. In an opinion issued on July 24, 2020, the court "**f[ound] that State improperly refuses to confirm the existence of some documents**, that the NSA's search was partially inadequate, and that State's Exemption 5 withholdings were proper." The court's opinion is attached as Appendix II-B.

The court's ruling delivered a significant victory to the ACLJ and vindicated our effort to push through the agencies' overuse of critical exemptions and the broad deference given by the courts to the agencies to do so. As the court held:

> "In sum, because the declassified memorandum establishes the existence of records about unmasking requests from Power, it waives State's Glomar response as to Part 2 of ACLJ's request."
>
> "State no longer can assert a Glomar response—for Part 2—for records about the unmasking requests referenced in the declassified memorandum. Here, that means requests made on behalf of Power to unmask Flynn, on the six dates specified in the memorandum. **State now must either turn over these records or else establish that their contents are exempt from disclosure**."

So, according to the court, the State Department may no longer refuse to admit or deny the existence of records of Obama Administration senior official Samantha Power's unmasking activity involving Lt. Gen. Michael Flynn.

While many outlets reported that Power had been involved in an inordinately high number of unmasking requests at the end of the Obama Administration, some on the Left had tried to downplay these actions by saying they were done by low level staffers under Power's name, and not by Power herself. **Friday's decision by the federal district court makes it clear that all unmasking requests made under Power's name can properly be attributed to Power herself.** This is so, in part, because unmasking actions taken by subordinates are indeed actions taken by the principals. According to the court:

> "So it comes down to this: are unmasking requests made on behalf of Power equivalent to unmasking requests from Power? . . . [T]here is no suggestion here that in making the requests, the "authorized individuals" were acting beyond the scope of their agency relationship with Power. **So here, the requests from Power's subordinates were requests from her."**

In fact, while the Left has tried to downplay this and reach an opposite conclusion, the court found that this conclusion was a matter of "commonsense": **"This result should**

be commonsense for anyone who works in a hierarchical organization, like the government. A communication 'on behalf of the principal' is equivalent to a communication 'from the principal.'"

Importantly, that same principle and conclusion can be applied to Joe Biden, or anyone else on the list, including President Obama's Chief of Staff. It refutes the notion that Biden and other senior Obama Administration officials named in the NSA Memorandum were not involved (and therefore not responsible) for political spying against President Trump's campaign and transition team. In court, the agencies' attempt to distance the principal, in this case Power, from the unmasking activity of the subordinates, didn't fly.

This court's opinion in our FOIA lawsuit explained:

> "[T]he [NSA] memorandum's cover page describes the enclosed list as giving the 'identities of any officials who submitted requests . . . to unmask . . . Flynn.' Sisney Decl. Ex. 2 at 5 (emphasis added). **As the list provides only the identities of the principals—not their subordinates—the cover page itself suggests that these unmasking requests were truly from the principals, including Power**."

For that reason and others, the court concluded that the NSA memo was an "official acknowledgment" that records about the unmasking activities attributed to Power existed and thus, "State no longer can assert a Glomar response . . . for records about the unmasking requests referenced in the declassified memorandum."

That ruling was bad news for the Deep State, as again, former Vice President (now President) Joe Biden and President Obama's Chief of Staff were also "principals" identified on the list of those for whom subordinates made unmasking requests. Now, a federal court has recognized that principals are responsible for the unmasking actions of their agents – and those unmasking requests carried out by subordinates, as agents, are attributable to the principals themselves. Efforts to distance Biden and other senior Obama officials from the political spying – blaming it on the staffers – just got a lot more difficult.

Since the court's ruling, the State Department has conducted searches as required by the court and identified documents responsive to our request – and which it can no longer neither deny nor admit exist. While first stating that it found no responsive records, the State Department has announced to the court that it has additional confirmatory searches it needs to conduct, but has not been able to do so because of staffing restrictions due to COVID-19. According to the State Department's January and February 2021 reports to the court, the confirmatory searches will require further searches of the classified system

and therefore will require the analyst to be on-site to conduct them – which is not possible until the appropriate personnel are able to return to the government offices.

Finally, as addressed above in relation to the ACLJ's FOIA for records on Comey's spies in the White House, the Trump White House publicly released a declassification memorandum on January 19, 2021. We continue to analyze what impact these developments might have, and to negotiate this issue with the State Department in our ongoing FOIA litigation.

A detailed analysis of records obtained by the ACLJ in these and related FOIA lawsuits is available in previous ACLJ FOIA Quarterly Reports published on www.aclj.org.

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 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 OBTAINS RECORDS FROM THE SMALL BUSINESS ADMINISTRATION SURROUNDING PLANNED PARENTHOOD OBTAINING MILLIONS OF DOLLARS OF CARES ACT COVID RELIEF FUNDS MEANT FOR SMALL BUSINESSES:

I. EXECUTIVE SUMMARY

In the devastating economic aftermath of the COVID-19 pandemic, Congress passed the CARES Act, and included hundreds of billions of dollars for small businesses in the form of Paycheck Protection Program (PPP) loans and aid. This COVID-19 relief package specifically included language preventing Planned Parenthood and its regional affiliates from obtaining a single dime of these funds. The reason for this prohibition was simple—Planned Parenthood and its more than 16,000 employees clearly do not qualify for small business loans intended for businesses with less than 500 employees.

Regardless, media reports revealed that at least 37 of Planned Parenthood's 49 affiliates unlawfully obtained a total of approximately $80 million from the Paycheck Protection Program (PPP) – taxpayer funds that were meant to go to small businesses as part of the CARES Act.

The ACLJ took action. In May 2020, we submitted a FOIA request to the Small Business Administration (SBA), the agency component tasked with administering this program. Our goal was to shine light on whether Planned Parenthood fraudulently obtained these funds through the SBA – funds that it had no lawful right to obtain; and, more generally, to find out *how* this contravention of Congress' limitations in the CARES Act occurred.

II. BACKGROUND

As reported by Fox News in May 2020:

> Thirty-seven Planned Parenthood affiliates applied for and received a total of $80 million in loans from the Paycheck Protection Program (PPP), . . . and now the federal government wants the money back, saying the affiliates should have known they weren't eligible for the coronavirus stimulus payouts.
>
> The Small Business Administration (SBA) is reaching out to each involved Planned Parenthood affiliate explaining that affiliates of larger organizations with more than 500 employees aren't eligible for PPP distributions, Fox News is told. The Planned Parenthood Federation of

> America (PFFA) alone has had more than 600 employees. A Planned Parenthood affiliate in Metropolitan Washington (PPMW), for example, will receive a letter stating that although self-certified that it was eligible for a $1,328,000 PPP loan in accordance with the SBA's affiliation rules, it will need to return the money.[10]

In our view, "should have known" is an understatement. Seventy-five percent of Planned Parenthood's affiliates applied for and obtained these funds, and, on average, received over $2 million per affiliate. The fact that Planned Parenthood was ineligible for these funds was a national news story and a point of negotiation between the House and Senate before the CARES Act passed. This was no accident. It's clear there was bad intent here.

In fact, some of the same Planned Parenthood affiliates that have been embroiled in the scandal[11] involving the sale of aborted babies' body parts[12] received some of the largest payments. For example, "[t]he Planned Parenthood of Orange and San Bernardino Counties received a $7.5 million loan – the largest granted to the organization's affiliates."[13]

At the ACLJ, our legal and Government Affairs teams worked around the clock to ensure that the CARES Act sent much-needed Coronavirus relief where it was needed most, and not to Planned Parenthood. Congress and the Trump Administration went to great lengths to prohibit Planned Parenthood from having legal access to these funds.

When Speaker of the House Nancy Pelosi attempted to pad[14] the original bill with funding for abortion, we caught it and helped ensure that the language was stripped out.

---

[10] Gregg Re, Alex Pfeiffer, *Planned Parenthood Affiliates Improperly Applied for and Received $80 Million in Coronavirus Stimulus Funds, Feds Say*, FOXNEWS.COM (May 19, 2020), https://www.foxnews.com/politics/planned-parenthood-coronavirus-stimulus-money-ppp-return.

[11] Alexandra DeSanctis, *Orange County DA Sues Planned Parenthood–Affiliated Research Companies Over Sale of Aborted Fetal Tissue*, NATIONAL REVIEW (Oct. 17, 2016), https://www.nationalreview.com/2016/10/abortion-fetal-tissue-lawsuit-orange-county-district-attorney-sues-planned-parenthood-medical-research/.

[12] Jordan Sekulow, *Newly Unsealed Invoices Revealing Planned Parenthood Profited From Sale of Aborted Babies' Body Parts Expose Its Troubled Relationship With the Truth*, ACLJ.ORG (May 6, 2020), https://aclj.org/pro-life/newly-unsealed-invoices-revealing-planned-parenthood-profited-from-sale-of-aborted-babies-body-parts-expose-its-troubled-relationship-with-the-truth.

[13] Mark Moore, *SBA Tells Planned Parenthood To Return $80M in Stimulus Funds*, NEW YORK POST (May 20, 2020), https://nypost.com/2020/05/20/sba-tells-planned-parenthood-to-return-80m-from-stimulus/.

[14] Jordan Sekulow, *Speaker Pelosi Tried To Slip a Billion Dollars in Abortion Funding in Coronavirus Bill – You Responded and We Defeated It*, ACLJ.ORG (Mar. 17, 2020),

This helped ensure that the Hyde Amendment was enforced, and that affiliated groups with more than 500 employees – like Planned Parenthood – would be ineligible. But somehow, Planned Parenthood decided it was above the law again, and went ahead and applied for those funds anyway in clear contravention to the law.

Planned Parenthood had ZERO claim to a single penny of those PPP funds. Calling Planned Parenthood a small business is like calling Apple or Amazon small tech start-ups. It's the biggest player in its sick game. It is the "abortion giant." In 2019 alone, it raked in $616,800,000 in taxpayer-funded support,[15] part of its $1.6 BILLION in annual revenue.[16] In addition, it reported over $110 million in profits – a banner year for the organization – for killing a record-breaking 345,672 defenseless babies.

The reality is that Planned Parenthood is exploiting this pandemic (just like they did in states that were limiting elective procedures[17]) in order to pad its bottom line.

Senator Marco Rubio (FL), Chairman of the Senate Committee on Small Business and Entrepreneurship, released a statement demanding Planned Parenthood return the funds, as it clearly had no claim to them:

> There is no ambiguity in the legislation that passed or public record around its passage that organizations such as Planned Parenthood . . . [are] not eligible for the Paycheck Protection Program.
>
> Those funds must be returned immediately. Furthermore, the SBA should open an investigation into how these loans were made in clear violation of the applicable affiliation rules[;] and if Planned Parenthood, the banks, or

---

https://aclj.org/pro-life/speaker-pelosi-tried-to-slip-a-billion-dollars-in-abortion-funding-in-coronavirus-bill-you-responded-and-we-defeated-it.

[15] Matthew Clark, *Planned Parenthood Breaks Records for Abortions, Taxpayer Funding, and Lies as Cancer Screenings Continue to Plummet*, ACLJ.ORG (Jan. 17, 2020), https://aclj.org/pro-life/planned-parenthood-breaks-records-for-abortions-taxpayer-funding-and-lies-as-cancer-screenings-continue-to-plummet.

[16] *We Are Planned Parenthood*, 2018-2019 Annual Report, PLANNEDPARENTHOOD.ORG, https://www.plannedparenthood.org/uploads/filer_public/2e/da/2eda3f50-82aa-4ddb-acce-c2854c4ea80b/2018-2019_annual_report.pdf.

[17] Edward White, *UPDATE: ACLJ Files TEN Amicus Briefs Against Planned Parenthood in Just Over 3 Weeks, Winning Significant Victories for Life During This Pandemic*, ACLJ.ORG (April 27, 2020), https://aclj.org/pro-life/aclj-files-nine-amicus-briefs-against-planned-parenthood-in-just-over-3-weeks-winning-significant-victories-for-life-during-this-pandemic.

> staff at the SBA knowingly violated the law[,] all appropriate legal options should be pursued.[18]

Senator Ben Sasse (NE), who was one of the sponsors of the Born-Alive Abortion Survivors Protection Act, bluntly called Planned Parenthood's actions an attempt to defraud the American people at a time when so many are struggling to stay afloat:

> Planned Parenthood, the nation's largest abortion business, tried to defraud taxpayers during the worst economic downturn since the Great Depression. The Paycheck Protection Program is supposed to be a lifeline for small businesses, not a slush fund for Big Abortion. The administration needs to reclaim that money and fire the bureaucrats who signed off on this scam.[19]

Senator Sasse cut right to the real question here: Did Planned Parenthood or its affiliates knowingly and willfully violate the law, defrauding American taxpayers, to get its hands on this money it knew it wasn't actually qualified to receive? If that turns out to be the case, there needs to be a full investigation and its representatives must be held accountable.

As Senator Josh Hawley (MO) put it, echoing his colleagues' statements on Twitter: "The money needs to be recovered and if anybody knowingly falsified applications, they need to be prosecuted."[20] In fact, as Senator Hawley explained in a letter to the SBA:

> Planned Parenthood is not a small business. It is a multi-billion-dollar company. In the fiscal year ending last June, Planned Parenthood had $2.3 billion in assets and nearly $2 billion in revenue. The year before, Planned Parenthood paid its CEO more than $1 million. And now, Planned Parenthood has diverted $80 million from actual small businesses during a global pandemic even though Planned Parenthood knew it was ineligible for this program . . . . The ease with which Planned Parenthood was able to unlawfully divert $80 million should concern everyone. . . .
>
> The Coronavirus Aid, Relief, and Economic Security (CARES) Act prohibits Planned Parenthood from receiving PPP funds as Planned Parenthood's own documents state that each organization is a "Planned Parenthood Affiliate."

---

[18] Statement of Sen. Marco Rubio (May 19, 2020), https://www.rubio.senate.gov/public/index.cfm?p=Press-Releases&id=0E282CEC-0AD2-446F-BD50-4518B31686D5.

[19] Steven Ertelt, *Planned Parenthood Abortion Biz Improperly Applied for and Received $80 Million in Coronavirus Funds*, LIFENEWS.COM (May 20, 2020), https://www.lifenews.com/2020/05/20/planned-parenthood-abortion-biz-improperly-applied-for-and-received-80-million-in-coronavirus-funds/.

[20] https://twitter.com/HawleyMO/status/1262917888555601927.

> Planned Parenthood therefore has about 16,000 employees in total, more than 30 times higher than the limit for the Paycheck Protection Program.[21]

Senate Majority Leader Mitch McConnell went straight to the point: "Disrespecting human life is their central mission. . . . It goes without saying: The money must be sent back immediately. Right now."[22]

Planned Parenthood seems to have a pattern of finding loopholes to get its claws on money from taxpayer-supported programs that it is expressly prohibited from receiving. We've told you before how it was siphoning off $60 million from the Title X program for years, despite the fact that the authorizing statute clearly states that none of the money is to be given to organizations that perform or recommend abortion as part of family planning services.

Thankfully, the Trump Administration, through the Department of Health and Human Services (HHS), enacted a new rule – on which the ACLJ and our members submitted comments expressing strong support[23] – to block Planned Parenthood from Title X funds. This is a rule that Planned Parenthood has repeatedly fought and failed to overturn.[24] (Of course, the Biden Administration is beholden to Planned Parenthood and is changing course.)

Yet somehow, in the face of all of this, Speaker Pelosi was focused[25] on finding new ways to expand Planned Parenthood's taxpayer funding even further with a new $3 trillion bill she rammed through the House that would let Planned Parenthood siphon off millions more of Coronavirus aid meant for small businesses and struggling Americans. In fact, the Speaker's bill that passed the House would have stripped away abortion-funding

---

[21] Sen. Josh Hawley, *Senator Hawley Asks SBA To Explain Planned Parenthood Loans Scandal* (May 20, 2020), https://www.hawley.senate.gov/senator-hawley-asks-sba-explain-planned-parenthood-loans-scandal.

[22] https://twitter.com/SBAList/status/1263112193098289152.

[23] Jordan Sekulow, *VICTORY REPORT: Enforcement of HHS Rule Cutting Millions in Title X Tax Dollars From Planned Parenthood Begins*, ACLJ.ORG (Aug. 16, 2019), https://aclj.org/pro-life/victory-report-enforcement-of-hhs-rule-cutting-millions-in-title-x-tax-dollars-from-planned-parenthood-begins.

[24] Matthew Clark, *Complete Debacle: Planned Parenthood Strikes Out at Ninth Circuit in Its Attempts To Keep $60 Million of Our Tax Dollars*, ACLJ.ORG (May 15, 2020), https://aclj.org/pro-life/complete-debacle-planned-parenthood-strikes-out-at-ninth-circuit-in-its-attempts-to-keep-60-million-of-our-tax-dollars.

[25] Harry G. Hutchison, *U.S. House of Representatives Narrowly Passes Speaker Pelosi's $3 TRILLION Leftist Wish List Disguised as a Coronavirus Relief Bill*, ACLJ.ORG (May 20, 2020), https://aclj.org/pro-life/us-house-of-representatives-narrowly-passes-speaker-pelosis-3-trillion-dollar-leftist-wish-list-disguised-as-a-coronavirus-relief-bill.

restrictions from numerous provisions, opening up more than a trillion dollars to the abortion industry.

This is why we must continue to fight to defund Planned Parenthood. It continually demands special treatment, filing reckless lawsuits to continue performing abortions during a pandemic when states are trying to conserve medical equipment and fight the spread of the virus. This endangers the public and amounts to nothing more than a hoarding of every tax dollar it can get.

At the ACLJ, we aren't just talking about these abuses; we're doing something about them. On May 22, 2020, the ACLJ filed a FOIA request to find out how Planned Parenthood unlawfully obtained these funds, whether it committed fraud, and whether it committed or was engaged in any other illegal or legally dubious actions to obtain this money.

A copy of our FOIA request to the SBA is attached as Appendix III-A.

III. THE ACLJ'S WORK TO ACHIEVE TRANSPARENCY

After submitting our FOIA request to the SBA in May 2020, the ACLJ recently received a record production in January 2021. The records we received are especially timely in light of the fact that Planned Parenthood's access to new COVID-19 relief funds, by way of new relief bills in the works in Congress, is again an issue in the news of the day.

The SBA invoked several FOIA exemption provisions to withhold or redact certain pieces of information. The invocation of Exemption 5 is the most telling to us. According to the SBA's letter to the ACLJ:

> Finally, SBA is withholding in full certain documents pursuant to FOIA Exemption 4. The documents being withheld in full include communications between SBA and certain pregnancy resource centers regarding their application and eligibility for PPP loans. **Specifically, SBA is withholding 38 letters it sent to certain pregnancy resource centers and approximately 135 pages of email communications with those centers.** Please note that it is SBA's long-standing practice that it does not release information regarding the status of a loan application unless it has been approved. All approved loans under the CARES Act have been made publicly available on SBA's website. (Emphasis added).

The SBA letter is attached as Appendix III-B. The SBA's response letter and the documents we did receive allow us to draw several conclusions. First, the number of letters, 38 ("38 letters … sent to certain pregnancy resource centers") cited in the response letter is

suspiciously close to the 37 PP affiliates mentioned in the press reports. Second, we know that Planned Parenthood affiliates did, in fact, apply for PPP funds. The emails obtained are the best evidence, even if you have to read between the lines, so to speak.

In this email, all we see is that someone applied for a loan and is asking for reconsideration:

> **From: Redacted**
> **To: Redacted**
> **Sent: Monday, May 18, 2020 11:45 AM**
>
> Please let me know what other documentation, if any, you need for reconsideration of our loan.
> Thank you for your attention to this request.
>
> Redacted, MA, JD
> She/Her/Hers
> President & CEO

However, the next email in the same chain confirms what we suspected:

> **From: @SunTrust.com>**
> **Sent: Monday, May 18, 2020 9:04 AM**
> **To: 7a Questions <7aQuesti@sba.gov>**
> **Subject: FW: PPP Loan**
>
> "Is Planned Parenthood Eligible for PPP program? I have seen conflicting views, and need this settled.
> Thank you."

A copy of this email is attached as Appendix III-C. Any doubts about Planned Parenthood's application for PPP funds is removed by this email from PPNNE:

> **From: redacted @ppnne.org>**
> **Sent: Thursday, May 21, 2020 7:25 PM**
> **To: redacted @peoples.com>**
> **Subject: PPP funds in new account**
> **WARNING: External E-mail. Use caution if opening Links and Attachments.**
> **Thanks!**
> **Jennifer Meyer, CPA (she/her/hers)**
> **Director of Finance**
> **Planned Parenthood of Northern New England**

A copy of this email is attached as Appendix III-D.

These emails are not the only such chain or email. An email's subject line from "7a Questions" (the SBA help center for PPP applicants and banks) provides further evidence that Planned Parenthood affiliates applied for loans and were approved.

> From: 7a Questions
> To: Wileman, Linda
> **Subject: RE: Planned Parenthood Loan # -**
> Date: Wednesday, May 13, 2020 12:11:56 PM
>
> [REDACTED]
>
> If you need anything else, feel free to contact us again.
> For loan submission instructions and additional information, please visit our LGPC webpage here. For the current SOP 50 10 5(K), please click here. If you need assistance with SBAOne, please contact SBAOne staff at: sba.one@bnymellon.com or (877) 245-6159 (call option 5).
>
> Please note that any opinions expressed on loan eligibility in this email are being given limited to the information you have provided and could change if new information is contained in your loan submission package.
>
> "For information on Disaster Assistance Loans for Small Businesses Impacted by Coronavirus (COVID-19), please CLICK HERE or contact the SBA Disaster Assistance Division at 1-800-659-2955 (TTY: 1-800-877-8339) or disastercustomerservice@sba.gov."
>
> Thank you,
> 7a Questions
> 7(a) Loan Guaranty Processing Center
> U.S. Small Business Administration
> (877) 475-2435 (toll free)
> 7aQuestions@sba.gov
> ak@7aQ

A copy of this email is attached as Appendix III-E.

The subject matter line of a subsequent email chain from May 20, 2020, starting at 9:02 AM, shows that loans were actually given, even if eventually returned:

> From: [SBA official]
> To: Billimoria, Jimmy F. (Jim)

Cc: Kelly, Jennifer F.
Subject: RE: Deliberative and pre-decisional- Re: Vice PP returning PPP
Date: Wednesday, May 20, 2020 9:02:20 AM

A copy of this email is attached as Appendix III-F.

Another email indicates a request to cancel two loans, but the SBA redacted who the loan recipients were:

> To: Kucharski, Stephen W. <Stephen.Kucharski@sba.gov>; Zheng, Mike (Contractor) <Mike.Zheng@sba.gov>; McConville, Sheri M. <Sheri.Mcconville@sba.gov>
> Subject: Please Cancel these two loans
> Mike/Sheri --- .
> Thanks

A copy of this email is attached as Appendix III-G.

We also learned from these records that the SBA seemingly did not want to make a decision on Planned Parenthood's eligibility. The SBA advice desk sent out this letter to a question from SunTrust:

> **From: 7a Questions <7aQuesti@sba.gov>**
> **Sent: Monday, May 18, 2020 5:11 PM**
> **To: @SunTrust.com>**
> **Subject: RE: PPP Loan**
>
> **"**SBA cannot make a final determination on eligibility as these decisions are the responsibility of the applicant and the lender.
> Based on the discussion below it appears the Applicant meets 501 (c) (3) criteria and if other eligibility criteria is met then the submission may be eligible.
> For additional information on this question and other questions, please consult the Treasury's website is at https://home.treasury.gov/policyissues/cares/assistance-for-small-businesses, and SBA's website is at Coronavirus (COVID-19): Small Business Guidance & Loan Resources"

A copy of this email is attached as Appendix III-H.

A copy of the entire set of records the ACLJ obtained from the SBA is available here at this link: SBA Records.

The ACLJ's FOIA investigation has uncovered records, and these are merely a few, that show that Planned Parenthood did apply for CARES Act loans, did get approval, and

then, at least in some cases, returned the funds. There are still some questions remaining to be answered. Did Planned Parenthood affiliates commit fraud in doing so? Were all the loans returned? We'll do our part, but Congress must investigate what happened.

IV. CONCLUSION AND NEXT STEPS

The ACLJ continues to review the records the SBA provided, and is analyzing potential legal challenges concerning certain of the SBA's redactions and the SBA's email communications with the 38 Planned Parenthood abortion providers which the SBA withheld in full. In addition, the ACLJ is watching the current COVID-19 relief bills closely so we can help call the public's attention to Planned Parenthood's access to even more of our taxpayer funds. We will provide updates on our website or publish them in future FOIA Quarterly Reports.

THE ACLJ OBTAINS RECORDS FROM THE U.S. DEPARTMENT OF EDUCATION SHEDDING MORE LIGHT ON THE GROWING TREND OF FEDERAL TAXPAYER FUNDS BEING USED TO IMPLEMENT BUDDHIST "MINDFULNESS" CURRICULA ON YOUNG CHILDREN IN PUBLIC SCHOOLS:

I. EXECUTIVE SUMMARY

Over two years ago, we told you about a disturbing development: Young elementary school students are being forced to participate in Buddhist-based meditation in public schools.[26] Then, we learned that federal government grant funds have been awarded to implement these so-called mindfulness programs on preschoolers. The ACLJ took action and issued a FOIA request to the U.S. Department of Education to find out about the grants it has awarded for these programs and how it justifies using federal taxpayer dollars to implement them. We wanted to find out what ethical, moral, and legal considerations the Department has taken into account before giving federal funds for these programs.

The ACLJ received a record production from the Department of Education, totaling nearly 8,000 pages. We continue to review and analyze these records but are now ready to report key documents we have uncovered, which include clear evidence that the U.S. Department of Education has been developing and funding these types of curricula for years.

II. BACKGROUND

According to news reports: "A Portland State University professor has won a $3.3 million federal grant to measure whether a mindfulness program backed by actress Goldie Hawn works to get preschoolers ready for kindergarten."[27] Further:

> Portland State psychology professor Andrew Mashburn specializes in testing programs to promote school readiness and has already looked into the MindU[P] program for the Gates Foundation. He won the big five-year grant

[26] Christina Stierhoff, *ACLJ Challenges Buddhist Meditation Practices in Public Schools*, ACLJ.ORG (Dec. 10, 2018), https://aclj.org/religious-liberty/aclj-challenges-buddhist-meditation-practices-in-public-schools.

[27] Betsy Hammond, *Does Goldie Hawn's Preschool Mindfulness Program Work? Portland State Gets $3 Million To Check*, THE OREGONIAN (posted July 20, 2018, updated Jan. 29, 2019), https://www.oregonlive.com/education/2018/07/does_goldie_hawns_mindfulness.html.

> from the U.S. Department of Education's Institute of Education Sciences to run the program in 120 classrooms in Multnomah, Washington and Clackamas counties and measure if it works, university officials announced Tuesday.[28]

The report continues:

> "The research project, co-led by Pennsylvania State University psychology professor Robert Roeser, will be done in three waves: Multnomah County in 2019-20, Washington County in 2020-21 and Clackamas County in 2021-22. **It will target children in public and private preschools that primarily serve low-income students**. Mashburn expects to recruit the first set of classrooms next spring."

As announced by Portland State University, "psychology professor Andrew Mashburn will use the grant from the U.S. Department of Education's Institute of Education Sciences to implement the MindUP program in 120 preschool classrooms throughout Oregon's Multnomah, Washington and Clackamas counties."[29]

It's not just happening in Oregon, and MindUP is not the only program being used to experiment on our schoolchildren. Other schools are using curricula like Inner Explorer and Dialectic Behavior Therapy.

As we continue to examine these developments, we've learned that even more federal contracts have been awarded to push these programs. For example, in 2014, $1.5 million was awarded to the University of Wisconsin for a three-year study to "take place in public elementary schools in an urban school district in Wisconsin," with a sample of "[a]pproximately 20-30 teachers and 400 students from fourth and fifth grade classrooms."[30]

In fact, the ACLJ has been contacted by numerous parents of elementary school students from over a dozen states. Some students are required to participate in as many as three meditation sessions each school day. If they refuse, kids are forced to sit outside the classroom, like a punishment.

---

[28] *Id.*

[29] Cristina Rojas, *PSU Professor Awarded $3.3M To Study Impact of Kindergarten Readiness Program*, PORTLAND STATE UNIVERSITY (July 16, 2018), https://www.pdx.edu/liberal-arts-sciences/news/psu-professor-awarded-33m-study-impact-kindergarten-readiness-program.

[30] A Classroom-Based Training Program of Attention and Emotion Regulation, National Center for Education Research (2014), https://ies.ed.gov/ncer/projects/grant.asp?ProgID=21&grantid=1530.

Why are government bureaucrats promoting and implementing these religious meditation programs on our children? And, why are we paying for it?

Despite claims to the contrary by the mindfulness program proponents, these programs are undeniably religious. For example, teachers play audio recordings for the children telling them: "We're all connected through nature. And we're all connected through the universe." It tells them how to clear their minds, watch their memories and emotions float away on clouds, and connect with the universe.

Indoctrinating young children in public schools with Buddhist meditation is unconstitutional. And what's more, the federal government should not be using our tax dollars to pay for it.

As part of our multifaceted legal campaign, including representing parents of these students, sending demand letters, and if necessary, litigation, we submitted a FOIA request to the U.S. Department of Education to bring the spotlight on these inappropriate and unconstitutional grant awards.

III. THE ACLJ'S WORK TO ACHIEVE TRANSPARENCY

In light of these developments, and what we were hearing of this being a growing trend, the ACLJ submitted a FOIA request to the U.S. Department of Education, focusing in on the use of federal taxpayer funds. Here is what our FOIA request sought:

> [T]his Request seeks records from the U.S. Department of Education (ED) concerning the $3.3 million grant awarded to Portland State University concerning MindUP, a mindfulness-based social emotional learning (SEL) program to be implemented on preschool-age children in 120 schools in Oregon, as well as other grant funds awarded to implement or test mindfulness programs on children attending public schools. **The purpose of this request is to seek information that will educate the American public about the U.S. government's spending of U.S. taxpayer dollars to conduct Buddhism-based social experiments on children.**

A complete copy of our FOIA request to the U.S. Department of Education is attached as Appendix IV.

The ACLJ recently received a massive record production from the Department of Education, totaling nearly 8,000 pages. Here's what we are learning from our review of these records.

The truth has come out that the Department of Education has been pushing this curriculum for years – long before parents became aware of the changes in curriculum in their schools. The DOE's documents produced in response to our FOIA requests indicate that the DOE switched from using a Social-Emotional Learning ("SEL") Curriculum through a program called Second Step – previously vetted by the ACLJ – to Jon Kabat-Zinn's curriculum in 2014.

The DOE IES Research Performance Progress Report for July 2014 through March 2015, or the mindfulness study, included quotes from Jon Kabat-Zinn as the study attempted to define mindfulness and its purposes. In these studies spanning five years, the DOE reported that the schools in the study used "Zenergy Chimes," or a Tibetan Bell for Buddhist religious ceremonies, to usher in the daily mindfulness practices. They implemented exercises that they called "cleansing breaths," without much explanation as to what was being cleansed.

They discussed the "Bubble Exercise" where they encouraged the children to watch their thoughts, like bubbles, float away or pop without allowing themselves to address the thoughts. Another similar practice is the "Puppy Mind" where you watch your thoughts race like a little puppy and practice "letting go/letting be." The description further explains that these exercises "ask us to allow all of it to pass without holding on. Initially this means resting one's physical sensations while thoughts and emotions cascade by." These practices emulate the similar "cloud" exercises that we dissected for you in the past.[31]

Most disconcerting is the DOE's description (and hence, admission) of one of the goals of mindfulness: "These practices continue the process of **turning inward to our experience** and paying attention in a particular way to allow oneself to be present moment to moment non-judgmentally." While these words might sound soothing, in reality this is a description of the Buddhist practice of finding your inner peace within oneself with the understanding that nirvana can only be found within. As we have explained, this is completely counter to our Christian belief that our inner self is sinful, and the only way to redemption is through Christ.[32]

You can view the 2,000-page document production we obtained from the Department of Education here: Part 1 (102.3mb) | Part 2 (107.4mb).

---

[31] Christina Stierhoff, *Forcing Change in Mindfulness Curriculum as We Dig Deeper Into Buddhist-Based Indoctrination in Public Schools*, ACLJ.ORG (Feb. 26, 2019), https://aclj.org/religious-liberty/forcing-change-in-mindfulness-curriculum-as-we-dig-deeper-into-buddhist-based-indoctrination-in-public-schools.

[32] Christina Stierhoff, *No, Buddhist-Based Mindfulness is Not the Same as Christian Meditation: Debunking the Unconstitutional and Unbiblical Fallacy in Schools*, ACLJ.ORG (Nov. 1, 2019), https://aclj.org/religious-liberty/no-buddhist-based-mindfulness-is-not-the-same-as-christian-meditation-debunking-the-unconstitutional-and-unbiblical-fallacy-in-schools.

IV. CONCLUSION AND NEXT STEPS

Now that the ACLJ has exposed that the DOE has given its full support for this dangerous mindfulness curriculum, how can you, as a parent, best protect your children? Parents must speak up and voice their opposition to these programs. We have prepared an educational memorandum[33] which contains helpful information regarding mindfulness programs, the research cautioning against the implementation of these programs, as well as legal discussion to assist parents in addressing the issue with teachers, school officials, and local school boards. It takes grassroots actions, where parents like you stand up and demand change. It's time to take back our children's education.

As our review of this enormous record production continues, we will post updates on our website or in our next FOIA Quarterly Report. Government agencies must be held accountable for how they use our taxpayer funds. Using these funds to promote Buddhism-based curricula on young children in what amounts to a social science experiment is unacceptable.

[33] ACLJ Memorandum, http://media.aclj.org/pdf/Memo---Mindfulness.pdf.

American Center for Law and Justice

QUARTERLY FOIA REPORT

APPENDIX I-A

ACLJ
American Center
for Law & Justice

July 25, 2019

Federal Bureau of Investigation
Attn: FOI/PA Request
Record/Information Dissemination Section
170 Marcel Drive
Winchester, VA 22602-4843
Fax: [redacted]

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.

[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 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.

[redacted]

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 Tushina 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] (fax)

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 Washington, DC 20535 Defendant.	)	**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

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 [redacted], 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.SC. § 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, 2019, 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.SC. § 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
JAY ALAN SEKULOW
[redacted])
COUNSEL OF RECORD
STUART J. ROTH
([redacted])
JORDAN SEKULOW
([redacted])
ABIGAIL A. SOUTHERLAND
([redacted])

/s/ Benjamin P. Sisney
BENJAMIN P. SISNEY
([redacted])
[redacted]

Counsel for Plaintiff

American Center for Law and Justice

QUARTERLY FOIA REPORT

APPENDIX I-B

DECLASSIFIED BY [redacted]
ON 1-8-2020

B6-1
B7C-1

[redacted] (RMD) (FBI)

From: COMEY, JAMES B. (DO) (FBI)
Sent: Thursday, January 19, 2017 9:52 PM
To: ["BAKER, JAMES A. (OGC) (FBI) [redacted]
Subject: FW: Letter [TOP SECRET, Record] --- TOP SECRET
Attachments: Letter_20170119153127OO.pdf

B6-1
B7C-1
B7E-1

Classification: TOP SECRET

C[redacted]
Derived From: FBI NSIC dated 20130301
Declassify On: 20271231

FYI

From: Eggleston, Neil [mailto [redacted]
Sent: Thursday, January 19, 2017 2:57 PM
To: COMEY, JAMES B. (DO) (FBI) [redacted] **MCCABE, ANDREW G. (DO)(FBI)** [redacted]
Cc: [redacted]
Subject: Letter [TOP SECRET, Record]

B6-2
B7E-1

Classification: TOP SECRET

Director and Deputy Director –

Please see the attached letter.

Thanks,
Neil

[redacted] (b)

Classified on: 01/19/2017

Declassify on: 01/19/2027

Classification: TOP SECRET

American Center for Law and Justice

QUARTERLY FOIA REPORT

APPENDIX I-C

James B. Comey

Subject:	Meet w/ [redacted]	b6 -1 b7C -1
Location:	Room 7062	
Start:	Monday, April 10, 2017 1:00 PM	
End:	Monday, April 10, 2017 1:30 PM	
Recurrence:	(none)	
Meeting Status:	No response required	
Organizer:	James B. Comey	

James B. Comey

Subject:	Meet w[redacted]	b6 -1 b7C -1
Location:	Room 7062	
Start:	Monday, April 10, 2017 1:00 PM	
End:	Monday, April 10, 2017 1:30 PM	
Recurrence:	(none)	
Meeting Status:	No response required	
Organizer:	James B. Comey	

American Center for Law and Justice

QUARTERLY FOIA REPORT

APPENDIX I-D

[redacted] (RMD) (FBI)

From: MCCABE, ANDREW G. (DO)(FBI) B6-1, -2
Sent: Monday, October 03, 2016 1:54 PM B7C-1
To: ["Eggleston, Neil [redacted]";"COMEY, JAMES B. (DO) (FBI) B7E-1
[redacted]
Cc: ["Quillian, Natalie H. [redacted] "PAGE, LISA C. (OGC) (FBI) [redacted]]
Subject: RE: --- ~~TOP SECRET~~//~~NOFORN~~

Classification: ~~TOP SECRET~~//~~NOFORN~~

[redacted]
Derived From: FBI CG dated 20120620
Declassify On: 20411231
==========

B6-1
B7C-1

Neil:

I understand your concerns with our request and am happy to come over with a small team to discuss with you the specifics at your earliest convenience.

Please let me know a POC my staff can contact to set up a meeting.

Thanks

B6-1
B7C-1
B7E-1

DATE: 1-16-2020
FBI INFO.CLASSIFIED BY: [redacted]
REASON 1.4(b,c,d)
DECLASSIFY ON: 12-31-2042

Andrew G. McCabe
Deputy Director
Federal Bureau of Investigation
CMS [redacted]
Work [redacted]
Mobile [redacted]

From: Eggleston, Neil [mailto [redacted]
Sent: Friday, September 30, 2016 4:04 PM
To: COMEY, JAMES B. (DO) (FBI) [redacted] MCCABE, ANDREW G. (DO)(FBI) [redacted]
[redacted]
Cc: Quillian, Natalie H. [redacted]
Subject:

B6-1, -2
B7C-1
B7E-1

Classification: TOP SECRET

Jim and Andy (cc'ing Tash to print for Loretta and Sally, both traveling) -

(TS) This responds to recent outreach from the Federal Bureau of Investigation (FBI) regarding the FBI's proposal to conduct a full-content review of [redacted]. We have had the opportunity to review a memorandum from Deputy Director McCabe to Deputy

B1-1
B3-1
B7D-1
B7E-6

FBI(19-CV-2643)-143

Attorney General Yates, shared by your staff with mine, which sets out the scope and justification for the proposed review.

(TS) [redacted] B1-1 B3-1 B5-1 B7E-2,-6

[redacted] B5-1

Notwithstanding this concern, we stand ready to work with the FBI and DOJ, as we have previously, to discuss possible ways forward. To that end, we are available to meet with DOJ and FBI leadership to discuss next steps.

Thanks,
Neil

~~[redacted](o)~~

~~Classified on: 09/30/2016~~

~~Declassify on: 09/30/2026~~

==========

Classification: ~~TOP SECRET//[redacted]//NOFORN~~

[redacted] (RMD) (FBI) B6-1 B7C-1

From: MCCABE, ANDREW G. (DO)(FBI)
Sent: Friday, September 30, 2016 8:22 PM
To: ["COMEY; JAMES B. (DO) (FBI) [redacted];"BAKER; JAMES A. (OGC) (FBI) [redacted];"RYBICKI; JAMES E. (DO) (FBI) [redacted] B7E-1
Subject: FW: --- ~~TOP SECRET~~//~~NOFORN~~

Classification: ~~TOP SECRET//NOFORN~~

[redacted] B6-1 B7C-1

~~Derived From: FBI CG dated 20120620~~
~~Declassify On: 20411231~~

Interesting response from Neil. I was not aware that we had shared our request to the DAG with the WH....

We should discuss where/how we should reach back to set up a meeting.

Andrew G. McCabe
Deputy Director
Federal Bureau of Investigation
CMS [redacted]
Work [redacted]
Mobile [redacted]

DATE: 1-16-2020
FBI INFO CLASSIFIED BY: [redacted] B6-1 B7C-1
REASON:1.4 (b,c,d) B7E-1
DECLASSIFY ON: 12-31-2042

From: Eggleston, Neil [mailto [redacted]
Sent: Friday, September 30, 2016 4:04 PM
To: COMEY, JAMES B. (DO) (FBI) [redacted] MCCABE, ANDREW G. (DO)(FBI) [redacted]
[redacted] B6-2
Cc: Quillian, Natalie H. [redacted] B7E-1
Subject:

Classification: ~~TOP SECRET~~

Jim and Andy (cc'ing Tash to print for Loretta and Sally, both traveling) -

This responds to recent outreach from the Federal Bureau of Investigation (FBI) regarding the FBI's proposal to conduct a full-content review of [redacted] B1-1 B3-1 B7D-1 B7E-6

(TS) [redacted] We have had the opportunity to review a memorandum from Deputy Director McCabe to Deputy Attorney General Yates, shared by your staff with mine, which sets out the scope and justification for the proposed review.

(TS) [redacted] B1-1 B3-1 B5-1 B7E-2, -6

(TS) [redacted] B1-1 B3-1 B5-1 B7E-2, -6

[redacted] B5-1

Notwithstanding this concern, we stand ready to work with the FBI and DOJ, as we have previously, to discuss possible ways forward. To that end, we are available to meet with DOJ and FBI leadership to discuss next steps.

Thanks,
Neil

~~[redacted] (o)~~

~~Classified on: 09/30/2016~~

~~Declassify on: 09/30/2026~~

==========

Classification: ~~TOP SECRET~~//~~NOFORN~~

American Center for Law and Justice

QUARTERLY FOIA REPORT

APPENDIX II-A

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

~~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: ~~20070110~~
Declassify On: 20450401

~~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 [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.

~~(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: [redacted]
Derived From: NSA/CSSM 1-52
Dated: 20180110
Declassify On: 20450501

~~(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 Briefer - [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 Briefer - [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)~~

~~(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)~~

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, *et al.*,** Defendants.	Case No. 1:17-cv-01425 (TNM)

MEMORANDUM OPINION

We all wear masks now, but this case is about a different type of masking. By law, intelligence agencies focus their surveillance on foreign persons and cannot intentionally target U.S. persons without individualized court orders. *See* 50 U.S.C. §§ 1881a, 1881b, 1881c. But even when surveilling appropriate targets, they sometimes incidentally capture information about U.S. persons. Intelligence reports typically "mask" the identities of these persons by using generic references such as "U.S. Person 1."

An "unmasking" request is a formal request to reveal the identity of an anonymized person. Unmasking is subject to strict limitations, and only certain high-ranking officials can authorize these requests. *See id.* §§ 1181a(e), 1801(h), 1821(4); Mot. Hr'g Tr. at 4–5.[1] As one might expect, this procedure is highly controversial when a government official seeks the unmasking of a political rival.

[1] *See also* Office of the Dir. of Nat'l Intelligence, Intelligence Cmty. Policy Guidance 107.1, Requests for Identities of U.S. Persons in Disseminated Intelligence Reports (Jan. 11, 2018), https://www.dni.gov/files/documents/ICPG/ICPG-107.1.pdf.

In 2017, media reports surfaced that members of President Trump's campaign and transition team had been caught up incidentally in surveillance by U.S. intelligence agencies. The reports suggested that officials in the outgoing Obama Administration had unmasked these individuals. Citing these reports, the American Center for Law and Justice ("ACLJ") submitted requests under the Freedom of Information Act ("FOIA") to the National Security Agency and the State Department, seeking records related to the alleged unmasking requests.

Both agencies refused to confirm or deny the existence of records responsive to most of ACLJ's requests. As to the rest, the NSA's search yielded no records and State's search yielded several records withheld in full or in part. ACLJ challenges some aspects of this response, and the matter is before the Court on cross-motions for summary judgment. Both motions will be granted in part and denied in part.

I.

In April 2017, Fox News reported that members of the Trump campaign and transition team had been targeted by U.S. Government surveillance activities.[2] According to the report, Susan Rice, National Security Advisor under President Obama, requested the unmasking of these individuals.

Citing this report, ACLJ sent a three-part FOIA request to the NSA. NSA Compl. Ex. A at 1–3, ECF No. 1-1.[3] The request names Rice and four other senior officials in the Obama

[2] *Susan Rice requested to unmask names of Trump transition officials, sources say*, Fox News (Apr. 3, 2017), https://www.foxnews.com/politics/susan-rice-requested-to-unmask-names-of-trump-transition-officials-sources-say.

[3] All page citations refer to the page numbers that the CM/ECF system generates. There are two Complaints because ACLJ filed two separate actions—one for each FOIA request. The "NSA Complaint" is on the docket for No. 17-cv-1425, and the "State Complaint" is on the docket for No. 17-cv-1991. Early on, the Court consolidated the two, and all filings after this consolidation are on the docket for No. 17-cv-1425. *See* Min. Order (Dec. 20, 2017).

Administration: Cheryl Mills, Chief of Staff to the Secretary of State; Valerie Jarrett, Senior Advisor to the President; Loretta Lynch, Attorney General; and Ben Rhodes, Deputy National Security Advisor. *Id.* at 4. Part 1 seeks

> All records . . . where one communicant was Susan Rice, Cheryl Mills, Valerie Jarrett, Loretta Lynch, or Ben Rhodes, and another communicant was the Director of the [NSA] . . . or any other NSA official or employee . . . regarding . . . communication[s], request[s] . . . whereby [Rice, Mills, Jarrett, Lynch, or Rhodes] sought access to . . . SIGINT reports or other intelligence products or reports containing the name(s) or any personal identifying information related to . . . Donald Trump [and 46 other specified individuals.]

Id. at 4–5. Part 2, using similar language, targets any communications from the five Obama Administration officials requesting the unmasking of Trump or the same 46 others. *Id.* at 5–7.[4] And Part 3 more generally seeks any communications between the five officials and the NSA referencing Trump or the 46 others. *Id.* at 7–8. For all three parts, the requested timeframe is "January 20, 2016, to January 20, 2017"—the final year of the Obama Administration. *Id.* at 3.

Invoking Exemptions 1 and 3 of FOIA, the NSA refused to confirm or deny the existence of records responsive to Parts 1 and 2 of ACLJ's request. Kiyosaki Decl. Ex. B at 24–25, ECF No. 37-1. And it found no records responsive to Part 3. *Id.* at 25. All told, ACLJ's FOIA request to the NSA has yielded not one document. ACLJ challenges the NSA's refusal to confirm or deny the existence of records responsive to Parts 1 and 2 and the adequacy of the agency's search as to Part 3. Pl.'s Cross-Mot. at 5–10, ECF No. 39.

Later in 2017, ACLJ sent a similar, six-part FOIA request to the State Department. State Compl. Ex. A, ECF No. 1-1 (17-cv-1991). It cited a report that Samantha Power, President Obama's Ambassador to the United Nations, had requested the unmasking of individuals

[4] Part 2 originally was not limited to Trump and the 46 others, but ACLJ later agreed to narrow Part 2 in this way. *See* Kiyosaki Decl. ¶ 12, ECF No. 37-1.

associated with the Trump transition team. *Id.* at 2.[5] Parts 1, 2, 4, and 5 seek records related to requests Power made to unmask any of the 47 individuals named in the NSA request. *See id.* at 4–11.[6] These four parts concern intelligence-related materials, as they target Power's attempts to access "SIGINT reports or other intelligence products or reports." *Id.*

Parts 3 and 6, meanwhile, more generally seek any communications sent or received by Power referencing Trump or the 46 others. *Id.* at 7–8, 11; *see* Stein Decl. ¶ 6, ECF No. 37-3. For all six parts, the requested timeframe is "January 20, 2016, to January 20, 2017"—the same timeframe as with the NSA request. State Compl. Ex. A at 3.

Invoking FOIA Exemptions 1 and 3, State refused to confirm or deny the existence of records responsive to Parts 1, 2, 4, and 5 of ACLJ's request. Redmond Decl. Ex. B at 26, ECF No. 37-2. In response to Parts 3 and 6, as narrowed, State released 243 records in whole or in part and withheld nine documents in full. Stein Decl. ¶ 12.

ACLJ was unsatisfied. It challenges State's refusal to confirm or deny the existence of records responsive to Parts 1, 2, 4, and 5. Pl.'s Cross-Mot. at 5–8. It also challenges State's decision to withhold portions of 15 documents under Exemption 5 of FOIA. *Id.* at 10–16.

ACLJ does not challenge the adequacy of State's search for records responsive to Parts 3 and 6. And though it raised a "pattern, practice, or policy" claim, *see* State Compl. ¶¶ 64–77, ECF No. 1 (17-cv-1991), its summary judgment briefing never mentions this claim, so the Court considers it abandoned. *See, e.g.*, *Noble Energy, Inc. v. Salazar*, 691 F. Supp. 2d 14, 23 n.6

---

[5] Adam Kredo, *Former U.N. Amb. Power Unmasked 'Hundreds' in Final Year of Obama Admin*, Free Beacon (Aug. 2, 2017), https://freebeacon.com/national-security/former-u-n-amb-power-unmasked-hundreds-last-year-obama-admin/.

[6] Parts 2, 4, and 5 were originally not limited to Trump and the 46 others, but ACLJ later agreed to this narrowed scope. *See* Redmond Decl. ¶ 7, ECF No. 37-2. It is this narrowed scope that is relevant here. *See DeFraia v. CIA*, 311 F. Supp. 3d 42, 47 (D.D.C. 2018).

(D.D.C. 2010); *accord Aliotta v. Bair*, 614 F.3d 556, 562 (D.C. Cir. 2010) ("[P]laintiffs cannot raise on appeal claims they allege in their complaint but abandon at the summary judgment stage."); *Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667, 678 (1st Cir. 1995) ("Even an issue raised in the complaint but ignored at summary judgment may be deemed waived.").

The Court held a hearing on the parties' cross-motions and they are ripe for disposition.[7]

II.

Summary judgment is appropriate if the record shows that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The party seeking summary judgment has the initial burden of identifying those portions of the record that show the lack of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met this burden, the non-moving party must "designate specific facts showing that there is a genuine issue for trial." *Id.* at 324 (cleaned up). The Court views the evidence "in the light most favorable to the non-moving party." *Brubaker v. Metro. Life Ins. Co.*, 482 F.3d 586, 588 (D.C. Cir. 2007).

"[T]he vast majority of FOIA cases can be resolved on summary judgment." *Brayton v. Office of the U.S. Trade Rep.*, 641 F.3d 521, 527 (D.C. Cir. 2011). An agency must establish beyond material doubt that it has conducted an adequate search—one reasonably calculated to uncover all relevant documents. *Morley v. CIA*, 508 F.3d 1108, 1114 (D.C. Cir. 2007). If the agency withholds records under one of the FOIA exemptions, it "bears the burden of proving the

[7] In its reply brief, ACLJ made new arguments based on events that took place in May 2020, after the Government filed its combined reply and opposition brief. Pl.'s Reply at 4–11, ECF No. 43; *see infra* Section III.A. The Court permitted the Government to respond to the new arguments, and it did so. Min. Order (May 22, 2020); *see* Defs.' Sur-Reply, ECF No. 44. ACLJ had an opportunity at the hearing to address the Government's sur-reply. *See* Mot. Hr'g Tr. at 26–39.

applicability of [the] claimed exemptions." *ACLU v. DOD*, 628 F.3d 612, 619 (D.C. Cir. 2011). "[A]n agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible." *Id.* (cleaned up). The agency must also produce any "reasonably segregable portion of a record . . . after deletion of the portions which are exempt." 5 U.S.C. § 552(b).

To meet its burden, an agency may rely on affidavits, *Aguiar v. DEA*, 865 F.3d 730, 734–35 (D.C. Cir. 2017), which receive "a presumption of good faith," *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991). The Court may grant summary judgment based on the agency's affidavits alone "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." *Aguiar*, 865 F.3d at 734–35 (cleaned up).

III.

The parties' cross-motions for summary judgment present three issues: (1) whether the NSA and State properly refuse to confirm or deny the existence of certain documents; (2) whether the NSA's search for records was adequate; and (3) whether State properly withheld portions of 15 documents under Exemption 5 of FOIA. In brief, the Court finds that State improperly refuses to confirm the existence of some documents, that the NSA's search was partially inadequate, and that State's Exemption 5 withholdings were proper.

A.

In response to ACLJ's FOIA requests, the NSA and State both refuse to confirm or deny the existence of intelligence-related records. This refusal is known as a *Glomar* response.[8]

[8] The name derives from the CIA's refusal to confirm or deny whether it had records about Howard Hughes's *Glomar Explorer*, a ship reportedly used to recover a sunken Soviet submarine. *ACLU v. CIA*, 710 F.3d 422, 426 n.1 (D.C. Cir. 2013).

The general rule under FOIA is that agencies "must acknowledge the existence of information responsive to a . . . request" and then either release the information or explain why an exemption justifies withholding it. *Roth v. DOJ*, 642 F.3d 1161, 1178 (D.C. Cir. 2011). But sometimes even admitting the *existence* of records implicates an exemption. If an exemption prevents an agency from acknowledging the existence of records, it can refuse to confirm or deny their existence—a *Glomar* response. *EPIC v. NSA*, 678 F.3d 926, 931 (D.C. Cir. 2012).

When an agency invokes a FOIA exemption to support a *Glomar* response, the same general standard of review applies: the agency's affidavit must be reasonably specific and the justification for invoking the exemption must appear logical or plausible. *Id.* When agencies assert *Glomar* responses in the interest of national security, as commonly happens, they get a healthy dose of deference. *See Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007) ("[I]n the context of national security concerns, courts must accord *substantial weight* to an agency's affidavit concerning the details of the classified status of the disputed record." (cleaned up)).

Unsurprisingly, there are caveats to the *Glomar* doctrine. One is that an agency cannot refuse to confirm or deny the existence of records if it has, in fact, officially acknowledged their existence. A plaintiff "can overcome a *Glomar* response by showing that the agency has already disclosed the fact of the existence (or nonexistence) of responsive records, since that is the purportedly exempt information that a *Glomar* response is designed to protect." *ACLU v. CIA*, 710 F.3d 422, 427 (D.C. Cir. 2013). The plaintiff has the burden of pointing to an official disclosure in the public domain that establishes the existence (or not) of responsive records. *Id.*

This point bears emphasis: the question is whether the agency has acknowledged the *existence* (or nonexistence) of responsive records, *not* whether it has disclosed the *contents* of the records. *Id.* If the agency has officially acknowledged the existence of records, it cannot assert a

Glomar response for those records. *Wolf*, 473 F.3d at 379. Bereft of its *Glomar* shield, the agency has a decision to make, the same one it has in any standard FOIA case: either disclose the records or establish that their *contents* are exempt from disclosure. *See id.* at 379–80.

Here, the NSA asserts *Glomar* responses for Parts 1 and 2 of ACLJ's request to it, and State asserts *Glomar* responses for Parts 1, 2, 4, and 5 of ACLJ's request to it. All these parts seek records related to alleged requests by Obama Administration officials to access intelligence reports. In refusing to confirm or deny the existence of such records, both agencies rely on FOIA Exemptions 1 and 3.

Exemption 1 protects matters "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" and "in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). Both agencies invoke Executive Order 13,526, which authorizes the classification of information about intelligence activities, sources, and methods. Exec. Order No. 13,526, § 1.4(c), 75 Fed. Reg. 707 (Dec. 29, 2009). Their affidavits adequately detail why "the fact of the existence or nonexistence" of responsive records is properly classified under this Executive Order. Kiyosaki Decl. ¶¶ 15–22, ECF No. 37-1; Redmond Decl. ¶¶ 9–21, ECF No. 37-2.

Exemption 3 covers matters "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3). Both agencies cite 50 U.S.C. § 3024(i)(1), and the NSA also relies on 50 U.S.C. § 3605 and 18 U.S.C. § 798. The agencies' declarations adequately explain why "the fact of the existence or nonexistence" of responsive records is exempt from disclosure under these statutes. Kiyosaki Decl. ¶¶ 23–28; Redmond Decl. ¶¶ 22–23.

The Court need not discuss Exemptions 1 and 3 further, because ACLJ does not challenge either agency's reliance on these exemptions. Instead, it contends that both agencies

have waived their *Glomar* responses by officially acknowledging the existence of responsive records. Pl.'s Cross-Mot. at 5–8.

In support of this argument, ACLJ first points to statements that Obama Administration officials made *after* leaving office. *See id.* at 4, 7–8; Pl.'s Statement of Add. Material Facts ("PSAMF") ¶¶ 24–28, ECF No. 39-1. By relying on these statements, ACLJ invites the Court to accept that statements made by former agency officials can constitute the sort of "official acknowledgment" that overcomes a *Glomar* response.

The Court declines this invitation. A "disclosure made by someone other than the agency from which the information is being sought" is not an "official" disclosure. *Frugone v. CIA*, 169 F.3d 772, 774 (D.C. Cir. 1999). The D.C. Circuit has "squarely rejected the argument that statements in books written by former [CIA] agents could be considered *official* disclosures." *Pub. Citizen v. Dep't of State*, 11 F.3d 198, 201–02 (D.C. Cir. 1993). Courts have consistently found that statements by former agency officials are not official agency disclosures. *See Hudson v. River Sloop Clearwater, Inc. v. Dep't of the Navy*, 891 F.2d 414, 421–22 (2d Cir. 1989); *James Madison Project v. DOJ*, 302 F. Supp. 3d 12, 27–28 (D.D.C. 2018).

ACLJ cites no decision to the contrary, which is unsurprising. It would be surpassing strange if an agency had to confirm the existence of records—and in doing so, compromise national security—simply because a private citizen no longer representing the agency forces its hand.

ACLJ also suggests that members of Congress can waive *Glomar* responses. *See* Pl.'s Cross-Mot. at 8. But disclosures by members of Congress—much like disclosures by former agency officials—are also not official agency disclosures. *See Frugone*, 169 F.3d at 774; *accord Schaerr v. DOJ*, 435 F. Supp. 3d 99, 118 (D.D.C. 2020) ("Congressman Nunes serves in the

legislature, not the executive branch, and does not speak for the agency."). A contrary rule would almost certainly raise significant constitutional problems, as this would invite congressional encroachment on the Executive's authority to control access to national security information. *See Fitzgibbon v. CIA*, 911 F.2d 755, 765–66 (D.C. Cir. 1990).

By citing press reports on the alleged unmasking requests, *see* PSAMF ¶¶ 24–28, ACLJ suggests that the media can waive *Glomar* responses. Not so. *See EPIC*, 678 F.3d at 933 n.5; *Knight First Amendment Inst. v. CIA*, 424 F. Supp. 3d 36, 44 (D.D.C. 2020). ACLJ also posits that "[f]or purposes of overcoming a *Glomar* response . . . [w]hat is important is that [the fact of unmasking requests] is now widely known." Pl.'s Cross-Mot. at 8. Again, ACLJ is mistaken. *See Wolf*, 473 F.3d at 378 ("An agency's official acknowledgment of information by prior disclosure . . . cannot be based on mere public speculation, no matter how widespread.").

Perhaps recognizing the weakness of these arguments, ACLJ tries a different tack in its reply brief. *See* Pl.'s Reply at 3–4, ECF No. 43. It urges that two recent disclosures overcome the agencies' *Glomar* responses. *Id.* at 4–11.[9] Here, matters become more complicated.

1.

The first disclosure comes from then-Acting Director of National Intelligence ("DNI") Richard Grenell. On May 4, 2020, the NSA issued a memorandum "pursuant to the oversight authorities vested with the [DNI]" that provides "a revised list of identities of any officials who submitted requests to the [NSA] 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

[9] Though ACLJ makes this argument for the first time in its reply brief, that is appropriate here because the relevant disclosures occurred in May 2020, after ACLJ submitted its first brief. In responding to ACLJ's reply brief, the Government tackles the new argument on the merits and does not contend that ACLJ forfeited it. *See* Defs.' Sur-Reply at 1–6.

(USA-Ret.)." Sisney Decl. Ex. 2 at 5, ECF No. 43-1. Samantha Power is among the listed officials. *Id.* at 6. Grenell declassified the memorandum shortly after it was issued and sent it to two Senators. *Id.* at 4; Sisney Decl. ¶¶ 2–3.

In its briefing, the Government acknowledged that this disclosure can in theory waive the NSA's *Glomar* responses, though it suggested that a DNI's disclosure can *never* waive State's *Glomar* responses. *See* Defs.' Sur-Reply at 2–3, ECF No. 44. But at oral argument, the Government changed course on the latter point, conceding that the DNI's disclosure *can* vitiate the intelligence-related *Glomar* responses that State asserts here. Mot. Hr'g Tr. at 10.[10] The only question now is whether the Acting DNI's disclosure here *does* overcome State's (or the NSA's) *Glomar* responses. Answering this requires close attention to exactly what the declassified memorandum discloses, for a *Glomar* waiver occurs only when the official disclosure "matches . . . the specific request for that information." *Wolf*, 473 F.3d at 379.

On this issue, both parties stake out absolute positions. The Government contends that the relevant disclosure is not specific enough to establish the existence of *any* records responsive to ACLJ's requests. *See* Defs.' Sur-Reply at 2–4. ACLJ, meanwhile, urges that the disclosure establishes the existence of at least *some* records responsive to the State request, and it suggests that this waives *all* of State's (and the NSA's) *Glomar* responses. *See* Pl.'s Reply at 7–8. The

[10] The Court agrees with the Government's concession. One agency's disclosure generally cannot vitiate the *Glomar* response of an unrelated agency, but that rule "does not apply . . . where the disclosures are made by an authorized representative of the agency's parent." *ACLU*, 710 F.3d at 429 n.7. The DNI is State's "parent" for purposes of its *Glomar* responses. The State Department office tasked with substantiating the agency's *Glomar* responses was the Bureau of Intelligence and Research ("INR"), *see* Redmond Decl. ¶¶ 1, 5, 8, a member of the U.S. Intelligence Community, 50 U.S.C. § 3003(4)(I). The DNI "serve[s] as head of the [I]ntelligence [C]ommunity," *id.* § 3023(b)(1), and the INR reports to the DNI, *see* Redmond Decl. ¶ 2. Given the DNI's "parent" status, its disclosures are "official acknowledgments" across all subordinate intelligence units, including the INR. *See Knight First Amendment Inst.*, 424 F. Supp. 3d at 42–44.

Court rejects both positions: the disclosure is specific enough to establish the existence of *some* responsive records, but it waives State's *Glomar* responses for those records only and waives none of the NSA's *Glomar* responses.

The case law demands precision when analyzing the scope of a *Glomar* waiver. "Prior disclosure of similar information does not suffice; instead, the *specific* information sought by the plaintiff must already be in the public domain by official disclosure." *Wolf*, 473 F.3d at 378. This "insistence on exactitude" honors "the Government's vital interest in information relating to national security." *Id.* (cleaned up). Indeed, "the fact that information resides in the public domain does not eliminate the possibility that further disclosures can cause harm to intelligence sources, methods, and operations." *Fitzgibbon v. CIA*, 911 F.2d 755, 766 (D.C. Cir. 1990).

The message is clear: hold agencies to their official disclosures but be precise, lest courts force them to release sensitive information they have not actually disclosed. The D.C. Circuit thus has consistently rejected the "claim that public disclosure of *some* information overlapping with [the] content of requested material results in waiver as to *all* information." *Wolf*, 473 F.3d at 378 (emphasis added) (citing *Military Audit Project v. Casey*, 656 F.2d 724, 752–53 (D.C. Cir. 1981)); *see also Pub. Citizen*, 11 F.3d at 202–03; *Fitzgibbon*, 911 F.2d at 765–66.

Consider *Wolf*. The plaintiff's FOIA request to the CIA in that case sought "all records about Jorge Eliecer Gaitan" (a former Colombian politician), but the agency refused to confirm or deny the existence of such records. 473 F.3d at 378. To overcome this *Glomar* response, the plaintiff pointed to "CIA Director Hillenkoetter's testimony before the Congress in 1948." *Id.* at 379. That testimony revealed the existence of some records about Gaitan. *Id.* But—critically—the court did not order the CIA to acknowledge the existence of *all* records it had about Gaitan. Instead, the court emphasized that "[t]he CIA's official acknowledgement waiver relate[d] only

to the existence or nonexistence of the records about Gaitan disclosed by Hillenkoetter's testimony." *Id.* So the plaintiff was "entitled to disclosure of that information, namely the existence of CIA records about Gaitan that have been previously disclosed (*but not any others*)." *Id.* (emphasis added). The *Glomar* waiver had a narrow and limited scope.

So too here. The declassified memorandum encloses "a list of recipients who may have received [Flynn's] identity in response to a request . . . to unmask an identity that had been generically referred to in an NSA foreign intelligence report." Sisney Decl. Ex. 2 at 6. The list consists of "select identified principals," including Power. *Id.* "[A]uthorized individuals requested unmaskings . . . *for* [these] select identified principals." *Id.* (emphasis added). So the memorandum acknowledges that individuals made requests, on behalf of Power, to unmask Flynn. In doing so, it establishes the existence of records relating to these requests, as the Government concedes. *See* Defs.' Sur-Reply at 3. And even more narrowly, the memorandum lists only six dates on which these requests were made. Sisney Decl. Ex. 2 at 6.

This disclosure is not specific enough to establish the existence of *most* records the Government refuses to acknowledge. The NSA asserts a *Glomar* response for Parts 1 and 2 of ACLJ's FOIA request, which target unmasking requests from Susan Rice, Cheryl Mills, Valerie Jarrett, Loretta Lynch, and Ben Rhodes. NSA Compl. Ex. A at 4–7. The declassified memorandum lists several principals, but *not* Rice, Mills, Jarrett, Lynch, or Rhodes. Sisney Decl Ex. 2 at 6–8. Given the precision the case law demands, this silence "makes a difference." *James Madison Project*, 302 F. Supp. 3d at 31–32 (citing *Wolf*, 473 F.3d at 373–74, 378). The memorandum does not establish the existence of any records of unmasking requests from Rice, Mills, Jarrett, Lynch, or Rhodes, so it fails to overcome the NSA's *Glomar* responses.

The same is true for Parts 4 and 5 of ACLJ's request to State. Both parts seek

> All records . . . regarding in any way . . . *requests from [Power] . . . regarding "minimization procedures"* in connection with . . . requests made by [Power] . . . regarding the "unmasking" of or access to the "unmasked" names or other personal identifying information of [Donald Trump and 46 others] contained in SIGINT reports or other intelligence products or reports[.]

State Compl. Ex. A at 8, 10 (emphasis added). The declassified memorandum references no "requests from [Power] . . . regarding 'minimization procedures.'" Sisney Decl. Ex. 2 at 5–8. So it does not establish the existence of documents responsive to Parts 4 or 5.

Parts 1 and 2 of the State request present a closer question. Part 1 seeks

> All records . . . *where one communicant was [Power]* . . . and where another communicant was the Director of the [NSA] . . . or any other NSA official or employee . . . which regards in any way . . . any communication, request . . . 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 [Donald Trump and 46 others.]

State Compl. Ex. A at 4–5 (emphasis added). Part 2, meanwhile, targets

> All records . . . *regarding in any way . . . requests from [Power]* . . . made to the Director of the [NSA] . . . or any other NSA official or employee . . . requesting the "unmasking" of or access to the "unmasked" names or other personal identifying information of [Donald Trump and 46 others] contained in SIGINT reports or other intelligence products or reports[.]

Id. at 5–7 (emphasis added).

For both Parts, the Government advances the same argument. It notes that the declassified memorandum mentions only unmasking requests made "for" Power—that is, on behalf of Power. *See* Defs.' Sur-Reply at 3. This, it urges, is not specific enough to establish the existence of records responsive to Parts 1 or 2, because both parts seek only "records in which [Power] was a 'communicant.'" *Id.*

The Court rejects this argument as to Part 2. That part is not limited to records in which Power was a "communicant." It more broadly seeks records "regarding in any way . . .

[unmasking] requests from [Power]." State Compl. Ex. A at 5. So it comes down to this: are unmasking requests made *on behalf of* Power equivalent to unmasking requests *from* Power?

By identifying Power as a "principal," the memorandum itself establishes that she was in a principal-agent relationship with the "authorized individuals" who made requests "for" her. Sisney Decl. Ex. 2 at 6. A defining feature of this sort of relationship is the principal's control over the agent. *See, e.g.*, *CIR v. Banks*, 543 U.S. 426, 436 (2005); Restatement (Third) of Agency § 1.01 (Am. Law. Inst. 2006). For this reason, the law generally attributes an agent's actions to the principal when the agent acts within the bounds of his authority. *See, e.g.*, *Salyers v. Metro. Life Ins. Co.*, 871 F.3d 934, 939 (9th Cir. 2017); Restatement (Third) of Agency § 2 intro. note; *see also McKesson Corp. v. Islamic Rep. of Iran*, 52 F.3d 346, 351–52 (D.C. Cir. 1995) (discussing whether a principal-agent relationship existed and thus whether the actions of the alleged agent could be attributed to the alleged principal). And there is no suggestion here that in making the requests, the "authorized individuals" were acting beyond the scope of their agency relationship with Power. So here, the requests from Power's subordinates were requests *from her*.

This result should be commonsense for anyone who works in a hierarchical organization, like the government. A communication "on behalf of the principal" is equivalent to a communication "from the principal." Consider some examples close to home. If a law clerk emails counsel on behalf of the judge, counsel is well advised to view that email as "from" the judge, even though the judge did not type the email. And if an AUSA files a brief, it comes with the imprimatur of the U.S. Attorney, even if he did not personally review it.

At oral argument, the Government's position on this issue shifted slightly. It suggested that the declassified memorandum does not refer to unmasking requests made *on behalf of*

Power. *See* Mot. Hr'g Tr. at 5–9, 49. Instead, it suggested, the memorandum refers simply to unmasking requests by individuals whom Power "authorized" at some indeterminate point—perhaps long ago—to make these requests. *See id.* And, it speculated, these individuals were making the requests for their own devices and without Power's knowledge. *See id.*

This shift in argument changes little. For one, the Government's speculation finds scant support in the memorandum's language. The only hint that Power's subordinates were making the unmasking requests for their own devices is the memorandum's proviso that the principals may not have personally seen the unmasked information. *See* Sisney Decl. Ex. 2 at 6. But that is a thin reed, especially when the memorandum also states that the "authorized individuals" made the unmasking requests "for" the principals. *Id.*; *see* Defs.' Sur-Reply at 3. It says nothing about subordinates making the requests for *themselves* or without the principal's knowledge. In fact, the memorandum's cover page describes the enclosed list as giving the "*identities* of any officials *who submitted requests* . . . to unmask . . . Flynn." Sisney Decl. Ex. 2 at 5 (emphasis added). As the list provides only the identities of the principals—not their subordinates—the cover page itself suggests that these unmasking requests were truly *from* the principals, including Power.

And even if the Government's speculation were accurate, this would make no difference. As noted, there is no suggestion that the "authorized individuals" making the unmasking requests were acting outside the bounds of the authority that Power gave them. Given that, these requests made "for" Power—the principal—are attributable to her, no matter how long ago she authorized

her agents, no matter if she knew about the requests, and no matter if the agents had personal reasons for making the requests. *See* Restatement (Third) of Agency §§ 1.01 cmt. f, 3.06, 5.03.[11]

In sum, because the declassified memorandum establishes the existence of records about unmasking requests *from* Power, it waives State's *Glomar* response as to Part 2 of ACLJ's request. But importantly, the scope of the waiver is narrow. The memorandum references only requests to unmask Lt. Gen. Michael Flynn, not anyone else. Given this silence, it does not establish the existence of unmasking records for any of the 46 others named in ACLJ's request. As discussed, the law demands exactitude when defining the scope of a *Glomar* waiver, even the smallest mismatch precludes waiver. *See Wolf*, 473 F.3d at 378–79. As the memorandum never mentions the 46 individuals other than Flynn, it is unavailing for those individuals. So the *Glomar* waiver for Part 2 extends only to Flynn, not any of the 46 others.

The applicable dates for the waiver are also limited. In *Fitzgibbon*, for example, the D.C. Circuit "rejected the argument that congressional testimony establishing the existence of a CIA station in the 1960s waived . . . 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." *Id.* at 378 (citing 911 F.2d at 765–66). Here, the timeframe specified in ACLJ's FOIA request is "January 20, 2016, to January 20, 2017." State Compl. Ex. A at 3. The six dates listed under Power's name in the memorandum all fall into that range, *see* Sisney Decl. Ex. 2 at 6, so the unmasking requests made on those six dates are fair game. But no more than that.

---

[11] The Government admits that the declassified memorandum would be a match with Part 2 if that part had mentioned unmasking requests "indirectly from" Power, as opposed to requests "directly from" her. *See* Mot. Hr'g Tr. at 7–8. Even assuming a meaningful difference exists between "indirectly from" and "directly from" in this context, the Government's admission still effectively concedes the point, for ACLJ did not use the words "directly from." Rather, Part 2 seeks records "regarding in any way . . . requests *from* [Power]," without limiting itself to requests "directly from" her. State Compl. Ex. A at 5 (emphasis added).

In other words, the existence of requests made on November 30, December 2, December 7, December 14, December 23 (all in 2016), and January 11, 2017, *id.*, does not establish the existence of unmasking requests made on any other dates. So the *Glomar* waiver for Part 2 extends only to the unmasking requests made on those six dates.

Consistent with the above, State no longer can assert a *Glomar* response—for Part 2—for records about the unmasking requests referenced in the declassified memorandum. Here, that means requests made on behalf of Power to unmask Flynn, on the six dates specified in the memorandum. State now must either turn over these records or else establish that their *contents* are exempt from disclosure. *See Wolf*, 473 F.3d at 380.

There is a final bit of housekeeping on this point. The Court need not decide whether the declassified memorandum overcomes any portion of State's *Glomar* response for Part 1 of ACLJ's request. At oral argument, the parties agreed that the Court need not decide this if it concludes—as it has—that the memorandum overcomes State's *Glomar* response for Part 2. *See* Mot. Hr'g Tr. at 38 (ACLJ), 53–54 (Government).

2.

The other recent disclosure that ACLJ relies on is a transcript of Power's testimony before the House Permanent Select Committee on Intelligence in October 2017. Pl.'s Reply at 8–11. Her testimony, standing alone, consists of statements by a *former* official, so it cannot overcome either agency's *Glomar* responses, as explained above.

ACLJ tries to surmount this by claiming the transcript was "declassified by the Intelligence Community." Pl.'s Corrected Reply at 8, ECF No. 46. This argument suffers from several problems. For one, ACLJ provides no evidence that the Intelligence Community declassified the transcript. Its accompanying declaration states simply that "[o]n May 8, 2020,

the [Committee] released the transcript of the testimony provided by [Power] before the [C]ommittee in Executive Session [in October 2017]." Sisney Decl. in Corrected Reply Br. ¶ 4, ECF No. 46-1. And the transcript itself reveals nothing about whether the Intelligence Community declassified it. Sisney Decl. Ex. 3 at 10–30, ECF No. 43-1.

ACLJ also does not explain *who* in the Intelligence Community declassified it or whether that official or entity enjoys "parent" status relative to the NSA or State. *See supra* note 10. Nor does ACLJ seek to explain how declassification of a transcript containing statements by a former agency official might convert those statements into official agency disclosures. Does declassification mean that the Intelligence Community stands by Power's statements? We are left to speculate, because ACLJ is silent on all these points.

Recall that the plaintiff has the burden of pointing to an official disclosure in the public domain that overcomes a *Glomar* response. *ACLU*, 710 F.3d at 427. Thus, because ACLJ offers no evidence that the transcript represents an official disclosure, it cannot rely on it to overcome any *Glomar* responses.

And even if the transcript were an official disclosure, that still would not help ACLJ. Nothing that Power states in the transcript is specific enough to establish the existence of any records subject to the agencies' *Glomar* responses.

ACLJ contends that Power admitted making unmasking requests for "persons affiliated with the Trump Campaign and the incoming Trump Administration." Pl.'s Reply at 11. That is inaccurate. Though members of the Committee asked her about unmasking, she never admitted making requests to unmask members of the Trump campaign and transition team, let alone any of the 47 specific individuals named in ACLJ's FOIA requests. *See* Sisney Decl. Ex. 3 at 10–30.

Indeed, the only individual Power ever mentioned is Michael Flynn, and she claimed to have "no recollection of making a request related to [him]." *Id.* at 21.

Given the precision that the law demands in the *Glomar* context, this transcript—even if it represents an official disclosure—does not overcome either agency's *Glomar* responses.

B.

The NSA did not assert a *Glomar* response for Part 3 of ACLJ's request, which seeks

> All records . . . created, generated, forwarded, transmitted, sent, shared, saved, received, or reviewed by the Director of the [NSA], 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, where one communicant was [Rice, Mills, Jarrett, Lynch, or Rhodes] and another communicant was any NSA official or employee, containing any reference to the term "Trump" or names or other personal identifying information of [Donald Trump and 46 others.]

NSA Compl. Ex. A at 7–8. The agency's search yielded no records responsive to Part 3. Kiyosaki Decl. Ex. B at 25. ACLJ challenges the adequacy of this search.

To show an adequate search, the agency must "demonstrate beyond material doubt that its search was reasonably calculated to uncover all relevant documents." *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995) (cleaned up). The adequacy of a search "is generally determined not by [its] fruits . . . but by the appropriateness of the methods used to carry [it] out." *Iturralde v. Compt. of Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003).

To carry its burden, an agency can submit 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). Courts give these affidavits "a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents." *SafeCard Servs., Inc*, 926 F.2d at 1200 (cleaned up). Searching for records

requires "both systemic and case-specific exercises of discretion and administrative judgment and expertise," so it "is hardly an area in which the courts should attempt to [micromanage] the executive branch." *Schrecker v. DOJ*, 349 F.3d 657, 662 (D.C. Cir. 2003).

ACLJ raises two objections to the NSA's search. First, it complains about the agency's decision to search the records of only three NSA officials. The agency's declaration explains that Part 3 "specifically requested records in which [Rice, Mills, Jarrett, Lynch, or Rhodes] was a direct communicant." Kiyosaki Decl. ¶ 29. Because all five occupied "senior positions," only "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 [NSA] and [the five]." *Id.* Thus, the agency searched only the records of the Director, the Deputy Director, and the Executive Director. *Id.*

ACLJ believes this search was too limited. Pl.'s Cross-Mot. at 9. It notes that Part 3 seeks records "sent [and] received" by a host of other NSA employees: "the Chief of the Central Security Service, SIGINT production organization personnel, the Signals Intelligence Director, Deputy Signals Intelligence Director, [and] the Chief/Deputy/Senior Operations Officers of the National Security Operations Center." *Id.* ACLJ demands that the NSA search the records of all these employees too, *id.*, though in reply, it omits any reference to "SIGINT production organization personnel," Pl.'s Reply at 13. ACLJ also faults the NSA for providing "no citation to a policy or standard practice" supporting a decision to search the records of only three officials. Pl.'s Cross-Mot. at 9.

The Court disagrees with ACLJ here. A plaintiff has no authority to dictate the scope of an agency's search. *See Mobley v. CIA*, 806 F.3d 568, 582 (D.C. Cir. 2015). While a "well defined" FOIA request may go a long way to expose deficiencies, *see DiBacco v. Dep't of the*

Army, 926 F.3d 827, 832 (D.C. Cir. 2019), ACLJ's request was not well defined. It sought records "sent or received" by all "SIGINT production organization personnel" and, as a catch-all, "any other NSA official or employee." NSA Compl. Ex. A at 7. And it defined the term "NSA official" to encompass not only agency employees but also any person "contracted for services by or on behalf of the NSA." *Id.* at 3. So if the agency had adhered to ACLJ's proposed scope, it would have searched the records of every NSA employee and contractor.

The agency need not do this, as even ACLJ now concedes. *See* Pl.'s Reply at 13. ACLJ's reply brief omits any reference to "SIGINT production organization personnel" and "any other NSA official or employee." *Id.* In doing so, it admits that the request posed a line-drawing problem for the agency and that drawing the line somewhere short of *all* employees was proper. *See Meeropol v. Meese*, 790 F.2d 942, 956 (D.C. Cir. 1986) ("[A]dequacy is measured by the reasonableness of the effort in light of the specific request.").

The NSA drew that line at the Director, the Deputy Director, and the Executive Director, because these officials, it reasoned, would have been copied on any correspondence with the five senior Obama Administration officials that ACLJ named. Kiyosaki Decl. ¶ 29. That rationale, supported by an affidavit, *id.*, is entitled to a presumption of good faith. *SafeCard Servs., Inc.*, 926 F.2d at 1200. And it is eminently reasonable to believe that high-ranking Administration officials would have communicated with their peers at the NSA, not career subordinates.

ACLJ tries to rebut the good-faith presumption only with speculation that responsive records may exist with other officials, *see* Pl.'s Cross-Mot. at 9; Pl.'s Resp. to Defs.' Statement of Material Facts ¶ 5, ECF No. 39-1; Pl.'s Reply at 12–13, but this is not enough. *SafeCard Servs., Inc.*, 926 F.2d at 1200. As for ACLJ's suggestion that the NSA had to cite "a policy or standard practice" justifying its decision, Pl.'s Cross-Mot. at 9, no such requirement exists. To

the contrary, the law recognizes that FOIA searches often involve "case-specific exercises of discretion and administrative judgment and expertise." *Schrecker*, 349 F.3d at 662.

ACLJ's second objection concerns the NSA's initial search terms. Here, ACLJ is on firmer footing. The agency devotes a single sentence to this subject in its declaration, explaining that it "us[ed] various permutations of the officials' names (e.g., susan rice, srice, rice susan) to identify an initial subset of records." Kiyosaki Decl. ¶ 30. That's it.[12]

ACLJ has two problems with this explanation. First, it questions how the NSA's chosen permutations would have captured any records associated with the government email address of Cheryl Mills—MillsCD@state.gov. Pl.'s Cross-Mot. at 9–10 (citing PSAMF ¶ 29).[13] Second, it argues that the agency's initial search terms certainly would not have captured any records associated with an email alias that Loretta Lynch used—"Elizabeth Carlisle." *Id.* (citing PSAMF ¶ 30).

These are related complaints, but there are key differences between them. Two cases illuminate these differences. Consider first *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321 (D.C. Cir. 1999), which emphasized an agency's duty "to follow through on obvious leads to discover requested documents." *Id.* at 325. The Coast Guard's own FOIA search revealed that

[12] After identifying the "initial subset of records," the agency eliminated "[r]ecords that were outside of the request's time frame." Kiyosaki Decl. ¶ 30. It then identified "records in which one of the officials was a communicant (on the to, from, cc, or bcc line)" and eliminated all others. *Id.* And it reviewed the remaining records to identify those that "contained any reference to any of the 47 listed individuals," finding none. *Id.* ACLJ does not challenge these aspects of the search. *See* Pl.'s Cross-Mot. at 9–10.

[13] ACLJ also questions how the NSA's initial search terms would have found records associated with a personal email address that Mills allegedly used for official communications—Cheryl.mills@gmail.com. Pl.'s Cross-Mot. at 9–10 (citing PSAMF ¶ 29). But the Court finds it clear that at least one of the agency's permutations—"cheryl mills"—would have captured this address. *See* Kiyosaki Decl. ¶ 30.

responsive documents "may be located at [a] federal records center in Georgia," but it inexplicably declined to probe this location. *Id.* at 325, 327. This "positive indication[] of overlooked materials" made the Coast Guard's search inadequate. *Id.* at 327.

At the same time, an agency "is not required to speculate about potential leads." *Kowalczyk v. DOJ*, 73 F.3d 386, 389 (D.C. Cir. 1996). Kowalczyk sent a request to the FBI's D.C. headquarters, asking for records associated with "Federal case number 88 CR 701." *Id.* at 388. Five months later, he sent an "appeal" letter, which described his original request as one for records associated with "Criminal Case Number 88 CR 701, in the Eastern District of New York." *Id.* He insisted that the FBI should have searched its New York field office, not just its D.C. headquarters, but the Circuit rejected this.

The analysis proceeded in two steps. The court first disregarded the plaintiff's "appeal" letter, which the FBI had received months after it searched for records responsive to the original request. *Id.* Agencies have no "obligation to search anew based upon a subsequent clarification." *Id.* Then, the court found that nothing in the original request (which did not mention New York) or the FBI's search would have enabled the agency to determine that the New York office had responsive records. *Id.* at 389. The FBI might have "speculated" about this potential lead, but an agency "is not obliged to look beyond the four corners of the request for leads." *Id.* And "if the *requester* discovers leads in the documents he receives from the agency, he may pursue those leads through a second FOIA request." *Id.* (emphasis added).

Read together, *Valencia-Lucena* and *Kowalczyk* establish complementary principles. Under *Valencia-Lucena*, an agency must follow clear leads apparent from the FOIA request or that it discovers during its search. But under *Kowalczyk*, an agency is not responsible for leads that it could not have been expected to discover. And an agency need not search anew based on

late-breaking clarifications from a plaintiff; if the plaintiff discovers leads, he can always submit a new FOIA request.

Here, *Valencia-Lucena* governs the issue with Mills's government email and *Kowalczyk* governs the issue with Lynch's alias. In its FOIA request, ACLJ specifically asked the NSA to search records associated with the government email accounts of the named officials, *see* NSA Compl. Ex. A at 3, 8, and the agency does not seriously dispute that it learned of Mills's government account during its search, *see* Mot. Hr'g Tr. at 12, 15–18, 51–52. Yet it is far from clear that the agency's initial search terms would have captured any records associated with this account. The declaration's mere sampling of permutations by "e.g.," *see* Kiyosaki Decl. ¶ 30, does not cut it. The only permutations it lists, as applied to Mills, are "cheryl mills," "cmills," and "mills cheryl." *Id.* Would any of these permutations capture the email address itself (MillsCD@state.gov)? "MillsCD" (or even just "mills") is not among the listed permutations. We are left to speculate. The NSA ultimately admits that it is "not entirely clear from the declaration" whether its search terms would have picked up the address. *See* Mot. Hr'g Tr. at 16.

The agency suggests that its permutations would have at least yielded emails that Mills signed with her name. *Id.* at 12–13. Even if Mills were the rare official who signed all her emails, this still does not fly. A search for "cheryl mills" might capture emails containing a block signature, but it seemingly would not capture emails containing a one-name signature ("Cheryl") or initials ("CDM").

In short, the NSA was aware of Mills's government email, but it fails to show that it performed a search reasonably calculated to uncover records associated with that address. This is barely any improvement on *Valencia-Lucena*, in which the agency declined to search a records center in Georgia that it knew likely contained responsive documents. The NSA's search-term

permutations here leave much to be desired—it's as if the agency went looking for the Georgia records by searching a location in Alabama. Its search was inadequate in this respect.[14]

Lynch's alias is a different story. The parties agree on the timeline: ACLJ sent its FOIA request to the NSA in April 2017, and Lynch's use of the alias was publicly exposed that August. *Id.* at 41, 50–51. Unlike with its FOIA request to State in August, ACLJ's FOIA request to the NSA did *not* specifically ask the agency to consider aliases in its search. *Compare* NSA Compl. Ex. A at 4–8, *with* State Compl. Ex. A at 4–5, 7–8, 10–11. So for starters, the "four corners" of ACLJ's request did not give the NSA a lead to aliases, for Lynch or anyone else. *Kowalczyk*, 73 F.3d at 389.

And there is no suggestion that the agency discovered Lynch's use of the alias during its search. Nor could the Court reasonably expect this. After all, Lynch was the Attorney General, not an NSA official. If she had been an NSA employee, a different analysis would apply. But the inundated staffers in our Nation's FOIA offices cannot be expected to track the use of aliases by officials at different agencies. ACLJ suggests that Lynch's alias was a major media story when it surfaced, Mot. Hr'g Tr. at 46, but that seems unlikely. It may have been a juicy bit of news for politicos and pundits, but probably not for FOIA staffers or the rest of America. And as we know, the D.C. news cycle moves quickly.

[14] ACLJ requests documents in the timeframe of January 20, 2016, to January 20, 2017, NSA Compl. Ex. A. at 3, yet based on public record, Mills left the State Department in 2013. So it seems possible the NSA will not find any records associated with Mills's government email account in the 2016–2017 timeframe, even if the agency uses a broader range of initial search terms. But the Government has nowhere offered this line of reasoning as a basis to uphold the adequacy of the NSA's search about Mills. *See* Defs.' Mot. at 25–26, ECF No. 37; Defs.' Reply at 16–18, ECF No. 41; Mot. Hr'g Tr. at 11–19, 51–52. The Court will not sua sponte uphold the adequacy of the search on a ground the agency has not proposed.

In *Kowalczyk*, the FBI at least had enough information to speculate that its New York office had relevant records. 73 F.3d at 389. Here, because the NSA had no reason to be aware of Lynch's alias, it had no basis even to speculate about that potential lead. More, Kowalczyk lost despite mentioning New York in his follow-up "appeal" letter. *Id.* at 388. Here, ACLJ apparently did not even alert the NSA when it learned of Lynch's alias. *See* Mot. Hr'g Tr. at 19–20, 42, 51. Having discovered this lead after sending its original request, ACLJ's path forward was—and remains—clear: send a second FOIA request. *See Kowalczyk*, 73 F.3d at 389.

C.

State did not assert a *Glomar* response for Parts 3 and 6 of ACLJ's request. As narrowed, these parts seek communications between Power and any NSA employee referencing Trump or the 46 others, as well as any records "sent [or] received by Power" referencing these individuals. Stein Decl. ¶ 6. After a search, State released 243 records in whole or in part, "with redactions based on FOIA Exemptions 1, 5, and 6." *Id.* ¶ 12. It also withheld nine documents in full. *Id.* ACLJ contests the agency's partial withholding of 15 documents under Exemption 5. *Id.* ¶ 13.

Exemption 5 protects "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). It "incorporates the privileges that the Government may claim when litigating against a private party," including the deliberative process privilege and attorney-client privilege. *Abtew v. DHS*, 808 F.3d 895, 898 (D.C. Cir. 2015).

To qualify for the deliberative process privilege, a document must be both predecisional and deliberative. *Id.* A document is "predecisional" if it precedes, in time, the decision to which it relates. *Id.* A document is "deliberative" if it reflects the give-and-take by which a decision is

made. *Id.* at 899. The privilege encompasses factual material if it is "inextricably intertwined" with deliberative material. *Judicial Watch, Inc. v. DOJ*, 432 F.3d 366, 372 (D.C. Cir. 2005).

The privilege generally protects "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975). This protection "rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance the quality of agency decisions by protecting open and frank discussions among those who make them." *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8–9 (2001) (cleaned up).

The attorney-client privilege similarly encourages clients "to be as open and honest as possible with attorneys." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). The privilege is "not limited to communications made in the context of litigation or even a specific dispute, but extends to all situations in which an attorney's counsel is sought on a legal matter." *Id.* It also protects "an attorney's written communications to a client." *Id.*

The 15 documents at issue—all withheld in part—fall into four categories:

1. Email chains discussing substantive edits and comments for speeches by then-Ambassador Power (12 documents; *Vaughn* Items 1, 2, 3, 4, and 6);
2. An email chain containing a discussion of line edits and the content of a draft memorandum for the U.N. Secretary-General (one document; *Vaughn* Item 5);
3. An email chain discussing a human resources matter, strategy about communications with Congress, and the substance of those policy deliberations with Members of Congress (one document; *Vaughn* Item 7); and

4. An email chain discussing potential courses of action related to the protests at Standing Rock Indian Reservation (one document; *Vaughn* Item 8).

Stein Decl. ¶ 26.

For all these documents, State invokes the deliberative process privilege. *Id.* ¶¶ 27–29. For certain redactions in the documents comprising *Vaughn* Items 1 and 2, State also invokes the attorney-client privilege. *Id.* ¶ 32. The Court finds that State's declarations and *Vaughn* Index adequately explain why all challenged documents qualify for these privileges. *Id.* ¶¶ 24–33; Second Stein Decl. ¶¶ 6–24, ECF No. 41-2; Stein Decl. Ex. A at 13–18, ECF No. 37-3. And, for the most part, ACLJ does not contest these explanations. *See* Pl.'s Cross-Mot. at 10–15; Pl.'s Reply at 13–15. It does so only for a few documents, but its arguments are unavailing.

Nos. C06497371 and C06497673 (two of the five documents in *Vaughn* Item 1): These documents, both dated May 19, 2016, are "email chains [that] discuss substantive edits and comments on the content of [Power's] upcoming commencement address at Yale University Class Day on May 22, 2016." Stein Decl. Ex. A at 13. State asserts that the withheld material "is pre-decisional and deliberative with respect to a final determination on the content and framing of the proposed speech." *Id.*

ACLJ suggests the deliberative process privilege does not apply to these emails because they do not discuss "the formation of the speech," but rather "contain the subject line, 'Re: How much grief,' and appear to discuss a current event." Pl.'s Cross-Mot. at 13. In response, State explains that this subject line "relates to the content of [Power's] speech at Yale." Second Stein Decl. ¶ 9. Power was asking the recipient "'[h]ow much grief' the Secretary of State received for a Trump reference in his speech at Northeastern, as she [was] 'trying to thread [the] needle' with her upcoming Yale speech." *Id.* (first and third alterations in original). The recipient

replied by providing "feedback regarding possible approaches to the speech." *Id.* Copies of these redacted emails are in the record, and they bear out the agency's explanation. Southerland Decl Ex. 1 at 3–4, ECF No. 39-2; Second Stein Decl. Ex. 1 at 20, ECF No. 41-2. ACLJ does not press the point in its reply brief. *See* Pl.'s Reply at 13–15.

No. C06497566 (*Vaughn* Item 3): This document is an "email chain [that] contains internal deliberations regarding substantive edits and comments on [Power's] speech upon receiving the Henry A. Kissinger Prize for her work in her position as U.S. Ambassador to the United Nations." Stein Decl. Ex. A at 15. "These edits and comments relate to the version of the speech that was to be published *after* she had given it at the ceremony," *id.* (emphasis added), and ACLJ believes this makes the document post-decisional, Pl.'s Cross-Mot. at 14.

Not so. ACLJ relies on *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997), which observes that the deliberative process privilege "does not shield documents that simply state or explain a decision the government has already made." *Id.* at 737. But the email chain does not "state or explain a decision . . . already made."

Power gave a speech at a ceremony, and the chain contains edits and comments on "the version of the speech that was to be published after she had given it at the ceremony"—so a *different version* of the speech, not the one already given. Stein Decl. Ex. A at 15. The chain includes "recommendations for revisions to the original address," so it reflects deliberations about the not-yet-published version. *Id.* After the ceremony speech, Power "was substantially redrafting it for a different format (i.e., in text rather than in person) and a different audience (i.e., the public rather than the audience at the . . . ceremony)." Second Stein Decl. ¶ 13. Once again, ACLJ does not press the point. *See* Pl.'s Reply at 13–15.

No. C06497581 (*Vaughn* Item 5): This document is an "email chain [that] contains discussion of line edits and the content of a draft memorandum for U.N. Secretary-General Antonio Guterres." Stein Decl. Ex. A at 16. ACLJ's objection here, however, concerns not this email chain but an attachment that State withheld in its entirety—the "Guterres Transition Memo _ January 2.docx." Pl.'s Cross-Mot. at 14.

State describes this attachment as "a draft transition memorandum for the incoming U.N. Secretary-General." Second Stein Decl. ¶ 19. It is deliberative, the agency says, because "it makes proposals and recommendations as to the substance of the memorandum." *Id.* ACLJ retorts that the attachment's status as a draft "does not make all content within [it] deliberative," but elaborates no further. Pl.'s Reply at 14. State has adequately explained why the attachment is deliberative, *see* Second Stein Decl. ¶¶ 19–20, and ACLJ's contrary assertion is merely unsupported speculation.[15]

No. C06647997 (*Vaughn* Item 7): This document is an "email chain [that] discusses a human resources matter, strategy regarding communications with Congress, and the substance of those policy deliberations with Members of Congress." Stein Decl. Ex. A at 17. These emails issued on August 2 and August 3, 2016, and they "pre-date[] the outreach to Congress." *Id.*

ACLJ suggests that State's failure to identify when "the outreach to Congress" occurred casts doubt on whether the email chain is predecisional. Pl.'s Cross-Mot. at 14. In its supplemental declaration, the agency explains that the withheld material "includes deliberations among multiple State officials regarding strategy for Legislative Branch outreach, including to

[15] After briefing was complete, the Government clarified that State also withheld this attachment in full under Exemption 1. Notice of Add. Basis for Withholding at 1, ECF No. 45. Because the Court upholds the withholding of this attachment under Exemption 5, the Court need not consider whether Exemption 1 also applies.

multiple senators, congressmen, committees, and staff, in August 2016 regarding a possible U.N. resolution on nuclear testing." Second Stein Decl. ¶ 21. It reiterates that these deliberations "pre-date[] the outreach." *Id.* While exact dates for the "outreach" would be preferable, State's explanation is still adequate. ACLJ provides no concrete basis for doubting that deliberations among State officials on August 2 and August 3 predated the "August 2016" outreach to Congress. Yet again, ACLJ does not press the point in its reply brief. *See* Pl.'s Reply at 13–15.

ACLJ also notes in passing that the content withheld in this email chain includes "a readout of [a] Moniz-Corker call," but it does not elaborate on why it thinks this withholding is improper. Pl.'s Cross-Mot. at 14. State explains that the readout is "a description of communications with Senator Bob Corker regarding the possible U.N. resolution . . . including discussion of policy issues and priorities around the resolution." Second Stein Decl. ¶ 21. It is deliberative, the agency says, because "it provides opinions on and analysis of potential U.S. courses of actions with respect to the possible U.N. resolution, and it distills the conversation into the points the author considered most important for the recipients of the email." *Id.* This explanation is adequate. *See Montrose Chem. Corp. v. Train*, 491 F.2d 63, 71 (D.C. Cir. 1974). And ACLJ provides no reason to question it. *See* Pl.'s Cross-Mot. at 14; Pl.'s Reply at 15.

That concludes ACLJ's specific objections to State's withholdings. ACLJ next argues—for all challenged withholdings—that State has shown no "foreseeable harm" that would result from disclosure. Pl.'s Cross-Mot. at 15–16. It cites a recent addition to FOIA, which provides that "[a]n agency shall . . . withhold information . . . only if . . . (I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b) . . . or . . . (II) the disclosure is prohibited by law." FOIA Improvement Act of

2016, Pub. L. No. 114-185, § 2(1)(D), 130 Stat. 538, 539 (codified at 5 U.S.C. § 552(a)(8)). State insists it has met this requirement, and the Court agrees.

The agency explains that disclosure of the material withheld—"material containing the details of internal discussions held in the course of formulating a policy or other forms of action"—"could reasonably be expected to chill the open and frank exchange of comments, recommendations, and opinions that occurs between Department officials about sensitive topics." Stein Decl. ¶ 28. This, in turn, "would severely hamper the ability of responsible Department officials to formulate and carry out Executive Branch programs." *Id.*

The agency's supplemental declaration goes into greater detail. For example, it notes that *Vaughn* Items 1, 2, 3, 4, and 6 encompass documents in which State officials "deliberate not only the framing of the Department's position on . . . substantive issues, but [also] the substantive issues themselves," including a "refugee policy" and "efforts to curb the Russian threat." Second Stein Decl. ¶ 16. If these deliberations were disclosed, officials "would be loath to provide the frank assessments or controversial opinions that result in the most effective and informed decision-making, particularly where the public positions relate to high-profile issues." *Id.* ¶ 17.

The foreseeable harm from disclosure is "particularly heightened in the context of foreign affairs, where the U.S. Government's official position" implicates "relationships with other countries." *Id.* Release of "non-final recommendations or opinions on foreign affairs" thus "may cause international public confusion about the United States' stance on these issues." *Id.* Similarly, "release of these preliminary comments . . . could cause harm by providing the public with an erroneous understanding of agency decision-making at the U.S. Mission to the United Nations and among senior Executive Branch officials." *Id.* ¶ 18.

The supplemental declaration goes into similar detail when explaining why disclosure of *Vaughn* Items 5, 7, and 8 would pose harm. *See id.* ¶¶ 20, 22–24. The Court finds that, by these detailed explanations, State has fulfilled the terms of 5 U.S.C. § 552(a)(8). After all, this provision requires only that the agency "reasonably foresee[] that disclosure would harm an interest protected by an exemption described in subsection (b)." 5 U.S.C. § 552(a)(8)(A)(i)(I). State's declarations provide a reasonable basis to think that disclosure of the withheld materials would harm several interests that Exemption 5 protects, such as encouraging candid discussions and guarding against premature disclosure and public confusion. *See Sears, Roebuck & Co.*, 421 U.S. at 151–53; *Coastal States Gas Corp.*, 617 F.2d at 866.

To be sure, ever since the FOIA Improvement Act was enacted, a debate has raged about what showing the Government must make under § 552(a)(8)(A)(i)(I). *See, e.g.*, *Cause of Action Inst. v. DOJ*, 330 F. Supp. 3d 336, 354–55 (D.D.C. 2018). The parties continue that debate, with ACLJ arguing that the statute requires a heightened showing and the Government disagreeing. *Compare* Pl.'s Cross-Mot. at 15–16, *with* Defs.' Reply at 26–27, ECF No. 41. The D.C. Circuit has not addressed this debate yet, and the Court need not resolve it either, for "the Government prevails under either approach." *Cause of Action Inst.*, 330 F. Supp. 3d at 355. State's explanation of "foreseeable harm" is like—if not more detailed than—other explanations that have been upheld. *See id.*; *Machado Amadis v. DOJ*, 388 F. Supp. 3d 1, 20 (D.D.C. 2019).

ACLJ has one final argument. It urges the Court to reject State's efforts at segregating non-exempt from exempt material for the 15 challenged documents. Pl.'s Cross-Mot. at 11–13. FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt." 5 U.S.C. § 552(b). The deliberative process privilege ordinarily does not shield factual material, as

distinct from "opinion" material. *See Coastal States Gas Corp.*, 617 F.2d at 867. So, when invoking this privilege, an agency must segregate and disclose any factual information not "inextricably intertwined" with the deliberative material. *See Judicial Watch, Inc.*, 432 F.3d at 372.

ACLJ pounces on this rule and complains that State "conveniently fails to detail whether any information it has withheld is factual, as opposed to opinion." Pl.'s Cross-Mot. at 11. But this misses the mark. As the Government points out, there is no requirement that an agency "attest to a negative," that it is *not* withholding non-exempt material. Defs.' Reply at 19. Instead, State must "demonstrate that all reasonably segregable material has been released." *Johnson v. EOUSA*, 310 F.3d 771, 776 (D.C. Cir. 2002). To show this, agencies can rely on the combination of its declarations and *Vaughn* Index. *Id.* And they "are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material." *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007). To overcome this presumption, the requestor must provide a "quantum of evidence." *Id.*

State notes that its withholdings "occasionally contain[] selected factual material intertwined with opinion." Stein Decl. ¶ 31. The agency "has carefully reviewed all of the [challenged] documents . . . and has segregated exempt from non-exempt information where reasonably possible." *Id.* ¶ 34. For each document, it "conducted a line-by-line review . . . and determined that there is no additional meaningful non-exempt information that can be reasonably segregated and released." Stein Decl. Ex. A at 14–18. After its initial review, the agency made a "supplemental production" in which it "released additional information in 11 documents previously released in part and in 4 documents previously withheld in full." Stein Decl. ¶¶ 11, 34. This supplemental production involved some documents that ACLJ challenges. Second

Stein Decl. ¶¶ 9–10. "Based on these multiple reviews, [State] determined that no further meaningful information can be segregated without disclosing information warranting protection under the law." Stein Decl. ¶ 34; *see also* Second Stein Decl. ¶ 25.

This explanation provides "reasonable specificity" under the D.C. Circuit's precedents. *See Loving v. DOD*, 550 F.3d 32, 41 (D.C. Cir. 2008); *Johnson*, 310 F.3d at 776. ACLJ provides no "quantum of evidence" to overcome the presumption that State complied with its obligation. It relies solely on speculation, claiming that "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." Pl.'s Cross-Mot. at 12. More, the agency's supplemental release of once withheld information cuts in its favor. *Cf. Military Audit Project*, 656 F.2d at 754 ("The release of over two thousand pages of documents after a thorough review suggests to us a stronger, rather than a weaker, basis for the classification of those documents still withheld.").

Finally, for some documents, ACLJ objects to the withholding of search terms and single words. *See* Pl.'s Cross-Mot. at 13–15 (referencing Nos. C06497371, C06497351, C06497352, C06497581, and C06647997). But as State explains in reply, it *did* disclose most of these terms and words. *See* Defs.' Reply at 21 & n.7, 22, 24; Second Stein Decl. ¶¶ 9–10, 19; Second Stein Decl. Ex. 1 at 16–20. And in any event, an agency need not "commit significant time and resources to the separation of disjointed words, phrases, or even sentences which taken separately or together have minimal or no information content." *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 261 n.55 (D.C. Cir. 1977). State says that the isolated terms it redacted are inextricably intertwined with exempt material and provide no meaningful content. *See* Defs.' Reply at 25; Second Stein Decl. ¶ 21. ACLJ provides no evidence casting doubt on these representations. *See* Pl.'s Reply at 13–15.

In sum, the Court rejects ACLJ's challenges to State's Exemption 5 withholdings.

IV.

For these reasons, the Court will grant in part and deny in part the Government's motion for summary judgment and ACLJ's cross-motion. A separate Order will issue.

2020.07.24
15:05:57 -04'00'

Dated: July 24, 2020

TREVOR N. McFADDEN, U.S.D.J.

American Center for Law and Justice

QUARTERLY FOIA REPORT

APPENDIX III-A

ACLJ
American Center
for Law & Justice

May 22, 2020

Chief, Freedom of Information/Privacy Acts Office
U.S. Small Business Administration
409 Third St. SW, eighth floor
Washington, DC 204169
FOIA@sba.gov

RE: FOIA Request for Records of Planned Parenthood Affiliates Obtaining Cares Act Paycheck Protection Program Funds From the SBA

To Who 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 the Small Business Administration (SBA) issuing Paycheck Protection Program funds to as many as 37 affiliates of Planned Parenthood, totaling as much as approximately $80 million, and specifically, any records of Planned Parenthood affiliates' representations made to the SBA in order to secure the funds.

Background

Pursuant to SBA FOIA regulation 13 C.F.R. §102.3(b), this Background "describe[s] the records sought in sufficient detail to enable agency personnel to locate them with a reasonable amount of effort," and provides "specific information that may help the component in identifying the requested records, such as the date, title or name, author, recipient, subject matter of the record, case number, file designation, reference number, the timeframe for which the records are sought,

[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 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.

[redacted]

the office that created the records, or any other information that will assist the component in locating documents responsive to the request."

The Coronavirus Aid, Relief, and Economic Security (CARES) Act was signed in to law on March 27, 2020. As described by the U.S. Department of the Treasury:

> The Paycheck Protection Program established by the CARES Act, is implemented by the Small Business Administration with support from the Department of the Treasury. This program provides small businesses with funds to pay up to 8 weeks of payroll costs including benefits. Funds can also be used to pay interest on mortgages, rent, and utilities.
>
> The Paycheck Protection Program [PPP] prioritizes millions of Americans employed by small businesses by authorizing up to $349 billion toward job retention and certain other expenses.
>
> Small businesses and eligible nonprofit organizations, Veterans organizations, and Tribal businesses described in the Small Business Act, as well as individuals who are self-employed or are independent contractors, are eligible if they also meet program size standards.[2]

According to a breaking news report by *FoxNews.com*, "Thirty-seven Planned Parenthood affiliates applied for and received a total of $80 million in loans from the Paycheck Protection Program (PPP)."[3] Planned Parenthood's website identifies a total of 49 affiliates.[4] That means approximately 75% of Planned Parenthood's affiliates received the PPP funds and that each affiliate that applied received an average of over $2 million. According to the report:

> The Small Business Administration (SBA) is reaching out to each involved Planned Parenthood affiliate explaining that affiliates of larger organizations with more than 500 employees aren't eligible for PPP distributions, Fox News is told. The Planned Parenthood Federation of America (PFFA) alone has had more than 600 employees. A Planned Parenthood affiliate in Metropolitan Washington (PPMW), for example, will receive a letter stating that although self-certified that it was eligible for a $1,328,000 PPP loan in accordance with the SBA's affiliation rules, it will need to return the money.[5]

Planned Parenthood affiliates received massive payments. For example, "[t]he Planned Parenthood of Orange and San Bernardino Counties received a $7.5 million loan – the largest granted to the organization's affiliates."[6]

---

[2] The CARES Act Provides Assistance to Small Businesses, U.S. Dept. of the Treasury, https://home.treasury.gov/policy-issues/cares/assistance-for-small-businesses.

[3] Gregg Re & Alex Pfeiffer, *Planned Parenthood affiliates improperly applied for and received $80 million in coronavirus stimulus funds, feds say*, FOXNEWS.COM (May 19, 2020), hhttps://www foxnews.com/politics/planned-parenthood-coronavirus-stimulus-money-ppp-return.

[4] Planned Parenthood, About Us, https://www.plannedparenthood.org/about-us/contact-us.

[5] Gregg Re & Alex Pfeiffer, *Planned Parenthood affiliates improperly applied for and received $80 million in coronavirus stimulus funds, feds say*, FOXNEWS.COM (May 19, 2020), hhttps://www foxnews.com/politics/planned-parenthood-coronavirus-stimulus-money-ppp-return.

[6] Mark Moore, *SBA Tells Planned Parenthood to Return $80M in Stimulus Funds*, NYPost.com (May 20, 2020), https://nypost.com/2020/05/20/sba-tells-planned-parenthood-to-return-80m-from-stimulus/.

Multiple United States Senators have spoken out and demanded an investigation and that the money be returned. According to a press release statement by Senator Marco Rubio, Chairman of the Senate Committee on Small Business and Entrepreneurship:

> "There is no ambiguity in the legislation that passed or public record around its passage that organizations such as Planned Parenthood, whose parent organization has close to half a billion dollars in assets, is not eligible for the Paycheck Protection Program," Chairman Rubio said. "Those funds must be returned immediately. Furthermore, the SBA should open an investigation into how these loans were made in clear violation of the applicable affiliation rules and if Planned Parenthood, the banks, or staff at the SBA knowingly violated the law all appropriate legal options should be pursued."[7]

According to Senator James Lankford, "every dollar Planned Parenthood took from PPP was a dollar that did not get to legitimate small businesses."[8] FoxNews.com quoted Senator Lankford as follows:

> "With an annual budget of over one billion dollars and the explicit Small Business Administration affiliation rules made it clear that Planned Parenthood was not and is not eligible for the Paycheck Protection Program," Lankford wrote. "Like other large organizations that returned monies they were not eligible for, Planned Parenthood should immediately repay the American people the money they took from deserving small businesses and non-profits."[9]

According to Senator Josh Hawley, "The money needs to be recovered and if anybody knowingly falsified applications, they need to be prosecuted."[10] Senator Hawley went further in a letter to the SBA:

> "Planned Parenthood is not a small business. It is a multi-billion-dollar company. In the fiscal year ending last June, Planned Parenthood had $2.3 billion in assets and nearly $2 billion in revenue. The year before, Planned Parenthood paid its CEO more than $1 million. And now, Planned Parenthood has diverted $80 million from actual small businesses during a global pandemic even though Planned Parenthood knew it was ineligible for this program," said Senator Hawley. "The ease with which Planned Parenthood was able to unlawfully divert $80 million should concern everyone."[11]

---

[7] Rubio Statement on Planned Parenthood Improperly Receiving PPP Loans (May 19, 2020), https://www rubio.senate.gov/public/index.cfm?p=Press-Releases&id=0E282CEC-0AD2-446F-BD50-4518B31686D5.

[8] Gregg Re & Alex Pfeiffer, *Planned Parenthood affiliates improperly applied for and received $80 million in coronavirus stimulus funds, feds say*, FOXNEWS.COM (May 19, 2020), hhttps://www.foxnews.com/politics/planned-parenthood-coronavirus-stimulus-money-ppp-return.

[9] *Id.*

[10] *Id.*

[11] Senator Hawley Asks SBA to Explain Planned Parenthood Loans Scandal (May 20, 2020), https://www hawley.senate.gov/senator-hawley-asks-sba-explain-planned-parenthood-loans-scandal.

Further:

> The Coronavirus Aid, Relief, and Economic Security (CARES) Act prohibits Planned Parenthood from receiving PPP funds as Planned Parenthood's own documents state that each organization is a "Planned Parenthood Affiliate." Planned Parenthood therefore has about 16,000 employees in total, more than 30 times higher than the limit for the Paycheck Protection Program.[12]

Senator Rick Scott weighed in as well: "Yet another example of the #PPP program being misused. Florida's taxpayers should not be footing to bail out a huge organization like Planned Parenthood. This money should be returned immediately."[13]

On Wednesday, May 20, 2020, Senate Majority Leader Mitch McConnell made his position clear: "Disrespecting human life is their central mission. . . . It goes without saying: The money must be sent back immediately. Right now."[14]

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 March 1, 2020, through the date this FOIA request is processed.

---

[12] *Id.*

[13] Gregg Re & Alex Pfeiffer, *Planned Parenthood affiliates improperly applied for and received $80 million in coronavirus stimulus funds, feds say*, FOXNEWS.COM (May 19, 2020), hhttps://www.foxnews.com/politics/planned-parenthood-coronavirus-stimulus-money-ppp-return.

[14] https://twitter.com/SBAList/status/1263112193098289152.

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

1. All records concerning or relating in any manner to any Planned Parenthood affiliate's application for Paycheck Protection Program funds, including but not limited to any application, information or material provided to the SBA by any Planned Parenthood affiliate, and any communication from or with any representative of any Planned Parenthood organization (e.g., Planned Parenthood Federation of America, Planned Parenthood Action Fund, etc.).

2. All records concerning or relating in any manner to any Planned Parenthood affiliate's application for Economic Injury Disaster Loans, including but not limited to any application, information or material provided to the SBA by any Planned Parenthood affiliate, and any communication from or with any representative of any Planned Parenthood organization (e.g., Planned Parenthood Federation of America, Planned Parenthood Action Fund, etc.).

3. All records concerning or relating in any manner to any organization providing abortion services which applied for Paycheck Protection Program funds, including but not limited to any application, information or material provided to the SBA by any such organization, and any communication from or with any representative of any Planned Parenthood organization (e.g., Planned Parenthood Federation of America, Planned Parenthood Action Fund, etc.).

4. All records concerning or relating in any manner to any organization providing abortion services which applied for Economic Injury Disaster Loans, including but not limited to any application, information or material provided to the SBA by any such organization.

5. To the extent construed as not concerning or relating to any application for Paycheck Protection Funds or Economic Injury Disaster Loans actually made by a Planned Parenthood affiliate, all records of any communication from or with (a) any Planned Parenthood affiliate or representative of any Planned Parenthood organization (e.g., Planned Parenthood Federation of America, Planned Parenthood Action Fund, etc.), or (b) any other for profit or not for profit organization that provides abortion.

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]

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 III-B

U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, DC 20416

OFFICE OF GENERAL COUNSEL

January 26, 2021

Benjamin P. Sisney
Senior Litigation Counsel
American Center for Law & Justice
201 Maryland Ave., NE
Washington, D.C. 20002-5703
bsisney@aclj.org

Dear Mr. Sisney,

This is in response to your Freedom of Information Act ("FOIA") request No. SBA-2020-001437 in which you have requested the following:

> 1. All records concerning or relating in any manner to any Planned Parenthood affiliate's application for Paycheck Protection Program funds, including but not limited to any application, information or material provided to the SBA by any Planned Parenthood affiliate, and any communication from or with any representative of any Planned Parenthood organization (e.g., Planned Parenthood Federation of America, Planned Parenthood Action Fund, etc.).
>
> 2. All records concerning or relating in any manner to any Planned Parenthood affiliate's application for Economic Injury Disaster Loans, including but not limited to any application, information or material provided to the SBA by any Planned Parenthood affiliate, and any communication from or with any representative of any Planned Parenthood organization (e.g., Planned Parenthood Federation of America, Planned Parenthood Action Fund, etc.).
>
> 3. All records concerning or relating in any manner to any organization providing abortion services which applied for Paycheck Protection Program funds, including but not limited to any application, information or material provided to the SBA by any such organization, and any communication from or with any representative of any Planned Parenthood organization (e.g., Planned Parenthood Federation of America, Planned Parenthood Action Fund, etc.).
>
> 4. All records concerning or relating in any manner to any organization providing abortion services which applied for Economic Injury Disaster Loans, including but not limited to any application, information or material provided to the SBA by any such organization.
>
> 5. To the extent construed as not concerning or relating to any application for Paycheck Protection Funds or Economic Injury Disaster Loans actually made by a Planned Parenthood affiliate, all records of any

communication from or with (a) any Planned Parenthood affiliate or representative of any Planned Parenthood organization (e.g., Planned Parenthood Federation of America, Planned Parenthood Action Fund, etc.), or (b) any other for profit or not for profit organization that provides abortion.

SBA is releasing in part certain emails responsive to your request. Redactions have been made pursuant to FOIA Exemptions 4, 5, and 6. FOIA Exemption 4 protects trade secrets and commercial or financial information obtained from a person that is privileged or confidential. The redactions made pursuant to Exemption 4 contain confidential information from lenders regarding the status and eligibility for PPP loans of certain organizations that provide abortion services.

FOIA Exemption 5 protects from disclosure inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency. The redactions made pursuant to Exemption 5 contain the back and forth among SBA employees regarding eligibility matters and include information that is protected by the deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege.

FOIA Exemption 6 protects from disclosure information about individuals in "personnel and medical files and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy. The redactions made pursuant to Exemption 6 contain names of individuals employed by lenders, their email addresses and phone numbers. Given the sensitivity of the information, SBA has determined that the privacy interest of the individual outweighs any public interest in the names and email addresses of individual employees.

Finally, SBA is withholding in full certain documents pursuant to FOIA Exemption 4. The documents being withheld in full include communications between SBA and certain pregnancy resource centers regarding their application and eligibility for PPP loans. Specifically, SBA is withholding 38 letters it sent to certain pregnancy resource centers and approximately 135 pages of email communications with those centers. Please note that it is SBA's long-standing practice that it does not release information regarding the status of a loan application unless it has been approved. All approved loans under the CARES Act have been made publicly available on SBA's website.

If you are dissatisfied with the Agency's decision, you may file an administration appeal within 90 days of the date of this letter to:

Office of Hearings and Appeals
Attention: Oreoluwa Fashola, FOIA Office
409 3rd Avenue, SW – 8th Floor
Washington, D.C. 20416

If you are unable to resolve your FOIA dispute through our FOIA Public Liaison in the Office of Hearings and Appeals, the Office of Government Information Services ("OGIS"), the Federal FOIA Ombudsman's Office, offers mediation services to help resolve disputes between FOIA requesters and Federal agencies. The contact information for OGIS is:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, MD 20740-6001
ogis@nara.gov
ogis.archives.gov
202-741-5770
877-684-6448

Sincerely,

/s/ Eric S. Benderson
Eric S. Benderson
Chief FOIA Officer
Office of General Counsel
U.S. Small Business Administration

American Center for Law and Justice

QUARTERLY FOIA REPORT

APPENDIX III-C

From: [redacted]@SunTrust.com>
Sent: Monday, May 18, 2020 9:04 AM
To: 7a Questions <7aQuesti@sba.gov>
Subject: FW: PPP Loan

CAUTION - The sender of this message is external to the SBA network. Please use care when clicking on links and responding with sensitive information. Send suspicious email to spam@sba.gov.

Is Planned Parenthood Eligible for PPP program? I have seen conflicting views, and need this settled. Thank you.

From: [redacted]@BBandT.com>
Sent: Monday, May 18, 2020 11:52 AM
To: [redacted]@SunTrust.com>
Cc: [redacted]@BBandT.com>
Subject: FW: PPP Loan

Please review and let me know.

From: [redacted]
Sent: Monday, May 18, 2020 11:45 AM
To: [redacted]
Subject: PPP Loan

[* This email contains attachments or links from an unverified sender. DO NOT open attachments or click links without verifying the sender. *]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Please let me know what other documentation, if any, you need for reconsideration of our loan.

Thank you for your attention to this request.

[redacted], MA, JD

She/Her/Hers

President & CEO

[redacted]

Phone: [redacted]

[redacted]

-

Like us on Facebook!

American Center for Law and Justice

QUARTERLY FOIA REPORT

APPENDIX III-D

<darcy.carter@sba.gov>
Cc: [redacted]@peoples.com>
Subject: RE: PPP funds in new account

CAUTION - The sender of this message is external to the SBA network. Please use care when clicking on links and responding with sensitive information. Send suspicious email to spam@sba.gov.

Hi Marilyn,

[redacted]

Thanks.

Corinna

From: [redacted]
Sent: Thursday, May 21, 2020 7:31 PM
To: [redacted]@peoples.com>; [redacted]@peoples.com>; [redacted]@peoples.com>
Cc: [redacted]@peoples.com>
Subject: FW: PPP funds in new account

Hi – [redacted]

[redacted]

Thanks so much,
Marilyn

[redacted]

[redacted]

People's United Bank What know-how can do®
www.peoples.com
Connect with us:
Facebook | Twitter | LinkedIn

From: [redacted]@ppnne.org>
Sent: Thursday, May 21, 2020 7:25 PM

To: [redacted]@peoples.com>
Subject: PPP funds in new account

WARNING: External E-mail. Use caution if opening Links and Attachments.

[redacted]

Thanks!

Jennifer Meyer, CPA (she/her/hers)
Director of Finance
Planned Parenthood of Northern New England
784 Hercules Drive, Suite 110 | Colchester, VT 05446
O: [redacted]
www.ppnne.org | [redacted]@ppnne.org

American Center for Law and Justice

QUARTERLY FOIA REPORT

APPENDIX III-E

From: 7a Questions
To: Wileman, Linda
Subject: RE: Planned Parenthood Loan #[redacted]
Date: Wednesday, May 13, 2020 12:11:56 PM

[redacted]

[redacted]

[redacted].

If you need anything else, feel free to contact us again.

For loan submission instructions and additional information, please visit our LGPC webpage here. For the current SOP 50 10 5(K), please click here. If you need assistance with SBAOne, please contact SBAOne staff at: sba.one@bnymellon.com or (877) 245-6159 (call option 5)

Please note that any opinions expressed on loan eligibility in this email are being given limited to the information you have provided and could change if new information is contained in your loan submission package.

"For information on Disaster Assistance Loans for Small Businesses Impacted by Coronavirus (COVID-19), please CLICK HERE or contact the SBA Disaster Assistance Division at 1-800-659-2955 (TTY: 1-800-877-8339) or disastercustomerservice@sba.gov."

Thank you,

7a Questions
7(a) Loan Guaranty Processing Center
U.S. Small Business Administration
(877) 475-2435 (toll free)
7aQuestions@sba.gov
ak@7aQ

From: [redacted]@frostbank.com>
Sent: Wednesday, May 13, 2020 6:34 AM
To: 7a Loan Program <7aLoanProgram@sba.gov>
Subject: Planned Parenthood Loan #[redacted]

CAUTION - The sender of this message is external to the SBA network. Please use care when clicking on links and responding with sensitive information. Send suspicious email to spam@sba.gov.

[redacted]

Thanks!

[redacted]
frostbank.com | www.frostbank.com

From: Hudspeth, Annie M. [mailto:annie.hudspeth@sba.gov]
Sent: Tuesday, May 05, 2020 11:38 AM
To: 7a Questions <7aQuesti@sba.gov>
Cc: [redacted]@frostbank.com>
Subject: [EXTERNAL] FW: Planned Parenthood

[redacted]?

American Center for Law and Justice

QUARTERLY FOIA REPORT

APPENDIX III-F

From: Biles, Brittany W
To: Billimoria, Jimmy F. (Jim)
Cc: Kelly, Jennifer F.
Subject: RE: Deliberative and pre-decisional- Re: Vice PP returning PPP
Date: Wednesday, May 20, 2020 9:02:20 AM

[redacted]

From: Billimoria, Jimmy F. (Jim) <jim.billimoria@sba.gov>
Sent: Wednesday, May 20, 2020 8:57 AM
To: Biles, Brittany W <Brittany.Biles@sba.gov>
Cc: Kelly, Jennifer F. <Jennifer.Kelly@sba.gov>
Subject: Deliberative and pre-decisional- Re: Vice PP returning PPP

Deliberative and pre-decisional

[redacted]

[redacted]

[redacted]

Get Outlook for iOS

From: Kelly, Jennifer F. <Jennifer.Kelly@sba.gov>
Sent: Wednesday, May 20, 2020 8:53:25 AM
To: Billimoria, Jimmy F. (Jim) <jim.billimoria@sba.gov>
Subject: Vice PP returning PPP

[redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]

American Center for Law and Justice

QUARTERLY FOIA REPORT

APPENDIX III-G

From: Zheng, Mike (Contractor)
To: Hannon, Glenn E.; Kucharski, Stephen W.; McConville, Sheri M.
Subject: RE: Please Cancel these two loans
Date: Tuesday, May 26, 2020 7:48:42 PM

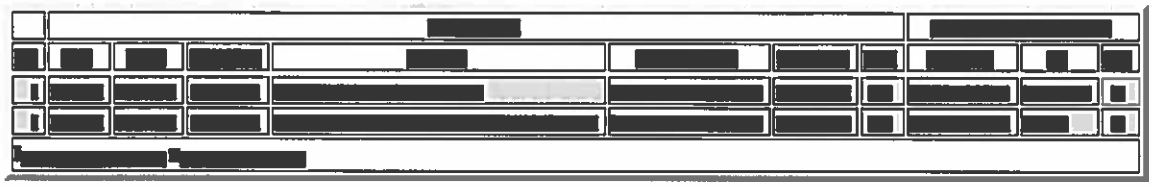
[redacted]

From: Hannon, Glenn E. <glenn.hannon@sba.gov>
Sent: Tuesday, May 26, 2020 6:52 PM
To: Kucharski, Stephen W. <Stephen.Kucharski@sba.gov>; Zheng, Mike (Contractor) <Mike.Zheng@sba.gov>; McConville, Sheri M. <Sheri.Mcconville@sba.gov>
Subject: Please Cancel these two loans

Mike/Sheri — [redacted]

Thanks

[redacted]



American Center for Law and Justice

QUARTERLY FOIA REPORT

APPENDIX III-H

From: Briggs, William J.
To: Hubert,Tim
Cc: John.Dewitt@SunTrust.com
Subject: RE: PPP Loan
Date: Friday, May 22, 2020 4:25:00 PM

[redacted]

From: [redacted]@SunTrust.com>
Sent: Friday, May 22, 2020 3:36 PM
To: Briggs, William J. <William.Briggs@sba.gov>
Cc: [redacted]@SunTrust.com>
Subject: FW: PPP Loan

CAUTION - The sender of this message is external to the SBA network. Please use care when clicking on links and responding with sensitive information. Send suspicious email to spam@sba.gov.

[redacted]

[redacted]

From: 7a Questions <7aQuesti@sba.gov>
Sent: Monday, May 18, 2020 5:11 PM
To: [redacted]@SunTrust.com>
Subject: RE: PPP Loan

SBA cannot make a final determination on eligibility as these decisions are the responsibility of the applicant and the lender.

Based on the discussion below it appears the Applicant meets 501 (c) (3) criteria and if other eligibility criteria is met then the submission may be eligible.

For additional information on this question and other questions, please consult the Treasury's website is at https://home.treasury.gov/policy-issues/cares/assistance-for-small-businesses, and SBA's website is at Coronavirus (COVID-19): Small Business Guidance & Loan Resources

For loan submission instructions and additional information, please visit our LGPC webpage here. For the current SOP 50 10 5(K), please click here. If you need assistance with SBAOne, please contact

SBAOne staff at: sba.one@bnymellon.com or (877) 245-6159 (call option 5).

Please note that any opinions expressed on loan eligibility in this email are being given limited to the information you have provided and could change if new information is contained in your loan submission package.

"For information on Disaster Assistance Loans for Small Businesses Impacted by Coronavirus (COVID-19), please CLICK HERE or contact the SBA Disaster Assistance Division at 1-800-659-2955 (TTY: 1-800-877-8339) or disastercustomerservice@sba.gov."

Thank you,

7a Questions
7(a) Loan Guaranty Processing Center
U.S. Small Business Administration
(877) 475-2435 (toll free)
7aQuestions@sba.gov
as@7aQ

From: [redacted]@SunTrust.com>
Sent: Monday, May 18, 2020 9:04 AM
To: 7a Questions <7aQuesti@sba.gov>
Subject: FW: PPP Loan

CAUTION - The sender of this message is external to the SBA network. Please use care when clicking on links and responding with sensitive information. Send suspicious email to spam@sba.gov.

[redacted].

From: [redacted]@BBandT.com>
Sent: Monday, May 18, 2020 11:52 AM
To: [redacted]@SunTrust.com>
Cc: [redacted]@BBandT.com>
Subject: FW: PPP Loan

Please review and let me know.

From: [redacted]@ppkeystone.org]
Sent: Monday, May 18, 2020 11:45 AM
To: [redacted]
Subject: PPP Loan

[* This email contains attachments or links from an unverified sender. DO NOT open

American Center for Law and Justice

QUARTERLY FOIA REPORT

APPENDIX IV

ACLJ
American Center
for Law & Justice

January 28, 2019

U.S. Department of Education
Office of Management
Office of the Chief Privacy Officer
400 Maryland Avenue, SW, LBJ 7W104
Washington, DC 20202-4536
ATTN: FOIA Public Liaison
Facsimile: (202) 401-0920

RE: FOIA Request for Records Regarding the U.S. Department of Education's grant award for MindUP program in Oregon and other Mindfulness-related grant awards

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 itself and over 65,000 of its members who demand our government be held accountable, and object to the implementation of curriculum that promotes Buddhist meditation techniques to be practiced on schoolchildren at taxpayer's expense. 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 from the U.S. Department of Education (ED) concerning the $3.3 million grant awarded to Portland State University concerning MindUP, a mindfulness-based social emotional learning (SEL) program to be implemented on preschool-age children in 120 schools in Oregon, as well as other grant funds awarded to implement or test mindfulness programs on children attending public schools. The purpose of this request is to seek information that will educate the American public about the U.S. government's spending of U.S. taxpayer dollars to conduct Buddhism-based social experiments on children.

[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 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.

[redacted]

Background

Pursuant to U.S. Department of Education FOIA regulation 34 C.F.R. § 5.20(b), this Background "describe[s] the type of agency record requested, the subject matter of the agency record, the date, if known, or general time period when it was created, and the person or office that created it," to the extent known.

According to news reports: "A Portland State University professor has won a $3.3 million federal grant to measure whether a mindfulness program backed by actress Goldie Hawn works to get preschoolers ready for kindergarten."[2] Further,

> Portland State psychology professor Andrew Mashburn specializes in testing programs to promote school readiness and has already looked into the MindUp program for the Gates Foundation. He won the big five-year grant from the U.S. Department of Education's Institute of Education Sciences to run the program in 120 classrooms in Multnomah, Washington and Clackamas counties and measure if it works, university officials announced Tuesday.[3]

"The research project, co-led by Pennsylvania State University psychology professor Robert Roeser, will be done in three waves: Multnomah County in 2019-20, Washington County in 2020-21 and Clackamas County in 2021-22. It will target children in public and private preschools that primarily serve low-income students. Mashburn expects to recruit the first set of classrooms next spring."[4]

As announced by Portland State University, "PSU College of Liberal Arts and Sciences psychology professor Andrew Mashburn will use the grant from the U.S. Department of Education's Institute of Education Sciences to implement the MindUP program in 120 preschool classrooms throughout Oregon's Multnomah, Washington and Clackamas counties."[5]

The grant award is entitled "Efficacy of MindUP on Pre-Kindergarteners' Development of Social-Emotional Learning Competencies and Academic Skills," and its grant award number is R305A180374.[6]

This agency has awarded other grants to other state educational institutions. For example, in 2014, $1.5 million was awarded to the University of Wisconsin for a study to "take place in public

---

[2] Betsy Hammond, *Does Goldie Hawn's Preschool Mindfulness Program Work? Portland State Gets $3 Million to Check*, The Oregonian/OregonLive (July 18, 2018), https://www.oregonlive.com/education/index.ssf/2018/07/does_goldie_hawns_mindfulness.html.

[3] *Id.*

[4] *Id.*

[5] Cristina Rojas, *PSU Professor Awarded $3.3M to Study Impact of Kindergarten Readiness Program*, Portland State University (July 16, 2018), https://www.pdx.edu/clas/news/psu-professor-awarded-33m-study-impact-kindergarten-readiness-program.

[6] "Efficacy of MindUP on Pre-Kindergarteners' Development of Social-Emotional Learning Competencies and Academic Skills," Award Number R305A180374, Inst. of Ed. Sciences (IES), Nat'l Center for Ed. Research (NCER) (2018), https://ies.ed.gov/ncer//projects/grant.asp?ProgID=7&year=2018&grantid=2190.

elementary schools in an urban school district in Wisconsin," with a sample of "[a]pproximately 20-30 teachers and 400 students from fourth and fifth grade classrooms."[7] According to the Institute of Education Sciences (IES), National Center for Education Research (NCER), webpage describing the grant:

> In this development project, the research team will develop a mindfulness program intended to train attention and emotion regulation in both teachers and students. The goal is to create a comprehensive self-sustaining "train the trainers" model of mindfulness instruction and to further refine training by examining issues of dosage and supports for long-term sustainability to maximize implementation directly within the school context.[8]

A review of the IES/NCER website indicates that many more U.S. Department of Education grants have been awarded for the study and implementation of mindfulness programs on public school children.

To the best of the Requestor's knowledge and belief, components of the U.S. Department of Education likely to be custodians of the records requested include, but are not necessarily limited to, the Office of the Secretary (OS), the Institute of Education Sciences (IES), and the National Center for Education Research (NCER).

Records Requested

For purposes of this Request, the term "record" means "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 recording, 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 Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145 (D.C. Cir. 2016)[9] (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 terms "ED official" or "ED employee" include, but are not limited to, any person who is (1) employed by or on behalf of the U.S. Department of Education, any of

---

[7] "A Classroom-based Training Program of Attention and Emotion Regulation," Award Number R305A140479, Inst. of Ed. Sciences (IES), Nat'l Center for Ed. Research (NCER) (2014), https://ies.ed.gov/ncer/projects/grant.asp?ProgID=21&grantid=1530.

[8] *Id.*

[9] *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145 (D.C. Cir. 2016).

its components, institutes, or centers, in any capacity; or (2) contracted for services by or on behalf of the U.S. Department of Education, any of its components, institutes, or centers, in any capacity.

For purposes of this Request, and unless otherwise indicated, the timeframe of records requested herein is January 1, 2012, through the date of receipt of this Request.

Pursuant to FOIA, 5 U.S.C. § 552, the ACLJ hereby requests that the FDA produce the following records:

1. All records prepared, generated, forwarded, transmitted, sent, shared, saved, received, or reviewed by any ED official or employee that concern or in any way discuss the grant award entitled "Efficacy of MindUP on Pre-Kindergarteners' Development of Social-Emotional Learning Competencies and Academic Skills," grant award number is R305A180374, including but not limited to all information, documents, or other such material reviewed in connection with the application for and granting of the award, and including but not limited to any text messages, any record located on backup tapes, archives, any other recovery, backup, storage or retrieval system, ED electronic mail or message accounts, non-ED electronic mail or message accounts, personal electronic mail or message accounts, ED servers, or non-ED 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 prepared, generated, forwarded, transmitted, sent, shared, saved, received, or reviewed by any ED official or employee that concern or in any way discuss any grant award, other than and excluding the specific award addressed in request #1 above, that concerns in any way mindfulness (as that term is described in the Background section above) in connection to education, including but not limited to all information, documents, or other such material reviewed in connection with the application and granting of any such award, and including but not limited to any text messages, any record located on backup tapes, archives, any other recovery, backup, storage or retrieval system, ED electronic mail or message accounts, non-ED electronic mail or message accounts, personal electronic mail or message accounts, ED servers, or non-ED 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 prepared, generated, forwarded, transmitted, sent, shared, saved, received, or reviewed by any ED official or employee that concern or in any way discuss mindfulness programs in connection with education or implementation on children, including but not limited to any text messages, any record located on backup tapes, archives, any other recovery, backup, storage or retrieval system, ED electronic mail or message accounts, non-ED electronic mail or message accounts, personal electronic mail or message accounts, ED servers, or non-ED 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 records prepared, generated, forwarded, transmitted, sent, shared, saved, received, or reviewed by any FDA official or employee that show total amounts of grant funds awarded by the ED, any of its components, institutes and/or centers, in connection with any mindfulness program, including but not limited to any text messages, any record located on backup tapes, archives, any other recovery, backup, storage or retrieval system, ED electronic mail or message accounts, non-ED electronic mail or message accounts, personal electronic mail or message accounts, ED servers, or non-ED 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.

5. All records prepared, generated, forwarded, transmitted, sent, shared, saved, received, or reviewed by any FDA official or employee that concern or in any way discuss a religious, spiritual, metaphysical, mystical, transcendental, and/or Buddhist aspect, characteristic or component of MindUP and/or any other mindfulness program (as described in the Background section above), including but not limited to any text messages, any record located on backup tapes, archives, any other recovery, backup, storage or retrieval system, ED electronic mail or message accounts, non-ED electronic mail or message accounts, personal electronic mail or message accounts, ED servers, or non-ED 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.

CONCLUSION

If this Request is denied in whole or in part, ACLJ requests that, within the time requirements imposed by FOIA, your agency support all denials by reference to specific FOIA exemptions and provide any statutorily or 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] 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

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 can be downloaded at ACLJ.org/FOIA