UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PROJECT FOR PRIVACY AND SURVEILLANCE ACCOUNTABILITY, INC., Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	Case No. 1:21-cv-2362-RC

PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56 and Local Rule 7(b), Plaintiff Project for Privacy and Surveillance Accountability, Inc., ("PPSA"), by and through undersigned counsel, hereby submits its Cross Motion for Summary Judgment and Opposition to Defendant's Motion for Summary Judgment. Along with this motion, PPSA submits a memorandum of points and authorities in support of the motion, multiple supporting exhibits, a statement of undisputed material facts, a response to Defendant's statement of undisputed facts, and a proposed order. For the reasons described in the memorandum, PPSA respectfully requests that the Court deny Defendant's motion for summary judgment and grant Plaintiff's motion.

Respectfully submitted,

/s/ Gene C. Schaerr

Gene C. Schaerr (D.C. Bar No. 416368)
Brian J. Field (D.C. Bar No. 985577)
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-jaffe.com

Counsel for Plaintiff PPSA, Inc.

March 11, 2022

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PROJECT FOR PRIVACY AND SURVEILLANCE ACCOUNTABILITY, INC., Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	Case No. 1:21-cv-2362-RC

PLAINTIFF'S RESPONSE TO DEFENDANT'S STATEMENT OF MATERIAL FACTS NOT IN DISPUTE AND PLAINTIFF'S COUNTER-STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

I.A. Not disputed

I.B. Not disputed

II.A. Not disputed

II.B. Not disputed

II.C. Not disputed

III.A. Not disputed

III.B. Not disputed

III.C. Not disputed

III.C.1. Plaintiff objects that the question of whether the FBI properly refused to confirm or deny the existence of records, and the question of whether the existence or nonexistence of such records is protected under any FOIA exemption, are both legal conclusions, not statements of fact.

III.C.2. Plaintiff objects that the OIP's reasoning is a legal conclusion, not a statement of fact.

III.C.3. Plaintiff objects that the question of whether the FBI properly refused to confirm or deny the existence of records, and the question of whether the release of such documents would disclose techniques and procedures or guidelines for law enforcement investigations or prosecutions, are both legal conclusions, not statements of fact.

Pursuant to Local Rule 7.1(h), Plaintiff Project for Privacy and Surveillance Accountability, Inc. respectfully submits the following Statement of Material Facts Not In Dispute:

1. By letter dated December 31, 1992 ("1992 Memo"), CIA Director Robert M. Gates notified Thomas S. Foley, Speaker of the U.S. House of Representatives, that he had developed procedures ("Gates Procedures") related to "the dissemination of intelligence information referring to Members of Congress or their staff." The 1992 Memo is contained in Plaintiff's Exhibit 1 (Ex. 1).

2. The 1992 Memo noted that Gates had developed such procedures in response to queries about the dissemination of that information, made by Senator David Boren during Gates's confirmation hearings. (Ex. 1 at 1).

3. In the 1992 Memo, Gates said that he had "considered the need to advise Congress of certain disseminated foreign intelligence reports that may be of special interest or concern to it because the reports refer to Members or staff." (Ex. 1 at 1).

4. In the 1992 Memo, Gates described the procedures for deciding whether and when to notify Congress that disseminated foreign intelligence reports refer to Members or staff, as follows:

> Although decisions must be made on a case-by-case basis rather than through application of rigid rules, the factors I will use in deciding to bring such intelligence to the attention of Congress will include whether:
>
> i. The information concerns foreign reaction to activities by a Member or staffer with important ramifications for U.S. foreign relations or national security.
>
> ii. The information concerns a threat of harm to a Member of Congress or staffer.
>
> iii. The information concerns an attempt by a foreign power to target a Member or staffer.

iv. The name of the Member or staffer has been provided to a requester.

v. The information indicates that a Member of Congress or staffer has engaged in activity that is potentially criminal, unethical or of a counterintelligence concern, *unless* the Department of Justice interposes an objection.

vi. The information refers to activities of a Member or staffer the disclosure of which would constitute an unwarranted invasion of privacy.

In applying the above criteria, except for the last, I intend to resolve all close questions in favor of notification.

(Ex. 1 at 1-2).

5. The 1992 Memo noted that similar letters "[were] being sent to the House Minority Leader, the Chairman and Ranking Republican Member of the House Permanent Select Committee on Intelligence, the Majority and Minority Leaders of the Senate and the Chairman and Vice Chairman of the Senate Select Committee on Intelligence." (Ex. 1 at 2).

6. In a memorandum dated March 29, 2013 ("2013 Memo"), Director of National Intelligence James R. Clapper "re-confirm[ed]" the Gates Procedures and described "how they should be implemented and applied throughout the IC [U.S. Intelligence Community]." The 2013 Memo is contained in Plaintiff's Exhibit 2 (Ex. 2).

7. The 2013 Memo stated that, except in circumstances specifically described therein, its procedural requirements, "are applicable whenever an IC element seeks to disseminate Congressional identity information within the Executive Branch or though intelligence channels, regardless of the source of the information." (Ex. 2 at 1). The 2013 Memo defines "Congressional identity information as "information that the originating IC element knows identifies Members of Congress or Congressional staff by name or by individually identifying titles or characteristics." (Ex. 2 at 1 n.2).

8. The 2013 Memo's description of circumstances in which its procedures do not apply included the dissemination of Congressional identity information that has been "collected overtly or through publicly available sources," or "where the Member of Congress … has provided consent for that dissemination." (Ex. 2 at 6). Moreover, the 2013 Memo procedures do not apply to "[t]he dissemination of Congressional identity information for law enforcement purposes, when required by law or when such dissemination is necessary for an IC element to fully satisfy its obligation to report possible violations of federal criminal law, consistent with applicable policies and procedures." (Ex. 2 at 7).

9. The 2013 Memo provides the "[u]nless it has received approval to unmask Congressional identity information pursuant to these procedures, an IC element seeking to disseminate intelligence that identifies a Member of Congress or Congressional staff shall mask or delete the Congressional identity information before it is disseminated within the Executive Branch." (Ex. 2 at 2).

10. The 2013 Memo further provides that:

> [r]outine requests to disseminate Congressional identity information may take two forms:
>
> i. An Executive Branch recipient of intelligence containing masked Congressional identity information believes that the identity of the Member of Congress or Congressional staff is necessary to understand and assess the associated intelligence and further a lawful activity of the recipient's agency, and requests the Congressional identity information from the originating IC element.
>
> ii. The originating IC element wishes to disseminate Congressional identity information in the absence of a request for dissemination because the originating IC element believes that the identity of the Member of Congress or Congressional staff is necessary for the proposed Executive Branch recipient to understand and assess the associated intelligence and further a lawful activity of the proposed recipient's agency.

(Ex. 2 at 2). In these "routine requests for approval," IC elements "should submit requests for approval in writing," although in "certain time-sensitive cases" they "may submit oral requests for approval that are memorialized in writing as soon as practicable." Moreover, [b]oth the IC element submitting the request for approval and the ODNI Office of General Counsel shall maintain records of all such requests and their disposition." (Ex. 2 at 3).

11. The 2013 Memo applies different approval procedures for "requests involving sensitive matters" versus "requests not involving sensitive matters," defining the former to mean "those requests that involve intelligence either indicating possible impropriety on the part of the Member of Congress or Congressional staff, or relating to or reflecting the targeting for intelligence collection or recruitment of a Member of Congress or Congressional staff by a foreign power or agent of a foreign power." (Ex. 2 at 3).

12. Although the procedures differ, the 2013 Memo allows for the notification of unmasked Members of Congress or Congressional staff both for requests involving sensitive matters and requests not involving sensitive matters. The procedures describe a non-exhaustive list of factors to be considered, "among others," in making the notification decision:

> (1) The recommendation provided by the originating IC element
>
> (2) whether the information concerns foreign reactions to Member or staff activities, and whether the foreign reactions present important ramifications for U.S. national security or foreign policy;
>
> (3) whether there is a credible threat of harm to the Member or staff;
>
> (4) whether there are indications of a foreign power's attempt to target the Member or staff;
>
> (5) whether there are any indications of Member or staff impropriety; and
>
> (6) whether the notification would be an unwarranted invasion of privacy.

(Ex. 2 at 5-6).

13. In a public release dated July 10, 2017 (the "Release"), the ODNI published the most current version of the Gates Procedures. The Release is contained in Plaintiff's Exhibit 3 (Ex. 3).

14. The Release states that "[i]n January 2017, the Director of National Intelligence incorporated the Gates Procedures into the formal Intelligence Community policy framework as an annex to Intelligence Community Directive 112, Congressional Notification" (Ex. 3). The annex ("2017 Annex") is contained in Plaintiff's Exhibit 4 (Ex. 4). Intelligence Community Directive 112 ("ICD 112") is contained in Plaintiff's Exhibit 5 (Ex. 5).

15. The 2017 Annex is dated January 19, 2017 (Ex. 4 at 8). The version of ICD 112 accompanying the Release is dated June 29, 2017 (Ex. 5 at 5).

16. The 2017 Annex states that, except in circumstances specifically described therein, it "establishes IC policy for when an IC element seeks to disseminate unmasked or masked congressional identity information within the Executive Branch, regardless of the source of the information." The 2017 Annex describes "congressional identity information" as "information that the originating IC element knows identifies Members of Congress or congressional staff by name or by individually identifying titles or characteristics." (Ex. 4 at 1).

17. Like the 2013 Memo, the 2017 Annex's description of circumstances in which its procedures do not apply includes the dissemination of Congressional identity information that has been "collected overtly or through publicly available sources," or "where the Member of Congress … has provided consent for that dissemination." (Ex. 4 at 2). Moreover, like the 2013 Memo, the 2017 Annex procedures do not apply to "[t]he dissemination of congressional identity information for law enforcement purposes, when required by law or when such dissemination is necessary for

an IC element to fully satisfy its obligation to report possible violations of federal criminal law, consistent with applicable policies and procedures." (Ex. 4 at 3).

18. Similar to the 2013 Memo, the 2017 Annex provides the "unless it has received approval to disseminate unmasked congressional identity information pursuant to these procedures, … an IC element seeking to disseminate intelligence reporting that identifies a Member of Congress or congressional staff shall mask or delete the congressional identity information before it is disseminated outside of that element within the Executive Branch." (Ex. 4 at 2).

19. The 2017 Annex further provides that:

> Requests for the Dissemination of Unmasked Congressional Identity Information May Be Made in Two Circumstances:
>
> i. A recipient of intelligence containing masked congressional identity information believes that the identity of the Member of Congress or congressional staff is necessary to understand and assess the associated intelligence and to further a lawful activity of the recipient's agency, and the recipient requests the congressional identity information from the originating IC element.
>
> ii. The originating IC element wishes to disseminate unmasked congressional identity information in the absence of a request because the originating IC element believes that the identity of the Member of Congress or congressional staff is necessary for a proposed recipient to understand and assess the associated intelligence and further a lawful activity of the proposed recipient's agency.

(Ex. 4 at 3). In these requests for approval, IC elements "should submit requests for approval in writing (including via electronic means)," although in "certain time-sensitive cases" they "may submit oral requests for approval, provided the request is memorialized in writing as soon as practicable." (Ex. 4 at 3). Moreover, [b]oth the IC element submitting the request for approval and the ODNI OGC [Office of General Counsel] shall maintain records of all such requests and their disposition." (Ex. 4 at 4). The 2017 Annex also requires that "[t]he dissemination of unmasked

congressional identity information shall be documented and recorded by IC elements." (Ex. 4 at 6).

20. Like the 2013 Memo, the 2017 Annex applies different approval procedures for "requests involving sensitive matters" versus "requests not involving sensitive matters," defining the former to mean "those requests involving: (1) possible violations of law by Members or staff …; (2) credible threats of physical harm to the Member or staff …; or (3) where there are indications of a foreign power's attempt to target the Member or staff for intelligence collection or recruitment." (Ex. 4 at 4).

21. However, irrespective of the distinction between sensitive and non-sensitive matters, the 2017 Annex generally provides that the ODNI "will notify appropriate congressional staff that a dissemination of unmasked congressional identity information has taken place." All notifications shall either be "provided in writing" or, in the case of oral notifications, "reduced to writing." (Ex. 4 at 6). Further, "[a]ll notifications will be made consistent with due regard for the protection of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters." (Ex. 4 at 6-7). Notifications "of the dissemination involving misconduct or possible violation of law by a Member or staff person" are "provided, when practicable, to the congressional leadership staff." (Ex. 4 at 7).

22. During a June 2, 2017 radio interview, Senator Lindsey Graham stated that he "ha[d] written to the FBI, the NSA, and the CIA" asking if there was "any incidental collection on Senator Lindsey Graham and if so, was that collection unmasked." *Senator Lindsey Graham: I Believe I Was Unmasked by The Obama Administration*, Fox News Radio, at 10:35–11:00 (June 2, 2017), https://radio.foxnews.com/2017/06/02/senator-lindsey-graham-i-believe-i-was-unmasked-by-the-obama-administration/).

23. On May 13, 2020, Acting Director of National Intelligence Richard Grenell declassified and publicly disclosed an NSA document listing, in chronological order, the names of Federal officials who requested to unmask the identity of former National Security Advisor Michael Flynn ("Grenell Disclosure"). The Grenell Disclosure is contained in Plaintiff's Exhibit 6 (Ex. 6).

24. By letter to Senator Mark Warner dated May 25, 2020 ("Grenell Letter"), Grenell addressed his decision to declassify and release the Grenell Disclosure. The Grenell Letter is contained in Plaintiff's Exhibit 7 (Ex. 7).

25. In the letter, Grenell states that "the decision to declassify the names of individuals who sought to unmask the identity of General Flynn poses absolutely no risk of compromise of either sources or methods." He also states that "the declassification of the identities of unmaskers" was "a declassification that posed no conceivable risks to sources or methods." (Ex. 7).

Respectfully submitted,

/s/ Gene C. Schaerr

Gene C. Schaerr (D.C. Bar No. 416368)
Brian J. Field (D.C. Bar No. 985577)
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-jaffe.com

Counsel for Plaintiff PPSA, Inc.

March 11, 2022

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PROJECT FOR PRIVACY AND SURVEILLANCE ACCOUNTABILITY, INC., Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	Case No. 1:21-cv-2362-RC

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS CROSS MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

* Authorities upon which we chiefly rely are marked with an asterisk.

TABLE OF AUTHORITIES (CONT'D)

Statutes

Rules

Other Authorities

INTRODUCTION

Plaintiff, the Project for Privacy and Surveillance Accountability, Inc. ("PPSA"), brought this Freedom of Information Act ("FOIA") action to determine the extent to which the United States Intelligence Community (IC) has been complicit in the unmasking of members of Congress. While the IC understandably want to prevent such abuses from becoming public, many are already a matter of public record. Consequently, for the last half century, Congressional intelligence committees have attempted to check the IC's tendency to conceal its abuses by providing greater oversight and accountability. In response, the IC appears to have turned its surveillance tools on its Congressional overseers. The possibility that the Executive is thus abusing its surveillance tools to escape accountability to Congress raises grave concerns about separation-of-powers and the health of our democracy. As demonstrated by the DOJ's secret 2017 subpoenaing of the private phone data of two members of the House Intelligence Committee,[1] these concerns are not merely theoretical.

FOIA is an important mechanism for holding the IC accountable and airing any potential abuses. That statute mandates transparency and accountability by requiring agencies to promptly search for and disclose responsive and non-exempt records in response to formal requests from members of the public, the press, and other interested groups.

Here, PPSA sought any records of communications between any agency and any member of Congress concerning the potential employment of "unmasking" surveillance tools on the Legislative Branch. Unfortunately, but perhaps unsurprisingly, the FBI responded by refusing to conduct any search for responsive records and invoking an interpretation of the so-called *Glomar*

---

[1] *See, e.g.*, Rebecca Heilweil, *The Trump administration forced Apple to turn over lawmakers' data. Democrats are outraged.*, VOX (June 14, 2021, 12:07 PM), https://tinyurl.com/mwuuczmm.

doctrine in such an aggressive way that it amounts to an administrative form of the state secrets privilege, a shield that it claims allows it to refuse even to search for records of publicly acknowledged enquiries into Congressional unmasking. The claim that surveilling members of Congress is too sensitive even to search for records related to *enquiries* about such surveillance subverts FOIA's broad transparency mandates. It does so by converting a non-textual judicial limitation on the statute into a common-law state-secrets privilege for FOIA suits. Under the statute itself and any reasonable view of *Glomar*, the FBI fails to satisfy its burden of justifying its refusal to search for and produce responsive, non-exempt records to PPSA.

Here, the FBI's conclusory affidavit is not only insufficient to establish any claimed exemption, it is also woefully inadequate to rebut contrary evidence of the existence of properly segregable and disclosable records responsive to PPSA's requests. First, the request clearly encompasses records sent *from* members of Congress *to* federal agencies—records whose existence has already been publicly acknowledged and whose content cannot be presumed to include sensitive information. Further, the IC's own policies on the acquisition and dissemination of Congressional identity information, and the very classification order on which the FBI relies, essentially admit the existence of numerous categories of responsive records—including Congressional communications falling squarely within Plaintiff's request—that can be disclosed without any of the harms contemplated by FOIA's narrow exemptions. Moreover, the IC's willingness to disclose sensitive unmasking records (when it suits its purposes to do so) puts the lie to the FBI's arguments that merely conducting a FOIA-mandated search would cause inevitable harm. Rather, the Court should hold the FBI to its obligation under FOIA to search for and produce all responsive, non-exempt records. The FBI's attempt to shirk this responsibility finds no support in Circuit precedent, or elsewhere. And therefore PPSA's cross-motion should be granted..

BACKGROUND

The PPSA request at the heart of this litigation concerns communications about potential abuses of "unmasking"—a surveillance process that allow Executive Branch actors to de-anonymize information about United States persons caught in the net of IC surveillance.

By letter dated December 13, 2019, PPSA submitted a multi-item FOIA request to the FBI. Item 35 of that letter requested all correspondence "between … any agency" and any member of Congress or Congressional leadership "concerning the unmasking of Congressmen or Senators." Plaintiff's Complaint, ECF No. 1 (filed Sept. 7, 2021) ("Compl.") ¶ 8. Item 35 specifically included several members of Congress who had made, or were otherwise associated with, public inquiries into the U.S. intelligence community's surveillance of them or other members. *Id.* At least one of those members, Senator Lindsey Graham, had publicly acknowledged that he had "*written* to the FBI, the NSA, and the CIA" about his own unmasking. Plaintiff's Statement of Material Facts Not In Dispute ("Pl's Statement") ¶ X (emphasis added). Moreover, the U.S. Intelligence Community ("IC") has publicly disclosed so-called "Gates Procedures" admitting that Congressional identity information is routinely unmasked, and acknowledging that IC agencies notify Congress about such unmaskings "in writing." Ex. 4 at 6.

But even though the existence of records falling within the scope of PPSA's request is a matter of public knowledge, the FBI has refused to even conduct a search for such records. On October 13, 2020, the FBI issued a *Glomar* response to PPSA's request, relying on Exemptions 1, 3, 6, 7(C), and 7(E). Compl. ¶ 10. And when PPSA timely appealed that response, the Department of Justice denied PPSA's administrative appeal on May 27, 2021. Compl. ¶¶ 11-12. Having exhausted its administrative remedies, PPSA brought this litigation on September 7, 2021, Compl., and Defendant filed its motion for summary judgment and supporting memorandum of points and authorities on January 14, 2022. ECF Nos. 9, 9-1.

LEGAL STANDARD

As in other contexts, summary judgment in a FOIA case is appropriate when "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). As the D.C. Circuit has explained, "[t]o meet this exacting standard in a FOIA suit, the defending agency must prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the FOIA's inspection requirements." *Perry v. Block*, 684 F.2d 121, 126 (D.C. Cir. 1982) (cleaned up). The agency bears the burden of justifying the application of any exemptions, "which are exclusive and must be narrowly construed." *Mobley v. CIA*, 806 F.3d 568, 580 (D.C. Cir. 2015); *see also Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007) (courts must construe FOIA exemptions "narrowly," in keeping with "FOIA's broad disclosure policy"). If the agency's affidavits or declarations in support of summary judgment fail to provide "reasonable specificity of detail rather than merely conclusory statements," or if they are "called into question by contradictory evidence in the record or by evidence of agency bad faith," summary judgment in favor of the agency is not appropriate. *Jud. Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 215 (D.C. Cir. 2013) (quotation omitted).

In addition, this Circuit's line of *Glomar* cases permit an agency, "in limited circumstances," to refuse to confirm or deny the existence of records. *ACLU v. CIA*, 710 F.3d 422, 426 (D.C. Cir. 2013); *see also Bartko v. U.S. Dep't of Just.*, 898 F.3d 51, 63 (D.C. Cir. 2018) (affirming that the circumstances justifying a *Glomar* response are "rare"). This, in turn, allows the agency to wholly escape FOIA's plain statutory language requiring the agency to search for and release responsive records. *Cf. Shapiro v. U.S. Dep't of Justice*, 153 F. Supp. 3d 253, 273 (D.D.C. 2016) (observing that *Glomar*, as a "judicial gloss on FOIA," is not described in the statute or its legislative history). "Because *Glomar* responses are an exception to the general rule that agencies must acknowledge the existence of information responsive to a FOIA request and provide

specific, non-conclusory justifications for withholding that information, they are permitted *only* when confirming or denying the existence of records would itself cause harm cognizable under an FOIA exception." *Roth v. U.S. Dep't of Just.*, 642 F.3d 1161, 1178 (D.C. Cir. 2011) (emphasis added). However, it is clear that merely conducting an internal search for records does not itself constitute a disclosure that protected records do or do not exist, as the D.C. Circuit has recognized an agency's ability to issue a "narrowed *Glomar* response" *after* searching for and disclosing any unprotected records. *People for the Ethical Treatment of Animals v. Nat'l Inst. of Health*, 745 F.3d 535, 545 (D.C. Cir. 2014) [hereinafter *PETA*].

Accordingly, "[i]n determining whether the existence of agency records *vel non* fits a FOIA exemption, courts apply the general exemption review standards established in non-*Glomar* cases." *Wolf*, 473 F.3d at 374. Under those standards, the agency's exemption justifications "need [to] be both plausible and logical." *ACLU v. U.S. Dep't of Def.*, 628 F.3d 612, 624 (D.C. Cir. 2011) (quotations omitted). Whenever "there exists a category of responsive documents for which a *Glomar* response would be unwarranted," an agency's "assertion of a blanket *Glomar* response … cannot be sustained." *PETA*, 745 F.3d at 545. Thus, even under *Glomar*, agencies are not "permitted … to withhold—or to decline to confirm or deny the existence of—any record or information that is *not* itself protected by a FOIA exemption or exclusion." *Shapiro*, 153 F. Supp. 3d at 274 (original emphasis).

ARGUMENT

In a clear effort to distract from its failure to comply with FOIA, the FBI raises and attacks a straw man, characterizing PPSA's request as "essentially seek[ing] to reveal whether the FBI possesses any classified FISA-obtained or -derived intelligence information" on members of Congress. Def's Mem. of Points & Authorities ("Def's Mem."), ECF No. 9-1. Not so. PPSA's request, which encompasses *any* communication between federal agencies and Congress touching on Congressional unmasking, does not fit neatly within the contours of any of the FOIA exemptions broadly invoked by the FBI. Because none of those exemptions is coextensive with PPSA's request, the FBI cannot justify its blanket *Glomar* response and must comply with its statutory duty to search for responsive, properly disclosable records.

I. Because the FBI fails to meet its burden of justifying its *Glomar*-based refusal even to *search* for responsive records under Exemption 1, its motion for summary judgment must be denied as to that exemption and PPSA's motion for an order compelling a search for relevant records must be granted.

Exemption 1 affords no justification for the government's *Glomar* response because the mere existence *vel non* of responsive records is neither "specifically authorized under criteria established by [Executive Order 13526]" nor "in fact properly classified pursuant to such [] order." 5 U.S.C. § 552(b)(1)(A). Where, as here, an agency fails to satisfy either of the "substantive and procedural criteria" for classification under Executive Order 13526 ("EO 13526"), it cannot rely on that order to justify its invocation of Exemption 1. *Jud. Watch, Inc. v. U.S. Dep't of Def.*, 715 F.3d 937, 941 (D.C. Cir. 2013); *see also id.* at 943 (reiterating that an agency may withhold information under Exemption 1 only if that information is "classified in accordance with the procedural criteria of the governing Executive Order as well as its substantive terms" (quoting *Lesar v. U.S. Dep't of Just.*, 636 F.2d 472, 483 (D.C. Cir. 1980)).

To satisfy the *substantive* criteria for a valid *Glomar* response, the classified information must not only "pertain to at least one of eight subject-matter classification categories," but must also "reasonably be expected to cause some [defined] degree of harm to national security … that is identifiable or describable." *Jud. Watch, Inc.*, 715 F.3d at 941 (citing EO 13526 §§1.1, 1.2, and 1.4).

To satisfy the *procedural* criteria for such a response, an individual with classification authority must not only make the threshold reasonable-damage determination, but must take all steps necessary to properly classify the information by complying with the myriad procedural mandates described throughout the order. *See*, *e.g.*, EO 13526 §§ 1.1(a)(1) (requirement to classify the information); 1.5(a) (requiring, "[a]t the time of the original classification," that the original classification authority "establish a specific date or event for declassification based on the duration of the national security sensitivity of the information"); 1.6 (requiring the classified information to be marked "in a manner that is immediately apparent" with: a classification level, the identity of the classifying authority, the agency and office of origin, declassification instructions, and a "concise reason for classification"); 1.7(a) (forbidding classification for certain prohibited purposes); 1.7(d) (imposing additional requirements for classifying previously undisclosed information "after an agency has received a request for it under the Freedom of Information Act"). The FBI itself recognizes that information that meets the order's substantive criteria does not automatically become classified, but requires compliance with the full classification process prescribed by the order. *See*, Def's Mem. 11 ("an original classification authority *must classify* the information") (emphasis added; internal quotations omitted).

Crucially, the FBI's *Glomar* response fails to qualify under Exemption 1 because, under EO 13526, an agency cannot refuse to confirm or deny the existence of requested records unless

"the fact of [the records'] existence is itself classified *under this order*."[2] EO 13526 § 3.6(a) (emphasis added). Thus, the FBI's *Glomar* decision is not exempt from the order's procedural criteria, but instead must be made by an individual with classification authority, must be accompanied by its own declassification instructions, and must otherwise comport with the order's requirements and prohibitions.

The FBI knows that *Glomar* classifications must satisfy all the same EO 13526 criteria as other classification actions, as it takes pains to explain that, besides satisfying "all four [substantive] factors for classification," its *Glomar* response was not made in violation of the order's Section 1.7(a) prohibitions. Def's Mem. 14 (claiming that classification decision was not made with certain proscribed purposes (quoting Seidel Decl. ¶ 35, ECF No. 9-2)); *see also generally* EO 13526 § 1.7 (imposing numerous procedural requirements on classification, declassification, and reclassification). However, because the FBI has failed to show in "reasonable specificity of detail" that its *Glomar* response otherwise meets the substantive and procedural criteria of EO 13526, that order provides no logical or plausible basis for its invocation of Exemption 1 and its conclusory statements fail to qualify for summary judgment.

A. The FBI fails to establish compliance with EO 13526's several procedural criteria.

Starting with the Executive Order's extensive procedural criteria, the FBI has shown, at best, that an individual with classification authority has made a *post hoc* determination that the withheld information—the fact of the existence or nonexistence of responsive records—purportedly meets the substantive criteria for classification. *See* Seidel Decl. ¶ 29. However, the FBI's affidavit fails to provide the detail necessary to conclude that the agency completed all the

[2] Although a *Glomar* decision may also be justified by classification under predecessor orders to EO 13526, the FBI has not invoked any prior order as a basis for Exemption 1.

procedural steps to actually classify that information before issuing its *Glomar* response. Although the FBI's affidavit claims that the fact of the existence or nonexistence of any responsive records is "properly classified" merely by falling within a *substantive* classification category under EO 13526 § 1.4(c), it fails to allege that the many *procedural* requirements scattered throughout the order have been met. Seidel Decl. ¶ 60. Among other things, the affidavit fails to establish that the withheld information: (1) was marked with declassification instructions, EO 13526 §§ 1.5 and 1.6(a)(4)); (2) complied with the special procedures applicable to classifying information after that information has been requested through FOIA, EO 13526 § 1.7(d); or (3) complied with any of the other transparency procedures required under the order.

The plain language of EO 13526 imposes those procedural requirements as part of its "*uniform* system for classifying … and declassifying national security information," and the FBI points to no provision excusing its own *Glomar* response from those uniform procedural requirements. EO 13526 (emphasis added); *cf. DiBacco v. U.S. Dep't of the Army*, 234 F. Supp. 3d 255, 273 (D.D.C. 2017), *aff'd sub nom. DiBacco v. Dep't of the Army*, 926 F.3d 827 (D.C. Cir. 2019) (concluding that the absence of "certain classification markings" did not render records improperly classified under Exemption 1 and EO 13526 because the "plain language" of EO 13526 § 1.6(f) specifically excepted information classified under a predecessor order). Thus, the FBI fails to show that the withheld information—the fact of the existence or nonexistence of responsive records—was properly classified under the only order invoked as a basis for Exemption 1.

B. The FBI fails to establish that all the withheld information satisfies EO 13526's substantive criteria.

The FBI's failure to establish that they properly classified the withheld information independently defeats their invocation of Exemption 1 for purposes of summary judgment.

1. But more fundamentally, that information fails to meet EO 13526's substantive criteria because the disclosure of the mere existence *vel non* of responsive records—records of any "correspondence between [Congress] and any agency … concerning the unmasking of Congressmen or Senators"—cannot reasonably be expected to cause identifiable and describable damage to national security. Compl. Ex. A ¶ 35, ECF No. 1-1. Most obviously, PPSA's request includes sent *from* members of Congress *to* federal agencies. Absent a search, the FBI has no basis to assume that such records contain sensitive information. In any case, multiple members of Congress have already made public statements acknowledging that such records exist, deflating the FBI's arguments supporting its refusal to confirm their existence. *See*, *e.g.*, Pl's Statement ¶ X (quoting Senator Lindsey Graham's public confirmation that he had "written to the FBI, the NSA, and the CIA" about his own unmasking); *see also* Compl. ¶ 8 n.1. Moreover, and as shown below, the IC has already publicized the fact that it advises Congress about Congressional unmaskings through written notifications.

First, the United States Intelligence Community's communications with Congress concerning the acquisition and dissemination of Congressional identification information has been a matter of public record for decades. For at least thirty years, the IC has frankly admitted not only that it acquires and "disseminat[es] intelligence information referring to Members of Congress [and] their staff," but that it routinely "advise[s] Congress" about those practices. Ex. 1 at 1. The fact of ongoing government treatment of Congressional identification information is and was so well-known that it was openly raised in CIA Director Robert M. Gates's 1991 confirmation hearings, leading Gates to publish a 1992 memorandum ("1992 Memo") adopting rules and standards governing such practices. *Id.* More recently, then-Director of National Intelligence James R. Clapper revised those procedures in a 2013 memorandum ("2013 Memo"), and then incorporated newly revised procedures into formal IC policy as an annex ("2017 Annex") to

Intelligence Community Directive 112 ("ICD 112"). The ODNI declassified both revised procedures in 2017. Ex. 3. The 2013 Memo demonstrates that the "unmask[ing of] Congressional identity information pursuant to [such] procedures" is so commonplace as to be labeled "routine," Ex. 2 at 2, and that "Congressional notification of [such] unmasking" occurs regularly, *id.* at 4. Thus, since at least 1991, the fact of the IC's ongoing communications with Congress about unmasking has been repeatedly acknowledged and widely publicized.[3]

Second, and contrary to the FBI's claims that merely searching for responsive records would damage national security, both the 1992 Memo and the procedures that succeeded it have rejected any wholesale withholding of information about those practices. To the contrary, each procedural iteration has recognized that the balancing of multiple factors, including the relative sensitivity of the information, may justify or even compel disclosure:

- The 1992 Memo expressly recognized that, as determined on a case-by-case basis, some information about the acquisition and dissemination of Congressional identity information could and should be disclosed to Congress; such decisions were not made categorically through application of "rigid rules" but rather through the weighing of various flexible factors. Ex. 1 at 1-2.
- Likewise, the 2013 Memo and 2017 Annex both contemplate that some information about these practices should be disclosed to Congress depending on multiple factors including whether or not an unmasking request involves "sensitive matters" like possible violations of law by Congressional members. Ex. 2 at 5-7; Ex. 4 at 4. Both policies recognize special exemptions for the "dissemination of congressional

[3] *See*, *e.g.*, John Solomon, *Spy agencies changed rules, making it easier to unmask members of Congress*, THE HILL (July 31, 2017, 4:17 PM), https://tinyurl.com/ybkez3mt.

> identity information for law enforcement purposes," showing the IC's awareness both that not all Congressional unmasking is conducted for law enforcement purposes, and that safe disclosure is possible when those practices are conducted for other reasons. Ex. 2 at 7; Ex. 4 at 3.

The complexity of each of these multi-factor policies and their spectrum of outcomes belies any categorical assertion that confirming or denying the mere existence of even a single communication—already one or more steps removed from the unmasking process itself—would necessarily cause damage to national security.

Indeed, the Gates Procedures—all publicly available—readily admit both that (1) that records about Congressional identity information are being generated and retained, and (2) written notifications concerning those practices are being sent to Congress. *See* Ex. 1 at 1-2 (procedures governing dissemination of intelligence information referring to Members of Congress generally require "written approval"); *id.* at 2 (discussing "Congressional notification"); *id.* (confirming the existence of "[a] similar letter [that] is being sent to" members of Congressional leadership); *id*. at 4 (noting "requirement to keep a record of any request [regarding Congressional identity information] and dispositions of the request"); Ex. 2 at 3 ("Both the IC element submitting the request for approval [to disseminate Congressional identity information] and the ODNI Office of General Counsel shall maintain records of all such requests and their disposition."); Ex. 4 at 4 (same); Ex. 2 at 6 (confirming the "dissemination of Congressional identity information [from IC elements] to Congress"); Ex. 4 at 5 (same).

Crucially, the current Gates Procedures explicitly confirm that "[a]ll notifications regarding the dissemination of unmasked congressional identity information shall be provided *in writing*." *Id.* at 6 (emphasis added); *see also generally id.* at 6-7 (confirming multiple forms of written notifications to Congressional members and staff). Thus, the IC has already confirmed,

repeatedly, the existence of records responsive to PPSA's request. Further, current procedures mandate that those written notifications "will be made consistent with due regard for the protection of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters." This mandate acknowledges the existence of written notifications concerning Congressional unmaskings that have been prepared in a way that protects sensitive information. Thus, the FBI has no excuse not to search for those safely disclosable records.

2. If that were not enough, recent declassification decisions by the ODNI, and that agency's explanations for those decisions, demonstrate that it is possible to both acknowledge and even publicize unmasking records without damaging national security. On May 8, 2020, then-Acting Director of National Intelligence Richard Grenell declassified documents listing, in chronological order, the names of federal officials who submitted requests to unmask the identity of former National Security Advisor Michael Flynn between 2016 and 2017. Ex. 6 at 2. That declassified list contained several redactions, but still named multiple senior officials including: the U.S. Ambassadors to Russia, Turkey, Italy, and the United Nations; the Directors of the FBI, CIA, and National Intelligence; the Secretary of the Treasury; the President's Chief of Staff; and the Vice President. *Id.* at 3-5. In a May 25, 2020 letter explaining his decision to declassify those unmasking records, Grenell condemned the practice of "conceal[ing] potential abuse behind unnecessary security classification," stressed that the declassification of even those highly sensitive records "posed no conceivable risk to [intelligence] sources or methods," and noted that EO 13526 absolutely forbids using classification as a tool to conceal illegality or to prevent embarrassment. Ex. 7. If it is possible—and sometimes necessary—to disclose the chronology and the very identities of public officials involved in specific unmasking requests without damaging national security, then clearly it is possible to merely conduct a statutorily mandated search for

correspondence merely touching on the unmasking topic. The FBI's arguments to the contrary are implausible and illogical when compared to the IC's own actions.

3. The FBI's arguments in support of blanket *Glomar* withholding also prove too much. Under their flawed reasoning, the IC can use the judicially-created *Glomar* doctrine—effectively a non-legislative amendment to the FOIA statute—to circumvent not just their statutory FOIA duties, but also the language and express intent of EO 13526 by refusing to even search for—much less disclose—records that the order stipulates should not be classified at all:

- Section 1.5 of EO 13526 mandates that "[n]o information may remain classified indefinitely," EO 13526 § 1.5(d), and thus requires all original classification decisions to set a "specific date or event for declassification," *id.* at 1.5(a). As a default, information not marked for an earlier date or event "shall be marked for declassification 10 years from the date of the original decision." *Id.* at 1.5(b). Because PPSA's request includes documents from any date range, a statutorily mandated search may reveal that many responsive records have either been declassified or at least should be declassified.
- Section 1.7(a) mandates that "*in no case* shall information be classified, continue to be maintained as classified, or fail to be declassified" for reasons including: to "conceal violations of law, inefficiency, or administrative error"; to prevent embarrassment to a person, organization, or agency"; or to "prevent or delay the release of information that does not require protection in the interest of national security." EO 13526 § 1.7(a) (emphasis added). Thus, a FOIA search may uncover improperly classified records, including records of agency wrongdoing, that the order flatly refuses to shield from disclosure.

- Section 1.8, by creating procedures and a duty to challenge wrongful classifications, expressly contemplates that at any given time the government may have records and information that are improperly classified. EO 13526 § 1.8(a) and (b). Without conducting a search, the FBI cannot eliminate the possibility that its blanket *Glomar* response hides the existence of those properly disclosable records.
- Notwithstanding an original declassification date and instructions, Section 3.1(a) mandates that "[i]nformation shall be declassified as soon as it no longer meets the standards for classification under this order." EO 13526 § 3.1(a). That information-specific determination must be made on a case-by-case basis, rendering a blanket *Glomar* response inappropriate.
- Finally, Section 3.1(d) recognizes that even where classified information might otherwise merit protection under the order's substantive requirements, in some cases "the need to protect such information may be outweighed by the public interest in disclosure of the information, and in these cases the information should be declassified." Again, this case-specific approach to declassification decisions indicates that a *Glomar* response unsupported by a prior search will hide the existence of records properly declassifiable under the order.

All of these provisions create the clear possibility that, at this moment, the FBI currently possesses records responsive to PPSA's FOIA request whose classification status is expired or invalid, or improper, or whose need for protection is nevertheless outweighed by the public interest in disclosure. Because none of those "categor[ies] of responsive documents" meets the substantive requirements of EO 13526, Exemption 1 cannot sustain the FBI's "assertion of a blanket *Glomar* response." *PETA*, 745 F.3d at 545.

Further, we know from the Gates Procedures that, as a matter of categorization, not all treatment of Congressional identity information involves law enforcement purposes or sensitive matters, and that Congressional notifications about unmasking are already prepared "with due regard for the protection of … [such] sensitive matters" in any case. Ex. 4 at 6. And yet, under the FBI's expansionist interpretation of *Glomar*, none of that properly disclosable information will see the light of day because, contrary to FOIA's plain language, the FBI claims it has no statutory duty to even search for those safely disclosable records. Under a narrow reading of Exemption 1, which binding precedent requires, that categorical stonewalling cannot be a logical outcome.

4. Finally, both the FOIA statute and EO 13526's changes to the classification regime were motivated by the same understanding that IC elements, acting in their own institutional self-interest, have demonstrated a repeated willingness to abuse their cloak of secrecy, and a corresponding unwillingness to divulge information of those abuses, necessitating external transparency mandates. The existence of properly disclosable information, including evidence of other surveillance abuses, will never be discovered absent an initial search. While such a search will necessarily sift through other, properly withholdable records, the FBI fails to plausibly explain why it should not be required to fulfill its statutory duty to at least *search* for safely disclosable information and then make appropriate redactions.

II. Summary judgment should be granted for PPSA and against the FBI as to Exemption 3 because its cited statutes, and thus the exemption, likewise fail to justify its *Glomar*-based refusal to conduct a search for responsive records.

As to its Exemption 3 defense, the FBI invokes one statute—the National Security Act—to justify its *Glomar*-based refusal to conduct a search for responsive records. But while that statute might justify the *withholding* or *redaction* of particular records, it cannot shield the FBI from its statutory duty to perform an initial FOIA search.

With respect to the National Security Act, the FBI admits that "the only question for the court is whether the agency … has shown that responding to a FOIA request can reasonably be expected to lead to unauthorized disclosure of intelligence sources and methods." Def's Mem. 17 (quotations omitted). Clearly, the answer is no.

In and of itself, merely performing a statutorily mandated FOIA *search* reveals nothing about unmasking communications beyond what the Gates Procedures already acknowledge—namely, that such communications exist. And, while such a search might identify particular records containing information about intelligence sources and methods, searching for and processing records is in no way equivalent to divulging all information contained therein. Indeed, the D.C. Circuit has made clear that it is possible for agencies to issue a "narrowed *Glomar* response" *after* performing a FOIA search—a holding premised on the recognition that the act of conducting an internal agency search does not itself reveal protected information. *PETA*, 745 F.3d at 545.

Here again, the ODNI's own words and actions contravene the FBI's arguments. As noted in the previous section, the ODNI has shown that it is possible to both search for—and publicly disclose—detailed communications related to intra-governmental surveillance with "no conceivable risks to [intelligence] sources or methods." Ex. 7. With FOIA's well-established exemption regime in place, and with the benefit of appropriate redaction, it is unreasonable to

expect that the mere act of performing a FOIA search will, by itself, lead to the unauthorized disclosure of intelligence sources and methods.

Because the FBI cites no statute that would justify its wholesale refusal to search for responsive records, Exemption 3 provides no basis for its *Glomar* response.

III. Summary judgment should be granted for PPSA and against the FBI as to Exemptions 7 because it fails to meet its burden of establishing that any subsection of that exemption justifies its *Glomar*-based refusal to search for responsive records.

The FBI also errs in relying upon Exemption 7. As a categorical answer to a FOIA request, a *Glomar* response fails when it lacks a categorical justification.[4] Here the FBI cannot invoke either of Exemptions 7(C) or 7(E) to justify its *Glomar* response because it fails to meet its burden to "make a threshold showing that the FOIA request seeks records compiled for law enforcement purposes." *Bartko*, 898 F.3d at 64 (quotations omitted; emphasis added); *see also* 5 U.S.C. § 552(b)(7). But even if it had, the FBI also fails to justify its *Glomar* response because it has failed to "mak[e] an *across-the-board* showing" that any of those exemptions would justify the categorical withholding of all responsive records. *Bartko*, 898 F.3d at 64 (emphasis added).

A. The FBI fails to meet its burden of making a threshold showing that all responsive records were compiled for law enforcement purposes.

As to the first showing, the FBI fails to provide the record-specific details necessary to satisfy its two-part burden under the "law-enforcement-purpose inquiry" operative in this Circuit. *Bartko*, 898 F.3d at 64. That inquiry "focuses on how and under what circumstances the requested files were compiled, and whether the files sought relate to anything that can fairly be characterized

[4] Although the FBI attempts to push its burden onto PPSA (Def's Mem. 20), it is well-established in this Circuit that "the agency bears the burden of proving that an exemption applies," *Bartko v. U.S. Dep't of Just.*, 898 F.3d 51, 62 (D.C. Cir. 2018) (citing *Citizens for Resp. & Ethics in Wash. v. Dep't of Just.*, 746 F.3d 1082, 1088 (D.C. Cir. 2014)). Further, this burden does not shift even when the requester files a cross-motion for summary judgment. *Pub. Citizen Health Rsch. Grp. v. FDA*, 185 F.3d 898, 904-05 (D.C. Cir. 1999).

as an enforcement proceeding." *Id.* (quotation omitted). "To qualify as law enforcement records, the documents must arise out of investigations which focus directly on *specifically alleged* illegal acts which could, if proved, result in civil or criminal sanctions." *Id.* (emphasis added; cleaned up). Thus, summary judgment is unavailable because the FBI provides "no sufficient basis on which to make the threshold *Glomar* determination" that all withheld records meet this standard. *Id.* at 66.

Nor could they. Most obviously, PPSA's request does not seek first-hand records directly generated by any law enforcement investigation, but rather seeks second-hand correspondence between any agency and any member of Congress concerning Congressional unmasking. Letters and emails sent *from* Congress *to* an agency would not be attributable to any agency purpose whatsoever, much less arise out of an agency's own investigation. And because PPSA's request encompasses correspondence to or from *any* agency, not merely the FBI, the FBI has no basis to assume, absent a search, that all responsive records in its possession would relate to a law enforcement proceeding.

Moreover, as shown above, the IC's internal policies openly acknowledge that not all acquisition and dissemination of Congressional identity information involves law enforcement purposes. Ex. 2 at 7; Ex. 4 at 3. And, to the extent that any IC element abuses its surveillance powers for illicit purposes, the responsive records generated by such practices would lack either "a rational nexus between the investigation and one of the agency's law enforcement duties [or] a connection between an individual or incident and a violation of federal law." *Bartko*, 898 F.3d at 64 (cleaned up). Because not all responsive records in the FBI's possession are necessarily law enforcement records, the FBI bears the burden of "showing on a case-by-case basis" that all requested records were actually compiled for law enforcement purposes. Because the agency

entirely fails to make that showing, its reliance on Exemptions 7(C) and (E) fails on that basis alone.

B. The FBI fails to meet its burden of showing that Exemption 7(C) would cover all responsive records.

Besides their failure to make any specific showing of law enforcement purposes, the FBI cannot invoke Exemption 7(C)[5] to justify its *Glomar* response because it fails to meet its secondary burden of "making an across-the-board showing that the privacy interest the government asserts categorically outweighs any public interest in disclosure." *Bartko*, 898 F.3d at 64.

From the outset, PPSA's request has always been focused on the government's potential abuse of its surveillance powers against its Congressional overseers, and *not* on any potential wrongdoing of members of Congress themselves. *See*, *e.g.*, Compl. Ex. A at 1 (requests "seek[] information about politically motivated unmasking"); Compl. Ex. D at 3 (ECF No. 1-4) (invoking potential "political targeting" and agency "misconduct" as grounds for disclosure); *id.* at 5 (noting "public's interest in knowing whether [intelligence] agencies surveilled their own congressional overseers"). That focus neatly aligns with FOIA's well-recognized, central public interest—"the citizens' right to be informed about what their government is up to." *DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773 (1989) (internal quotations omitted). Admittedly, that purpose would be ill-served by a request principally concerned with "information about private citizens … that reveals little or nothing about an agency's own conduct," but that is clearly not the case here. *Id*. Indeed, PPSA's specifically and repeatedly indicated its willingness to receive "anonymized" and "redacted" production to avoid "disclos[ing] the agency's interest (or lack

[5] The FBI concedes that Exemption 6 provides even weaker support for its *Glomar* response. Exemption 6 "weights the scales in *favor* of disclosure," thus undermining rather than supporting the FBI's categorical refusal. *Ripskis v. HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984) (emphasis added).

thereof) in any particular individual." Compl. Ex. A at 6-7.[6] Thus, the requests' purpose has always been recognizably focused on federal agencies' own conduct and *mis*conduct.

Against that well-recognized public interest, the closest the FBI comes to identifying a categorical justification for its *Glomar* response is to cite *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197 (D.C. Cir. 1991). But *SafeCard*, at best, would only "authorize the redaction of the names and identifying information of private citizens," *not* allow the FBI to "withhold every responsive document *in toto*." *Citizens for Resp. & Ethics in Wash. v. Dep't of Just.*, 746 F.3d 1082, 1094 (D.C. Cir. 2014). Because that justification is by no means coextensive with PPSA's request, it cannot support the FBI's *Glomar* response.

Further, the varying balances between particular privacy interests and the public interest in disclosure defeats any across-the-board *Glomar* response. *See Bartko*, 898 F.3d at 66 (*Glomar* response failed where agency could not "establish that there would be a single answer to every balancing of interests involving any [responsive] records"). Here, not only do all the individuals falling within the scope of PPSA's request have diminished privacy interests as nationally prominent public office-holders, *Forest Serv. Emps. for Environ. Ethics v. U.S. Forestry Serv.*, 524 F.3d 1021, 1025-26 (9th Cir. 2008) (already reduced privacy interest of public officials even more diminished for higher level officials), but their privacy interests vary based on a number of other personal factors—not least, whether they are still alive. *See Davis v. Dep't of Just.*, 460 F.3d 92, 97-98 (D.C. Cir. 2006) (affirming that fact of death may diminish privacy interest in

[6] PPSA's clearly stated willingness to received anonymized production also shows the FBI's reliance on *NARA v. Favish*, 541 U.S. 157 (2004) to be inapt. The requester in *Favish* sought records about the death of one specifically identified individual, meaning that there was no possible way to protect any privacy interests through redaction. Here, the scope of PPSA's request expressly states that it is "not limited" to the members of Congress specifically named in the request, so anonymization through redaction is clearly possible. Compl. Ex. A at 5.

nondisclosure); *see also id.* at 98 (without confirmation that government ascertained whether individual was still alive, court could not evaluate whether it reasonably balanced privacy interests against public interest in disclosure). Moreover, as the FBI concedes, some of the individuals falling within the scope of PPSA's request "have … diminished their rights to privacy" by publicizing their inquiries into their own potential unmaskings. Def's Mem. 23; *see also* Compl. ¶ 8 n.1. And, of course, the FBI also fails to acknowledge how privacy interests degrade over time, further undermining its categorical approach to a request for documents not limited to any particular timeframe. *Davin v. U.S. Dep't of Just.*, 60 F.3d 1043, 1058 (3d Cir. 1995) (noting that some individuals' "privacy interest may become diluted by the passage of time").

As mentioned in PPSA's administrative appeal, the compelling public interest in knowing whether U.S. intelligence agencies surveil their own Congressional overseers greatly outweighs any diminished privacy interests of those already prominent public figures. Against that strong interest in disclosure, the FBI utterly fails to show that the varying factors diminishing the countervailing privacy interests would justify categorical withholding of all information in all responsive records. Their "vaporous justification" cannot justify their blanket denial. *Bartko*, 898 F.3d at 66.

C. The FBI fails to establish that at FOIA search would cause harm cognizable under an appropriately narrow construction of Exemption 7(E).

Although FISA surveillance like unmasking is a publicly known technique, the FBI nevertheless invokes Exemption 7(E) and in so doing stretches the coverage of that exemption to an untenable degree. As an initial matter, Exemption 7(E) cannot justify a blanket *Glomar* response because PPSA's request encompasses any communications in the FBI's possession between members of Congress and *any* agency, not just law enforcement agencies like the FBI. Absent a search, the FBI cannot rule out the possibility that it possesses responsive records that reveal

nothing about law enforcement techniques and procedures. But even with respect to records generated by the FBI, the agency's reliance on Exemption 7(E) is untenable.

First, the FBI claims that "[h]ow the FBI applies its investigative resources … is itself a law enforcement technique or procedure" protected by Exemption 7(E). Seidel Decl. ¶ 46. That overbroad interpretation would cause the exemption to swallow the FBI's general duty of disclosure. Read thus, the mere search for responsive records would constitute a dangerous disclosure on "the scope of law enforcement techniques and procedures." *Id.* ¶ 9.

The FBI's argument also proves too much, as it is difficult to imagine any disclosure touching FBI activities that would not, by necessity, reveal some information about its use of investigative resources. The agency's strained interpretation of "technique or procedure" cannot survive the Supreme Court's repeated direction that, because the FOIA should be construed heavily in favor of disclosure, its exemptions must be read narrowly. *See*, *e.g.*, *U.S. Dep't of Just. v. Julian*, 486 U.S. 1, 8 (1988) (FOIA's "broad" mandate of disclosure requires its exemptions to be "narrowly construed").

Second, and as shown above, the FBI's abstracted claim that disclosure of the mere existence of unmasking and upstreaming records would risk circumvention of the law rings hollow in the face of the ODNI's recent actions and express rationale for disclosing details related to the unmasking of Michael Flynn. Not only did the ODNI publicly release a redacted list of individuals—many of them at the highest levels of government—who might have been involved in Flynn's unmasking, but it emphatically confirmed that such disclosures posed "absolutely no risk" to national security. Ex. 7. If actual disclosure of surveillance records can be "absolutely" safe, then clearly it is possible to merely *search* for responsive records without triggering the harms the FBI vaguely invokes. *Cf. Reps. Comm. for Freedom of Press v. FBI*, 369 F. Supp. 3d 212, 225 (D.D.C. 2019) ("[A]cknowledging the existence of records, without any indication about the

number or type of records found, would not provide any information about the frequency of the technique's use."). Because PPSA's request encompasses records compiled other than for law enforcement purposes, and because redaction is possible even for law enforcement records, the merely performing a statutorily mandated search will not "reduce or nullify the[] effectiveness" of this already well-known technique. *Vasquez v. U.S. Dep't of Just.*, 887 F. Supp. 2d 114, 116 (D.D.C. 2012) (quotations omitted).

Finally, as mentioned above, the scope of PPSA's record clearly encompasses communications sent from members of Congress to federal agencies, and the FBI makes no attempt to explain how, as a categorical matter, a search for those externally created records will reveal any law enforcement techniques or procedures. Absent a categorical showing, the FBI's blanket *Glomar* response cannot stand.

For the foregoing reasons, summary judgment should be entered for Plaintiff.

CONCLUSION

Judging from the IC's own unmasking policies and actions, it is likely that the FBI possesses responsive records whose disclosure, perhaps after appropriate segregation and redaction, will pose "no conceivable risks" of the types of harms cognizable under FOIA's narrowly construed exemptions. Given the IC's own acknowledgment of records that are neither sensitive nor related to law enforcement purposes, the FBI's *Glomar* response is both inappropriately expansive and thinly rationalized. Because the FBI fails to meet its burden of justifying its refusal to search for records, it should be ordered to comply with its FOIA obligation to conduct a thorough search and produce at least a *Vaughn* index as to all of Plaintiff's requests.

Respectfully submitted,

/s/ Gene C. Schaerr

Gene C. Schaerr (D.C. Bar No. 416368)
Brian J. Field (D.C. Bar No. 985577)
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-jaffe.com

Counsel for Plaintiff PPSA, Inc.

March 11, 2022