PPSA
PROJECT FOR PRIVACY & SURVEILLANCE ACCOUNTABILITY

November 18, 2021

Via Email
NSA FOIA/PA Appeal Authority (P132)
National Security Agency
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RE: FOIA Case 112526

To Whom It May Concern:

On behalf of the Project for Privacy and Surveillance Accountability, Inc. ("PPSA"), I write to appeal the NSA's denial of the above-captioned FOIA request (the "Request").[1]

The Request seeks:

"**All documents, reports, memoranda, or communications regarding the obtaining, by any element of the intelligence community from a third party in exchange for anything of value, of any covered customer or subscriber record or any illegitimately obtained information regarding any person listed [in the Request.]**"

The Request listed past and present members of congressional judiciary committees, with a date range for responsive records covering the period between January 1, 2008 and July 26, 2021.

The agency issued a blanket denial on August 20, 2021.[2] The agency gave no indication that it had initiated any searches before making its response, instead denying the Request under FOIA Exemptions 1 and 3.

The agency's cursory denial, made mere days after receiving the Request, demonstrates its failure to conduct an adequate search for responsive records. Further, the blanket denial was itself unwarranted because neither Exemption 1 nor Exemption 3 justifies nondisclosure. In the alternative, unique public interests justify waiving those exemptions even if they apply.

[1] *See* Letter from G. Schaerr to NSA FOIA Officer, July 26, 2021 (Attachment A)
[2] *See* Letter from Kimberly Beall to G. Schaerr, Aug. 20, 2021 (Attachment B)

I. The agency's claimed exemptions do not justify withholding responsive documents.

A. Exemption 1 does not justify a *Glomar* response because there are categories of documents whose disclosure cannot be reasonably expected to result in damage to national security.

Exemption 1 exempts from disclosure materials that are (1) "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" and (2) "are in fact properly classified pursuant to such Executive order." 5 U.S.C. 552(b)(1)(a). Under the relevant executive order, for a document to be classified, the agency must show (among other things) that its disclosure could "reasonably [] be expected to result in damage to the national security[.]" Executive Order ("EO") 13526 1.1(a)(4) (Dec. 29, 2009). Moreover, no classification is permanent: "[i]nformation shall be declassified as soon as it no longer meets the standards for classification under this order." *Id.* at 3.1(a). Many of the individuals listed in the Request are no longer members of congressional judiciary committees, several no longer hold any public office at all, and some are dead. Further, by mandating procedures to challenge classification decisions, the order recognizes the existence of "improperly classified" records and information. *Id.* at 1.8(b). Because there are categories of documents responsive to PPSA's request that are not properly classified as of today, Exemption 1 does not shield them from disclosure, nor can it justify a blanket *Glomar* response or refusal to search.

B. Exemption 3 does not justify a *Glomar* response.

Exemption 3 also does not categorically shield these documents from disclosure. That exemption permits non-disclosure when the documents in question are "specifically exempted from disclosure by statute." 5 U.S.C. 552(b)(3). NSA's denial cites three statutes that allegedly exempt responsive materials from disclosure—Section 6, Public Law 86-36 (50 U.S.C. § 3605, the "NSA Act"); Title 18 U.S.C. § 798; and 50 U.S.C. § 3024(i) (the "National Security Act").

Most obviously, the NSA Act cannot justify the NSA's categorical *Glomar* response because that statute, at best, authorizes withholding merely portions or sub-categories of responsive records. *See* 50 U.S.C. § 3605 (exemption from disclosure of "the organization or any function of the National Security Agency"). But PPSA's request is clearly broader than the scope of that statutory protection, encompassing any records in the NSA's possession that relate to activities "by any element of the intelligence community." Thus, the NSA Act cannot shield the agency from searching for and disclosing segregable, responsive records after appropriate redaction.

Second, 18 U.S.C. § 798 does not justify a *Glomar* response because that statute protects only "classified information," meaning information that, "at the time of [dissemination], is, for reasons of national security, specifically designated … for limited or restricted dissemination or distribution." 18 U.S.C. § 798(a) and (b). As noted in Section I.A.

above, EO 13526 expressly recognizes the existence of categories of documents that are not classified as of today. Further, that order recognizes the possibility that documents may have been classified for reasons other than national security, including the improper purposes described in EO 13526 § 1.7(a). Here again, the NSA must conduct a search for those records not covered by the scope of the statute.

Finally, with respect to the National Security Act, 50 U.S.C. 3024(i)(1) instructs the Director of National Intelligence to "protect intelligence sources and methods from unauthorized disclosure." But this statute does not justify a *Glomar* response because nothing about the original Request would require the NSA to jeopardize any of the intelligence community's "sources [or] methods." From the very beginning, I have encouraged the agency to redact names and other identifying information before records are produced if it would "render a responsive but exempt record nonexempt."[3] Doing so would enable the agency to comply with the requirements of FOIA without divulging the agency's interest or non-interest in any specific individual.

To be sure, particular documents generated by the search *may* (but not necessarily will) reveal "sources or methods" that cannot be revealed even with redactions. And in such circumstances, *those* documents could be withheld under Exemption 1 and Exemption 3 in whole or in part. But the agency's refusal to even search for responsive documents is inappropriate.

C. The agency's *Glomar* objection is misplaced

Instead of considering redaction or production of responsive, non-classified documents, the agency issued a *Glomar* response. The agency thus refused to produce any documents in those categories, or to admit or deny the existence of any responsive documents. But a *Glomar* response is appropriate only when "the fact of [documents'] existence or nonexistence is itself classified." Executive Order 13526 ¶ 3.6(a). Here no national security interest justifies classifying the mere existence of these documents.

The agency is no doubt concerned about the potential for *political* embarrassment if it becomes widely known that members of Congress were themselves subject to surveillance. But political concerns do not become national security concerns simply because they are held by the NSA. The agency's *Glomar* response is inappropriate and misplaced for that reason alone.

Finally, even if there were legitimate concerns about releasing the names of the individual members of Congress whose data was purchased, those names could be redacted from the records provided in response to my request. As noted earlier, I have been clear that I would prefer records with information redacted over a simple denial of my request as to any category of records.

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[3] *See* Letter from G. Schaerr to NSA FOIA Officer, July 26, 2021 (Attachment A)

In short, contrary to the agency's concerns, it can reasonably respond to the Requests without needing to respond in other circumstances that do raise the concerns it identifies.

II. In the alternative, important public interests justify waiving those exemptions here.

Even if Exemption 1 or Exemption 3 *permits* the NSA to deny this FOIA request, they do not *require* denial. Assuming the exemptions are properly invoked here, they should be waived.

One important consideration strongly supporting a waiver is that this Request concerns whether Executive Branch agencies (including the NSA) abused intelligence surveillance powers against American citizens in the Legislative Branch. Those troubling violations of separation-of-powers may well have been intended to serve the Executive Branch's own institutional purposes rather than legitimate national security interests.[4] Violating the privacy of American citizens for politicized reasons, perhaps to shield the Executive Branch from legitimate congressional oversight, undermines our democratic processes and violates the law. 50 U.S.C. §§ 1809(a)(1), 1810; 18 U.S.C. § 2712.

In that unique setting, it is difficult to imagine any national security interest that justifies concealing whether data purchasing—itself a troubling end-run around Fourth Amendment protections—has been weaponized for political purposes. Yet without access to the requested documents, members of Congress as the general public cannot know whether such violations occurred. This FOIA request, then, is one of the only pathways to vindicate the legal rights that the agency may have violated.

In short, even if some responsive materials could technically be withheld, the agency should exercise its discretion to disclose those materials for three reasons:

- First, withholding reports about potential agency misconduct puts a shadow on the NSA and other involved agencies. If documents remain secret—or if the NSA covers up a political operation to undermine congressional oversight—that hurts the NSA and any other agencies involved in such an operation. Everyone would be helped by a full airing.
- Second, current and past congressional members have other legal recourses against the NSA and its officials, including civil litigation. 50 U.S.C. § 1810; 18 U.S.C. § 2712. In such a suit, the plaintiffs could likely obtain these same documents through civil discovery. *See* 50 U.S.C. § 1806(f). The agency should prefer to provide responsive documents under FOIA rather than in adversarial litigation.
- Last, the agency's categorical denial raises serious Fourth Amendment and Due Process considerations. Without the ability to discover whether or not his or her private information was purchased for political gain, a person is "deprived … of

[4] *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/9hd84upk.

liberty"—freedom of speech and freedom from unreasonable searches and seizures—without due process of law. *See* U.S. Const. Amend. V, IV.

If the agency is nonetheless cautious about full disclosure, I would be willing consider access to the documents pursuant to confidentiality agreements or other mutually satisfactory arrangements. Federal courts have acknowledged that agencies could enter into confidentiality agreements with private parties in analogous circumstances. *Cf., e.g.*, *Salomon Bros. Treasury Litig. v. Steinhardt Partners, L.P. (In re Steinhardt Partners, L.P.),* 9 F.3d 230, 236 (2d Cir. 1993).

For all these reasons, this appeal should be granted, and the NSA should immediately conduct a search, declassify documents as needed, and begin producing them.

Thank you for your attention to this important matter.

Sincerely,

Gene C. Schaerr
PPSA, Inc.
General Counsel