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

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

**DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

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

Dated: August 30, 2018

Respectfully Submitted,

CHAD A. READLER
Acting Assistant Attorney General

ELIZABETH J. SHAPIRO
Deputy Director, Federal Programs Branch

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**STATEMENT OF MATERIAL FACTS IN SUPPORT OF**
**DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

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

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

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

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

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

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

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

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

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

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

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

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

Dated: August 30, 2018

Respectfully Submitted,

CHAD A. READLER
Acting Assistant Attorney General

ELIZABETH J. SHAPIRO
Deputy Director, Federal Programs Branch

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

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

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## INTRODUCTION

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

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

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

## BACKGROUND

Administrative Background.

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

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

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

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

Russia Investigation and FISA Applications Related to Carter Page

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

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

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

## ARGUMENT

### I. Statutory Standards.

#### A. The Freedom of Information Act

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

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

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

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

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

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

**B. Special Considerations in National Security Cases**

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

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

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

**C. The Glomar Response.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## CONCLUSION

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

Dated: August 30, 2018

Respectfully Submitted,

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

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

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

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

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U.S. DISTRICT COURT JUDGE