THE UNITED STATES DEPARTMENT of JUSTICE

PROJECT FOR PRIV. & SURVEILLANCE ACCOUNTABILITY, INC. V. DOJ, NO. 20-3657, 2022 WL 4365745 (D.D.C. SEPT. 19, 2022) (HOWELL, C.J.)

Date:
Monday, September 19, 2022

Project for Priv. & Surveillance Accountability, Inc. v. DOJ, No. 20-3657, 2022 WL 4365745 (D.D.C. Sept. 19, 2022) (Howell, C.J.)

Re: Requests for records concerning "'the unmasking and upstreaming – including requests for unmasking or upstreaming – of [48] current and former members of congressional intelligence committees'"

Disposition: Granting defendants' motion for summary judgment; denying plaintiff's cross-motion for summary judgment

- **Exemption 1, *Glomar* Response:** The court holds that "all defendants properly relied on Exemption 1 for their *Glomar* responses." The court finds that "[i]n this case, defendants have sufficiently established that the existence or non-existence of responsive records is classified under Executive Order ('E.O.') 13,526, which is 'the operative classification order under Exemption 1, [that] sets forth both substantive and procedural criteria for classification.'" "An agency may 'refuse to confirm or deny the existence or nonexistence of requested records whenever the fact of their existence or nonexistence is itself classified under [the Order] or its predecessors.'" The court relates that "[i]n plaintiff's view, defendants 'cannot refuse to confirm or deny the existence of requested records unless "the fact of [the records"] existence is itself classified under [E.O. 13,526],'" . . . ." "Plaintiff reasons that the intangible nature of what defendants call a '*Glomar* fact,' . . . does not absolve an agency from Exemption 1's second criterion that the matter be '*in fact properly classified* pursuant' to an executive order . . . ." The court finds that "[it] has considered and rejected the plaintiff's exact argument," "rel[ying] on the D.C. Circuit's interpretation of the identical provision in a predecessor Executive Order to hold that 'if the agency affidavit plausibly explains the danger of the expected damage to national security or foreign relations from confirming or denying the existence of records, the existence of records *vel non* is properly classified under Executive Order 12958 and justifies the Agency's invocation of Exemption 1' . . . ." "Plaintiff acknowledges that this Court has already thoroughly considered and rejected this argument twice, but urges reconsideration on [several] grounds." Among them, "plaintiff contends that E.O. 13,526 'pointedly imposes the same classification requirements on [*Glomar*] responses without any hint of exception." "[H]owever, the Order did not appear to contemplate the fundamental nature of a *Glomar* response, which the plaintiff agrees is an 'intangible form[ ] of classified information.'" "The Executive Order, in interchangeably using the words 'document,' 'record,' and 'information' to refer to national security information, signaled an 'implicit assumption that all classified information is in a tangible form.'" "[Next], plaintiff contends that defendants could comply with the Order's procedural criteria, such as providing necessary markings, because *Glomar* responses do create tangible records – 'including, at the very least, either or both of the original FOIA requests . . . and the agency's *Glomar* letter to the requester.'" "In this argument, plaintiff misses the mark." The court explains that "FOIA requests and *Glomar* letters may be tangible, but are not themselves classified documents." "Marking them would not satisfy the procedural requirements of the Order; only marking the concededly intangible *Glomar* fact would do so – a metaphysical impossibility."

- The court relates that "[t]he crux of plaintiff's substantive challenge to defendants' *Glomar* responses turns on the fourth requirement of § 1.1(a) of E.O. 13,526, that 'the declarations [of the government] establish the requisite level of harm.'" "Defendants have submitted six declarations describing the potential harm to national security that would arise from the disclosure of the existence or non-existence of documents related to the unmasking or upstreaming of the 48 identified lawmakers." "Each declarant explained that acknowledging the existence of records related to unmasking and upstreaming of the named individuals would reveal both whether those

individuals' communications were intercepted through FISA surveillance, and whether they were identified in intelligence reports during the requested time period." "Disclosing such information would tip off the intelligence community's adversaries to its 'priorities, capabilities, activities, and methods.'" "As to plaintiff's requests for records regarding the unmasking of the named lawmakers, the confirmation of the existence (or not) of any of these records would reveal whether information about the named individuals has been collected pursuant to FISA and appeared in subsequent, FISA-sourced intelligence reports." "This information would, 'in effect, tend to confirm the existence or nonexistence of broader U.S. Government intelligence interest in and/or activity regarding a particular subject.'" "Further, acknowledging that these individuals were the target or otherwise had their communications incidentally targeted by FISA surveillance 'could give targets, their cohorts, foreign intelligence agencies, and others intent on interfering with NSD's and its partner's investigative efforts information necessary to take defensive actions to conceal criminal activities, develop and implement countermeasures to elude detection.'" "At the same time, confirming the non-existence of unmasking records about a particular individual could 'identif[y] an area in which ODNI and the [intelligence community] have a lack of interest in the subjects or an inability to obtain information on the individuals or entities of interest and potentially confirms the success of any evasive techniques.'" "Defendants' declarants identified many of the same risks in confirming or denying upstreaming-related records about the named lawmakers pursuant to the second part of the plaintiff's requests."

- **Exemption 1, Waiver of Exemption 1 Protection:** The court relates that "Plaintiff argues that disclosure of the responsive records would not harm national security because 'since at least 1991, the fact of the IC's ongoing acquisition and dissemination of so-called "Congressional identity information" has been repeatedly acknowledged and widely publicized.'" "As examples, plaintiff cites procedures originally drafted by CIA Director Robert Gates in 1992 that governed the unmasking of members of Congress or their staff in intelligence reports, which procedures have subsequently been revised, incorporated into formal intelligence community policy, and declassified." The court finds that "[t]he thrust of this argument is that the government has already 'repeatedly acknowledged and widely publicized' the existence of the requested information, compelling disclosure even over an otherwise valid exemption claim." "This argument overstates the situation here." "The mere '[p]rior disclosure of similar information does not suffice.'" "Instead, 'the information requested must be as specific as the information previously released; [and] the information requested must match the information previously disclosed . . . .'" "Further, in order to fall within this exception, the requested information must be 'in the public domain.'" "Plaintiff has not sought records that would reveal the intelligence community's *procedures* governing the dissemination of intelligence reports containing unmasked identities of members of Congress; rather, the plaintiff seeks records about the unmasking of specific lawmakers over a specific period of time, revealing whether these lawmakers in particular had communications collected through FISA surveillance." "The information that the plaintiff seeks neither 'match[es]' nor is 'as specific' as the information previously released in the Gates Memo and its subsequent iterations."

- **Exemption 3:** The court relates that "[a]ll defendants, except DOJ, also justify their *Glomar* responses under FOIA Exemption 3 . . . ." "The defendant agencies' declarations identified the statute excluding the requested information as the National Security Act of 1947, 50 U.S.C. § 3024." "This provision protects 'intelligence sources and methods from unauthorized disclosure.'" "Plaintiff's challenges to Exemption 3 mirror the arguments made in opposition to Exemption 1, and fail for the same reasons."

- **Exemption 7, Threshold:** The court holds that "DOJ has met its threshold burden of showing that the records at issue were compiled for law enforcement purposes." The court relates that "[i]n addition to Exemption 1, DOJ alternatively relied on Exemption 7 to justify its *Glomar* response, with component FBI invoking Exemption 7(E), NSD invoking 7(A), and both invoking 7(C)." The court finds that "DOJ, and particularly its components FBI and NSD, 'is an agency "specializ[ing] in law enforcement," [and so] its claim of a law enforcement purpose is entitled to deference.'" "Defendants' declarations establish a 'rational nexus,' . . . between DOJ's law enforcement duties and any investigation that may be reflected in responsive records in the agency's possession." "As the FBI declarant affirms, '[t]he only circumstance under which the FBI can request – and the Department of Justice can and would seek on the FBI's behalf – a FISA surveillance order is when the FBI is conducting an authorized, predicated investigation within the scope of its law enforcement and foreign intelligence responsibilities.'" "Any

records in DOJ's possession would arise in the context of a federal law enforcement investigation." The court relates that "Plaintiff criticizes defendants for failing to identify 'a connection between the assertedly exempt records and an inquiry into a possible security risk or violation of federal law.'" The court finds that, "[t]o be sure, an agency should normally 'be able to identify a particular individual or a particular incident as the object of its investigation and the connection between that individual or incident and a possible security risk or violation of federal law.'" "Yet, in the context of a *Glomar* response by an agency specializing in law enforcement and entitled to deference, the requirement that the agency show that the records, of which it cannot confirm the existence, concern a particular individual or incident does not apply."

- **Exemption 7(A):** The court holds that "[f]or the same reason [as discussed in the court's Exemption 7, Threshold analysis], absent other arguments from plaintiff, NSD's invocation of Exemption 7(A) is appropriate."

- **Exemption 7(C):** First, the court finds that "[t]he privacy interests at issue held by the 48 named individuals is not trivial." "Plaintiff fairly describes the named individuals to be 'nationally prominent public-office holders,' whose privacy interests may be diminished in certain contexts by dint of their public office." "Nevertheless, 'public officials do not surrender all rights to personal privacy when they accept a public appointment.'" "Correctly weighing the public interest in disclosure here is more a more vexing undertaking." "Plaintiff's evidence for the impropriety it seeks to ferret out via FOIA requests – the 'potential abuse of [the intelligence community's] surveillance powers against its congressional overseers,' . . . – consists of public reporting that lawmakers' identities are frequently unmasked in intelligence reports without the lawmakers being informed, as well as reports of spying on intelligence committee members in an unrelated context." "The problem with plaintiff's evidentiary showing is [that] merely because members of Congress's identities are unmasked in intelligence reports does not mean that the intelligence community is engaging in abuse." "As plaintiff concedes, this type of unmasking is governed by long-existing policy guidelines." "Plaintiff attempts to bridge this gap by alleging that the 'frequency of such undisclosed surveillance indicates that unmaskings may have been requested for illegitimate reasons.'" "Even recognizing that plaintiff finds itself in a catch-22 – in which sufficient evidence is lacking of governmental misconduct to justify obtaining any such evidence – this is too slim a reed to 'warrant a belief by a reasonable person that the alleged Government impropriety might have occurred.'" "Plaintiff has failed to advance anything more than speculation that the requested records would serve the public interest of monitoring potential abuses by the intelligence community." "As a result, the balance of the named lawmakers' privacy interest outweighs the public interest in disclosure, meriting the protection of Exemption 7(C)."

- **Exemption 7(E):** The court holds that "Exemption 7(E) is satisfied as an alternative basis for the FBI's *Glomar* response." The court finds that "the FBI has adequately demonstrated that confirming the existence or non-existence of the particular records sought by the plaintiff 'could risk "circumvention of the law."'" The court relates that the FBI explains that "'[a]cknowledging when and under what circumstances the FBI relies upon this authorized law enforcement technique would provide targets and other adversaries with insight into the activities likely to attract – or not attract – the FBI's attention." "'Individuals and adversaries would then be able [to] alter their behavior to avoid attention by law enforcement, making it more difficult for the FBI to be proactive in assessing and investigating national security threats." "'Foreign intelligence officers and other adversaries that have communicated with the lawmakers referenced in the FOIA requests at issue would learn whether those communications were subject to covert surveillance – and likely alter their behavior accordingly – if the agency were to confirm whether the requested records exist." The court finds "[t]hat the unmasking and upstreaming of lawmakers' identities generally is 'publicly known,' as plaintiff contends, does not undermine the risk created by acknowledging whether the FBI maintains records concerning the unmasking or upstreaming of the *particular* 48 individuals named in plaintiff's FOIA requests."

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