

VIA MAIL

March 20, 2017

Director, Office of Information Policy
United States Department of Justice
Suite 11050, 1425 New York Ave., NW
Washington, DC 20530-0001

RE: Freedom of Information Act Appeal, FOIA/PA #17-096

Dear Ms. Pustay:

This letter constitutes an appeal under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552(a)(6)(A) and 28 C.F.R. § 16.8(a), and is submitted on behalf of the Electronic Privacy Information Center (“EPIC”).

On March 6, 2017, EPIC submitted a FOIA request (the “EPIC FOIA Request”) to the Department of Justice’s National Security Division (“NSD”) for disclosure of all § 1804 FISA applications for wiretapping in Trump Tower in the NSD’s possession. *See* Appendix A. The EPIC FOIA Request followed directly from the tweet of President Donald Trump on March 4, 2017, which stated “Terrible! Just found out that Obama had my “wires tapped” in Trump Tower just before the victory. Nothing found. This is McCarthyism!”¹

This letter appeals NSD’s response to EPIC that the agency “can neither confirm nor deny the existence of records” responsive to the request, dated March 17, 2017 (“NSD’s March 17th Response”). *See* Appendix C.

Today the FBI Director, after consultation with the Department of Justice, stated to the House intelligence Committee that “The Department has no information that supports those tweets.” Based on the FBI Director’s statement today, and for the reasons set out below, the agency may not hide behind the “neither confirm nor deny response. The agency should immediately process EPIC’s FOIA Request.

Procedural Background

On March 6, 2017, EPIC submitted EPIC’s FOIA Request to the NSD via e-mail. EPIC requested one category of records:

¹ @realDonaldTrump, Twitter (Mar. 4, 2017, 6:35 AM), <https://twitter.com/realDonaldTrump/status/837989835818287106>.

All applications made pursuant to 50 U.S.C. § 1804 where the facilities or places at which the electronic surveillance was directed included facilities located in Trump Tower, 725 5th Avenue, New York, NY 10022.

EPIC also requested expedited processing and a fee waiver.

In an e-mail to EPIC dated March 15, 2017, the NSD granted EPIC expedited processing and a fee waiver (“NSD’s March 15th Response”). *See* Appendix B. EPIC’s request was designated FOIA/PA #17-096. *Id.*

Next, in an e-mail dated March 17, 2017, the NSD stated, “we can neither confirm nor deny the existence of records in these files responsive to your request pursuant to 5 U.S.C. § 552(b)(1).” *See* NSD’s March 17th Response.

EPIC challenges this March 17th response by the NSD to EPIC’s FOIA request.

EPIC appeals the NSD’s March 17th Response

EPIC challenges the NSD’s refusal to confirm or deny the existence of records responsive to EPIC’s FOIA request pursuant to 5 U.S.C. § 552(b)(1).

Under the FOIA, the “burden is on the agency to sustain its action.” 5 U.S.C. § 552(a)(4)(B). Courts have previously upheld agencies’ “refusal to either confirm or deny the existence of records’ in limited circumstances.” *ACLU v. CIA*, 710 F.3d 422, 426 (D.C. Cir. 2013). These so-called “*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. DOJ*, 642 F.3d 1161, 1178 (D.C. Cir. 2011) (quoting *Wolf v. CIA*, 473 F.3d 370, 374–75 (D.C. Cir. 2007)). “In 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.

To justify the response to EPIC’s FOIA Request in this case, the NSD would need to establish that the fact of the existence (or nonexistence) of the requested records is properly classified and thus subject to Exemption 1. Section 552(b)(1) of the FOIA exempts records which are “(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order.” 5 U.S.C. § 552(b)(1) (2017). Executive Order 13526 permits information to be withheld where it “(1) ‘pertains to’ one of the categories of information specified in the Executive order, including ‘intelligence activities (including covert action),’ ‘intelligence sources or methods,’ or ‘foreign relations or foreign activities of the United States’ and (2) if ‘unauthorized disclosure of the information could reasonably be expected to cause identifiable and describable damage to the national security.’” *N. Y. Times Co. v. DOJ*, 756 F.3d 100 (2d Cir. 2014) (quoting Executive Order No. 13526 § 1.1(a)(3)-(4), 1.4(c)-(d), 75 Fed.Reg. 708, 709 (Dec. 29, 2009)).

The agency must support an Exemption 1 claim with evidence particularized to the withholdings at issue. *EPIC v. DOJ*, No. 13-cv-1961, 2016 WL 447426, at *3 (D.D.C. Feb. 4, 2016). Withholding is insufficiently justified where the agency only “speaks broadly to the dangers of releasing the classified and otherwise sensitive information of which [the] particular withholdings are a part.” *Id.*

However, even where an agency can establish that information is properly classified, the agency cannot withhold that information “when [the] 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*, 710 F.3d at 426. “[W]hen information has been ‘officially acknowledged,’ its disclosure may be compelled even over an agency’s otherwise valid exemption claim.” *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990); *see also Wolf*, 473 F.3d at 378. Therefore, where a requester has identified “specific information in the public domain that appears to duplicate that being withheld requires the requester to point to “specific information in the public domain that appears to duplicate that being withheld.” *Wolf*, 473 F.3d at 378. For example, in *ACLU v. CIA* the D.C. Circuit found that the CIA could not properly issue a *Glomar* response with respect to the a request for records concerning the agency’s involvement in drone strikes. *ACLU*, 710 F.3d at 428. The court found that where the “President of the United States himself publicly acknowledged” the government’s involvement in drone strikes. *Id.* at 430.

The specific records at stake in the EPIC FOIA Request—applications to wiretap Trump Tower—are the subject of public and unequivocal statements by numerous government officials, including the President, the Director of the FBI, and leaders of congressional intelligence committees.

First, the agency cannot properly claim that the *existence* of such a FISA application may not be disclosed. The President has publicly alleged in a series of tweets that Trump Tower was wiretapped by former President Obama. The President alleged, “How low has President Obama gone to tapp my phones during the very sacred election process. This is Nixon/Watergate. Bad (or sick) guy!”² Minutes later, he continued: “How low has President Obama gone to tapp my phones during the very sacred election process. This is Nixon/Watergate. Bad (or sick) guy!”³

Nor can the agency properly claim that the *non-existence* of such a FISA application cannot be disclosed, for that too has been officially acknowledged by members of the Senate Intelligence Committee, the House Intelligence Committee, and Speaker of the House based on briefings from the U.S. intelligence community. In a bipartisan, joint statement, House Intelligence Committee leaders Chairman Richard Burr

² @realDonaldTrump, Twitter (Mar. 4, 2017, 6:35 AM), <https://twitter.com/realDonaldTrump/status/837989835818287106>.

³ @realDonaldTrump, Twitter (Mar. 4, 2017, 7:02 AM), <https://twitter.com/realDonaldTrump/status/837996746236182529>.

and Vice Chairman Mark Warner stated: “Based on the information available to us, we see no indications that Trump Tower was the subject of surveillance by any element of the United States government either before or after Election Day 2016.”⁴ Yesterday, March 19, on talk show Fox News Sunday, party leaders on the House Intelligence Committee publicly agreed that Justice Department documents given to Congress showed no evidence of the alleged wiretap.⁵ Chairman Devin Nunes stated “There was no FISA warrant that I’m aware of to tap Trump Tower,” while Ranking Member Adam Schiff added “We are at the bottom of this: There is nothing at the bottom.”⁶ During a news conference, asked about the alleged wiretap, Speaker Paul Ryan responded, “We’ve seen no evidence of that.”⁷ The former Director of National Intelligence James Clapper categorically denied the President’s allegations, stating that “For the part of the national security apparatus that I oversaw as DNI, there was no such wiretap activity mounted against the President-elect at the time, or as a candidate, or against his campaign.”⁸

Finally, and most importantly, the DOJ itself has acknowledged the non-existence of such FISA applications. Today, the James Comey, Director of the FBI, acknowledged in an open hearing before the House Intelligence Committee that the FBI had no information to support the President’s tweets, and issued the same statement on behalf of the Department of Justice. He stated:

With respect to the President’s tweets about alleged wiretapping directed at him by the prior administration, I have no information that supports those tweets, and we have looked carefully inside the FBI. The Department of Justice has asked me to share with you that the answer is the same for the Department of Justice and all its components. The Department has no information that supports those tweets.⁹

⁴ Joint Statement from Senate Intel Committee Leaders on Wiretapping Evidence at Trump Tower (Mar. 16, 2017), <https://www.burr.senate.gov/press/releases/joint-statement-from-senate-intel-committee-leaders-on-wiretapping-evidence-at-trump-tower>.

⁵ Mike DeBonis, *Intelligence chairman: Justice report shows no evidence for Trump’s claims of wiretapping during campaign*, Wash. Post (Mar. 19, 2017), https://www.washingtonpost.com/news/powerpost/wp/2017/03/19/no-new-evidence-to-support-trumps-wiretap-claims-house-intelligence-chairman-says/?utm_term=.b5502f68a861.

⁶ *Id.*

⁷ *Speaker Ryan: We’ve Seen No Evidence” of Wiretapping*, C-Span (Mar. 16, 2017), <https://www.c-span.org/video/?c4661400/speaker-ryan-weve-seen-evidence-wiretapping> (providing clip of House Speaker Weekly Briefing).

⁸ Jeremy Diamond, *Clapper: ‘No Such Wiretap Activity Mounted’ on Trump*, CNN (Mar. 5, 2017), <http://www.cnn.com/2017/03/05/politics/clapper-trump-wiretap/>.

⁹ *Russian Election Interference*, C-Span (Mar. 20, 2017), <https://www.c-span.org/video/?425087-1/fbi-director-says-hes-investigating-links-trump-campaign-russia&live&vod&start=3512> (video of FBI Director Comey testimony before the House Select Intelligence Committee hearing on the Russian interference in the 2016 election). *See also* Ellen Nakashima, Karoun Demirjian, and Devlin Barrett, *FBI Director Comey: Justice Dept. has no information that supports Trump’s tweets alleging he was*

The *Washington Post* subsequently reported, “FBI Director Comey: Justice Dept. has no information that supports Trump’s tweets alleging he was wiretapped by Obama.”¹⁰ Politico wrote “Comey says 'no information' to support Trump wiretap claim.”¹¹ And, the New York Times concluded, “Comey...Sees No Evidence of Wiretapping.”¹²

For the foregoing reasons, the NSD’s refusal to either confirm or deny the existence of records responsive to EPIC’s FOIA request must fail, and the agency must continue to expeditiously process the EPIC FOIA Request in accordance with the statute. 5 U.S.C. § 552(a)(6)(E)(iii).

Conclusion

Thank you for your consideration of this appeal. As provided in 5 U.S.C. § 552(a)(6)(A)(ii), I will anticipate your determination on our request within twenty working days.

For questions regarding this request I can be contacted at 202-483-1140 x111 or FOIA@epic.org.

Respectfully Submitted,

Eleni Kyriakides
Eleni Kyriakides
EPIC Fellow

wiretapped by Obama, Wash. Post (Mar. 20, 2017), https://www.washingtonpost.com/world/national-security/fbi-director-to-testify-on-russian-interference-in-the-presidential-election/2017/03/20/cdea86ca-0ce2-11e7-9d5a-a83e627dc120_story.html?utm_term=.335625cb910b&wpisrc=nl_&wpmm=1; Politico Staff, *Comey says 'no information' to support Trump wiretap claim*, Politico (Mar. 20, 2017), <https://www.politicopro.com/tech/whiteboard/2017/03/comey-says-no-information-to-support-trump-wiretap-claim-085131>; Matthew Rosenberg, Emmarie Huetteman, and Michael S. Schmidt, *Comey Confirms F.B.I. Inquiry Into Trump Campaign Links to Russian Hackers; Sees No Evidence of Wiretapping*, N.Y. Times (Mar. 20, 2017), https://www.nytimes.com/2017/03/20/us/politics/intelligence-committee-russia-donald-trump.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=a-lede-package-region®ion=top-news&WT.nav=top-news&_r=0.

¹⁰ Ellen Nakashima, Karoun Demirjian, and Devlin Barrett, *supra* note 9.

¹¹ Politico Staff, *supra* note 9.

¹² Matthew Rosenberg, Emmarie Huetteman, and Michael S. Schmidt, *supra* note 9.

APPENDIX A

VIA E-MAIL

March 6, 2017

Arnetta Mallory
FOIA Initiatives Coordinator
Room 10702
600 E Street, NW
Washington, DC 20530-0001

Dear Ms. Mallory,

This letter constitutes a request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and is submitted on behalf of the Electronic Privacy Information Center (“EPIC”) to the Department of Justice National Security Division (“NSD”).

EPIC seeks any § 1804 FISA applications for wiretapping in Trump Tower in the possession of the National Security Division.

The NSD, which was created in 2006 to consolidate the Justice Department’s national security operations, is responsible for coordinating and facilitating national security investigations. In particular, the Office of Intelligence represents the government before the Foreign Intelligence Surveillance Court (“FISC”). As a result of the NSD’s role in making filings with the FISC, it follows that any FISA application seeking to conduct electronic surveillance or other FISA-authorized searches of Donald J. Trump, his associates, or facilities within Trump Tower would be held by NSD.

Documents Requested

1. All applications made pursuant to 50 U.S.C. § 1804 where the facilities or places at which the electronic surveillance was directed included facilities located in Trump Tower, 725 5th Avenue, New York, NY 10022;

Request for Expedited Processing

EPIC is entitled to expedited processing of this request. 5 U.S.C. § 552(a)(6)(E)(v)(II); 28 C.F.R. § 16.5(e)(1)(ii). There is there is an “urgency to inform the public about an actual or alleged federal government activity,” and the request is “made by a person who is primarily engaged in disseminating information.” § 16.5(e)(1)(ii).

First, there is an “urgency to inform the public about an actual or alleged federal government activity.” § 16.5(e)(1)(ii). The President of the United States has charged that former

President Obama “had [his] ‘wires tapped’ in Trump Tower. . . .”¹ Second, EPIC is an organization “primarily engaged in disseminating information.” § 16.5(e)(1)(ii). As the Court explained in *EPIC v. Dep’t of Def.*, “EPIC satisfies the definition of ‘representative of the news media’” entitling it to preferred fee status under FOIA. 241 F. Supp. 2d 5, 15 (D.D.C. 2003).

In submitting this request for expedited processing, I certify that this explanation is true and correct to the best of my knowledge and belief. § 16.5(e)(3); § 552(a)(6)(E)(vi).

Request for “News Media” Fee Status and Fee Waiver

EPIC is a “representative of the news media” for fee classification purposes. *EPIC v. Dep’t of Def.*, 241 F. Supp. 2d 5 (D.D.C. 2003). Based on EPIC’s status as a “news media” requester, EPIC is entitled to receive the requested record with only duplication fees assessed. 5 U.S.C. § 552(a)(4)(A)(ii)(II). *See also* 28 C.F.R. § 16.10(c).

Further, any duplication fees should also be waived because “disclosure of the requested information is in the public interest because it is likely to contribute to the public understanding of the operations or activities of the government” and “is not primarily in the commercial interest” of EPIC, the requester. 28 C.F.R. § 16.10(k)(2); 5 U.S.C. § 552(a)(4)(A)(iii). EPIC’s request satisfies this standard based on DOJ’s considerations for granting a fee waiver.

For these reasons, a fee waiver should be granted.

Conclusion

Thank you for your consideration of this request. I anticipate your determination within ten calendar days. 5 U.S.C. § 552(a)(6)(E)(ii)(I); 28 C.F.R. § 16.5(e)(4).

For questions regarding this request I can be contacted at 202-483-1140 x111 or FOIA@epic.org.

Respectfully submitted,

Eleni Kyriakides
Eleni Kyriakides
EPIC Fellow

¹ @realDonaldTrump, Twitter (Mar. 4, 2017, 6:35 AM), <https://twitter.com/realDonaldTrump/status/837989835818287106>.

APPENDIX B

NSD FOIA request #17-096

From: NSDFOIA (NSD)

Sent: Wed, Mar 15, 2017 at 12:45

To: kyriakides@epic.org

Eleni Kyriakides

Epic.org

1718 Connecticut Ave N.W.

Suite 200

Washington, D.C. 20009

Re: FOIA/PA #17-096

Dear Ms. Kyriakides:

This is to acknowledge receipt of your email dated March 6, 2017 pertaining to All applications made pursuant to 50 U.S.C. § 1804 where the facilities or places at which the electronic surveillance was directed included facilities located in Trump Tower, 725 5th Avenue, New York, NY 10022. Our FOIA office received your Freedom of Information Act request on March 6, 2017.

Our policy is to process FOIA requests on a first-in, first-out basis. Consistent with this policy, every effort will be made to respond to your request as quickly as possible. The actual processing time will depend upon the complexity of the request, whether it involves sensitive or voluminous records, and whether consultations with other agencies or agency components are appropriate.

You have requested expedited processing of your request under the Department of Justice standards permitting expedition when a requester demonstrates a "compelling need." A compelling need is defined as follows:

1. Failure to obtain requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or
2. With respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.

You have demonstrated that there is a particular urgency to inform the public about an actual or alleged federal government activity. Therefore, we have determined that your request for expedited processing is granted.

Also, you requested a waiver of processing fees. Your reason for a fee waiver does meet the fee waiver threshold. Therefore, your request for a fee waiver has been granted.

If you are not satisfied with my response to this request, you may administratively appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, DC 20530-0001, or you may submit an appeal through OIP's FOIAonline portal by creating an account on the following web site: <https://foiaonline.regulations.gov/foia/action/public/home>. Your appeal must be postmarked or

electronically transmitted within 90 days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,
Arnetta Mallory
Government Information Specialist

From: kyriakides@epic.org [mailto:kyriakides@epic.org]
Sent: Monday, March 06, 2017 7:03 PM
To: NSDFOIA (NSD) <Ex_NSDFoia@jmd.usdoj.gov>
Cc: FOIA@epic.org
Subject: FOIA request

Dear Ms. Mallory:

Please find the FOIA requests attached to this email.

Respectfully submitted,

Eleni Kyriakides
EPIC Fellow
1718 Connecticut Ave, N.W.
Suite 200
Washington, DC 20009
202.483.1140x111
FOIA@epic.org

APPENDIX C

RE: NSD FOIA request #17-096

From: NSDFOIA (NSD)
Sent: Fri, Mar 17, 2017 at 10:41
To: kyriakides@epic.org

Eleni Kyriakides
Epic.org
1718 Connecticut Ave N.W.
Suite 200
Washington, D.C. 20009

Re: FOIA/PA #17-096

Dear Ms. Kyriakides:

This is in reference to your email dated March 6, 2017 pertaining to All applications made pursuant to 50 U.S.C. § 1804 where the facilities or places at which the electronic surveillance was directed included facilities located in Trump Tower, 725 5th Avenue, New York, NY 10022. Our FOIA office received your Freedom of Information Act request on March 6, 2017.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c) (2006 & Supp. IV (2010)). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

The National Security Division (NSD) maintains operational files which document requests for and approvals of authority for the U.S. Intelligence Community to conduct certain foreign intelligence activities.

We do not search these records in response to requests regarding the use or non-use of such techniques in cases where the confirmation or denial of the existence of responsive records would, in and of itself, reveal information properly classified under Executive Order 13526. To confirm or deny the existence of such materials in each case would tend to reveal properly classified information regarding whether particular surveillance techniques have or have not been used by the U.S. Intelligence Community. Accordingly, we can neither confirm nor deny the existence of records in these files responsive to your request pursuant to 5 U.S.C. 552(b)(1).

If you are not satisfied with my response to this request, you may administratively appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, DC 20530-0001, or you may submit an appeal through OIP's FOIAonline portal by creating an account on the following web site:

<https://foiaonline.regulations.gov/foia/action/public/home>. Your appeal must be postmarked or electronically transmitted within 90 days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,
Arnetta Mallory

Government Information Specialist

From: NSDFOIA (NSD)
Sent: Wednesday, March 15, 2017 12:46 PM
To: kyriakides@epic.org
Subject: NSD FOIA request #17-096

Eleni Kyriakides
Epic.org
1718 Connecticut Ave N.W.
Suite 200
Washington, D.C. 20009

Re: FOIA/PA #17-096

Dear Ms. Kyriakides:

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You have requested expedited processing of your request under the Department of Justice standards permitting expedition when a requester demonstrates a "compelling need." A compelling need is defined as follows:

1. Failure to obtain requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or
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Sincerely,
Arnetta Mallory
Government Information Specialist

From: kyriakides@epic.org [<mailto:kyriakides@epic.org>]
Sent: Monday, March 06, 2017 7:03 PM
To: NSDFOIA (NSD) <Ex_NSDFoia@jmd.usdoj.gov>
Cc: FOIA@epic.org
Subject: FOIA request

Dear Ms. Mallory:

Please find the FOIA requests attached to this email.

Respectfully submitted,

Eleni Kyriakides
EPIC Fellow
1718 Connecticut Ave, N.W.
Suite 200
Washington, DC 20009
202.483.1140x111
FOIA@epic.org