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CERTIFIED MAIL
RETURN RECEIPT REQUESTED

NSA/CSS FOIA Appeal Authority (DJ4)
National Security Agency
9800 Savage Road, STE 6248
Fort George G. Mead, MD 20755-6248

Re: FOIA Case Number 76098 - Jeffrey E. Epstein

Dear FOIA Appeals Officer:

This is a timely appeal pursuant to 5 U.S.C. §552(a)(6), concerning the United States National Security Agency's (the "Agency") denial of a request for records within its control in Case Number 76098.

I am writing this letter on behalf of Jeffrey E. Epstein ("Epstein") regarding the Agency's denial of the January 2, 2014 FOIA/Privacy act request to the Agency submitted via the Internet on January 2, 2014 and attached hereto (the "FOIA Request"). As more fully detailed in Section II of the FOIA Request, Mr. Epstein seeks disclosure of any:

records, documents, files, communications, memoranda, orders, agreements and/or instructions relating to or referring to Epstein that were created from January 1 2000 to January 2, 2014, and were prepared, received, transmitted, collected and/or maintained by the National Security Agency, Department or Defense . . .

By letter dated January 17, 2014, the Agency denied the FOIA request (the "Denial"), asserting that the matter covered by the FOIA request was exempt under the first exemption of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(1), in that the request relates to matter that is currently and properly classified matter in accordance with Executive Order 13526, Section 1.4(c). Additionally, the Agency asserted that as classified matter, it is also protected from disclosure by statute and is therefore subject to the third exemption of FOIA under 5 U.S.C. § 552(b)(3). The Agency asserted that the matter covered by the FOIA request is both classified and protected from disclosure by statute on the grounds that the FOIA Request seeks information on Epstein in relation to NSA intelligence programs or in relation to specific methods or means for conducting the programs. In the Denial, the Agency was particularly focused on two NSA intelligence programs: (a) a program under Section 702 of the Foreign Intelligence Surveillance Act ("FISA") targeting non-U.S. persons reasonably believed to be located outside the United States for foreign intelligence purposes (the "Foreign Surveillance Program"); and (b) a program in which the NSA gathers telephone metadata as authorized by the Foreign Intelligence Surveillance Court ("FISC") under Section 215 of the USA Patriot Act (the "Metadata Program"). The Agency refused to acknowledge the existence or non-existence of any of the records requested in the FOIA Request based on its unsubstantiated and conclusory assertions that "adversaries" would likely compile any positive or negative response to the FOIA Request with public responses to other FOIA requests and draw conclusions about the Agency's "technical capabilities, sources and methods" which "would reasonably be expected to cause exceptionally grave damage to the national security."¹

We respectfully disagree with the Agency's "Glomar Response" and the assertions contained in the Denial, and hereby appeal the blanket denial of the FOIA Request.

KLAYMOR AND 5 U.S.C. § 1.7(a)

As was all but confirmed by Judge Leon in the December 2013 decision of the [REDACTED] Circuit Court in the case of *Klayman v. Obama*, 2013 WL 6598728 ([REDACTED] Cir. 2013), the Metadata Program cited in the Agency's Denial violates the Fourth Amendment of the United States Constitution.² In *Klayman*, the United States Court of Appeals for the Circuit of the District of Columbia granted the plaintiffs a preliminary injunction barring the government from collecting metadata of the plaintiffs under the Metadata Program and requiring the government to destroy any such metadata previously collected. In granting that preliminary injunction, the Court found that the plaintiffs have a substantial likelihood of success on their Fourth Amendment claim with respect to the Metadata Program.³ In its opinion, the

¹ See pages 1 and 2 of the Denial.

² We also maintain that this program violates federal statutes, including, without limitation, 50 U.S.C. § 1809 and 18 U.S.C. § 2511.

Court also noted with disapproval the Agency's systematic non-compliance with FISC ordered procedures in connection with the Metadata Program, as well as repeated instances of misrepresentations and inaccurate statements made by the Agency to FISC judges about the Metadata Program and other major collection programs conducted by the Agency.⁴

Sections 1.7(a)(1) and (2) of E.O. 13526 prohibit the Agency from continuing to maintain information as Classified in order to conceal violations of law or to prevent embarrassment to a person, organization or agency. We respectfully appeal the Agency's denial of the FOIA request to the extent that it is based on the Agency's continuing to classify the matter covered by the FOIA Request to conceal wholesale violations of the Fourth Amendment of the United States Constitution or other federal statutes, as well as to prevent further disclosure of embarrassing misconduct by Agency representatives in connection with proceedings before the FISC.

THE AGENCY'S RELIANCE ON THE CITED NSA INTELLIGENCE PROGRAMS AND NATIONAL SECURITY AS THE BASIS FOR ITS DENIAL IS INSUFFICIENT, IMPLAUSIBLE AND LACKS CREDIBILITY

A. The Agency Failed to Sustain Its Burden

The Agency bears the burden of demonstrating that merely acknowledging the existence or non-existence of records sought in the FOIA Request is exempt under FOIA.⁵ The Agency has failed to meet that burden. For the reasons stated below, neither the first nor the third FOIA exemption asserted by the Agency could properly apply to create a basis for the Agency's Glomar Response.

The Agency is required to "explain[] in as much detail as possible the basis for [the agency's] claim" that the fact of the existence or non-existence of requested records is classified and therefore not subject to disclosure.⁶ The explanation must include reasonably specific detail to demonstrate that the information withheld logically falls within the two claimed exemptions⁷ and will be deemed insufficient if it is "conclusory, merely reciting statutory standards, or . . . too vague or sweeping."⁸

³ *Klayman v. Obama*, 2013 WL 6598728 (■■■■ Cir. 2013) ("[P]laintiffs have a substantial likelihood of showing that their privacy interests outweigh the Government's interest in collecting and analyzing bulk telephony metadata and therefore the NSA's bulk collection program is indeed an unreasonable search under the Fourth Amendment.")

⁴ *Id.*, pages 8-9

⁵ *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 68 (2d Cir. 2009); *Minier v. CIA*, 88 F.3d 796, 800 (9th Cir. 1996).

⁶ *See Phillippi v. CIA*, 546 F.2d 1009, 1013 (■■■■ Cir. 1976).

⁷ *People for the American Way v. National Security Agency/Central Security Service*, 462 F. Supp.2d 21, 27 (■■■■ Cir. 2006) (citing *Military Audit Project v. Case*, 656 F.2d 724, 738 (■■■■ Cir. 1981)).

The Agency's argument in support of its Glomar Response in this case must be "logical or plausible".⁹ And courts have rejected this type of a response when, for example, an agency's response is not properly substantiated or is not credible.¹⁰

The Agency makes a bald assertion that "adversaries" could compile the mere acknowledgement of the existence or non-existence of records about Epstein with other Agency responses to draw conclusions about the Agency's technical capabilities, sources and methods which "would reasonably be expected to cause exceptionally grave damage to national security."¹¹ Other than its conclusory statements to that effect, the Agency provides no substantiation to support this incredible proposition.

The FOIA Request sought disclosure of any Agency records relating to or referring to Epstein that were created from January 1 2000 to January 2, 2014, and were prepared, received, transmitted, collected and/or maintained by the National Security Agency. The FOIA Request sought records held by the Agency without any reference to any particular NSA intelligence program. The Agency's merely generally confirming the existence or non-existence of records about Epstein could not even plausibly lead an adversary to glean any details of a particular intelligence program, particularly when the request for such records was made without reference to any specific program.

B. Focus on Foreign Surveillance Program and Metadata Program

The Agency's Denial appeared to be particularly focused on the Foreign Surveillance Program and the Metadata Program. Inasmuch as Epstein is a United States Citizen who resides in the U. S. Virgin Islands, he is a United States Person, and Section 702 of FISA, would prohibit the Agency from conducting targeted surveillance of Epstein either in the United States or indeed anywhere else in the world.¹² Thus, the Agency's Foreign Surveillance Program would appear to be inapplicable to Epstein and any denial based on the Agency's activities under Section 702 lacks credibility.

⁸ *King v. U.S. Dep't of Justice*, 830 F.2d 210, 219 (██████████, 1987).

⁹ *Larson v. Dept. of State*, 565 F.3d 857, 862 (██████████, Cir. 2009) (citing *Wolf v. CIA*, 473 F.3d 370, 374-75 (██████████, Cir. 2007)).

¹⁰ See, e.g., *Morley v. CIA*, 508 F.3d 1108, 1126 (██████████, Cir. 2007) (remanding for agency to "substantiate its Glomar response"); *Judicial Watch, Inc. v. U.S. Secret Serv.*, 579 F. Supp. 2d 182, 185-86 (██████████, 2008) (invalidating agency's Glomar response on basis that agency's proffered harms justifying refusal were not credible); See also *ACLU v. Dep't of Def.*, 389 F. Supp. 2d 547, 561, 565-66 (██████████, 2005) (rejecting government's Glomar response as to one part of plaintiffs' FOIA request); *Nat'l Sec. Archive v. CIA*, No. 99-1160, slip op. at 15-16, 19 (██████████, July 31, 2000) (holding that CIA had waived Glomar response by previous official disclosures of information).

¹¹ See page 2 of the Denial.

¹² 50. U.S.C. 1881a(b).

The Agency has confirmed in its Denial that “there has been considerable coverage of the two NSA intelligence programs in the press/media” and “these two programs have been publicly acknowledged.”¹³ And although the Agency asserts that “details about these programs remain classified and/or protected from release by statutes . . .”¹⁴, it is not plausible that merely acknowledging the existence or non existence of records about U.S. citizens, when the existence of such records have already been publicly acknowledged to exist, could permit “adversaries” to draw any further conclusions about the technical capabilities, sources and methods of the Agency.

C. CONTINUING PATTERN OF GLOMAR RESPONSES TO U.S. CITIZENS FRUSTRATES THE PURPOSE OF FOIA AND LACKS CREDIBILITY

The Agency has provided no indication that there is anything unique about Epstein, a U.S. citizen, or the request that would somehow elevate a general records request about a U.S. citizen to a matter of national security. Indeed, based on the Agency’s response, as well as widespread media reports about repeated Agency denials of similar FOIA/Privacy Act requests from other U.S. citizens, the Agency appears to be engaged in a recurring pattern of providing Glomar Responses to any and all U.S. citizens on virtually identical grounds. The Agency’s contention that merely confirming or denying the existence of records about ordinary U.S. citizens would somehow allow unidentified “adversaries” to compile such confirmations to cause “exceptionally grave damage to the national security” seems untenable. FOIA is designed to promote the disclosure of information. It is to be construed with a view to disclosure, not secrecy, and exemptions from disclosure under FOIA are not to be read broadly.¹⁵ In light of the essential purpose of disclosure for which FOIA was designed and the narrow manner in which its exemptions are to be construed, the Agency’s recurring across-the-board refusal to honor such requests by ordinary U.S. citizens surely lacks credibility.

THE DENIAL DOES NOT COMPLY WITH 5. U.S.C. § 551(b)(1)

¹³ See pages 1-2 of the Denial. In addition, see Judge Leon’s opinion in *Klayman v. Obama*, 2013 WL 6598728, p. 6 (█████ Cir. 2013), for a description of the substantial disclosure regarding the Metadata Program made by the Agency in that case.

¹⁴ See page 2 of the Denial.

¹⁵ *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 398 (5th Cir. 1985)(citing *Department of Air Force v. Rose*, 425 U.S. 352, 361, 96 S.Ct. 1592, 1599, 48 L.Ed.2d 11, 21 (1976); *Charles River Park “A”, Inc. v. Department of Housing and Urban Development*, 519 F.2d 935, 941 (█████,1975); *Superior Oil Co. v. Fed. Energy Reg. ██████*, 563 F.2d 191, 204 (5th Cir.1977)).

Finally, the unsupported characterization of the mere fact of the existence or non-existence of the requested records as “classified” is a violation of 5 U.S.C. § 551(b)(1). The first exemption under FOIA, 5 U.S.C. § 552(b)(1), permits an agency to refuse disclosure only when the matter to be disclosed is “specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy,” and is “properly classified pursuant to such Executive order.”¹⁶ The relevant Executive Order (“E.O.”) cited by the Agency in the Denial is E.O. 13526.

To properly invoke the first exemption under FOIA, the “government must demonstrate that information is in fact properly classified pursuant to both procedural and substantive criteria.”¹⁷ Under E.O. 13526, only certain specifically enumerated officials have the authority to classify information.¹⁸ In addition, the information to be classified must fall “within one or more of the categories of information listed in section 1.4 of [the E.O.]”¹⁹ Moreover, the original classification authority must determine that the unauthorized disclosure of the information “reasonably could be expected to result in damage to the national security.”²⁰

In its Denial, the Agency fails to identify the official who determined that the fact of the existence or non-existence of records about Epstein is properly classified. The Agency’s response also fails to explain how the fact of the existence or non-existence of records about Epstein constitutes intelligence activities, intelligence sources or methods or cryptology exempt from disclosure under Section 1.4(c) of E.O. 13526. In addition, the Agency failed to disclose which official made the determination, and on what specific basis, that confirmation of the existence or non-existence of records about Epstein reasonably could be expected to result in damage to national security.²¹

CONCLUSION

For the reasons explained above, we maintain that the Agency has erred in its refusal to acknowledge the existence or non-existence of the records requested in the FOIA Request. The mere fact of the existence or non-existence of such records is not exempt under either the first or the third exemption under FOIA, 5 U.S.C. §552(b)(1) or (3), and the Agency’s conclusory and unsubstantiated assertions to the contrary are implausible, illogical and lack credibility. Accordingly, we hereby

¹⁶ 5 U.S.C. § 552(b)(1) (2012).

¹⁷ S. Rep. No. 93-100, at 6 (1974) (Conf. Rep.); *see also Goldberg v. Dept. of State*, 818 F.2d 71, 77 (■■■■ Cir. 1987), *cert. denied*, 485 U.S. 904 (1988); *Lesar v. Dept. of Justice*, 636 F.2d 472, 483 (■■■■ Cir. 1980); *Allen v. CIA*, 636 F.2d 1287, 1291 (■■■■ Cir. 1980).

¹⁸ Exec. Order 13526 §§ 1.1(a)(1) and 1.3(a).

¹⁹ Exec. Order 13526 § 1.1(a)(3).

²⁰ Exec. Order 13526 § 1.1(a)(4).

²¹ See page 2 of the Denial.

ask that the Agency reverse its blanket denial of the FOIA Request and provide us with the requested records.

Moreover, assuming *arguendo*, that the Agency determines that any specific responsive record contains information that may be exempt from disclosure, “any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt . . .”²² We hereby request application of the “segregable portions” clause of FOIA to any such determination by the Agency.

In the event this appeal is denied, the Agency is required to provide a written response describing the reasons for the denial, names and titles of each person responsible for the denial, and the procedures required to invoke judicial assistance in this matter.²³ If the appeal is denied or the Agency’s response is not forthcoming within 20 working days, my client reserves his right under FOIA to seek judicial review, including the award of attorney’s fees.

I await your prompt reply.

Respectfully,

Darren K. Indyke

²² 5 U.S.C. § 552(b).

²³ 5 U.S.C. §552(a)(6)(ii), 7 C.F.R. § 1.8(d).