IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS UNITED,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil No. 18-1862-RDM
	)	
UNITED STATES DEPARTMENT OF STATE,	)	
	)	
Defendant.	)	

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT OR FOR *IN CAMERA* REVIEW

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I. Introduction.

Based on the Department of State's filing, two categories of withholdings are no longer in dispute, narrowing somewhat the matters needing this Court's resolution. First, on the eve of the filing of the State Department's motion for summary judgment and response to plaintiff's motion, the FBI reversed position and released the name of the senior FBI official (Special Agent Stephen Laycock) who exchanged emails with Deputy Assistant Secretary of State ("DAS") Kathleen Kavalec (Record Nos. 3 and 6). *See* Exhibit A. Second, based on the State Department's filing, plaintiff Citizens United ("CU") now withdraws its request for (i) information withheld under the Immigration and Nationality Act (Record No. 4, page 2); and (ii) the FBI's withholding of an internal email address and "unique employee identifier" being withheld under the privacy exemptions (a portion of the withholdings in Record Nos. 3 and 6).

However, justification for the remainder of the withholdings is not adequately established by defendant's two declarations and its memorandum. Accordingly, CU again asks the Court to grant plaintiff's motion for summary judgment and to deny defendant's motion for summary judgment for the documents which remain at issue. Alternatively, before this Court accepts any exemption asserted, CU believes that *in camera* review of the small number of documents being withheld is necessary for the Court in conducting its *de novo* review.

II. Defendant's Justifications for Nondisclosure Are Controverted by Evidence of Agency Bad Faith.

Although plaintiff provided the Court with the context of the political nature of the actions taken by the government officials involved with the Christopher Steele briefing, the defendant State Department ignored it all, preferring to have this Court view its claimed

exemptions in the abstract contexts of the State Department's mission of international relations and the FBI's mission of law enforcement. But that is not where this case stands. This case is at the center of a political scandal and the ongoing national debate about the FBI's improper surveillance of those opposing the previous incumbent administration.

The State Department (presumably "on behalf of the FBI") assiduously avoids acknowledging the FBI's misuse of the discredited Steele dossier in applications to the FISA court for authority to conduct surveillance against Carter Page and those in the Trump campaign with whom he associated.[1] The State Department's Statement of Genuine Issues disputes CU's factual assertions regarding the FBI's activities leading up to the first FISA application, but only as being "immaterial and lacking reference to support in the record." Defendant's Statement of Genuine Issues, ¶¶ 4-16, 41-42, 49-50. State does not, however, deny or otherwise address the merits of plaintiff's assertions as to the significant public interest supporting disclosure of key information about an event that has dominated the American political landscape for nearly three years. Thus, the credibility of the FBI's exemption claims must be evaluated in the context of what the plaintiff has asserted, and the public knows, about apparent improper FBI activity, which defendant does not deny.

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[1] Independent evaluation of the Steele dossier demonstrates the impropriety of the FBI's reliance on that document to obtain a FISA warrant. "Multiple sources familiar with the FBI spreadsheet tell me the vast majority of Steele's claims were deemed to be wrong, or could not be corroborated even with the most awesome tools available to the U.S. intelligence community. One source estimated the spreadsheet found upward of 90 percent of the dossier's claims to be either wrong, nonverifiable or open-source intelligence found with a Google search." J. Solomon, "FBI's spreadsheet puts a stake through the heart of Steele's dossier," *The Hill* (July 16, 2019).

In defendant's filings, the only references to the circumstances surrounding the FBI's surveillance of individuals connected with the Trump campaign were in the Declaration of Eric Stein, referring to Record No. 3 — the emails between DAS Kavalec and FBI Special Agent Stephen Laycock — where Stein states that "[w]hile the document is responsive to Plaintiff's FOIA request, the underlying subject matter does not concern Donald Trump and is not directly related to any alleged interference in the 2016 elections." Stein Declaration ¶ 35. Based on that single sentence, the State Department asserts that "President Trump is not the subject of the redacted information" and denies that information in Record No. 3 "relates to Russian interference in the 2016 presidential elections." Defendant's Memorandum of Points and Authorities ("Def. Memo") at 6. That does not come close to settling the matter.

First, defendant's assertion is implausible on its face, as Record No. 3 was identified by defendant as relating to the briefing by Christopher Steele on October 11, 2016, involving his dossier on President Trump's supposed connections and information related to Russia. Thus, it is not credible that Record No. 3 "does not concern Donald Trump," unless defendant is being hyper-literal.

Moreover, the Foreign Intelligence Surveillance Act ("FISA") application was never directly aimed at "President Trump." Instead, the FISA application targeted Carter Page mentioned in the Steele dossier, who previously had been a low-level volunteer in the Trump campaign.[2] It was an attempt by persons, paid by the Clinton campaign and the Democratic

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[2] It cannot be denied that the *ex parte* nature of the FISC combined with the vast surveillance power of the federal government implicate serious Fourth Amendment issues. *See*, *e.g.*, ACLU, "Fix FISA - End Warrantless Wiretapping."

National Committee, to tie candidate Trump to Russia in order to defeat him at the polls and, if that was not successful, to undermine the legitimacy of his presidency. What the State Department told the FBI about the Steele dossier as a result of the Steele briefing is central to the unraveling of the scandal. The agencies appeared to have allowed politics to corrupt their official missions, facilitating opposition research on behalf of one of the presidential candidates.[3] It is not hyperbole to say that this weaponization of powerful government surveillance tools against a presidential campaign should be viewed as one of the greatest political scandals in U.S. history.[4]

The Carter Page FISA application based on the Steele dossier is not just material — it is central to this Freedom of Information Act ("FOIA") litigation. Public access to the requested documents, which detail what the FBI knew and when they knew it, cannot be blocked by conclusory claims, since the FBI and its personnel have a known motive for concealing either incompetence or the agency's own culpability in deceiving the Foreign Intelligence

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[3] Victoria Nuland, DAS Kavalec's direct superior at State in 2016, acknowledged the political nature of an early version of the Steele dossier: "What I did was say that this is about U.S. politics, and not the work of — not the business of the State Department, and certainly not the business of a career employee who is subject to the Hatch Act, which requires that you stay out of politics." S. Glasser, "Victoria Nuland: The Full Transcript," Politico (Feb. 5, 2018).

[4] Even Attorney General William Barr has found it difficult to learn the truth about the FBI and DOJ activities surrounding the 2016 elections:

> I — like many other people who are familiar with intelligence activities, I had a lot of questions about what was going on. I assumed I'd get answers when I went in and I have not gotten answers that are well satisfactory, and in fact probably have more questions, and that **some of the facts that — that I've learned don't hang together with the official explanations** of what happened. [CBS News, William Barr Interview (May 31, 2019) (emphasis added).]

Surveillance Court ("FISC").[5] For example, in the first FISA application signed by former FBI Director James Comey, the FBI represented to the FISC:

> [Steele] was hired by a business associate to conduct research into [Trump's] ties to Russia. [Steele] provided the results of his research to the business associate, and the FBI assesses that the business associate likely provided this information to the law firm that hired the business associate in the first place. [Steele] told the FBI that he/she **only provided this information to the business associate and the FBI**. [Redacted] The FBI does **not** believe that [Steele] **directly provided this information to the press**. [In re Carter W. Page, a U.S. person, Verified Application (Oct. 20, 2016) at 23 n.18 (emphasis added).]

The documents already produced in this case demonstrate several facts: (i) in addition to his business associate and the FBI, Steele provided information to DAS Kavalec, who communicated to the FBI about the Christopher Steele briefing at the State Department both before and after the October 11, 2016 Department of State briefing (*see* Record Nos. 3 and 6); (ii) that Steele wanted his information made public before November 8, 2016, demonstrating a political motive; (iii) that Steele was reporting information known to be false (*see* Record No. 4 Supplemental regarding a non-existent Russian consulate in Miami); and (iv) that Steele was communicating information to the press prior to the FISA application (*see* Record No. 9).

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[5] Former U.S. Attorney Joseph E. diGenova, "The Politicization of the FBI," *Imprimis*, Vol. 47, No. 2 (Feb. 2018), explained:

> Over the past year, facts have emerged that suggest there was a plot by high-ranking FBI and Department of Justice (DOJ) officials in the Obama administration, acting under color of law … to frame Donald Trump and his campaign for colluding with Russia to steal the presidency. This conduct was not based on mere bias, as has been widely claimed, but rather on deeply felt animus toward Trump and his agenda.
>
> In the course of this plot, FBI Director James Comey, U.S. Attorney General Loretta Lynch, FBI Deputy Director Andrew McCabe, FBI Deputy Director of Counterintelligence Peter Strzok, … FBI lawyer Lisa Page, FBI General Counsel James Baker … compromised federal law enforcement to such an extent that the American public is losing trust.

These circumstances reveal an obvious motive for defendant to prevent further disclosures, including Record Nos. 3, 4, 6, 7, and 9.[6]

III. Plaintiff's Response to Defendant's Statement of Genuine Issues.

Defendant's Statement of Genuine Issues provides three types of responses to plaintiff's Statement of Material Facts ("SOMF"): (i) "Not disputed"; (ii) "Disputed" (almost always relating to the State Department's recent release of the name of an FBI agent); and (iii) "Disputed as immaterial and lacking reference to support in the record."

Plaintiff believes that the facts which received "Not disputed" responses are alone sufficient for this Court to find defendant's claims of exemptions insufficient to justify its withholdings.

The "Disputed" responses paradoxically relate to matters that actually are no longer in dispute, because of a State Department release of a previously withheld name, which release occurred after plaintiff filed its Statement of Material Facts.

The facts responded to by the State Department with "Disputed as immaterial and lacking reference to support in the record" require further comment.

First, these facts were asserted to provide the Court with important background and context about the subject matter of the documents requested, and the context of the withholding of those documents by the State Department. The State Department's filings almost completely ignore this contextual information.

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[6] *See* Appendix I for additional historical context of the misuse of the FBI for political and electoral purposes.

Second, defendant's objection based on materiality is for the Court to decide. Plaintiff believes all facts it asserted are material to the exemptions claimed for the documents in dispute.

Third, Local Rule 7(h)(1) states that "the Court may assume that facts identified by the moving party in its statement of material facts are admitted, unless such a fact is **controverted** in the statement of genuine issues filed in opposition to the motion." (Emphasis added.) This particular response by defendant never actually disputes the truthfulness of plaintiff's facts, and thus, other than disputing materiality, never "controverts" those facts as required under the rule to put them into question. As such, plaintiff believes that they should be deemed admitted, and if material, relied on by the Court.

Fourth, although several of plaintiff's material facts omitted paragraph references to the Bossie Declaration, it is clear that they were drawn directly from, and closely track, that Declaration as shown in the footnote.[7]

Fifth, three of plaintiff's material facts that are not supported by the Bossie Declaration are proper subjects of judicial notice. Paragraphs 41 & 42 of Plaintiff's Statement of Material Facts ("SOMF") asserted that Bruce G. Ohr had been Associate Deputy Attorney General, and his wife Nellie Ohr worked for Fusion GPS, the opposition research firm that hired Steele and,

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[7] The material facts questioned closely track the Bossie Declaration: SOMF 4, Bossie ¶7; SOMF 5, Bossie ¶6; SOMF 6, Bossie ¶6; SOMF 7, Bossie ¶7; SOMF 8, Bossie ¶8; SOMF 9, Bossie ¶10; SOMF 10, Bossie ¶11; SOMF 11, Bossie ¶11; SOMF 12, Bossie ¶12; SOMF 14, Bossie ¶13, Exhibit D; SOMF 15, Bossie ¶13; and SOMF 16, Bossie ¶16.

that although Bruce Ohr has since been demoted, but still works at the Justice Department.[8] Because these facts have been contained in hundreds if not thousands of news stories, as well as Congressional documents and their truthfulness has never been disputed, they fall within the category of facts that may be judicially noticed under Rule 201 of the Federal Rules of Evidence. Surprisingly, defendant also challenges plaintiff's material fact no. 50 ("November 8, 2016 was the date of the presidential election in the United States"), but clearly the Court can take judicial notice of the date of election day as well. Indeed, virtually all of plaintiff's material facts, responded to by the State Department in this manner, would be subject to judicial notice, and would be supported by the record.

IV. Defendant's Actions in This Case Raise Questions about Its Claimed Exemptions.

In a number of instances, the defendant has withheld records, only to later disclose them. To be sure, the general rule in this Circuit is that an agency's reversal of its position on a previously claimed withholding constitutes evidence of good faith, not bad faith. *See* ACLU v. United States DOD, 628 F.3d 612, 627 (D.C. Cir. 2011) ("we find that the government demonstrated good faith by voluntarily reprocessing the documents after the President declassified the OLC memoranda and the CIA Inspector General's report."). However, the instant case presents a somewhat different fact pattern than the ACLU case.

After the agency's initial production of Record No. 4 to CU on April 30, 2019, it made a supplemental production of Record No. 4 (Record No. 4 Supplemental), releasing a page and a half of material that had been withheld under the National Security Act of 1947. *See* Seidel

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[8] *See, e.g.,* D. Chaitin, "GOP investigators seek Nellie Ohr's research for Fusion GPS on Trump family," *Washington Examiner* (July 19, 2019).

¶ 8. Although it is commendable that the FBI permitted the release of the improperly withheld information, the FBI has never explained why or how it mistakenly withheld such a sizable amount of disclosable information, claiming an exemption (no. 3) under which courts often defer to agency determinations.

Even more significantly, after the April 30, 2019 production, counsel for CU requested that the State Department reconsider the withholding of the FBI official's name in the emails in Record Nos. 3 and 6. Counsel for CU explained his understanding of the privacy exemptions and the application to low-level agency employee names, but did not believe that the privacy exemptions were applicable to the senior official believed to be named in the documents. At that point, the State Department had the opportunity to reconsider its withholding and make a good faith correction. Instead, on May 2, 2019, the State Department stood by its redaction, claiming that the individual's name being withheld was not widely known.[9] However, once CU's motion for summary judgment was filed, and on the eve of the original filing date for the State Department's motion for summary judgment, the State Department released the FBI special agent's name.[10] The FBI admitted it "mistakenly asserted Exemptions 6 and 7(C) to redact the name of an FBI executive," but only in the anticipation of of being caught in a clearly erroneous claim. Seidel, pp. 5-6, n.2, n.3, and n.4. Again, the FBI does not explain how it made this "mistake" not once, but twice. Certainly, an agency having a change of heart

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[9] In November 2018, the FBI announced that Stephen Laycock was promoted to be Assistant Director of the FBI Directorate of Intelligence. *See* FBI Press Release, Nov. 5, 2018.

[10] *See* Bossie Declaration ¶ 23.

on its own is not to be discouraged, but in this instance, the agencies were provided multiple opportunities to make a correction, and did so only at the last minute.[11] At best, it demonstrates the FBI is overly expansive with its application of its claimed exemptions, but here, it also casts a measure of doubt on the remainder of the claimed exemptions.

V. Defendant Has Failed to Provide Any Meaningful Justification for Withholding Record No. 7.

Remarkably, defendant provided the least justification for the most significant document being withheld — Record No. 7 (referred to by defendant as C06682575). This five-page record which was withheld in full is an attachment to an email sent by DAS Kavalec to FBI Special Agent Stephen Laycock on October 13, 2016. However, at the request of the FBI, it asserts Exemption 3 and Exemption 7(E).

The following facts about Record No. 7 are undisputed:

(1) It is a five-page document that is unclassified in its entirety — otherwise Exemption 1 would have been asserted;

(2) It originated with the Department of State, not the FBI or any other law enforcement agency;

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[11] In ACLU, *supra*, the agency was credited with "good faith by voluntarily reprocessing the documents after the President declassified the OLC memoranda and the CIA Inspector General's report." ACLU at 627. Similarly, in this case, there has been an intervening action by the President in that he has authorized the Attorney General to declassify matter which is classified under Executive Order 13526 regarding "intelligence activities relating to the campaigns in the 2016 Presidential election and certain related matters." Presidential Memorandum of May 23, 2019, 84 *Fed. Reg.* 24971 (May 29, 2019). Here, however, there is no evidence of a good faith effort by the State Department to reconsider any of the withholdings in light of the President's recent authorization.

(3) It concerns the briefing by Christopher Steele at the Department of State because State acknowledges that it is responsive to CU's FOIA request; and

(4) It was sent via email by DAS Kavalec to FBI Special Agent Stephen Laycock two days after Steele's October 11, 2016 briefing at the Department of State.

The State Department itself asserted exemption to disclosure. The sole justifications for withholding this record in its entirety are found in the FBI's Seidel declaration. The Stein Declaration merely incorporates those justifications by reference. *See* Stein ¶ 47. Although Seidel's Declaration discusses his views of the nature of documents that may properly be withheld under Exemption 3 and Exemption 7(E), he makes almost no effort to explain how those general principles apply to the specific document in question. Indeed, the Seidel Declaration never even hints at the basis for the FBI's "sources and methods" Exemption claim. Such conclusory claims as it does make are implausible on their face, as discussed below. The law of this circuit is clear that conclusory claims, using general language that documents are subject to Exemptions, cannot support withholding of documents. *See* Oglesby v. U.S. Dep't of Army, 79 F.3d 1172, 1184 (D.C. Cir. 1996). Because of the importance of this document, plaintiff sets out below all that the defendant has claimed about this record to justify its withholding.

A. Exemption 3

Defendant's Seidel Declaration (FBI) seeks to justify withholding Record No. 7 under Exemption 3 as follows:

> "Exemption 3 was asserted in conjunction with Exemption 1 and/or 7(E) to withhold information pursuant to Section 102A(i)(1) of the National Security Act of 1947…." Seidel ¶ 32.

> "[T]he FBI has determined that intelligence sources and methods would be revealed if any of the withheld information is disclosed to Plaintiff; therefore, the FBI is prohibited from disclosing such information under § 3024(i)(1)." Seidel ¶ 35.

In arguing to the Court from the Seidel Declaration, the government's Memorandum of Points and Authorities adds nothing of substance to support its claimed exemption:

> "State's withholdings are proper." Def. Memo at 3.

> "[T]he FBI withheld certain *un*classified information under Exemption 3 and the National Security Act from Document[] … 7, the disclosure of which would reveal the FBI's intelligence sources and methods." Def. Memo at 8.

> "Because the FBI has determined and averred that intelligence sources and methods would be revealed if the redacted information were disclosed, SUMF ¶ 20, that information was properly withheld under Exemption 3 and the National Security Act." Def. Memo at 9.

> "Citizens United complains that no statute was identified for the withholdings to Record No. 7. Pl's Br. at 15-16. Those withholdings are made pursuant to the National Security Act. *See* Seidel Decl. ¶ 32." Def. Memo at 9, n.2.

Although unclassified records are sometimes exempt from disclosure under Exemption 3, the vast majority of unclassified records in the government's possession are subject to disclosure under FOIA. As this Court recently emphasized in Talbot v. Department of State, 315 F. Supp. 3d 355 (D.D.C. 2018), when an agency seeks to withhold unclassified documents under Exemption 3, it is incumbent on the agency to provide more than just a recitation of the statutory basis for claiming the exemption. The declaration supporting the exemption must include sufficient details to allow the court to conduct its own independent assessment of the proffered exemption claim. The declarations in this case stand in stark contrast to those described by this Court in Talbot, where the court upheld the claim of exemption:

> Ms. Shiner's declaration … further details the categories of withheld information contained in the records — foreign liaison services, locations of and assignments to permanent overseas field installations, the use of cover and cover methods, and coding information — and the harms to national security that would flow from disclosure of such information, including damage to the U.S. government's relationship with foreign intelligence partners, and disclosure of the location of clandestine CIA bases and the agency's intelligence methods. [Talbot at 373.]

Far from the detail found to be sufficient in Talbot, Seidel appears to offer only a review of the relevant statutory language. Seidel uses the type of vague, unconfirmable, and conclusory statements regarding sources, methods, and activities that could apply to any case where an agency is claiming Exemption 3 pursuant to § 3024(i)(1) of the National Security Act. In fact, Seidel makes absolutely no attempt to describe anything about Record No. 7, but simply refers to "FBI intelligence sources and methods" as if it were an incantation that casts a protective spell over the records.

In sum, Record No. 7 is an attachment to an email sent from DAS Kavalec to FBI Special Agent Stephen Laycock on October 13, 2016[12] — two days after her meeting with British national Christopher Steele, eight days before the FBI's first Carter Page FISA application (filed October 21, 2016), and less than a month before the November 8, 2016 presidential election. If any inference should be drawn from the facts surrounding this email attachment, it should be that the State Department — as evidenced by Steele's own admission at the briefing with DAS Kavalec — was passing along political opposition research or information relating to opposition research, not national intelligence, to the FBI.

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[12] FBI Special Agent Laycock immediately forwarded DAS Kavalec's email to the FBI team handling the Russia collusion investigation. *See* Bossie Declaration, ¶ 23.

B. Exemption 7(E)

As the Supreme Court explained in FBI v. Abramson, 456 U.S. 615 (1982) analysis of an Exemption 7 claim involves a two-part inquiry. First, the agency must establish that the records in question were "compiled for law enforcement purposes." Abramson at 622. Only after that test is met does the inquiry move to the second part. The State Department's claim to Exemption 7(E) fails both parts of the inquiry.

First, Record No. 7 was not compiled for law enforcement purposes. The FBI does not dispute that Record No. 7 originated with the Department of State. In fact, Record No. 7 was a document produced by or provided to the State Department, which, in turn, produced a copy to the FBI by way of an email from DAS Kavalec to FBI Special Agent Laycock. However, the government fails to explain how the FBI's activities in this case relate to specific law enforcement activities. Instead, it just asserts that the FBI is a law enforcement agency, as if every single activity of the FBI is covered by the law enforcement exemption. *See* Def. Memo at 11 (citing Pratt v. Webster, 673 F.2d 408, 418-19 (D.C. Cir. 1982)). Claiming that the FBI is an law enforcement agency is a far cry from establishing a nexus between the FBI's activities relevant to Record No. 7 and its lawful law enforcement duties. *See* FBI v. Abramson at 631 (which requires that it be "established that information was compiled pursuant to a legitimate law enforcement investigation"). Indeed, the D.C. Circuit held in Pratt:

> while our measure of a criminal law enforcement agency's "law enforcement purpose" is deferential, in recognition of the realities of these agencies' duties and the importance of their functions, it is not vacuous. In order to pass the FOIA Exemption 7 threshold, such an agency must establish that its investigatory activities are realistically based on a legitimate concern that federal

> laws have been or may be violated…. [T]hese concerns must have some plausible basis and have a rational connection to the object of the agency's investigation. [Pratt at 421 (emphasis added).]

Plaintiff submits that the activities of certain FBI employees activities involving the Steele dossier do not constitute permissible law enforcement activity, and the FBI has not provided sufficient detail to determine whether Record No. 7 in particular involved law enforcement activity at all. Thus, the claimed exemption for Record No. 7 fails the first part of the Exemption 7 inquiry.

Furthermore, the government does not even claim that Record No. 7 was compiled for law enforcement activity, but rather that it "was compiled during the FBI's investigations of national security matters." Def. Memo at 12. But Exemption 7(E) does not expressly cover a "national security intelligence investigation." "National security intelligence investigation" is expressly addressed in the second part of the confidential source protection of Exemption 7(D), which is one of the exemptions at issue in Pratt, but which is not asserted here. It must be assumed that Congress knew what it was doing in including intelligence investigation in 7(D), but not in 7(E).[13] *See* Stein v. DOJ & FBI, 662 F.2d 1245, 1261 (7th Cir. 1981) (quoting S.Rep.No.93-1200, 93d Cong., 2nd Sess. (1974)).

Even if Record No. 7 could somehow pass the first part of the Exemption 7 inquiry (for the reasons stated above, it does not), it fails the second part of the inquiry as well. To

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[13] If somehow Exemption 7(E) is now read as including "national security intelligence investigation," which is the basis for which defendant claims all the remaining withholdings, the D.C. Circuit has explained that this claim "may require a determination of the lawfulness of the investigation's methods." Pratt at 424 n.39. That lawfulness is not present in this case.

support the State Department's withholdings under Exemption 7(E), including Record No. 3, the Seidel declaration explains:

> The FBI also relied on Exemption 7(E) to protect this information because the intelligence source, method, and activity information at issue related to the conduct of an FBI investigation, and thus also constitutes investigative technique and procedure information. Release of this information would disclose the identity of methods used in collecting and analyzing information, including how and from where the FBI collects information, and the methodologies employed to analyze it. Such disclosures would enable investigative subjects to circumvent FBI intelligence and information gathering efforts relying on similar, currently-used techniques. The relative utility of these techniques diminishes as details about their use are disclosed over periods of time and FOIA requests. In particular, incremental disclosures permit the accumulation of information by adversaries about how the FBI conducts its investigations, gathers information and intelligence, and otherwise collects and analyzes information. Such accumulations of information enable adversaries to educate themselves about the techniques employed for the collection and analysis of information and the types of information of greatest value to FBI investigations, and in turn would enable them to develop effective countermeasures to circumvent the techniques, deprive the FBI of key investigative information/intelligence, and continue to violate the law and engage in criminal activities. Accordingly, the FBI properly asserted FOIA Exemption 7(E), in conjunction with Exemption 3 and at times Exemption 1 to protect this type of information. [Seidel ¶ 46.]

Perhaps the most substantive statement in the Seidel Declaration as to why the five-page attachment to the DAS Kavalec email was withheld is:

> In particular, incremental disclosures permit the accumulation of information by adversaries about how the FBI conducts its investigations, gathers information and intelligence, and otherwise collects and analyzes information. [Seidel ¶ 46.]

Although this statement is offered to explain why a specific five-page document should be withheld, it really is only a generic description of why the FBI may need to guard actual sources and methods information. Defendant never even seeks to describe how this principle applies to the document in question. Without any meaningful discussion, this claim to an exemption cannot be upheld.

Moreover, there are several reasons to doubt this claimed exemption applies to this document. First, the five-page attachment in question is not an FBI document, nor is it provided by a source directly to the FBI — rather, it came from the State Department. As such, it is a stretch to claim any connection to protecting FBI "sources and methods." Second, the immediate "source" of the information to the FBI is known — it was the State Department. The five-page attachment could discuss how the State Department came to obtain some information, but however obtained, it was not an exclusive FBI source. Third, the five-page attachment appears not to have been sent in response to an FBI request, but rather arrived unsolicited at the FBI from the State Department. Thus, it certainly tells nothing about "how the FBI conducts its investigations…." Fourth, all that the five-page attachment could show about "how the FBI … gathers information and intelligence" is that the FBI accepts emails from other government offices — which is not a sensitive method of intelligence collection. All agencies are possible FBI sources. Fifth, the five-page attachment from the State Department would obviously show nothing about "how the FBI … analyzes information." The document may show something about what the State Department thought to be sufficiently significant to provide it to the FBI, but that tells nothing about any FBI analysis.

C. Segregability

The State Department's Memo claims that "both State and the FBI reviewed **all** of the withheld information to ensure that all reasonably segregable information was released to Citizens United." Def. Memo at 18. However, the Stein Declaration's brief discussion of Record No. 7 never claims that the State Department conducted a review of this document, very much unlike the line-by-line review it describes that it undertook with respect to Record

Nos. 3, 4, and 6. *Compare* Stein ¶ 47 *with* Stein ¶¶ 38, 41, and 45. Instead, the Stein Declaration simply refers to the Siedel Declaration, and little explanation is provided there.

Unlike the other documents in this case, Record No. 7 is the only document being withheld in full, yet with only a conclusory recitation regarding nonsegregability. *See* Seidel Decl. ¶ 50. Because the defendant failed to describe Record No. 7 — other than as a five-page attachment to the October 13, 2016 email to the FBI (Record No. 6) — and failed to provide a detailed segregability analysis, it has failed to provide the basic showing of "reasonable specificity" that it claims it has provided.

"Before approving the application of a FOIA exemption, the district court must make specific findings of segregability regarding the documents to be withheld." Sussman v. U.S. Marshals Serv., 494 F.3d 1106, 1116 (D.C. Cir. 2007) (citing Summers v. DOJ, 140 F.3d 1077, 1081 (D.C. Cir. 1998)). Based on the insufficient evidence provided by the defendant, the Court cannot conduct any review at all. Thus, the defendant cannot invoke the presumption that it complied with its obligation regarding segregability, and this Court is not able to make the specific findings necessary to uphold the defendant's withholding in full of Record No. 7.

VI. The Claimed Exemptions for Record Nos. 3, 4, 6, and 9 Are Unsupported by the Record and Controverted by Agency Bad Faith.

Defendant's Memorandum of Points and Authorities lays out the appropriate standard of review for this Court's determination of the government's motion for summary judgment in a FOIA case. Def. Memo at 2-3. Summary judgment may be granted to the government based on information provided by the agency if supported by declarations "with reasonably specific

detail … and are not controverted … by evidence of agency bad faith." CREW v. U.S. DOJ, 746 F.3d 1082, 1088 (D.C. Cir. 2014) (citation omitted). Defendant's motion meets neither test.

First, the defendant's declarations do not contain reasonably specific detail. Defendant's memorandum and supporting declarations do little more than recite the relevant statutory language of the exemptions. For example, at one point, defendant speaks in broad, ambiguous terms of "a particular intelligence source against specified targets in particular locations and at specific period in time … known to very few individuals," but provides nothing to buttress its assertion. Def. Memo at 6. The D.C. Circuit has made clear that "conclusory affidavits that merely recite statutory standards, or are overly vague or sweeping will not … carry the government's burden." Larson v. Dep't of State, 565 F.3d 857, 864 (D.C. Cir. 2009). Likewise, although the bar for Exemption 7(E) is relatively low, "the agency must at least provide *some* explanation of what procedures are involved and how they would be disclosed." CREW at 1102 (holding that the agency failed to provide sufficient detail for Exemption 7(E)).

The State Department claimed that it applied Exemption 1 to Record No. 3 — which was responsive to CU's request — because it "would reveal information about foreign nationals suspected of conducting intelligence activities **against** the United States." Def. Memo at 5 (emphasis added). This claim appears preposterous. A logical inference from that assertion is that perhaps Christopher Steele, whose name is redacted throughout Record No. 3, is the foreign national conducting intelligence activities against the United States. If that is the case, then either (i) Steele was an enemy of the United States in the paid employ of the FBI, or

(ii) the email involved drew Steele's veracity into question. Either way, the FBI was on notice that Steele was disclosing dubious and political information to the State Department three weeks before it relied upon his "intelligence" in a verified application to the FISC.

Likewise, the State Department withheld the "names of particular foreign countries that were the subject of intelligence reporting," asserting in general terms that disclosure could hurt foreign relations. However, it is already clear that the topic of the Steele briefing was Russian connections to individuals associated with the Trump campaign. Special Counsel Robert Mueller's report,[14] which was released to the public with redactions, laid out Russian efforts to interfere with the 2016 elections, and that report was not withheld from the public based on a fear of harming foreign relations. Of course, the general standard is that it is the executive's, not the judiciary's, responsibility to determine what may be withheld under Exemption 1. But it is not believable that the production of the disputed records in this case could harm U.S. foreign relations in a manner different from the enormous amount of information already made public by the Mueller report. This fact raises the suspicion that the document was not properly classified.

Record No. 3 is clearly marked "no discernable classification" on each page, yet defendant claims Record No. 3 is appropriately classified. Defendant never even attempts to explain the discrepancy of how a document with a "no discernable classification" marking can be classified and withheld under Exemption 1.

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[14] Special Counsel Robert S. Mueller, III, Report on the Investigation into Russian Interference in the 2016 Presidential Election (Mar. 2019).

Defendant also claims Exemption 1 to protect Record No. 3 because other foreign persons would be reticent to "convey sensitive information" for fear that the U.S. government would breach that confidence. However, the basis for the claim in this case is misapplied, because — unless the confidential information was **about** Christopher Steele — Steele indicated that he wanted his "information to come to light prior to November 8" and also said he was providing the information to two news outlets. *See* Record Nos. 4 and 9. Thus, he was not providing his information to the State Department on a confidential basis (which would have triggered a claim to Exemption 7(D)). Similarly, information in Record Nos. 4 and 9 was withheld pursuant to Exemption 1, but both of those documents were based on information Steele provided to DAS Kavalec, and thus not conveyed with any expectation of confidentiality.

Defendant also relies on Exemption 3 and the National Security Act of 1947 to withhold portions of Record Nos. 3, 4, 6, and 9. However, defendant makes only broad claims, and "has not adequately explained why it cannot provide general information (for example: length, date, author and brief description of each document) which would present [plaintiff] with a more realistic opportunity to challenge [the agency's] invocation of exemption." Oglesby at 1181.

Finally, defendant relies on Exemption 7(E) for withholding portions of Record Nos. 3, 4, 6, and 9. However, with respect to Record No. 3, defendant claims disclosure would reveal intelligence activities related to national security, and Record Nos. 4 and 9 were related to the "furtherance of the FBIs counterintelligence mission" related to national security. Neither

claim justifies withholding as law enforcement activities as required by Exemption 7(E), as explained *supra*, and thus are not properly withheld under that exemption.

VII. For Any Exemption which May Seem Plausible, In Camera Review Is Necessary.

The State Department claims that CU's request for *in camera* review was premature and, now that it has explained its claims of exemption, this Court should deny the request for *in camera* review. CU does not agree that its request was premature, but even if it was, CU now renews that request, and incorporates by reference its prior arguments. The State Department has been provided the opportunity to provide evidence that the documents are clearly exempt from disclosure, but it has not carried its burden of proof.

It is now clear that the information the FBI provided to the FISC initial application to surveil Carter Page on October 21, 2016 was false. From the documents released, it is known that the FBI was **on notice** that the information was false, and there is sufficient reason to believe that by any standard the FBI **should have known** the information to be false. Some have questioned whether the FBI **actually knew** that it was false when it made. In a usual case, if the defendant's explanation is sufficiently detailed and plausible, then the Court can accept that explanation and affirm the claimed exemption. Here, however, the exemptions could be being claimed to conceal evidence that the FBI knowingly committed fraud upon the FISC. Plaintiff urges the Court to exercise its discretion and examine the relatively few pages of documents that remain at issue, and determine for itself whether the claims of exemption remain "colorable." *See* Spirko v. United States Postal Service, 147 F.3d 992, 996 (D.C. Cir. 1998) ("*[I]n camera* inspection does not depend on a finding or even a tentative finding of bad faith. A judge has discretion to order *in camera* inspection on the basis of an uneasiness, on a

doubt that he wants satisfied before he takes responsibility for a de novo determination." Quoting Ray v. Turner, 587 F.2d 1187, 1195 (D.C. Cir. 1978)).

Indeed, this would not be the first time the FBI misused its powers to conduct an investigation of a President's political opponents. *See* Appendix I. In a FOIA case involving FBI Director J. Edgar Hoover's files which he maintained on prominent political figures, D.C. Circuit Judge Silberman urged a district court to conduct *in camera* review on remand:

> As is now generally known, the files revealed that Hoover, through bureau agents, had collected over many years scandalous material on public figures to be used for political blackmail. They also contained shocking information as to how the FBI had been used by several Presidents, most notably Lyndon Johnson, as a political investigative unit to gather dirt on political opponents…. There can be no doubt that these documents as a group are of the very highest public interest. The public concern over presidential misuses of power has been amply demonstrated by the Act of Congress ensuring that "Watergate" material from the Nixon White House be preserved and disclosed. [Summers v. DOJ, 140 F.3d 1077, 1084 (D.C. Cir. 1998) (Silberman, J., concurring).]

With this history of the FBI as acting as a "political investigative unit," there again is the need for *in camera* review of the documents relating to the politically sponsored Steele dossier and the Carter Page FISA applications.

Even if the Court ultimately affirms the claimed exemptions, *in camera* review would provide some assurance to CU and the American public that the FBI's naked assertions were not just accepted, but that the documents were scrutinized in a meaningful manner. *In camera* review is necessary for this Court to conduct a responsible *de novo* determination regarding the claims of exemptions. The documents that currently remain in dispute totals 11 pages, would pose no more than a minimal burden on this Court, and could minimize the risk of further litigation.

CONCLUSION

This litigation has already resulted in the release of documents confirming that the FBI had received actual notice from the State Department, and thus had reason to believe, that the Steele dossier was a false and politically motivated document on October 13, 2016 — well before the filing of the first successful Application to the FISA court on October 21, 2016. Nevertheless, two FBI officials signed that application and three renewals, certifying that it complied "with the requirements of the Foreign Intelligence Surveillance Act of 1978, as amended" — FBI Director James B. Comey and Deputy Director Andrew G. McCabe. These documents have been recognized as providing some of the most compelling evidence thus far of wrongdoing at and politicization of the FBI. The emails and other documents obtained through this litigation had previously been withheld from Congress. The broader context of this case, unacknowledged by defendant, demonstrates a pattern of improper behavior and a lack of candor with a tribunal (the FISC), the type of conduct for which a private party would face severe sanctions and demonstrating apparent bad faith. The government's handling of plaintiff's request casts further doubt the validity of the claimed exemptions. This Court has every reason not to accept conclusory representations about how FOIA exemptions apply the documents still in question.

For the foregoing reasons, plaintiff respectfully requests that its motion for summary judgment be granted, and the withheld records ordered to be disclosed to CU. In the alternative, CU requests the Court to order the defendant to provide the Court with unredacted versions of the withheld documents so that the Court may make its own determination as to whether the defendant properly withheld the responsive documents.

Respectfully submitted,

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Appendix I. A Historic Perspective on the Politicization of the FBI.

In 2000, four scholars published a voluminous collection of information about the history and operations of the FBI, *See* Athan G. Theoharis, Tony G. Poveda, Susan Rosenfeld, and Richard Gid Powers, The FBI: A Comprehensive Reference Guide (Checkmark Books:2000). The number of instances detailed in that book in which the powers of the FBI were misused by Administrations of both parties to achieve political ends are shocking, but just a few historic illustrations make the point.

- Beginning in May 1940, President Roosevelt and senior White House aides forwarded to FBI Director Hoover the names of individuals who had written or telegraphed to protest the president's unneutral foreign policy…. The FBI director expanded upon the president's proposal, and that month forwarded to the White House reports detailing whatever **derogatory information** the FBI had already collected on the **identified critics**. When the FBI had no preexisting file, a special FBI inquiry was initiated with the results also sent to the White House….

  Thus, after 1940, not all of the **FBI's "intelligence" mission** could be characterized as counterespionage; **many political activists were monitored** who, at worst, could undermine national unity by raising public doubts about the consequences of the president's foreign policy. [*Id*. at 18 (emphasis added).]

- In 1934, Congress had formally banned wiretapping [but] did not explicitly apply this ban against the "interception and divulgence" of communications "transmitted by wire" to federal agents…. The Supreme Court … held that the wiretapping ban did apply to federal agents….

  President Roosevelt privately concluded that the Court's rulings governed only criminal cases…. [Attorney General Robert] Jackson responded by adopting **a procedure to minimize the risk of public discovery** … to 'have no detailed record kept concerning the cases in which wiretapping would be utilized….."

  Hoover minimized this risk through a **Do Not File procedure**. [*Id.* at 20- 21 (emphasis added).]

- Director Hoover … had maintained a secret office file containing **derogatory personal and political information on presidents,** members of Congress, cabinet officials, and other prominent Americans. [*Id*. at 37 (emphasis added).]

- Johnson White House aide Bill Moyers requests an FBI report on members of the Senate staff of **Republican presidential nominee Barry Goldwater**. The requested report is hand-delivered to the White House on October 28, 1964. [*Id*. at 371 (emphasis added).]

- "October 26, 1964. President Nixon directs FBI Director Hoover to **assist** in House minority leader Gerald Ford's effort to **impeach Supreme Court Justice** William Douglas." [*Id*. at 373 (emphasis added).]

- November 25, 1970. Nixon White House aide H.R. Haldeman asks FBI Director Hoover to provide the White House with a list of Washington reporters who are gay (and "any other stuff"). The requested report is hand-delivered to the White House two days later. [*Id*. at 374.]

- January 1988. Responding to a Freedom of Information Act request, the FBI releases its files on the Committee in Solidarity with the People of El Salvador (CISPES). These reveal that, from 1981 through 1985, FBI agents had closely monitored CISPES and other groups (UAS and NEA locals) and individuals (Catholic nuns and college students) opposed to the Reagan administration Central America policy. [*Id*. at 379.]

Other secondary sources confirm the long train of political abuses being committed by the FBI. Once the third ranking official in the FBI under Director Hoover, William C. Sullivan explained his experience at the FBI: "[President] Johnson … wanted the FBI to keep an eye on every senator and congressman who opposed his policies, whether they were Republicans or Democrats, whether they leaned to the left or to the right. He wanted anything our agents cound dig up on them that might prove embarrassing or politically damaging." William C. Sullivan, The Bureau: My Thirty Years in Hoover's FBI (Norton & Co. 1979).