

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
GRANT F. SMITH,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 1: 18-cv-02048-TSC
)	
U.S. NATIONAL ARCHIVES AND)	
RECORDS ADMINISTRATION,)	
)	
Defendant.)	
-----))	

DECLARATION OF JOHN P. FITZPATRICK
SENIOR DIRECTOR, RECORDS ACCESS AND
INFORMATION SECURITY MANAGEMENT DIRECTORATE,
NATIONAL SECURITY COUNCIL

I, John P. Fitzpatrick, declare as follows:

1. I currently serve as the Senior Director, Records Access and Information Security Management Directorate at the National Security Council ("NSC"). I have worked in the information review and release field since 2011, and in the realm of classified national security information policy since 2006.

2. I am a senior NSC official and hold original classification authority at the TOP SECRET level under written delegation of authority pursuant to section 1.3(c) of Executive Order 13526, 75 Fed. Reg. 707 (Jan. 5, 2010). This means that I am authorized to assess the current, proper classification of NSC information, up to and including TOP SECRET information, based on the classification criteria of Executive Order 13526 and applicable regulations. Among other things, the purpose of the NSC is to advise the President with respect to the integration of domestic, foreign, and military policies relating to the national security so as

to enable the Armed Forces and the other departments and agencies of the United States Government to cooperate more effectively in matters involving the national security.

3. Among other things, I am responsible for the classification review of NSC information that may be the subject of court proceedings or public requests for information under the Freedom of Information Act (FOIA), 5 U.S.c. § 552.

4. Through the exercise of my official duties, I have become familiar with this civil action and the underlying FOIA requests. I make the following statements based upon my personal knowledge and information made available to me in my official capacity. This declaration supports the U.S. National Archives and Records Administration's ("NARA") motion for summary judgment in this matter.

5. It is my understanding that the Plaintiff in this case is seeking certain records he believes to be in the possession and control of NARA or its components. Specifically, I understand Plaintiff to be requesting purported Presidential letters addressed to members of the Israeli government, as described in a June 2018 *New Yorker* article. I also understand that NARA has not produced any records responsive to Plaintiff's requests and has refused to confirm or deny that any responsive records exist.

6. For the reasons discussed below, the NSC can neither confirm nor deny the existence or nonexistence of records responsive to the requests because to do so would reveal classified national security information. The information that is classified is the fact of the existence or nonexistence of the Presidential letters. This response is commonly referred to as the "Glomar" response.

7. It is my understanding that FOIA Exemption 1 provides that FOIA does not require the production of records that 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) afC in fact properly classified pursuant to such Executive Order. 5 U.S.c. § 552(b)(1).I-Icre, Executive Order 13526 is the operative Executive Order that govems classification. Section 3.6(a) of Executive Order 13526 provides that “[a]n agency may refuse to confirm or deny the existence or nonexistence of requested records whenever the fact of their existence or nonexistence is itself classified under this order or its predecessors.”

8. Section 1.1(a) of Executive Order 13526 set out the conditions for proper classification.¹ Those conditions are satisfied here. As noted, I am an original classification authority. The existence or nonexistence of Presidential letters is information owned by and under the control of the United States Government. As explained below, the fact of the existence or nonexistence of the requested letters pertains to two categories in section 1.4, "foreign government information" and "foreign relations or foreign activities of the United States." Finally, and as explained below, I have determined that the unauthorized disclosure of the information could reasonably be expected to result in damage to the national security. Accordingly, I have determined that the fact of the existence or nonexistence of the requested records is currently and properly classified.

9. Plaintiff seeks records that pertain to both section 1A(b), "foreign government information," and section 1.4(d), "foreign relations or foreign activities of the United States." Plaintiff's requests seek purported correspondence between the President of the United States and foreign counterparts. Responding substantively to Plaintiff's requests would require the

¹ Those conditions are "(1) an original classification authority is classifying the information; (2) the information is owned by, produced by or for, or is under the control of the United States Government; (3) the information falls within one or more of the categories of information listed in section 1.4 of this order; and (4) the original classification authority determines that the unauthorized disclosure of the information could reasonably be expected to result in damage to the national security, which includes defense against transnational terrorism, and the original classification authority is able to describe the damage."

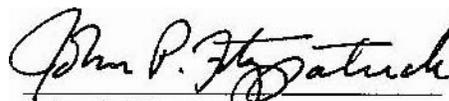
NSC to reveal a classified fact-i.e., whether the U.S. Government is or is not engaged in particular foreign relations or foreign activities. This concern is underscored by Plaintiff's reference in his requests to a June 18, 2018 article in the *New Yorker*, which portrays certain information as a government secret, and refers to purported letters from several U.S. Presidents regarding such secret to a foreign head of state. Given the contents of the article, responding substantively could confirm or refute the substance of information exchanged between the United States and one or more foreign governments.

10. The specific nature of the harm to national security that is reasonably likely to occur if the existence or nonexistence of the letters is confirmed could include: undermining the foreign relations objectives of the United States by sowing doubt about the U.S. commitment to the Non-Proliferation Treaty; undermining the foreign policy objectives of the United States by eliminating strategic ambiguity (i.e., whether or not an allied foreign state maintains certain capabilities); undermining relations with an important ally by revealing information shared with an expectation of confidentiality; undermining U.S. government policy limiting the potential for an arms race in a particular region; serving as confirmation for adversaries that there is no such information; undermining relations with other nations by suggesting differential treatment; and revealing the relationship (or absence of such a relationship) with foreign intelligence agencies. Further, confirming the existence of the subject letters, if they exist, could reveal the United States' regional interests, and relationships. Conversely, confirming the nonexistence of the letters, if they do not exist, could reveal the absence of such interests and relationships. Adversaries can exploit this information to gain a more accurate picture of the U.S. Government's activities and interests, which would impair the effectiveness of the President's foreign policy.

11. Some of the harms identified above might come to pass only if the United States confirmed the existence of the alleged records; some might come to pass only if the United States confirmed the nonexistence of the alleged records. But the NSC must insist on a Glomar response even when disclosure of nonexistence would not create a given harm because the Glomar response loses its effectiveness if it is only asserted to protect information that exists. Over time, such one-sided assertions of the Glomar response would transform the Glomar response into the very confirmation it is designed to avoid. For these reasons, NARA asserted a Glomar response to Plaintiffs' requests because the very fact of the existence or nonexistence of such records is itself a currently and properly classified fact, the disclosure of which reasonably could be expected to cause damage to the national security.

12. The determination to classify the information described above was made to protect the national security of the United States. The information was not classified to conceal violations of law, inefficiency, or administrative error; to prevent embarrassment to a person, organization, or agency; to restrain competition; or to prevent or delay the release of information that does not require protection in the interests of national security.

I declare under penalty of perjury that the foregoing is true and correct, to the best of my information and belief. 28 U.S.C. § 1746. Executed this 18th day of December 2018.



John P. Fitzpatrick

Senior Director, Records Access and
Information Security Management
Directorate
National Security Council