Gloomy *Glomar* Ruling: Lawyers Lose FOIA Bid to Discover Whether Their Conversations With Clients at Guantanamo Bay Were Recorded

STEVEN A. MEYEROWITZ

A New York federal district court ruling rejecting lawyers' requests under the Freedom of Information Act to determine whether the federal government had illegally intercepted their communications with their clients makes it more difficult for lawyers to represent their clients — and raises questions about the judicial system and privacy rights in the context of the "war on terror."

The federal Freedom of Information Act ("FOIA") was enacted in 1966 "to improve public access to information held by government agencies."[1] It expresses a public policy "in favor of disclosure so that the public might see what activities federal agencies are engaged in."[2] In essence, FOIA requires a federal agency to disclose records in its possession unless they fall under one of nine enumerated and exclusive exemptions.[3] The statutory exemptions "do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act."[4] Accordingly, as courts have explained, the exemptions are to be "given a narrow compass."[5]

Steven A. Meyerowitz, the editor-in-chief of the *Privacy & Data Security Law Journal*, can be reached at smeyerow@optonline.net.

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Recently, attorneys representing individuals detained by the United States government at Guantanamo Bay, Cuba, went to court challenging the government's rejection of their FOIA requests for records showing whether the government had intercepted communications relating to their representation of their clients. The government moved for summary judgment, claiming that it rightly had refused to confirm or deny the existence of the requested records. On June 25, 2008, in *Wilner v. National Security Agency*,[6] a decision with important ramifications for privacy law and attorney client relationships, the U.S. District Court for the District of New York granted the defendants' motion and rejected the plaintiffs' claim that they were entitled to the information they had sought under FOIA.

BACKGROUND

The plaintiffs in Wilner are partners and associates at prominent law firms, law professors, and attorneys for established non-profit organizations who are representing individuals detained by the federal government at Guantanamo Bay, Cuba, on suspicion of terrorist activity. The defendant National Security Agency ("NSA") is an agency within the Department of Homeland Security that is charged with, among other tasks, collecting, processing, and disseminating signals intelligence information for national foreign intelligence purposes. NSA's signals intelligence ("SIGINT") work includes intercepting communications necessary to the national defense, national security, or the conduct of foreign affairs of the United States. The Department of Justice, the cabinet department charged with law enforcement, is another defendant in the *Wilner* case.

As the district court explained in its decision, in the aftermath of the September 11, 2001, attacks by al Qaeda on the United States, President George W. Bush secretly authorized the Terrorist Surveillance Program ("TSP"), under the auspices of which the NSA was empowered "to intercept the international communications of people with known links to al Qaeda and related terrorist organizations."[7] President Bush described the TSP as "a highly classified program that is crucial to our national security. Its purpose is to detect and prevent terrorist attacks against the United

States, our friends and allies."[8] Surveillance under the TSP was conducted without warrants, and without oversight by the Foreign Intelligence Surveillance Court ("FISC"). The TSP was conducted in secret until President Bush publicly acknowledged its existence on December 17, 2005. On January 17, 2007, Attorney General Alberto Gonzales announced that electronic surveillance conducted under the TSP would be subject to the approval of the FISC.

By separate letters to the NSA and Department of Justice dated January 18, 2006, the plaintiffs submitted FOIA requests seeking seven categories of records. The first of these ("FOIA Request No. 1"), the only request specifically at issue in *Wilner*, sought "records obtained or relating to ongoing or completed warrantless electronic surveillance or physical searches regarding, referencing or concerning any of the plaintiffs." The defendants refused to confirm or deny whether they possessed records responsive to the request.[9]

As a result, the plaintiffs brought suit. The plaintiffs filed their complaint on May 17, 2007, and amended it twice thereafter. In the second amended complaint, the plaintiffs claimed that they had "a statutory right to the records that they seek, and there is no legal basis for the defendants' refusal to disclose them." The plaintiffs principally sought a declaration that the defendants' refusal to disclose the requested records was unlawful and an order compelling the defendants to produce the records without further delay. The defendants moved for partial summary judgment concerning the plaintiffs' FOIA Request No. 1 and the defendants' refusal to confirm or deny the existence of records concerning specific alleged targets of the TSP.

THE *GLOMAR* RESPONSE

In its decision, the district court pointed out that, in rejecting FOIA Request No. 1, the defendants gave what is commonly known as the "Glomar Response," which derives from a FOIA case, *Phillippi v. CIA*,[10] concerning records pertaining to the Glomar Explorer, an oceanic research vessel. In *Phillippi*, the Central Intelligence Agency ("CIA") asserted that the "existence or nonexistence of the requested records was itself a clas-

sified fact exempt from disclosure under…FOIA,"[11] and therefore responded to the plaintiff's FOIA request by stating that, "in the interest of national security, involvement by the U.S. Government in the activities which are the subject matter of [Phillippi's] request can neither be confirmed nor denied."[12] The *Wilner* court explained that, following *Phillippi*, courts have found in favor of the government where it refused to offer a substantive response to a FOIA request, if doing so "would remove any lingering doubts that a foreign intelligence service might have on the subject, and [where] the perpetuation of such doubts may be an important means of protecting national security."[13]

The *Wilner* court explained that the Glomar Response[14] does not stand alone; rather, the defendants had to tether it to one of the nine FOIA exemptions and explain why the requested documents fell within the identified exemption. In this case, the defendants invoked the Glomar Response under FOIA Exemptions 1 and 3.

EXEMPTION 1

Exemption 1 permits the nondisclosure 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) are in fact properly classified pursuant to such Executive order."[15] The district court noted that Exemption 1 in this way establishes a specific exemption for defense and foreign policy secrets, and delegates to the president the power to establish the scope of that exemption by executive order.[16]

The district court explained that, in invoking Exemption 1, the defendants relied on Executive Order 12958,[17] as amended by Executive Order 13292,[18] which provides that an agency may classify records relating to, inter alia, "intelligence activities (including special activities), intelligence sources or methods, or cryptology," and "vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security, which includes defense against transnational terrorism."[19] Executive Order 12958 permits a classifying agency such as the NSA to classify information when it "determines that

the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, which includes defense against transnational terrorism, and the original classification authority is able to identify or describe the damage."[20] Further, the *Wilner* court added, the Executive Order specifically countenances the Glomar Response, permitting a classifying agency to "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."[21]

EXEMPTION 3

Exemption 3 applies to records "specifically exempted from disclosure by statute," provided that the statute "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue."[22] In invoking Exemption 3, the defendants identified three statutes that they alleged encompassed the documents sought by plaintiffs, and therefore precluded disclosure. First, Section 6 of the National Security Agency Act of 1959 ("NSAA")[23] provides that:

> [N]othing in this Act or any other law…shall be construed to require the disclosure of the organization or any function of the National Security Agency, of any information with respect to the activities thereof, or of the names, titles, salaries, or number of persons employed by such agency.

The second statute relied on by the defendants, Section 102(A)(i)(1) of the Intelligence Reform and Terrorism Prevention Act of 2004,[24] requires the Director of National Intelligence to "protect intelligence sources and methods from unauthorized disclosure."

Third, the defendants relied on Section 798 of Title 18 of the U.S. Code, which criminalizes disclosure of information "concerning the communications intelligence activities of the United States."

BASIS FOUND FOR INVOKING THE GLOMAR RESPONSE

The *Wilner* court stated that the defendants only had to proffer one legitimate basis for invoking the Glomar Response to succeed on their motion for summary judgment. In the district court's opinion, the defendants' affidavits provided the requisite detailed explanations for withholding the documents requested in FOIA Request No. 1 under FOIA Exemption 3. Specifically, the district court held, the defendants demonstrated that acknowledging the existence or nonexistence of the information entailed in FOIA Request No. 1 "would reveal the NSA's organization, functions, and activities, in contravention of Section 6 of the NSAA." Accordingly, it granted their motion for summary judgment.

The district court then explained its reasoning. It noted that in *CIA v. Sims*,[25] the U.S. Supreme Court adopted a two-pronged approach that a court had to follow when evaluating an agency's invocation of FOIA Exemption 3: First, the court must consider whether the statute identified by the agency was a statute of exemption as contemplated by Exemption 3. Second, the court must consider whether the withheld material satisfied the criteria of the exemption statute.[26] As the D.C. Circuit has observed,

> "[e]xemption 3 presents considerations distinct and apart from the other eight exemptions" inscribed in FOIA. *Association of Retired R.R. Workers v. U.S. R.R. Retirement Bd*., 830 F.2d 331, 336 (D.C. Cir. 1987): Exemption 3 differs from other FOIA exemptions in that its applicability depends less on the detailed factual contents of specific documents; the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within the statute's coverage.[27]

The *Wilner* court observed that the defendants argued, and the plaintiffs did not dispute, that Section 6 of the NSAA qualified as an exemption statute under Exemption 3. Indeed, the court noted that the language of Section 6 made "quite clear" that it fell within the scope of Exemption 3. Section 6 states that no "law…shall be construed to require the disclo-

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sure…of any information with respect to the activities" of the NSA.[28] Section 6, the district court ruled, thus "specifically exempt[s]" certain information from disclosure.[29]

The district court then turned to the second part of the Exemption 3 inquiry under Sims, which probes whether the withheld material satisfies the criteria of the exemption statute. The defendants contended that "[a]cknowledging the existence or nonexistence of the information requested by Plaintiffs' FOIA Request No. 1 would unquestionably reveal NSA's organization, functions and activities by revealing the success or failure of NSA's activities." In support of this contention, they submitted affidavits from Joseph J. Brand, Associate Director, Community Integration, Policy and Records for the NSA; J. Michael McConnell, Director of National Intelligence; and David M. Hardy, Section Chief of the Record/Information Dissemination Section, Records Management Division, Federal Bureau of Investigation.

PROGRAM "CRITICAL TO THE NATIONAL SECURITY"

In his affidavit, Brand averred that the TSP was a SIGINT program "that was critical to the national security of the United States." Operation of the TSP "depends upon the collection of electronic communications, which can be easily compromised if targets are made aware of NSA capabilities and priorities." Giving the Glomar Response to FOIA Request No. 1 was essential, Brand attested, because:

> [a]cknowledging the existence or nonexistence of those individuals or organizations subject to surveillance would provide our adversaries with critical information about the capabilities and limitations of the NSA, such as the types of communications that may be susceptible to NSA detection. Confirmation by NSA that a person's activities are not of foreign intelligence interest or that NSA is unsuccessful in collecting foreign intelligence information on their activities on a case-by-case basis would allow our adversaries to accumulate information and draw conclusions about NSA's technical capabilities, sources, and methods.

Similarly, McConnell stated that "[t]o confirm or deny whether someone is a target of surveillance…would reveal to our adversaries that an individual may or may not be available as a secure means for communicating or, more broadly, the methods being used to conduct surveillance." The disclosure of such information would run afoul of Section 6 of the NSAA, Brand contended, because it "would reveal the sources of intelligence…and would tend to reveal the methods by which such intelligence is collected…." Further, "confirmation or denial of this information would reveal the limitations of NSA SIGINT capabilities." Even the disclosure of "what appears to be the most innocuous information about the TSP" posed a threat to national security, McConnell averred, because it might permit the country's adversaries "to piece together sensitive information about how the Program operated, the capabilities, scope and effectiveness of the Program and our current capability, which would be utilized by the enemy to allow them to plan their terrorist activities more securely."

In the district court's view, these affidavits demonstrated that the documents sought in FOIA Request No. 1 related to "the organization or any function of the National Security Agency" and sought "information with respect to the activities thereof,"[30] all of which were exempted from disclosure by Section 6 of the NSAA. The district court noted that the affidavits averred that the TSP was a SIGINT program, that "signals intelligence is one of [NSA's] primary functions," and that the release of the SIGINT information would "disclose information with respect to [NSA] activities, since any information about an intercepted communication concerns an NSA activity."[31] Moreover, the district court added, the affidavits explained in "detailed, nonconclusory" fashion[32] why the Glomar Response was appropriate. The affidavits thus "giv[e] reasonably detailed explanations why any withheld documents fall within an exemption," and were therefore "sufficient to sustain the agency's burden," the district court held.[33]

THE CLAIM THAT THE TSP WAS ILLEGAL

The plaintiffs did not challenge the legal basis for the defendants'

Glomar Response, nor did they challenge the sufficiency — either in form or substance — of the defendants' affidavits in support of their reliance on FOIA Exemption 3 and Section 6 of the NSAA. Instead, the plaintiffs challenged the defendants' refusal to produce the requested information primarily by arguing that the TSP was illegal, violating both the United States Constitution[34] and FISA, and that FOIA exemptions could not be invoked to facilitate the concealment of unlawful activity. The district court decided, however, that it did not need to address the plaintiffs' substantive arguments concerning the TSP's legality because the language of FOIA Exemption 3 and Section 6 of the NSAA made it clear that the defendants had permissibly refused to disclose the information requested by the plaintiffs.

As the district court explained, FOIA Exemption 3 states without exception that the disclosure requirements of FOIA do not apply to information "specifically exempted from disclosure by statute."[35] It then noted that Section 6 of the NSAA, in turn, requires the nondisclosure of information concerning "the organization or any function of the National Security Agency" or "information with respect to the activities thereof." The district court then pointed out that, as the D.C. Circuit has observed, this language is "unequivocal."[36] The district court declared that the plaintiffs' assertion that the TSP was illegal proved an "insufficient retort to these clear statutory directives."[37]

THE *HAYDEN* "DICTA"

The district court stated that the plaintiffs' argument rested primarily on what it characterized as dicta in the D.C. Circuit's decision in *Hayden v. CIA* and a handful of district court cases, none of which, the district court declared, actually endorsed plaintiffs' theory.[38] In *Hayden*, the D.C. Circuit considered a FOIA request for foreign intelligence reports concerning the plaintiffs. The plaintiffs did not allege that the reports derived from any unlawful activity. The circuit court nonetheless opined that, "[c]ertainly where the function or activity is authorized by statute and not otherwise unlawful, NSA materials integrally related to that function or activity fall within [the predecessor statute to Section 6 of the NSAA] and

Exemption 3."[39]

The *Wilner* court stated that the plaintiffs attempted to cast this "line of dicta" as a prohibition on using FOIA to avoid disclosure of allegedly unlawful government activity, but ruled that it was "clear" that the D.C. Circuit eschewed that question in *Hayden* and did not opine on the availability of FOIA amidst allegations of illegality. Indeed, it said, the D.C. Circuit held that "all that is necessary" for the NSA to successfully resist disclosure under Exemption 3 was to explain how the requested documents "would reveal information integrally related to…NSA activity."[40] Given what the *Wilner* court said was "the clear language of the statutes at issue," it found that the plaintiffs' "creative interpretation" of the D.C. Circuit's dicta in *Hayden* was insufficient to vindicate their position.

The *Wilner* court added that a number of district courts confronting requests for information concerning President Bush's "war on terror" have expressed concern that the government might refuse to disclose requested information in order to conceal unlawful activity. Indeed, some have cited the *Hayden* dicta to underscore their point.[41] Nonetheless, the *Wilner* court continued, "none of these courts has resolved the question in plaintiffs' favor."

For example, in one case, plaintiffs sued AT&T under the Electronic Communications Privacy Act,[42] alleging that AT&T had released records of its customers' telephone calls to the NSA and seeking production of those records in discovery. The NSA intervened and moved to dismiss, arguing that the plaintiffs' allegations implicated matters vital to national security and therefore that production of AT&T's records would violate Section 6 of the NSAA. The district court explicitly refused to "definitively determine the thorny issue of the proper scope of" Section 6 because the government provided an alternative, independent basis for withholding the records requested by the plaintiff.[43]

The *Wilner* court added that in another case, *ACLU v. Dep't of Defense*,[44] the district court considered plaintiff's FOIA request for documents concerning the government's treatment of detainees at Guantanamo Bay. The government gave the Glomar Response with respect to plaintiff's request for information concerning interrogation techniques being used on the detainees. The *ACLU* court expressed "concern…that the pur-

pose of the CIA's Glomar responses is less to protect intelligence activities, sources or methods than to conceal possible violations of law in the treatment of prisoners, or inefficiency or embarrassment of the CIA."[45] Nonetheless, observing the "small scope for judicial evaluation in this area,"[46] the ACLU court accepted the government's Glomar Response under FOIA Exemption 3.

Finally, the *Wilner* court added, in another case, a court considered a FOIA request for information concerning the TSP and the government's Glomar Response, explicitly recognized the *Hayden* dicta, and wrote that the "potential illegality [of the TSP] cannot be used in this case to evade the unequivocal language of Section 6 [of the NSAA], which prohibits the disclosure of information relating to the NSA's functions and activities."[47]

EFFECT OF PUBLIC DISCLOSURE

The *Wilner* plaintiffs also argued that the Glomar Response was an inappropriate reply to FOIA Request No. 1 because high ranking officials have publicly disclosed certain aspects of the TSP. Through these disclosures, plaintiffs contended, the defendants waived their right to assert the Glomar Response. The *Wilner* court noted that, for the purposes of this motion, the defendants did not appear to dispute that officials in the presidential administration have publicly acknowledged the existence of the TSP, as well as certain details about the program. But, it ruled, as they "rightly" argued, "the Glomar response in this case has been exceedingly narrow and covers only confirming or denying whether particular individuals were targeted by or otherwise subject to surveillance under the TSP." According to the district court, the defendants' affidavits sufficiently explained why disclosure of this additional information would violate Section 6 of the NSAA. It added that the law was "clear" that limited voluntary disclosures by the government did not necessarily require further disclosures sought through FOIA requests where those disclosures fell within a FOIA exemption.[48]

Finally, the *Wilner* court noted that the plaintiffs had emphasized the "narrowness of the question" to be decided, and that because the government had disclosed much information about the TSP, "[t]he only addi-

tional information sought by the plaintiffs is whether the government has illegally intercepted their communications." The *Wilner* court found this argument to be misguided for two reasons. First, it found, denying whether the plaintiffs' communications with their clients had been intercepted would reveal information about the NSA's capabilities and activities, in contravention of Section 6 of the NSA. Second, it added, the identity of the person making an FOIA request is "irrelevant to the FOIA inquiry," and the agency must not consider the requester's identity. The court stated that if, as a matter of law, the defendants were required to respond to the plaintiffs' FOIA requests, they would have to do so no matter who was requesting the information. In conclusion the court cited Brand, who declared that the accretion of progressively disclosed information "would disclose the targets and capabilities (sources and methods) of the TSP and inform our adversaries of the degree to which NSA is aware of some of their operative or can successfully exploit particular communications."

CONCLUSION

The *Wilner* court's application of the Glomar Response and its statutory analysis are important developments in FOIA law, although the plaintiffs' primary focus — whether the government's conduct was illegal — was, unfortunately, not thoroughly addressed. The plaintiffs had argued in their memorandum in opposition to the defendants' partial motion for summary judgment regarding the Glomar Response that "Glomar functions to protect legitimate government interests, not to conceal illegal or unconstitutional activity" and that the "fatal defect" in the government's argument was that there was "no legitimate government interest to protect here" because warrantless surveillance of plaintiffs' communications "would be unconstitutional under the Fourth Amendment and would be illegal under the Foreign Intelligence Surveillance Act." Regardless of the merits of the government's general defense of the surveillance program, the plaintiffs asserted, there was "no credible claim that without judicial approval the government may lawfully eavesdrop on plaintiffs' communications in the course of representation."

It is difficult to accept that the federal government may unlawfully intercept communications between attorneys and their clients and that it does not even have to disclose the fact of the interception. Yet that is the result of the district court's ruling in *Wilner*. One can expect further litigation on this issue. Whether the district court's ruling will set the standard, in this case and others, remains to be seen.

NOTES

[1] *Pierce & Stevens Chem. Corp. v. U.S. Consumer Prod. Safety Comm'n*, 585 F.2d 1382, 1384 (2d Cir. 1972).

[2] *A. Michael's Piano, Inc. v. F.T.C.*, 18 F.3d 138, 143 (2d Cir. 1994).

[3] 5 U.S.C. § 552(a)(3)-(b); *see also Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976).

[4] *Dep't of the Interior and Bur. of Indian Affairs v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) (citation omitted).

[5] *Id.* (citation omitted); *see also Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 356 (2d Cir. 2005).

[6] 07 Civ. 3883 (DLC) (S.D.N.Y. June 25, 2008).

[7] George W. Bush, President's Radio Address (Dec. 17, 2005), http://www.whitehouse.gov/news/releases/2005/12/20051217.html.

[8] *Id.*

[9] As indicated in the plaintiffs' memorandum in opposition to the defendants' partial motion for summary judgment regarding the Glomar Response, *see infra*, the plaintiffs concerns were based "on the government's own actions," including the government's official acknowledgments that the National Security Agency "engaged in warrantless interception of electronic communications of individuals alleged to have connections to terrorist organizations" and "that the detainees' lawyers may have been targeted; the government's repeated claims that the zone of privacy that ordinarily safeguards the attorney client relationship does not apply to the detainees and their counsel; and the government's refusal to disavow that it has the legal right to eavesdrop on the plaintiffs." The plaintiffs also observed that lead plaintiff Thomas Wilner had even been informed by government officials that he was "probably the subject of government surveillance and should be careful in [his] electronic communications." The plaintiffs argued that they were bringing this case to determine whether these warning signs of government sur-

veillance were real or just false alarms. The plaintiffs argued that "[i]nstead of acknowledging, one way or the other, whether the plaintiffs had been subject to surveillance, the government claims that Glomar authorizes it to keep counsel guessing about whether the government is listening to their communications. That is not so."

[10] 546 F.2d 1009 (D.C. Cir. 1976).

[11] *Id.* at 1012.

[12] *Id.*

[13] *Frugone v. CIA*, 169 F.3d 772, 774-75 (D.C. Cir. 1999) (citation omitted).

[14] The Glomar Response is established in a number of federal circuits, *see, e.g., Carpenter v. U.S. Dep't of Justice*, 470 F.3d 434, 436-37 (1st Cir. 2006); *Bassiouni v. CIA*, 392 F.3d 244, 246 (7th Cir. 2004); *Hunt v. CIA*, 981 F.2d 1116, 1117 (9th Cir. 1992), although the Second Circuit has never opined on the Glomar Response. However, the plaintiffs in *Wilner* did not challenge the general availability of the Glomar Response but rather the applicability of the Glomar Response to their FOIA Request No. 1. It should be noted that the Second Circuit has evidenced a willingness to look to the law of other circuits in the area of FOIA, even when it has not specifically adopted other circuits' law. This is especially the case when the Second Circuit has defined the contours of the FOIA exemptions. *See, e.g., Inner City Press/Community on the Move v. Bd. of Governors of Federal Reserve Sys.*, 463 F.3d 239, 244-45 (2d Cir. 2006); *Tigue v. U.S. Dep't of Justice*, 312 F.3d 70, 77-78 (2d Cir. 2002).

[15] 5 U.S.C. § 552(b)(1).

[16] *See, e.g., Military Audit Project v. Casey*, 656 F.2d 724, 737 (D.C. Cir. 1981).

[17] 60 Fed. Reg. 19825 (Apr. 17, 1995.

[18] 68 Fed. Reg. 15315 (Mar. 25, 2003).

[19] 68 Fed. Reg. at 15317.

[20] *Id.* at 15315.

[21] *Id.* at 15324.

[22] 5 U.S.C. § 552(b)(3).

[23] Pub. L. No. 86-36, § 6, 73 Stat. 63, 64, codified at 50 U.S.C. § 402.

[24] Pub. L. No. 108-458, 118 Stat. 3638 (Dec. 17, 2004), codified at 50 U.S.C. § 403-1(i)(1).

[25] 471 U.S. 159 (1985).

[26] *Id.* at 167; *see Fitzgibbon v. C.I.A.*, 911 F.2d 755, 761 (D.C. Cir. 1990).

[27] *Id.*

[28] Pub. L. No. 86-36, § 6, 73 Stat. 63, 64, codified at 50 U.S.C. § 402.

[29] 5 U.S.C. § 552(b)(3). The D.C. Circuit — the only circuit court to have considered this question — has reached the same conclusion. *See Founding Church of Scientology, Inc. v. NSA*, 610 F.2d 824, 828 (D.C. Cir. 1979); *Hayden v. NSA*, 608 F.2d 1381, 1389 (D.C. Cir. 1979).

[30] Pub. L. No. 86-36, § 6, 73 Stat. 63, 64, codified at 50 U.S.C. § 402.

[31] *Hayden*, 608 F.2d at 1389.

[32] *Wood v. FBI*, 432 F.3d 78, 85 (2d Cir. 2005).

[33] *Carney*, 19 F.3d at 812.

[34] Specifically, the plaintiffs claimed that the TSP — or, more specifically, the government's possible surveillance of their communication with their clients and the government's refusal to confirm that plaintiffs are not being surveilled — violated their First Amendment right and duty to raise all reasonable arguments on their clients' behalf, their clients' Fifth Amendment due process right to a meaningful opportunity to present a complete defense, and the plaintiffs' own Fifth Amendment liberty right to pursue their chosen occupation as attorneys.

[35] 5 U.S.C. § 552(b)(3).

[36] *Linder v. Nat'l Sec. Agency*, 94 F.3d 693, 696 (D.C. Cir. 1996).

[37] *See People for the Am. Way v. Nat'l Sec. Agency*, 462 F. Supp. 2d 21, 31 (D.D.C. 2006).

[38] The plaintiffs also cited the D.C. Circuit's decision in Founding Church of Scientology. In that case, the circuit court observed,

> Although NSA would have no protectable interest in suppressing information simply because its release might uncloak an illegal operation, it may properly withhold records gathered illegally if divulgence would reveal currently viable information channels, albeit ones that were abused in the past.

610 F.2d at 829 n.49. The *Wilner* court stated that the *Wilner* plaintiffs had not alleged that the NSA had refused to disclose the information requested in FOIA Request No. 1 "simply because its release might uncloak an illegal operation," noting that the plaintiffs themselves had conceded that members of President Bush's administration have publicly acknowledged the existence of the TSP. The *Wilner* court also found that the defendants' detailed affidavits described the ways in which disclosing the information sought by the plaintiffs would compromise ongoing SIGINT activities, and it stated that the plaintiffs had not challenged the defendants' assertions in that regard.

[39] *Hayden*, 608 F.2d at 1389.
[40] *Id.* at 233.
[41] *See, e.g., People for the Am. Way*, 462 F. Supp. 2d at 33; *Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899, 905 (N.D. Ill. 2006).
[42] 18 U.S.C. § 2702(a)(3).
[43] *Terkel*, 441 F. Supp. 2d at 905.
[44] 389 F. Supp. 2d 547 (S.D.N.Y. 2005).
[45] *Id.* at 564-65 (citation omitted).
[46] *Id.* at 565.
[47] *People for the Am. Way*, 462 F. Supp. 2d at 31 (citation omitted). Plaintiffs also cited an earlier case, *Navasky v. CIA*, 499 F. Supp. 269 (S.D.N.Y. 1980), which was unrelated to the "war on terror." In that case, plaintiffs sought records related to the CIA's "clandestine book publishing activities." *Id.* at 271. The CIA claimed such records were exempt from disclosure under FOIA Exemption 3. Plaintiffs argued that because such activities were "ultra vires the CIA charter," *id.* at 273, and therefore illegal, the CIA could not invoke the FOIA exemption. After reviewing the language of FOIA and a handful of D.C. Circuit cases concerning allegations of illegal government activity, the district court drew "[t]he inference…that illegality is not a bar to an otherwise valid justification under exemption 3," *id.*, and ruled in the CIA's favor. The *Wilner* court found that this case "plainly does not support plaintiffs' position."
[48] *See Salisbury v. United States*, 690 F.2d 966, 971 (D.C. Cir. 1982). It should be noted that the *Wilner* court also decided that the plaintiffs' reliance on the Ninth Circuit's decision in *Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190 (9th Cir. 2007), was misplaced because that case did not concern FOIA, but rather the state secrets doctrine, which has its own substantive standards that differ from those under FOIA.