

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA

v.

MICHAEL T. FLYNN,

Defendant

Crim. No. 17-232 (EGS)

GOVERNMENT’S RESPONSE TO THE COURT’S OCTOBER 23 MINUTE ORDER

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, hereby files with the Court its response to the Court’s Minute Order of October 23, 2020. By that Minute Order, the Court directed the government to file, by no later than October 26, 2020, a declaration pursuant to penalty of perjury under 28 U.S.C. sec. 1746, that the 14 exhibits attached to its motion to dismiss (ECF 198) and supplement (ECF 249) (hereinafter “Government Exhibits”) are true and correct copies. The Court extended this order to documents produced by the government in discovery which were subsequently filed by the defendant as exhibits in support of the defendant’s supplementary filings (ECF Nos. 228, 231, 237, 248, 251, 257, and 264) (hereinafter “Discovery Documents”). With respect to both categories, the Court ordered the government to identify each “exhibit” and “discovery document” by “name, date and author.” Lastly, the Court ordered the government to “provide transcriptions of all handwritten notes contained in the Exhibits.” *See* ECF Minute Order of October 23, 2020.

Government Exhibits

There have been no material alterations made to any of the 14 Government Exhibits filed in support of the motion to dismiss and the supplement to the motion to dismiss. Several of the

documents contain routine redactions made by the FBI to protect classified information, and/or law enforcement sensitive information, and/or made to comply with the Local Rule to remove Privacy Act information. In compliance with the Court's Order, the government has created a chart, attached hereto as Exhibit A,¹ that identifies the name, date, and author of each of the 14 government exhibits.

The Government Exhibits described in Exhibit A are authenticated as follows:

(A)(1) John Brown, Executive Assistant Director ("EAD") of the National Security Branch of the Federal Bureau of Investigation ("FBI"), has declared, under penalty of perjury, to the best of his knowledge, and based on the information provided to him, that all Government Exhibits described in Exhibit A, with the exception of those described in paragraphs (A)(2) and (A)(3), are true and correct copies of documents and records, including copies of select pages of larger records, maintained by the FBI pursuant to the applicable records retention policy. *See* Declaration of EAD John Brown, attached hereto as Exhibit C.

(A)(2) One of the Government Exhibits, ECF 198-8, is a summary chart of electronic communications created by attorneys at the D.C. U.S. Attorney's Office (DC-USAO) and the Eastern District of Missouri U.S. Attorney's Office (EDMO-USAO) (collectively EDMO/DC-USAO) to capture relevant electronic communications involving multiple FBI personnel while excluding irrelevant information and excess metadata. For this Government Exhibit, AUSA Saylor Fleming has declared, under penalty of perjury, to the best of her knowledge, that that this Government Exhibit truly and correctly reflects excerpts from documents and records maintained

¹ Consistent with its practice in this case, the government has redacted the names of individual FBI employees where those employees are not employed at the Senior Executive Service level, or where those employees are not otherwise publicly associated with this matter. An unredacted copy of Exhibit A will be filed with the Court under seal.

by the FBI pursuant to the applicable records retention policy, and provided to EDMO/DC-USAO for review.² *See* Declaration of AUSA Sayler Fleming, attached hereto as Exhibit D.

(A)(3) One of the Government Exhibits is a report of the interview of Special Agent William Barnett. *See* ECF 249-1. Keith Kohne, a Special Agent with the Federal Bureau of Investigation, has declared, under penalty of perjury, to the best of his knowledge, and based on the information provided to him, that this exhibit is a true and correct copy of the report of that interview. *See* Declaration of Special Agent Keith Kohne, attached hereto as Exhibit E.

Discovery Documents

The government has undertaken a comprehensive review of the documents produced in discovery in this case which were subsequently filed by the defendant as exhibits in support of the defendant's supplementary filings (ECF Nos. 228, 231, 237, 248, 251, 257, and 264). Those Discovery Documents consist of various handwritten notes, transcripts, electronic communications, and summary substitutions. The government has created a second chart, attached hereto as Exhibit B,³ that identifies the name, date, and author of the Discovery Documents provided to the Mr. Flynn by the government in this case.

The Discovery Documents referenced in the defendant's supplemental filings described in Exhibit B are authenticated as follows:

² The government and the declarant agree that there is a single typographical error in this exhibit. A single message ("Will do.") from DAD Peter Strzok, sent on 4-Jan-17, is incorrectly identified as having been sent at 2:17 PM; the message was actually sent at 2:18 PM.

³ As described above, the government has redacted the names of individual FBI employees where those employees are not employed at the Senior Executive Service level, or where those employees are not otherwise publicly associated with this matter. An unredacted copy of Exhibit B will be filed with the Court under seal.

(B)(1) EAD Brown has declared, under penalty of perjury, to the best of his knowledge, and based on the information provided to him, that the Discovery Documents described in Exhibit B, with the exception of those described in paragraphs (B)(2) and (B)(3), are true and correct copies of documents and records maintained by the FBI pursuant to the applicable records retention policy. *See* Declaration of EAD Brown, attached hereto as Exhibit C.

(B)(2) One of the Discovery Documents is a spreadsheet that was created by attorneys at EDMO/DC-USAO to capture relevant electronic communications involving multiple FBI personnel while excluding irrelevant information and excess metadata. *See* ECF 228-3, which is identical to ECF 198-8. For this Discovery Document, AUSA Sayler Fleming has declared, under penalty of perjury, to the best of her knowledge, that that this Government Exhibit truly and correctly reflects excerpts from documents and records maintained by the FBI pursuant to the applicable records retention policy, and provided to EDMO/DC-USAO for review, as described above. *See* Exhibit D.

(B)(3) One of the Discovery Documents is a summary substitution of classified materials that were provided to EDMO/DC-USAO by the FBI. *See* ECF 257-2. This summary substitution was prepared by AUSA Jocelyn Ballantine, and was reviewed, approved, and declassified by the FBI. EAD Brown has declared under penalty of perjury, to the best of his knowledge, and based on the information provided to him, that the information contained therein truly and correctly summarizes the underlying classified information provided by the FBI and maintained by the FBI pursuant to the applicable records retention policy pursuant to the applicable records retention policy. *See Exhibit C.*

Documents Not Relied Upon by the Government

On September 2018, the DC-USAO received from the Department of Justice Office of the Inspector General a complete set of the text messages between OGC Attorney Lisa Page and DAD Peter Strzok. As the Court is well-aware, the government first disclosed the existence of these text messages to Mr. Flynn on November 30, 2017. Thereafter, the government provided excerpts of these text messages and links to publicly available compilations of these communications to Mr. Flynn on March 13, 2018, June 24, 2018, October 28, 2019, and April 29, 2020. On September 23, 2020, the government provided Mr. Flynn with additional text messages from the set it had received from the OIG in September 2018. The government is not relying on these additional text messages in support of its motion to dismiss.

The government also notes that there are Discovery Documents attached to Mr. Flynn's filings that it has not authenticated for the purpose of this filing because those documents were not relied upon by the government in its motion to dismiss or arguments in support thereof. *See* ECF Nos. 228-2, 228-4, 228-5, and 248-1.

Transcriptions of Handwritten Notes

The Court has additionally ordered the government to provide transcriptions of all handwritten notes contained within the Government Exhibits and the Discovery Documents. The government has complied to the best of its abilities. *See* Exhibits F through N.⁴ Where possible, the government has provided copies of these notes and the resulting transcripts to the author or their attorney for review.

⁴ As described above, the government has redacted the names of individual FBI employees where those employees are not employed at the Senior Executive Service level, or where those employees are not otherwise publicly associated with this matter. An unredacted copy of any transcriptions of notes will be filed with the Court under seal.

The government acknowledges its obligation to produce true and accurate copies of documents. The government has fully admitted its administrative error with respect to the failure to remove three reviewer sticky notes containing estimated date notations affixed to three pages of undated notes (two belonging to former Deputy Assistant Director Peter Strzok, and one page belonging to former Deputy Director Andrew McCabe) prior to their disclosure. These dates were derived from surrounding pages' dates in order to aid secondary reviewers. These three sticky notes were inadvertently not removed when the relevant documents were scanned by the FBI for production in discovery. *See* ECF 259. The government reiterates, however, that the content of those exhibits was not altered in any way, as confirmed by attorneys for both former FBI employees.

The government respectfully submits this response, and declares under penalty of perjury that the Government Exhibits and Discovery Documents are true and correct, are correctly identified, and have been faithfully transcribed. Consistent with the *en banc* D.C. Circuit's statement, "we trust and expect the District Court to proceed with appropriate dispatch," *In re Flynn*, 2020 WL 5104220, at *7, the government respectfully submits that the Court should immediately grant the unopposed motion to dismiss the criminal information with prejudice.

Respectfully submitted,

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Enclosures