IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GRANT F. SMITH, *PRO SE*	)	
Plaintiff,	)	
vs.	)	
U.S. NATIONAL ARCHIVES AND RECORDS ADMINISTRATION	)	
	)	
Defendant.	)	Case: 18-02048
	)	**Oral Argument Requested**
	)	
	)	

PLAINTIFF'S STATEMENT OF MATERIAL FACTS NOT IN DISPUTE AND RESPONSE TO DEFENDANT'S STATEMENT OF FACTS NOT IN DISPUTE

Pursuant to Local Rule 7(h) of the Rules of the United States District Court for the District of Columbia, Plaintiff hereby submits the following statement of material facts as to which Plaintiff contends there is no genuine issue in connection with its cross-motion for summary judgment, and Plaintiff's response to Defendant's statement of material facts. (ECF 10-4)

1. Plaintiff disputes that he submitted his FOIA requests on July 29, 2018. Plaintiff submitted his FOIA requests on June 29, 2018. The rest of the Defendant's statement of material facts in point 1 are not in dispute.

2. Plaintiff agrees that the matters set forth in 2 of Defendant's statement of material facts are not in dispute, but adds that the Bush Library should have notified Plaintiff that it might consider such records to be non-releasable under 12-year rules and enumerated PRA exemptions that it has since advanced in litigation. He also calls the court's attention to the apparent lack of any NARA consultation with the NSC before issuing a "Glomar" based on its own uninformed speculation. Plaintiff notes that while John P. Fitzpatrick is presently with the National Security Council, he formerly worked in the National Archives and Records Administration Information Security Oversight Office until 2016.
3. Plaintiff agrees that the matters set forth in 3 of Defendant's statement of material facts are not in dispute.
4. Plaintiff disputes Defendant assertions that George W. Bush administration records may be unavailable for release until January 2021 since an abundance of records was already released in August of 2018. Plaintiff disputes Defendant assertions that records requested by Plaintiff necessarily fall into any designated PRA category, absent verifiable NARA or *in camera* review.
5. Plaintiff disputes that fact of the existence or nonexistence of the requested records is in fact properly classified pursuant to Executive Order 13,526 since the records may not be classified given the provenance of their content and their intended use, absent verifiable NARA or *in camera* review.

6. Plaintiff disputes that fact of the existence or nonexistence of the requested records is in fact properly classified pursuant to Executive Order 13526.

    a. Plaintiff agrees that John Fitzpatrick is an original classification authority. However, Plaintiff disputes any assertion that Fitzpatrick can apply his authority to presidential "ambiguity" records since he has not examined their contents. It is also important to assert that while Fitzpatrick may be an original classification authority, he could not have been "the" original classification authority responsible for any classification of the presidential letters sought since he did not work for the NSC when the letters sought were produced.

    b. Plaintiff disputes that whether the requested records do or do not exist the information is necessarily under the control of the United States. Given their provenance and intended use, existence of the letters is probably not under control of the United States.

    c. Plaintiff disputes that the information whether the requested records do or do not exist pertains any more to the foreign relations of the United States, more than, say, domestic politics, campaign contributions, undue foreign influence and defrauding taxpayers.

    d. Plaintiff disputes that the information necessarily pertains to information provided to the United States by a foreign government.

    e. Plaintiff disputes that an original classification authority determined, on

the basis of any firsthand knowledge of the documents requested, or familiarity with "ambiguity" history, or records about it already properly released, the fact whether or not the requested records exist could reasonably be expected to result in damage to the national security. History suggests the precise opposite.

f. Plaintiff disputes uninformed, inflated and specious descriptions of damage to national security that is reasonably likely to occur.

7. Plaintiff disputes that it is the role of a National Security Council affidavit to determine the permissibility or impermissibility of classification and FOIA exemptions in a *de novo* court proceeding. Plaintiff asserts that is the court's role.
8. Plaintiff asserts the information requested is as specific as and matches information previously officially released about the U.S. acquiescence to the half-century old Israeli "ambiguity" policy calling first for the U.S. to violate the NPT and, more recently, the AECA.
9. Plaintiff asserts that FOIA and E.O. 13526 do not provide blanket cover for "breaking the law" under the guise of government secrecy.
10. Plaintiff asserts that NARA has yet to conduct a search for responsive documents.
11. Plaintiff believes *in camera* review of the letters would provide a necessary and authoritative finding of whether the letters have original classification

markings and whether their contents fall into any FOIA or PRA exemption. *In camera* review would provide a warranted check against rank speculation, failures to properly research the context and relevant history of the information sought, and blanket assertions about their releasability. Given NARA's associations with Fitzgerald, *in camera* review may be the only bona fide review outside the NARA domain.

12. Plaintiff asserts, on the basis of concurrent related action, that U.S. State Department input would not meaningfully contribute to this legal proceeding.

Dated: January 17, 2018

Respectfully submitted,

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