

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

OPEN SOCIETY JUSTICE INITIATIVE,

Plaintiff,

v.

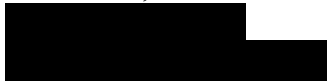
OFFICE OF THE DIRECTOR OF  
NATIONAL INTELLIGENCE,

Defendant.

Civil Action No. 20 Civ. 06625 (PAE)

**PLAINTIFF OPEN SOCIETY JUSTICE INITIATIVE'S MEMORANDUM OF LAW IN  
SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT AND IN  
OPPOSITION TO THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT**

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Plaintiff, the Open Society Justice Initiative (“OSJI”), respectfully submits this memorandum of law in support of its cross-motion for summary judgment and in opposition to the motion for summary judgment by Defendant Office of the Director of National Intelligence (“ODNI”) in this action brought pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552.

### **PRELIMINARY STATEMENT**

This case concerns ODNI’s failure to disclose under FOIA a Congressionally-mandated report identifying those responsible for the murder of *Washington Post* columnist Jamal Khashoggi (“ODNI Khashoggi Report,” identified by ODNI as a National Intelligence Council Memorandum dated February 7, 2020 (“NICM”)). Last October, on the second anniversary of Mr. Khashoggi’s death, President-elect Biden made a statement in support of accountability for the murder, pledging to “reassess our relationship with the Kingdom [of Saudi Arabia]” under his new administration and vowing to “make sure America does not check its values at the door to sell arms or buy oil.”<sup>1</sup> Public disclosure of the ODNI Khashoggi Report is a vital step towards securing that accountability.<sup>2</sup>

Since October 2018, the Trump administration has gone to great lengths to shield the Saudi government and Saudi Crown Prince Mohammed bin Salman from responsibility for the killing, despite widespread domestic and international acknowledgment of their culpability. Indeed, the Trump administration went so far as to flout the will of Congress by refusing to

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<sup>1</sup> Anniversary of Jamal Khashoggi’s Murder – Statement by Vice President Joe Biden (Oct. 02, 2020), <https://joebiden.com/2020/10/02/anniversary-of-jamal-khashoggis-murder-statement-by-vice-president-joe-biden/>.

<sup>2</sup> In *OSJI v. CIA*, No. 19 Civ. 1329, 2020 WL 7231954 (S.D.N.Y. Dec. 8, 2020), in the context of OSJI’s first set of FOIA requests for information relating to the Khashoggi murder, this Court addressed the CIA’s and ODNI’s refusal to even identify and explain the basis for withholding certain responsive records, including, *inter alia*, a tape of and a CIA report on the murder. The ODNI Khashoggi Report was not encompassed by OSJI’s prior FOIA requests because it was created well after OSJI filed suit in connection with those requests.



comply with legislation that required it to submit to Congress an unclassified report identifying those responsible for Mr. Khashoggi's murder. Congress has castigated "[t]he evident belief of the Director [of National Intelligence] that no unclassified information can be produced in accordance with the directives of Congress" as "contrary to the unambiguous and lawful command of Congress" and "dubious, in light of the extensive body of credible, unclassified reporting available regarding the murder of Mr. Khashoggi, and the roles and culpability of officials at the highest levels of the Government of Saudi Arabia."<sup>3</sup> ODNI now seeks to withhold this report from Plaintiff in full under FOIA Exemptions 1 and 3, based on conclusory assertions of vague risks to national security and to intelligence sources and methods.

Summary judgment should be granted to OSJI and denied to ODNI, *first*, because Defendant's declaration plainly lacks the reasonably specific detail that would provide a meaningful opportunity for Plaintiff to contest, and the Court an adequate foundation to review, the soundness of the withholding, as required for Defendant to satisfy its burden under FOIA Exemptions 1 and 3. *Second*, ODNI's justifications for non-disclosure are controverted by contrary evidence in the record, including assessments by members of Congress who have reviewed the ODNI Khashoggi Report and the sense of Congress as a whole that the report can be disclosed without risking intelligence sources or methods, or other harm to U.S. national security. *Third*, this case presents extraordinary circumstances that meet the bar for a finding of bad faith. Specifically, there is ample evidence—including the sense of Congress that ODNI "should reasonably have been able to produce an unclassified report . . . without putting sources and methods at risk,"<sup>4</sup> as well as President Trump's compromising public statements and

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<sup>3</sup> Decl. of A. Singh, Ex. 3 (Intelligence Authorization Act for Fiscal Year 2021, H.R.133, 116th Cong., Div. W, Title VI § 625(a)(7), <https://www.govinfo.gov/content/pkg/BILLS-116hr133enr/pdf/BILLS-116hr133enr.pdf>).

<sup>4</sup> *Id.* at § 625(b).

personal financial ties to Saudi Arabia—to create a genuine inference of bad faith warranting heightened scrutiny of ODNI’s justifications for its withholdings. At a minimum, regardless of whether the Court finds evidence of bad faith, Defendant should be required to produce the ODNI Khashoggi Report for *in camera* review, so that the Court can determine whether it may be disclosed in whole or in part.

## **BACKGROUND**

### **I. Factual Background**

#### **A. Khashoggi’s Murder and the U.S. Investigation**

Mr. Khashoggi, a Saudi national, a *Washington Post* columnist, and a U.S. resident who was vocally critical of the Saudi government and Crown Prince Mohammed bin Salman, disappeared on October 2, 2018, after entering the Saudi consulate in Istanbul.<sup>5</sup> On October 19, 2018, the Saudi government finally admitted that Mr. Khashoggi had been killed by Saudi officials inside the consulate.<sup>6</sup>

The Trump administration has acknowledged that the U.S. Intelligence Community (“IC”) has conducted an assessment of the circumstances of Mr. Khashoggi’s murder.<sup>7</sup> President

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<sup>5</sup> *Jamal Khashoggi: Turkey says journalist was murdered in Saudi consulate*, BBC (Oct. 7, 2018), <https://www.bbc.com/news/world-europe-45775819>.

<sup>6</sup> Kevin Sullivan et al., *Saudi Arabia fires 5 top officials, arrests 18 Saudis, saying Khashoggi was killed in fight at consulate*, WASH. POST (Oct. 19, 2018, 9:40 PM), <https://www.washingtonpost.com/news/world/wp/2018/10/19/saudi-government-acknowledges-journalist-jamal-khashaoggi-died-while-in-that-countrys-consulate-in-istanbul/>.

<sup>7</sup> Statement from President Donald J. Trump on Standing with Saudi Arabia (Nov. 20, 2018), <https://www.whitehouse.gov/briefings-statements/statement-president-donald-j-trump-standing-saudi-arabia/> (“After great independent research, we now know many details of this horrible crime . . . . Our intelligence agencies continue to assess all information.”); *Worldwide Threat Assessment of the U.S. Intelligence Community, Hearing Before the S. Select Comm. on Intel.*, 116th Cong. 77 (2019), <https://www.intelligence.senate.gov/hearings/open-hearing-worldwide-threats#> (statement of Gina Haspel, Director of the Cent. Intel. Agency) (“During the fall months, we spent a significant amount of time briefing and providing written products on our assessment of what happened to Mr. Jamal Khashoggi.”); *see generally* OSJI Mem. of Law in Supp. of Cross-Mot. for Summ. J. and Opp’n to Defs.’ Mot. for Summ. J. (“OSJI Mem.”), Jan. 21, 2020, 19 Civ. 00234 (PAE), ECF No. 125, at 4-8.

Trump and CIA Director Gina Haspel have both publicly discussed written CIA assessments of the murder, which reportedly conclude that the CIA has “‘medium-to-high confidence’ that Prince Mohammed ‘personally targeted’ Khashoggi and ‘probably ordered his death.’”<sup>8</sup> Senators have confirmed reports of the CIA’s findings, including Senator Jack Reed, (D-RI), who stated, “The CIA concluded that the crown prince of Saudi Arabia was directly involved in the assassination of Khashoggi. They did it, as has been reported to the press, with high confidence, which is the highest level of accuracy that they will vouch for.”<sup>9</sup> Senator Bob Corker (R-TN) affirmed that there was “zero question in [his] mind that the crown prince directed the murder and was kept apprised of the situation all the way through . . . .”<sup>10</sup> Senator Lindsey Graham (R-SC) also told reporters after a CIA briefing that “[t]here is not a smoking gun, there’s a smoking saw . . . . You have to be willfully blind not to come to the conclusion [] that this was orchestrated and organized by people under the command of [the Crown Prince] and that he was intricately involved in the demise of Mr. Khashoggi.”<sup>11</sup> On December 13, 2018, a bipartisan group of Senators unanimously approved a resolution holding the Crown Prince responsible for the murder.<sup>12</sup>

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<sup>8</sup> Warren P. Strobel, *CIA Intercepts Underpin Assessment Saudi Crown Prince Targeted Khashoggi*, WALL ST. J. (Dec. 1, 2018, 1:33 AM), <https://www.wsj.com/articles/cia-intercepts-underpin-assessment-saudi-crown-prince-targeted-khashoggi-1543640460>.

<sup>9</sup> Mary Papenfuss, *Trump Lied When He Said CIA Didn’t Link Saudi Prince To Khashoggi Killing: Senator Jack Reed*, HUFFINGTON POST (Nov. 23, 2018, 9:36 PM), [https://www.huffpost.com/entry/senator-jack-reed-trump-saudi-arabia-mohammed-binsalman-jamal-khashoggi-killing\\_n\\_5bf887dde4b03b230fa18d4e](https://www.huffpost.com/entry/senator-jack-reed-trump-saudi-arabia-mohammed-binsalman-jamal-khashoggi-killing_n_5bf887dde4b03b230fa18d4e).

<sup>10</sup> Decl. of A. Singh, Ex. 6 (Laura Litvan et al., *A ‘Smoking Saw’ Links Saudi Prince to Khashoggi’s Murder, Senator Says*, BLOOMBERG (Dec. 4, 2018, 1:52 PM), <https://www.bloomberg.com/news/articles/2018-12-04/cia-evidence-tying-saudi-prince-to-murder-called-a-smoking-saw>).

<sup>11</sup> *Id.*

<sup>12</sup> Jordain Carney, *Senate passes resolution naming crown prince ‘responsible’ for Khashoggi slaying*, THE HILL (Dec. 13, 2018, 4:05 PM), <https://thehill.com/homenews/senate/421287-senate-passes-resolution-naming-crown-prince-responsible-for-khashoggi>.

A United Nations investigation reached the same conclusion: In June 2019, Agnes Callamard, the United Nations Special Rapporteur on extrajudicial executions, issued a report finding the State of Saudi Arabia responsible for Mr. Khashoggi's murder. In particular, in assessing the responsibility of the Crown Prince for the murder of Mr. Khashoggi, the Special Rapporteur concluded that "there is no doubt he was involved and his responsibility is involved...."<sup>13</sup> The Special Rapporteur has appealed to the Trump administration to "fulfill its responsibility under international human rights law to cooperate fully in the investigation of the crime and produce as much information as possible to those seeking to hold the perpetrators accountable."<sup>14</sup>

Despite widespread and persistent public demands for accountability and transparency, the Trump administration has refused to release publicly its assessment of who is responsible for the murder. Instead the administration, and most prominently the President himself, continues to equivocate regarding the Crown Prince's role in the murder and to shield the Saudi government from accountability. For example, in stark contrast to the reaction of members of the Senate after being briefed on the results of the intelligence investigation, President Trump said, "It could very well be that the Crown Prince had knowledge of this tragic event—maybe he did and maybe he didn't!"<sup>15</sup> When pressed on the Crown Prince's role in a January 2020 interview, President Trump continued to insist: "He will always say that he didn't do it. He says that to everybody,

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<sup>13</sup> *Assessing the U.S.-Saudi Security and Intelligence Relationship, Hearing Before the H. Permanent Select Comm. on Intel.*, 116th Cong. 10 (2020) (statement of Agnes Callamard, Special Rapporteur on extrajudicial, summary or arbitrary executions, the United Nations), <https://docs.house.gov/meetings/IG/IG00/20200911/110993/HHRG-116-IG00-Transcript-20200911.pdf>.

<sup>14</sup> Annex to the Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions: Investigation into the unlawful death of Mr. Jamal Khashoggi, U.N. Doc. A/HRC/41/CRP.1 at 4 (June 19, 2019).

<sup>15</sup> Statement from President Donald J. Trump on Standing with Saudi Arabia, *supra* note 7.

and frankly I'm happy that he says that . . . . He's never said he did it." Asked, "Do you believe that he did it?", President Trump responded, "No, he says that he didn't do it."<sup>16</sup>

Indeed, rather than penalize the Saudi government for the killing, President Trump has continued to support it in both word and deed. In November 2018, in a statement titled "Standing with Saudi Arabia," President Trump declared that the United States would remain a "steadfast partner" of Saudi Arabia, regardless of Mr. Khashoggi's murder.<sup>17</sup> In April 2019, President Trump vetoed a bipartisan resolution that would have ended U.S. military support for the war in Yemen, a measure intended to be "a rebuke of Mr. Trump's support for Saudi Arabia even after the killing" of Mr. Khashoggi.<sup>18</sup> In May 2019, the Trump administration instituted an emergency declaration to bypass Congressional review and fast-track the sale of billions of dollars of arms to Saudi Arabia over objections from lawmakers on both sides of the aisle who had been blocking the sale.<sup>19</sup> The President and his family also have extensive financial ties to the Saudi monarchy, including to the Crown Prince himself, that accrue to their personal benefit.<sup>20</sup> President Trump has reportedly bragged about protecting the Saudi Crown Prince

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<sup>16</sup> Decl. of A. Singh, Ex. 7 (BOB WOODWARD, RAGE, 227 (2020)).

<sup>17</sup> Statement from President Donald J. Trump on Standing with Saudi Arabia, *supra* note 7.

<sup>18</sup> Mark Landler and Peter Baker, *Trump Vetoes Measure to Force End to U.S. Involvement in Yemen War*, N.Y. TIMES (April 16, 2019), <https://www.nytimes.com/2019/04/16/us/politics/trump-veto-yemen.html>.

<sup>19</sup> Patricia Zengerle, *Defying Congress, Trump sets \$8 billion-plus in weapons sale to Saudi Arabia, UAE*, REUTERS (May 24, 2019, 1:10 PM), <https://www.reuters.com/article/us-usa-saudi-arms/defying-congress-trump-sets-8-billion-plus-in-weapons-sales-to-saudi-arabia-uae-idUSKCN1SU25R>.

<sup>20</sup> See Decl. of A. Singh, Ex. 9 (Philip Bump, *Whether Trump has financial interests \*in\* Saudi Arabia, he has plenty \*with\* the country*, WASH. POST (Oct. 16, 2018, 9:26 AM), [https://www.washingtonpost.com/politics/2018/10/16/whether-trump-has-financial-interests-saudi-arabia-he-has-plenty-with-country/?utm\\_term=.58acd22ef759](https://www.washingtonpost.com/politics/2018/10/16/whether-trump-has-financial-interests-saudi-arabia-he-has-plenty-with-country/?utm_term=.58acd22ef759)) (quoting President Trump saying, "The[] [Saudis] buy apartments from me. They spend \$40 million, \$50 million. Am I supposed to dislike them? I like them very much."); Jon Swaine, *Company part-owned by Jared Kushner got \$90m from unknown offshore investors since 2017*, THE GUARDIAN (June 10, 2018, 2:00 AM), <https://www.theguardian.com/us-news/2019/jun/10/jared-kushner-real-estate-cadre-goldman-sachs>; Decl. of A. Singh, Ex. 10 (Edward Luce, *Jared Kushner and the triumph of Saudi Arabia*, FIN. TIMES (Feb. 21, 2019), <https://www.ft.com/content/90d98374-3528-11e9-bb0c-42459962a812>) (describing how Kushner has pushed to relax nuclear regulations for a project in Saudi Arabia

against U.S. action in the aftermath of the murder, stating, “I saved his ass,” and “I was able to get Congress to leave him alone. I was able to get them to stop.”<sup>21</sup>

**B. *The 2020 NDAA Reporting Requirements and ODNI’s Response***

Congress has not, in fact, stopped demanding that the Trump administration publicly assigns blame and imposes consequences upon all those responsible for the murder. To that end, as part of the National Defense Authorization Act for Fiscal Year 2020 (“2020 NDAA”), enacted in December 2019, Congress included two provisions requiring the Director of National Intelligence (“DNI”) to provide to Congress unclassified reports on the circumstances surrounding the killing of Khashoggi and those responsible.<sup>22</sup> Section 1277 of the NDAA required the Director to submit to appropriate congressional committees a report in unclassified form (which could include a classified annex) consisting of:

(1) a determination and presentation of evidence with respect to the advance knowledge and role of any current or former official of the Government of Saudi Arabia or any current or former senior Saudi political figure over the directing, ordering, or tampering of evidence in the killing of Washington Post columnist Jamal Khashoggi; and

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that is backed by Brookfield Asset Management, the same company that bailed out Kushner’s family business in August 2018); Alex Emmons et al., *Saudi Crown Prince Boasted that Jared Kushner Was “In His Pocket,”* INTERCEPT (Mar. 28, 2018, 4:09 PM), <https://theintercept.com/2018/03/21/jared-kushner-saudi-crown-prince-mohammed-bin-salman>; David D. Kirkpatrick et al., *The Wooing of Jared Kushner: How the Saudis Got a Friend in the White House*, N.Y. TIMES (Dec. 8, 2018), <https://www.nytimes.com/2018/12/08/world/middleeast/saudi-mbs-jared-kushner.html>.

<sup>21</sup> Decl. of A. Singh, Ex. 7, *supra* note 16; *see also* Decl. of A. Singh, Ex. 8 (John Hudson, *Trump threw Saudi Arabia a lifeline after Khashoggi’s death. Two years later, he has gotten little in return*, WASH. POST (Oct. 2, 2020, 6:18 PM), [https://www.washingtonpost.com/national-security/trump-threw-saudi-arabia-a-lifeline-after-khashoggis-death-two-years-later-he-has-gotten-little-in-return/2020/10/02/699af7f6-04d5-11eb-8879-7663b816bfa5\\_story.html](https://www.washingtonpost.com/national-security/trump-threw-saudi-arabia-a-lifeline-after-khashoggis-death-two-years-later-he-has-gotten-little-in-return/2020/10/02/699af7f6-04d5-11eb-8879-7663b816bfa5_story.html)).

<sup>22</sup> Decl. of A. Singh, Ex. 2 (National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, 113 Stat. 1198, 1277, 5714).

(2) a list of foreign persons that the Director of National Intelligence has high confidence—

(A) were responsible for, or complicit in, ordering, controlling, or otherwise directing an act or acts contributing to or causing the death of Jamal Khashoggi;

(B) knowingly and materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services in support of, an activity described in subparagraph (A); or

(C) impeded the impartial investigation of the killing of Jamal Khashoggi, including through the tampering of evidence relating to the investigation.<sup>23</sup>

Separately, Section 5714 required DNI to submit to Congress a report, in unclassified form, that included “identification of those who carried out, participated in, ordered, or were otherwise complicit in or responsible for the death of Jamal Khashoggi.”<sup>24</sup> The legislative history is clear that Congress mandated these reports be submitted in unclassified form because Congress intended to share the reported information with the public. As Senator Wyden, the sponsor of the text that became Section 5714, explained:

[CIA] Director Haspel said she would not disclose to the public what the intelligence community thought with respect to who was involved in the brutal murder of Mr. Khashoggi. That is why there is a provision in the Intelligence Authorization Act that we are considering, as a part of this Defense bill, requiring a *public* report on the Khashoggi killing. The provision is there so . . . there will finally be some real accountability. . . . In order to get my amendment to make sure that we would actually *have the American people get the information that the intelligence community has about how Mr. Khashoggi died*, I accepted boilerplate language about protecting sources and methods. But I want to be clear—because the intelligence community has, in effect, bobbed and weaved around this issue for some time—that if the intelligence community attempts to use that boilerplate

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<sup>23</sup> *Id.*, Section 1277.

<sup>24</sup> *Id.*, Section 5714.

language to avoid real accountability and real transparency, I am going to fight them tooth and nail . . . .<sup>25</sup>

ODNI failed to comply with the requirements of either Section 1277 or Section 5714 of the 2020 NDAA.<sup>26</sup> Instead, on February 20, 2020, more than 30 days after the Congressionally-mandated deadline, ODNI sent Congress a report consisting of only a classified annex, along with a letter stating that ODNI could not declassify any of the information requested under those Sections.<sup>27</sup>

Congress has made it abundantly clear that it considers this delayed and paltry response to be a violation of the statute. The 2021 Intelligence Authorization Act (“2021 IAA”), passed as part of the 2021 Consolidated Appropriations Act, includes a “Sense of Congress” provision stating that “[c]ontrary to the unambiguous and lawful command of Congress under such sections 5714 and 1277, the [DNI] did not produce any unclassified report as required by either such section, and instead, on February 20, 2020, the [DNI] submitted to such committees a classified report, which the [DNI] referred to as an ‘annex.’”<sup>28</sup>

Congress as a whole, and the relevant oversight Committees, have also made it clear that DNI could disclose the requested information without threatening intelligence sources and methods or otherwise risking harm to U.S national security. In a February 27, 2020 letter to Acting DNI Richard Grenell, House Intelligence Committee Chairman Adam Schiff (D-Calif.)

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<sup>25</sup> Decl. of A. Singh, Ex. 4 (165 Cong. Rec. S4771-72 (daily ed. June 14, 2019) (statement of Sen. Wyden), <https://www.congress.gov/congressional-record/2019/06/24/senate-section/article/S4470-1>) (emphasis added).

<sup>26</sup> Emma Loop, *A Law Required The US’s Top Intelligence Official To Turn Over A Report On Jamal Khashoggi’s Killing. He Blew The Deadline.*, BUZZFEED NEWS (Jan. 23, 2020, 2:36 PM), <https://www.buzzfeednews.com/article/emmaloop/jamal-khashoggi-report-odni>; Andrew Desiderio, *Burr, Warner ask DNI to declassify Khashoggi info*, POLITICO (Mar. 3, 2020, 11:18 AM), <https://www.politico.com/news/2020/03/03/congress-ask-declassify-khashoggi-information-119458>.

<sup>27</sup> Decl. of A. Singh, Ex. 1.

<sup>28</sup> Decl. of A. Singh, Ex. 3, *supra* note 3 at § 625(a)(6).



urged him to declassify the report, noting “after reviewing the classified annex, the Committee believes that the annex could be declassified with appropriate redactions that should not alter or obscure in any way the Intelligence Community’s determinations, presentation of evidence, or identification of relevant persons, as required by law. In doing so, ODNI would fulfill Congress’ requirement and intent that your office submit an unclassified report on the killing of Mr. Khashoggi.” Compl., Ex. A, August 19, 2020, Case No. 1:20-cv-06625, Doc. No. 1. The letter added that it did not “foresee that any harm to U.S. national security would result from immediately declassifying the findings contained in DNI’s classified annex, with redactions as necessary” and that “[f]ailure to declassify the annex and produce an unclassified report could give rise to concerns that ODNI is using the classification process impermissibly in order to shield information of intense public interest from public release.” Compl., Ex. A, August 19, 2020, Case No. 1:20-cv-06625, Doc. No. 1. In March 2020, Senator Richard Burr (R-NC), chairman of the Senate Intelligence Committee, and Senator Mark Warner (D-VA), the vice chairman, also sent a letter to Acting DNI Grenell, urging him to reconsider his agency’s decision not to declassify the information provided in the ODNI Khashoggi Report.<sup>29</sup> As Section 625 of the 2021 IAA states:

The evident belief of the [DNI] that no unclassified information can be produced in accordance with the directives of Congress is dubious, in light of the extensive body of credible, unclassified reporting available regarding the murder of Mr. Khashoggi, and the roles and culpability of officials at the highest levels of the Government of Saudi Arabia . . . . It is the sense of Congress that the Director of National Intelligence should reasonably have been able to produce an unclassified report pursuant to [Sections 5714 and 1277] that did not alter or obscure, in any way, the intelligence community’s core determinations, its presentation of

<sup>29</sup> Decl. of A. Singh, Ex. 5 (Ellen Nakashima, *Lawmakers want the DNI to make public the intelligence community’s assessment of who’s responsible for killing Jamal Khashoggi*, WASH. POST (Mar. 3, 2020, 9:48 AM), [https://www.washingtonpost.com/national-security/lawmakers-want-the-dni-to-make-public-the-intelligence-communitys-assessment-of-whos-responsible-for-killing-jamal-khashoggi/2020/03/03/aafa70ee-5d07-11ea-9055-5fa12981bbbf\\_story.html](https://www.washingtonpost.com/national-security/lawmakers-want-the-dni-to-make-public-the-intelligence-communitys-assessment-of-whos-responsible-for-killing-jamal-khashoggi/2020/03/03/aafa70ee-5d07-11ea-9055-5fa12981bbbf_story.html)).

evidence, or identification of relevant persons, as required, without putting sources and methods at risk.<sup>30</sup>

## II. Procedural Background

On July 20, 2020, OSJI submitted a procedurally and substantively proper FOIA request to Defendant seeking disclosure of “[r]eports (including annexes) related to the killing of Jamal Khashoggi provided in 2020 by ODNI to Congress pursuant to sections 1277 and 5714 of the National Defense Authorization Act for Fiscal Year 2020 (P.L. 116-92) and the Intelligence Authorization Act.” Compl., Ex. B, August 19, 2020, Case No. 1:20-cv-06625, Doc. No. 1. OSJI sought expedited processing of its request because of the “compelling need” to inform an ongoing public debate regarding accountability for the killing and the U.S. government’s response. *See* 5 U.S.C. § 552(a)(6)(E)(i), (v). Following the agencies’ failure to respond to the request within the statutorily prescribed time, OSJI filed the current action. Compl., August 19, 2020, Case No. 1:20-cv-06625, Doc. No. 1.

On October 9, 2020, ODNI provided OSJI with 26 responsive pages, portions of which were withheld pursuant to FOIA Exemptions 1, 3, and 6. These documents are all non-substantive transmittal letters or other responses to congressional parties.<sup>31</sup> ODNI sent OSJI a letter stating that any other records, including the ODNI Khashoggi Report, are classified and withheld under FOIA Exemptions 1 and 3.<sup>32</sup>

On November 9, 2020, ODNI filed a motion for summary judgment with the Court supported by a public declaration of Gregory M. Koch, Director, Information Management Division, ODNI (“Koch Decl.”).

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<sup>30</sup> Decl. of A. Singh, Ex. 3, *supra* note 3 at § 625(a)(7)-(b).

<sup>31</sup> Decl. of A. Singh, Ex. 1, *supra* note 27.

<sup>32</sup> Decl. of A. Singh, Ex. 1, *supra* note 27.

### STANDARD OF REVIEW

Summary judgment is proper only when a “movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Under FOIA, “the defending agency has the burden of showing that its search was adequate and that any withheld documents fall within an exemption to the FOIA.” *Carney v. U.S. Dep’t of Justice*, 19 F.3d 807, 812 (2d Cir. 1994); *see also* 5 U.S.C. § 552(a)(4)(B). “[C]onsistent with the Act’s goal of broad disclosure, [FOIA] exemptions have consistently been given a narrow compass.” *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8 (2001). In addition to construing these exemptions narrowly, courts are to “[resolve] all doubts in favor of disclosure.” *Associated Press v. U.S. Dep’t of Def.*, 554 F.3d 274, 283 (2d Cir. 2009) (quoting *Wood v. Fed. Bureau of Investigation*, 432 F.3d 78, 82-83 (2d Cir. 2005)).

In FOIA matters, an agency is entitled to summary judgment only “if no material facts are in dispute and if it demonstrates ‘that each document that falls within the class requested either has been produced . . . or is wholly exempt from the Act’s inspection requirements.’” *Students Against Genocide v. Dep’t of State*, 257 F.3d 828, 833 (D.C. Cir. 2001) (citation omitted). The agency must provide an explanation for its exemptions that is “full and specific enough to afford the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding.” *King v. U. S. Dep’t of Justice*, 830 F.2d 210, 218 (D.C. Cir. 1987). An affidavit must at a minimum describe the justifications for withholding information with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and must not be controverted by contrary evidence in the record or by evidence of the agency’s bad faith. *Larson v. Dep’t of State*, 565 F.3d 857, 862 (D.C. Cir. 2009) (citing *Miller v. Casey*, 730 F.2d 773, 776 (D.C. Cir.

1984)). An agency also cannot treat each record as an indivisible whole; even if parts of a record are exempt, an agency has an obligation under FOIA to “take reasonable steps necessary to segregate and release nonexempt information.” 5 U.S.C. § 552(a)(8)(A)(ii)(II).

### **ARGUMENT**

ODNI’s conclusory and vague declaration lacks the reasonably specific detail to satisfy its burden for withholding the requested information under Exemptions 1 and 3. In addition, ODNI’s justifications for non-disclosure are controverted by contrary evidence in the record, including assessments by members of Congress who have reviewed the ODNI Khashoggi Report and the sense of Congress as a whole that the report can be disclosed without risking intelligence sources or methods, or other harm to U.S. national security. Further, ODNI’s justifications for withholding the ODNI Khashoggi Report in full should be afforded heightened scrutiny because they are controverted by evidence of bad faith, including Congress’s position that there appears to be no plausible reason to withhold this information from the public. President Trump’s personal financial ties to Saudi Arabia, alongside his continued endorsement, without basis, of Crown Prince Mohammed bin Salman’s denials of involvement in the murder, indicate the actual, and impermissible, motive for withholding the report: to avoid contradicting or embarrassing the President. Accordingly, the Court should deny ODNI’s motion for summary judgment and grant OSJI’s cross-motion. At a minimum, regardless of whether the Court finds evidence of bad faith, Defendant should be required to produce the ODNI Khashoggi Report for *in camera* review, so that the Court can determine whether additional information may be disclosed.

**I. Defendant Has Failed to Meet Its Burden to Demonstrate that the ODNI Khashoggi Report Is Exempt from Disclosure**

The Defendant cannot justify withholding the ODNI Khashoggi Report in its entirety under Exemptions 1 and 3 by merely invoking national security in a conclusory and vague affidavit. As the Defendant acknowledges, the burden is on the agency to provide “reasonably detailed explanations why any withheld documents fall within an exemption . . . .” Gov’t Mem. in Supp. of Mot. for Summ. J. at 5 (quoting *Carney*, 19 F.3d at 812); *see also Hayden v. Nat’l Sec. Agency*, 608 F.2d 1381, 1387, 1390 (D.C. Cir. 1979) (requiring agency’s affidavit to show “with reasonable specificity” and “specifically and clearly that the requested materials fall into the category of the exemption”). Though courts may accord “substantial weight” to agency affidavits in the national security context, “deference is *not* equivalent to acquiescence.” *Campbell v. U.S. Dep’t of Justice*, 164 F.3d 20, 30 (D.C. Cir. 1998) (emphasis added) (citing *King*, 830 F.2d at 217-18). Rather, “concerns of national security and foreign relations do not warrant abdication of the judicial role” and “[d]eference to the executive’s national security and military judgments is appropriate only where [Courts] have sufficient information to evaluate whether those judgments were logical and plausible.” *Am. Civil Liberties Union v. U.S. Dep’t of Def.*, 901 F.3d 125, 134 (2d Cir. 2018) (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010)). The sole declaration entered by Defendant does not describe any justification for withholding the allegedly exempt information in reasonably specific detail; instead, it is “vague,” “sweeping,” “conclusory,” and insufficient to meet the Defendant’s burden under either Exemption 1 or 3. *Hayden*, 608 F.2d at 1387; *see also Founding Church of Scientology v. Nat’l Sec. Agency*, 610 F.2d 824, 830 (D.C. Cir. 1979) (“[C]onclusory and generalized allegations of exemptions’ are unacceptable . . . .”).

**A. Defendant Has Failed to Meet Its Burden Under Exemption 1**

To meet its burden under Exemption 1, Defendant must demonstrate that any information withheld is “specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy,” and is “in fact properly classified pursuant to such Executive order.” 5 U.S.C. § 552(b)(1). In order for a record to be properly classified, disclosure of the asserted classified information “must reasonably be expected to cause some degree of harm to national security . . . that is identifiable or describable.” *Judicial Watch, Inc. v. U.S. Dep’t of Def.*, 715 F.3d 937, 941 (D.C. Cir. 2013).

Courts have held agency affidavits to be insufficient when they fail to draw a specific connection between the withheld document and the relevant standard for classification under Exemption 1. *See Halpern v. Fed. Bureau of Investigation*, 181 F.3d 279, 293 (2d Cir. 1999) (holding affidavit insufficient because it gave “no contextual description either of the documents subject to redaction or of the specific redactions made to the various documents” and its “explanations read more like a policy justification” for the relevant executive order “while barely pretending to apply the terms of that section to the specific facts of the documents at hand”); *Campbell*, 164 F.3d at 31 (requiring FBI to file new declaration because its declaration failed “to draw any connection between the documents at issue and the general standards that govern the national security exemption”).

Here, ODNI relies solely on a declaration that merely avers, without the necessary reasonably specific detail, that ODNI has met the statutory requirements for invoking Exemption 1 because the release of *any* information in the ODNI Khashoggi Report “[b]y its very nature” would reveal intelligence activities, sources, and methods and thereby impair national security. Gov’t Mem. in Supp. of Mot. for Summ. J. at 9; *see Koch Decl.* ¶¶ 21-23. Such descriptions are insufficient under Exemption 1 because they are “too broad and conclusory to allow the Court to

perform the type of ‘searching de novo review’ required by the governing precedent.” *Shapiro et al. v. Dep’t of Justice*, 239 F. Supp. 3d 100, 123 (D.D.C. 2017) (quoting *Church of Scientology of Ca., Inc. v. Turner*, 662 F.2d 784, 786 (D.C. Cir. 1980)). Specifically, they do “not provide enough detail to permit the Court to assess the propriety of any individual decision or explain how disclosing any particular record would harm national security.” *Wash. Post Co. v. Special Inspector Gen. for Afg. Reconstr.*, No. 18-2622, 2020 WL 5530308, at \*9 (D.D.C. Sept. 15, 2020). Defendant’s boilerplate declaration falls far short of the requirement that agencies provide information “full and specific enough” to afford Plaintiff a meaningful opportunity to contest the withholding, and the Court with an adequate foundation to review the soundness of the withholding. *King*, 830 F.2d at 218.

ODNI’s argument that the ODNI Khashoggi Report was properly withheld in full under Exemption 1 because it describes previously unrevealed “particular intelligence interests of the U.S. Government” is equally unavailing, because it is contradicted by contrary evidence in the record. Koch Decl. ¶ 24. The subject matter of the report is already publicly known because it was mandated by public statute; the report must identify those responsible for the murder of Mr. Khashoggi or for impeding the investigation into his murder, including a “determination and presentation of evidence” regarding the role of any Saudi officials.<sup>33</sup> It is no secret that this is a “particular topic[] . . . of interest” to the U.S. intelligence community, Koch Decl. ¶ 24, given public acknowledgement of an extensive U.S. intelligence investigation into Mr. Khashoggi’s murder by officials in the IC chain of command, including the President and Vice President.<sup>34</sup>

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<sup>33</sup> Decl. of A. Singh, Ex. 2, *supra* note 22, Section 1277(a)(1).

<sup>34</sup> See notes 7 and 8, *supra*, and accompanying text.

Further, ODNI's production of responsive documents includes letters from DNI Ratcliffe to certain congressional parties asserting his determination that there is only a "marginal 'public interest' argument for" declassification of the ODNI Khashoggi Report "given the substantial public discourse on this topic, to include official actions and statements by the U.S. Government on this issue."<sup>35</sup> This suggests that the contents of the ODNI Khashoggi Report may overlap with information that the U.S. Government has already publicly disclosed, making ODNI's justification for withholding this information under Exemption 1 "illogical and implausible." *Am. Civil Liberties Union v. U.S. Dep't of Def.*, 17 Civ. 9972 (ER), 2020 WL 5913758, at \*6 (S.D.N.Y. Oct. 5, 2020). In light of this, ODNI's declaration falls far short of sufficiently explaining how withholding the ODNI Khashoggi Report in full would cause some "identifiable" or "describable" harm to national security by protecting "DNI's or any IC element's interest in a particular area or event" that is not already publicly known. *Judicial Watch, Inc.*, 715 F.3d at 941; Koch Decl. ¶ 24.

Furthermore, Defendant's claim that disclosure of *any* information contained in the ODNI Khashoggi Report would cause damage to national security, Koch Decl. ¶¶ 18, 21, is belied by Congress, which characterized the DNI's refusal to disclose the same information as "dubious" given the "the extensive body of credible, unclassified reporting available regarding the murder of Mr. Khashoggi, and the roles and culpability of officials at the highest levels of the

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<sup>35</sup> Decl. of A. Singh, Ex. 1, *supra* note 27 (Redacted Letter from John Ratcliffe, Director of National Intelligence, to Sen. Marco Rubio (R-FL), Acting Chairman, Senate Select Committee on Intelligence, and Sen. Mark Warner (D-VA), Vice Chairman, Senate Select Committee on Intelligence on the ODNI Report Issued Pursuant to Section 5714 of the NDAA for Fiscal Year 2020 (July 21, 2020), citing to, *inter alia*, U.S. Department of the Treasury sanctions against 17 individuals believed to be involved in Mr. Khashoggi's murder and the U.S. Secretary of State's public designation of 16 individuals as human rights violators under Section 7031(c) of the Department of State, Foreign Operations, and Related Programs Appropriations Act for Fiscal Year 2019 for their roles in the murder).



Government of Saudi Arabia.”<sup>36</sup> Individual members of the House and Senate Intelligence Committees who have reviewed the ODNI Khashoggi Report have also stated that they do not foresee any harm to national security in disclosing it with appropriate redactions and have in fact urged declassification consistent with the 2020 NDAA’s requirements and Congressional intent. Compl., Ex. A, August 19, 2020, Case No. 1:20-cv-06625, Doc. No. 1.<sup>37</sup> These statements by individual members of Congress and Congress as a whole should give the Court additional cause to question ODNI’s justifications for the withholding. *See Larson*, 565 F.3d at 862 (agency affidavits must not be controverted by contrary evidence in the record). Congress’s position has “appreciable probative value in determining, under ‘the record as a whole,’ ‘whether the justifications set forth’” in the ODNI declaration “are logical and plausible in this case.” *Florez v. CIA*, 829 F.3d 178, 184-85 (2d Cir. 2016) (citation omitted). In this sense, the information disclosed by Congress regarding the ODNI Khashoggi Report can be analogized to the third party agency disclosures in *Florez*, in that it “shift[s] the factual groundwork upon which a district court assesses the merits” of the agency’s response. *Id.* at 186.

### **B. Defendant Has Failed to Meet Its Burden Under Exemption 3**

A government agency invoking FOIA Exemption 3 must establish (1) that the statutes invoked are valid nondisclosure statutes and (2) that the records in question fall within the withholding provision(s) of the nondisclosure statutes(s). 5 U.S.C. § 552(b)(3). “[T]he Agency must show specifically and clearly that the requested materials fall into the category of the exemption.” *Hayden*, 608 F.2d at 1390.

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<sup>36</sup> Decl. of A. Singh, Ex. 3, *supra* note 3 at § 625(a)(7).

<sup>37</sup> *See also* Decl. of A. Singh, Exhibit 5, *supra* note 29.

ODNI invokes the National Security Act's protection of "intelligence sources and methods from unauthorized disclosure" as the applicable withholding statute. In support, ODNI's declaration summarily asserts that *all* information contained in the ODNI Khashoggi Report "relates to intelligence sources or methods" and is thus properly exempt, without providing *any* explanation as to how or why that necessarily is the case. Koch Decl. ¶¶ 26-27. Such a bare assertion falls far short of the requirement that the agency must demonstrate specifically and clearly that it is "logical and plausible" that non-disclosure would "protect" "intelligence sources and methods." *N.Y. Times Co. v. U.S. Dep't of Justice*, 756 F.3d 100, 109 (2d Cir. 2014). Nor does it sufficiently "educate the Court on the connection between" the protection of intelligence sources and methods and the withholding of the information at issue. *Am. Civil Liberties Union v. U.S. Dep't of Def.*, 17 Civ. 9972 (ER), 2020 WL 5913758, at \*7 (S.D.N.Y. Oct. 5, 2020); *see also Founding Church*, 610 F.2d at 831 ("Barren assertions that an exempting statute has been met cannot suffice to establish that fact . . ."). As even cases cited by Defendant demonstrate, courts have declined to credit conclusory assertions that withheld information "relates to" intelligence sources and methods and instead have, at a minimum, elected to review the information *in camera* before making this determination. *See Am. Civil Liberties Union v. Dep't of Justice*, 681 F.3d 61, 75-76 (2d Cir. 2012); *Maynard v. CIA*, 986 F.2d 547, 556-59 (1st Cir. 1993).

In addition, ODNI's claim that the ODNI Khashoggi Report as a whole "relates to intelligence sources and methods" and therefore is entirely exempt from disclosure under Exemption 3, Gov't Mem. in Supp. of Mot. for Summ. J. at 12, is also contradicted by contrary evidence in the record, *see Larson*, 565 F.3d at 862; namely, the sense of Congress that the DNI could have produced an unclassified report containing its "core determinations" regarding the

circumstances of Mr. Khashoggi’s murder and the individuals responsible “without putting sources and methods at risk.”<sup>38</sup> It is also contradicted by members of Congress from both sides of the aisle who reviewed the ODNI Khashoggi Report and took the position that ODNI could declassify its findings with appropriate redactions. Compl., Ex. A, August 19, 2020, Case No. 1:20-cv-06625, Doc. No. 1.<sup>39</sup>

**C. Defendant Has Failed to Meet Its Burden to Reasonably Segregate Information Which Is Not Exempt for Disclosure**

At a minimum, ODNI has failed to meet its burden to disclose all reasonably segregable information. “[A]ny portions of a document that fall outside of FOIA’s exemptions must be disclosed unless they are ‘inextricably intertwined’ with the exempt material.” *Am. Civil Liberties Union v. Fed. Bureau of Investigation*, No. 11-CV-7562, 2015 WL 1566775, at \*3 (S.D.N.Y. Mar. 31, 2015) (citing *Inner City Press v. Bd. of Governors of the Fed. Reserve Sys.*, 463 F.3d 239, 249 n.10 (2d Cir. 2006)). Intelligence agencies are not exempt from this requirement and have managed to segregate non-exempt information for release in past cases. *See, e.g., Larson v. Dep’t of State*, No. 1:02 CV 01937 (PLF), 2005 WL 3276303, at \*10 (D.D.C. Aug. 10, 2005) (CIA was able to redact information such as precise date and time of cable that would implicate intelligence methods and sources, while releasing other parts of document).

ODNI argues that the release of *any* portion of the ODNI Khashoggi Report in whole or in part “would reveal classified and statutorily protected information pertaining to intelligence activities and intelligence sources and methods . . . .” Gov’t Mem. in Supp. of Mot. for Summ. J. at 7. However, as discussed above, members of Congress specifically tasked with oversight of

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<sup>38</sup> Decl. of A. Singh, Ex. 3, *supra* note 3 at § 625(b).

<sup>39</sup> *See also* Decl. of A. Singh, Ex. 5, *supra* note 29.

intelligence operations who have reviewed the ODNI Khashoggi Report, as well as Congress as a whole, maintain that it can be disclosed with appropriate redactions consistent with national security and applicable law. Compl., Ex. A, August 19, 2020, Case No. 1:20-cv-06625, Doc. No. 1.<sup>40</sup> This, at the very least, undermines the plausibility of ODNI's position that no portion of the ODNI Khashoggi Report can be reasonably segregated and disclosed to Plaintiff under FOIA. The Court should therefore, at a minimum, review the ODNI Khashoggi Report *in camera* to determine what additional information may be disclosed.

## **II. ODNI's Justifications for Withholding Are Contradicted by Evidence of Bad Faith, Warranting Heightened Scrutiny**

ODNI relies heavily on the "substantial weight" it argues should be afforded to agency declarations in the national security context. Gov't Mem. in Supp. of Mot. for Summ. J. at 11. While ODNI's declaration cannot be justified even under that standard for the reasons discussed above, in any event, that is not the standard applicable to Defendant's declaration in this case, where the agency's justifications for withholding requested information are contradicted by evidence of bad faith. *Miller*, 730 F.2d at 776; *Minier v. CIA*, 88 F.3d 796, 803 (9th Cir. 1996) ("Upon a showing of agency bad faith, a court must *not* accord agency affidavits 'substantial weight.'") (citation omitted). While agency affidavits are accorded a presumption of good faith, a plaintiff may rebut this presumption by providing evidence of bad faith. *Rugiero v. U.S. Dep't of Justice*, 257 F.3d 534, 544 (6th Cir. 2001). The plaintiff may present such evidence "even when the bad faith concerns the underlying activities that generated the FOIA request rather than the agency's conduct in the FOIA action itself." *Id.* (citing *Jones v. Fed. Bureau of Investigation*, 41 F.3d 238, 242-43 (6th Cir. 1994)).

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<sup>40</sup> See also Desiderio, *supra* note 26; Decl. of A. Singh, Ex. 5, *supra* note 29; Decl. of A. Singh, Ex. 3, *supra* note 3.

While the “quantum of evidence” required to overcome the presumption that an agency has complied with its obligations under FOIA in good faith is unclear, courts have pointed to the Supreme Court’s reasoning that, given FOIA’s “pro-disclosure purpose,” the requester need only “produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred.” *Citizens United v. U.S. Dep’t of State*, 460 F. Supp. 3d 12, 24 (D.D.C. 2020) (quoting *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004)). Courts may find bad faith when plaintiffs identify an improper basis for withholding requested information and ground their argument in “evidence suggesting bad faith on the part of the [agency]” that rises above “mere speculation.” *Wilner v. Nat’l Sec. Agency*, 592 F.3d 60, 75 (2d Cir. 2009) (quoting *Larson*, 565 F.3d at 864). In particular, the avoidance of embarrassment is not a proper basis for withholding information under FOIA.<sup>41</sup>

“[T]he remedy for a showing of bad faith is to review the agency affidavits with greater scrutiny . . . .” *Minier*, 88 F.3d at 803. While the Court has discretion to conduct an *in camera* review even without finding bad faith, evidence of bad faith makes such a review, at a minimum, imperative due to circumstances suggesting the agency’s justifications for withholding cannot be credited. *See Jones*, 41 F.3d at 243 (“In certain circumstances the court *must* play a more active role because no other party or institution is available to ensure that the agency’s assertions are reliable.”). For example, the Sixth Circuit has found that *in camera* review may be warranted where “it becomes apparent that the subject matter of a request involves activities which, if disclosed, would publicly embarrass the agency or that a so-called ‘cover-up’ is presented, [such

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<sup>41</sup> *See* Exec. Order No. 13,526, 3 C.F.R. § 13526 (Dec. 29, 2009), at 1.7(a)(2) (information may not be classified or continue to be maintained as classified in order to “prevent embarrassment to a person, organization, or agency”).

that] government affidavits lose credibility . . . .” *Id.* (quoting *Ingle v. Dep’t. of Justice*, 698 F.2d 259, 267 (6th Cir. 1983)).

The evidence in the record supports a finding that Defendant’s justification for withholding the ODNI Khashoggi Report in full is tainted by bad faith. ODNI has taken the extraordinary position of refusing to comply with legislation requiring it to submit an unclassified report on individuals responsible for Mr. Khashoggi’s murder. Congress’s clear position that the requested information can be publicly disclosed without revealing intelligence sources or methods, or other risk to national security, in and of itself independently supports an inference of bad faith.<sup>42</sup> As Chairman Schiff observed in his letter to Acting DNI Grenell, ODNI’s continued refusal to disclose this information “give[s] rise to concerns that ODNI is using the classification process impermissibly in order to shield information of intense public interest from public release.” Compl., Ex. A, August 19, 2020, Case No. 1:20-cv-06625, Doc. No. 1.

Indeed, when combined with the Trump administration’s pattern of shielding the Saudi government and Crown Prince from accountability, as well as President Trump and his family’s personal financial ties to the Saudi government, these circumstances suggest a “total and complete cover-up . . . .”<sup>43</sup> The public record makes clear that President Trump has consistently denied the Crown Prince’s possible involvement in the murder despite contrary statements from numerous other officials who have reviewed the same intelligence.<sup>44</sup> The President’s contrarian position on the killing has been particularly scrutinized in light of his extensive financial ties to

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<sup>42</sup> Decl. of A. Singh, Ex. 3, *supra* note 3.

<sup>43</sup> Desiderio, *supra* note 26 (quoting Sen. Ron Wyden (D-OR)).

<sup>44</sup> Decl. of A. Singh, Ex. 7, *supra* note 16; Decl. of A. Singh, Ex. 8, *supra* note 20; Decl. of A. Singh, Ex. 6, *supra* note 10; Decl. of A. Singh, Ex. 5, *supra* note 29.

Saudi Arabia, which predate his taking office. The President has publicly acknowledged his considerable financial ties to the country in media interviews, and has even intimated that his business interests there have endeared “the [Saudis]” to him.<sup>45</sup> The President’s son-in-law Jared Kushner, a close advisor to the President on Middle East affairs, also has extensive personal ties to Saudi Arabia and to the Crown Prince himself.<sup>46</sup> At a minimum, these ties create the appearance of a conflict of interest that casts doubt on the Trump administration’s legal basis for withholding the ODNI report under FOIA in this case.

President Trump’s motives for shielding the information in the ODNI Khashoggi Report from public disclosure can be imputed to ODNI because the DNI serves as the “principal adviser to the President . . . for intelligence matters related to national security,” “[s]ubject to the authority, direction, and control of the President . . . .”<sup>47</sup> Indeed, under President Trump, ODNI has faced repeated accusations of improperly politicizing its role.<sup>48</sup> For example, a January 2021 report to the Senate Intelligence Committee on foreign election interference produced by an ODNI ombudsman found “a loss of objectivity” and politicization of intelligence, accusing ODNI of delaying, distorting or obstructing analysis “out of concern over policymaker reactions or for political reasons.”<sup>49</sup> In this context, Defendant’s refusal to disclose any portion of the ODNI Khashoggi Report in response to Plaintiff’s FOIA request points inescapably to bad faith:

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<sup>45</sup> See Decl. of A. Singh, Ex. 9, *supra* note 21 (quoting President Trump saying, “Saudi Arabia, I get along with all of them . . . . The[] [Saudis] buy apartments from me. They spend \$40 million, \$50 million. Am I supposed to dislike them? I like them very much.”).

<sup>46</sup> Swaine, *supra* note 21; Decl. of A. Singh, Ex. 10, *supra* note 21; Emmons et al., *supra* note 21; Kirkpatrick et al., *supra* note 21.

<sup>47</sup> Exec. Order No. 13,470, 3 C.F.R. § 13470 (July 30, 2008), at 1.3.

<sup>48</sup> See, e.g., Julian E. Barnes et al., *Trump Administration Politicized Some Intelligence on Foreign Election Influence, Report Finds*, N.Y. TIMES (Jan. 8, 2021), <https://www.nytimes.com/2021/01/08/us/politics/trump-administration-politicized-election-intelligence.html>.

<sup>49</sup> *Id.*

ODNI is refusing to publicly disclose its report because its findings undermine President Trump's decision to continually obfuscate the potential culpability of the Saudi Crown Prince for Mr. Khashoggi's murder, including in circumstances where President Trump and his family stand to make personal financial gains as a result of their support for the Saudi government.

In sum, ODNI's declaration is not entitled to "substantial weight" in light of the President's public statements supporting the Saudi government and shielding the Crown Prince from responsibility; evidence of the President's compromising financial ties; and public statements by Congress as a whole, as well as by members of Congress with access to relevant intelligence, that lead to a reasonable inference of a cover-up. Collectively, these facts indicating bad faith rise well above "mere speculation." *Wilner*, 592 F.3d at 75. The Court should therefore, at a minimum, subject ODNI's justifications for withholding the requested information to heightened scrutiny, and grant Plaintiff's request for *in camera* review of the ODNI Khashoggi Report.

### CONCLUSION

For the foregoing reasons, OSJI's cross-motion for summary judgment should be granted, and ODNI's motion denied.

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Respectfully submitted,

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