

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

OPEN SOCIETY JUSTICE INITIATIVE,

Plaintiff,

v.

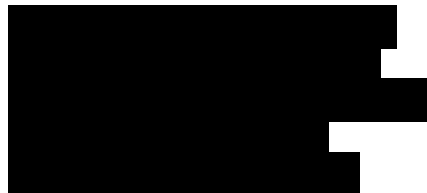
OFFICE OF THE DIRECTOR OF NATIONAL
INTELLIGENCE,

Defendant.

20 Civ. 06625 (PAE)

**MEMORANDUM OF LAW IN SUPPORT OF
THE OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE'S
MOTION FOR SUMMARY JUDGMENT**

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the Southern District of New York



Of Counsel:

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Defendant the Office of the Director of National Intelligence (“ODNI”) respectfully submits this memorandum of law in support of its motion for summary judgment in this action brought pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552.

PRELIMINARY STATEMENT

This lawsuit concerns a FOIA request by plaintiff Open Society Justice Initiative (“Plaintiff”) for reports related to the killing of Jamal Khashoggi provided to Congress by the ODNI in 2020 in response to sections 1277 and 5714 of the National Defense Authorization Act for Fiscal Year 2020 (the “NDAA”). Pub. Law No. 116-92 (Dec. 20, 2019). In response to Plaintiff’s FOIA request, the ODNI released 26 pages of records, portions of which were withheld pursuant to FOIA Exemptions 1 and 3, 5 U.S.C. § 552(b)(1), (3), and withheld one two-page record in full, also pursuant to Exemptions 1 and 3. Plaintiff challenges only the ODNI’s withholding of the record withheld in full: a two-page classified memorandum produced by the National Intelligence Council to the appropriate Congressional Committees as provided by the relevant provisions of the NDAA. Because disclosure of any portion of this record would reveal classified and statutorily protected intelligence information—and would harm national security by revealing the Intelligence Community’s intelligence collection capacity, or lack thereof, and the existence or non-existence of relationships with foreign entities—the record was properly withheld in full under FOIA Exemptions 1 and 3.

BACKGROUND AND PROCEDURAL HISTORY

I. The National Defense Authorization Act for Fiscal Year 2020

In December 2019, the President signed the NDAA. *See* Pub. Law No. 116-92 (Dec. 20, 2019). Section 1277 of the NDAA provides that:

[T]he Director of National Intelligence shall submit to the appropriate congressional committees a report 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 (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.

Id. § 1277(a). The NDAA further provides that the report “shall be submitted in unclassified form, but may include a classified annex,” and that the “name of each foreign person listed in the report . . . shall be included in the unclassified portion of the report unless the Director of National Intelligence determines that such disclosure would undermine United States intelligence sources and methods or threaten the national security interests of the United States.” *Id.*

§ 1277(b).

Section 5714 of the NDAA states that “the Director of National Intelligence shall submit to Congress a report on the death of Jamal Khashoggi, consistent with protecting sources and methods. Such report shall include identification of those who carried out, participated in, ordered, or were otherwise complicit in or responsible for the death of Jamal Khashoggi,” and the report “shall be submitted in unclassified form.” *Id.* § 5714.

II. The ODNI’s Response to Congress Regarding Sections 1277 and 5714 of the NDAA

On February 20, 2020, the ODNI informed Congress that “[c]onsistent with the protection of sources and methods, the Office of the Director of National Intelligence cannot provide additional information pursuant to sections 1277 and 5714 of the FY20 NDAA at the unclassified level.” Declaration of Gregory M. Koch (“Koch Decl.”) ¶ 17 & Ex. A. Instead, the ODNI transmitted “a classified annex . . . with additional information.” *Id.*

During his confirmation hearing on May 5, 2020, the Director of National Intelligence (“DNI”) “committed to review all the underlying intelligence and the ODNI’s prior responses.” Koch Decl. ¶ 18 & Ex. B. On July 21, 2020, following his review and conversations with other intelligence community leaders, the DNI “confirm[ed] that the process for declassifying the information required by Sections 1277 and 5714 was conducted consistent with law, [Intelligence Community] policy, and applicable Executive Orders.” Koch Decl., Ex. B. The DNI noted that “[i]n response to [Congress’s] concerns about the ODNI’s compliance with Sections 1277 and 5714, this process was again conducted to ensure that any information that could be presented in an UNCLASSIFIED format was provided as required.” *Id.* The DNI explained that both the initial review, as well as his second review, “confirmed yet again that the disclosure of additional details surrounding Mr. Khashoggi’s murder would undermine U.S. intelligence sources and methods.” *Id.* The DNI also confirmed that the previously transmitted classified annex—which was a “downgraded memorandum produced by the National Intelligence Council” following a “brief[ing] on the issue at the compartmented level”—represents “the lowest possible classification that can be given to this intelligence without significantly threatening the national security interests of the United States.” *Id.*

III. Plaintiff’s FOIA Request and the ODNI’s Response

This is Plaintiff’s second FOIA request and lawsuit seeking ODNI records regarding the Khashoggi killing. In December 2018, Plaintiff requested from the ODNI, among other agencies, “all records relating to the killing of U.S. resident Jamal Khashoggi.” *See* Compl. (ECF No. 1), 19 Civ. No. 00234. In response, the ODNI acknowledged that the Intelligence Community has assessed information concerning Mr. Khashoggi’s killing, but has not disclosed the volume or type(s) of intelligence or the sources and methods implicated because those details are classified

and statutorily protected. *See generally* ECF Nos. 111-116, 139-142, 19 Civ. 00234 (“*OSJI I*”). Accordingly, the ODNI, along with the CIA, provided a “no number, no list” response to Plaintiff’s December 2018 FOIA request to the extent it sought such protected records and information. *See id.* The parties’ cross motions for summary judgment regarding the agencies’ no number, no list responses in this related case are currently pending before the Court in *OSJI I*.

On July 20, 2020, Plaintiff submitted to the ODNI a second FOIA request that is the subject of this action. *See* Koch Decl. ¶ 11; *see also* Compl. (ECF No. 1) ¶ 27 & Ex. B (ECF No. 1-2). Plaintiff’s July 20, 2020 request sought “[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” (the “Request”). *See* Compl., Ex. B at 6. The ODNI responded to Plaintiff by letter dated July 22, 2020, in which the ODNI acknowledged receipt of the Request, granted Plaintiff’s request for a fee waiver, denied Plaintiff’s request for expedited processing, and assigned the Request tracking number DF-2020-00301. Koch Decl. ¶ 12. Plaintiff commenced this action on August 19, 2020. *See* Compl.

On October 8, 2020, the ODNI provided Plaintiff with 26 pages of records, portions of which were withheld pursuant to FOIA Exemptions 1, 3, and 6, and withheld one two-page record in full, pursuant to FOIA Exemptions 1 and 3. Koch Decl. ¶ 14. The 26 pages of records released to Plaintiff consisted of correspondence from the ODNI to various members of Congress. *See id.* ¶ 15 & Ex. A. The record withheld in full is a two-page National Intelligence Council Memorandum, dated February 7, 2020 (the “NICM”), that was provided to Congress in response to sections 1277 and 5714 of the NDAA. *Id.* ¶ 15. Based on discussions with Plaintiff’s

counsel, the ODNI understands that Plaintiff challenges only the ODNI's withholding of the NICM. *See* Koch Decl. ¶¶ 15, 18.¹

ARGUMENT

I. Standards of Review

FOIA represents a balance struck by Congress “between the right of the public to know and the need of the Government to keep information in confidence.” *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (quoting H.R. Rep. No. 89-1497, at 6 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2423). Thus, while FOIA generally requires disclosure of agency records, the statute recognizes “that public disclosure is not always in the public interest,” *Baldrige v. Shapiro*, 455 U.S. 345, 352 (1982); *accord* *ACLU v. DOJ*, 681 F.3d 61, 69 (2d Cir. 2012), and mandates that records need not be disclosed if “the documents fall within [the] enumerated exemptions,” *Dep’t of the Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 7 (2001).

FOIA cases are typically decided through motions for summary judgment. *See, e.g., Grand Cent. P’ship v. Cuomo*, 166 F.3d 473, 478 (2d Cir. 1999); *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994). In a FOIA case, “[a]ffidavits or declarations supplying facts . . . giving reasonably detailed explanations why any withheld documents fall within an exemption are sufficient to sustain the agency’s burden” on summary judgment. *Carney*, 19 F.3d at 812

¹ Because the ODNI understands that Plaintiff does not contest the adequacy of the ODNI's search, we do not detail that search in this motion. *See* Koch Decl. ¶ 15.

(footnote omitted).² An agency’s declaration must be “accorded a presumption of good faith.” *Carney*, 19 F.3d at 812 (quotation marks omitted). “Ultimately, an agency may invoke a FOIA exemption if its justification ‘appears logical [and] plausible.’” *ACLU v. DOJ*, 681 F.3d at 69 (quoting *Wilner v. NSA*, 592 F.3d 60, 73 (2d Cir. 2009)); *ACLU v. DOD*, 901 F.3d 125, 134 n.9 (2d Cir. 2018).

In the national security context, moreover, courts must accord “substantial weight” to agency declarations. *Wilner*, 592 F.3d at 73; accord *ACLU v. DOJ*, 681 F.3d at 69; *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007). In reviewing an agency’s declarations regarding such matters, courts “consistently defer[] to executive [declarations] predicting harm to the national security, and have found it unwise to undertake searching judicial review.” *ACLU v. DOD*, 901 F.3d at 134; see also *ACLU v. DOJ*, 681 F.3d at 70-71 (“Recognizing the relative competencies of the executive and judiciary, we believe that it is bad law and bad policy to second-guess the predictive judgments made by the government’s intelligence agencies regarding whether disclosure of the [withheld information] would pose a threat to national security.” (quoting *Wilner*, 592 F.3d at 76) (internal quotation marks omitted)). As the Second Circuit has instructed, “[j]udges do not abdicate their judicial role by acknowledging their limitations and deferring to an agency’s logical and plausible justification in the context of national security; they fulfill it.” *ACLU v. DOD*, 901 F.3d at 136.

² The ODNI has not submitted a Local Rule 56.1 statement, as “the general rule in this Circuit is that in FOIA actions, agency affidavits alone will support a grant of summary judgment,” and a Local Rule 56.1 statement “would be meaningless.” *Ferguson v. FBI*, 1995 WL 329307, at *2 (S.D.N.Y. June 1, 1995), *aff’d*, 83 F.3d 41 (2d Cir. 1996); *New York Times v. DOJ*, 872 F. Supp. 2d 309, 314 (S.D.N.Y. 2012) (noting Local Civil Rule 56.1 statement not required in FOIA actions in this Circuit).

The ODNI properly withheld the NICM in its entirety pursuant to FOIA Exemptions 1 and 3. The NICM contains “additional information pursuant to sections 1277 and 5714 of the FY20 NDAA.” Koch Decl. Ex. B. As explained further in the Koch Declaration, the ODNI properly withheld the NICM pursuant to exemptions 1 and 3 because its unauthorized disclosure would reveal classified and statutorily protected information pertaining to intelligence activities and intelligence sources and methods—or lack thereof—and could reasonably be expected to result in damage to national security. Furthermore, the ODNI disclosed all non-exempt information that reasonably could be segregated and disclosed, and properly concluded that no portion of the NICM can be released.

II. The ODNI Properly Withheld the NICM Pursuant to FOIA Exemption 1

Exemption 1 exempts from public disclosure records that are “specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy,” and “are in fact properly classified pursuant to such Executive order.” 5 U.S.C. § 552(b)(1). The current standard for classification is set forth in Executive Order 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009). Section 1.1(a) of the Executive Order lists four requirements for the classification of national security information: (1) an original classifying authority must classify the information; (2) the information must be owned by, produced by or for, or is under the control of the United States Government; (3) the information pertains to one of eight categories of information specified in the Executive Order, including “intelligence activities (including covert action), sources and methods”; and (4) its “unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security.” Executive Order 13,526, § 1.1(a)(1)-(4). The protected categories of information listed in Section 1.4 of the Executive Order that are relevant here are: “intelligence activities (including

covert action), [or] intelligence sources or methods,” and “foreign relations or foreign activities of the United States.” Koch Decl. ¶ 21; *see* Executive Order 13,526, § 1.4(c), (d).

The declaration submitted by ODNI logically and plausibly demonstrates that these standards have been met regarding the classified information withheld under Exemption 1. *See* Koch Decl. ¶¶ 21-24. All of the information withheld was classified by an original classification authority; is owned by and is under the control of the U.S. Government; and pertains to intelligence activities, intelligence sources and methods, and foreign relations or foreign activities of the United States, within the meaning of section 1.4(c) and (d) of the Executive Order. *See id.* ¶ 21. The ODNI declarant is an original classification authority who has determined that the unauthorized disclosure of the NICM could reasonably be expected to result in damage to national security. *See id.* The ODNI’s declaration identifies and describes the harms to national security that are reasonably expected to result should the withheld classified information be disclosed. The ODNI explains that “[r]elease of the information provided . . . to Congress in response to sections 1277 and 5714 of the FY 20 NDAA would reveal intelligence activities and intelligence sources and methods such as collection capacity, or lack thereof, and the existence or non-existence of relationships with foreign entities.” *Id.* ¶ 23. Disclosing “such intelligence activities and information relating to intelligence sources and methods can permit foreign intelligence services and other groups to disrupt [United States Intelligence Community] activities and/or exploit perceived weaknesses, thereby compromising intelligence operations and impairing the national security of the United States.” *Id.*

Disclosure of the withheld NICM would also disclose “particular intelligence interests of the U.S. Government.” *Id.* ¶ 24. Intelligence interests, which are “synonymous with intelligence sources and methods,” “show the strategic direction of the United States’ intelligence practice.”

Id. Disclosure of particular topics that are of interest to the ODNI would reveal the intelligence objectives of both the Director of National Intelligence and the United States Government more broadly. *Id.* Here, disclosure of the withheld information contained in the NICM “would reveal details of the [Intelligence Community’s (“IC’s”)] collection efforts, or lack thereof.” *Id.* Such a disclosure could result in the IC’s efforts being “thwarted or made more difficult, reducing its effectiveness, requiring a diversion of resources, and resulting in a loss of valuable intelligence.” *Id.* In addition, disclosure of the NICM would harm national security because “information about the DNI’s or any IC element’s interest in a particular area or event may benefit a foreign intelligence service or terrorist organization by enabling it to redirect its resources to circumvent IC intelligence activities, and generally enhance its intelligence or counterintelligence activities at the expense of the U.S. national security.” *Id.*

The justifications provided in the ODNI’s declaration are entirely logical and plausible. By its very nature, release of the NICM would reveal specific information about intelligence sources, methods and activities or lack thereof, and information about the United States’ intelligence collection capabilities or lack thereof. Disclosure of such information can reasonably be expected to result in damage to the national security. *See, e.g., James Madison Project v. DOJ*, 436 F. Supp. 3d 195, 202 (D.D.C. 2020) (“Forcing the CIA to produce [intelligence] information would mean forcing it to publicize details of certain CIA counterterrorism operations and other intelligence activities conducted abroad that are still classified.”). Indeed, the NDAA itself expressly contemplates that intelligence information concerning the Khashoggi killing may remain properly classified, by providing for the submission of a classified annex. The undisputed record demonstrates, moreover, that the ODNI undertook two separate and thorough declassification reviews and downgraded the information to the lowest possible level of

classification, and ultimately twice determined that no information could be provided at an unclassified level. *See* Koch Decl. ¶ 18 & Ex. B. Particularly in light of the substantial deference owed to the agency’s judgments regarding the classified status of records, *ACLU v. DOJ*, 681 F.3d at 69, ODNI’s withholding of the NICM under Exemption 1 is proper.

III. The ODNI Properly Withheld the NICM Pursuant to FOIA Exemption 3

Under Exemption 3, matters “specifically exempted from disclosure by [a] statute” that “leave[s] no discretion on the issue” or “establishes particular criteria for withholding” need not be disclosed. 5 U.S.C. § 552(b)(3). When assessing whether Exemption 3 applies, a court must determine (1) whether there is an applicable withholding statute, and (2) if so, whether the materials withheld is within the statute’s coverage. *CIA v. Sims*, 471 U.S. 159, 167 (1985). 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.” *Wilner*, 592 F.3d at 72 (quoting *Ass’n of Retired R.R. Workers v. U.S. R.R. Ret. Bd.*, 830 F.2d 331, 336 (D.C. Cir. 1987)).

Section 102A(i)(1) of the National Security Act, as amended, states: “the Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure.” 50 U.S.C. § 3024(i)(1). Courts have consistently held that the National Security Act qualifies as a FOIA Exemption 3 withholding statute. *See, e.g., ACLU v. DOJ*, 681 F.3d at 72-75; *ACLU v. DOD*, 628 F.3d 612, 619, 626 (D.C. Cir. 2011); *Berman v. CIA*, 501 F.3d 1136, 1137-38, 1140 (9th Cir. 2007); *N.Y. Times Co. v. DOD*, 499 F. Supp. 2d 501, 512-13 (S.D.N.Y. 2007); *see also Sims*, 471 U.S. at 167 (considering materially identical predecessor to National Security Act).

Thus, the “only remaining inquiry” for the Court is whether the NICM falls within the scope of the National Security Act. *See ACLU v. DOJ*, 681 F.3d at 73. As the Second and D.C. Circuits have recognized, the statute protects not only intelligence sources and methods themselves, but any information that “relates to” an intelligence source or method, *ACLU*, 681 F.3d at 73, or would tend to disclose an intelligence source or method, *see Halperin v. CIA*, 629 F.2d 144, 147-50 (D.C. Cir. 1980). The deference accorded to the ODNI in national security cases extends to the agency’s determinations as to whether information relates to intelligence sources or methods protected by the National Security Act. *See, e.g., ACLU v. DOJ*, 681 F.3d at 75 (“[a]ccording substantial weight” to agency’s declarations and holding that records “relate[d] to an intelligence method within the meaning of the NSA, and accordingly, may be withheld”); *Maynard v. CIA*, 986 F.2d 547, 555 (1st Cir. 1993) (“[g]iving due deference to the agency’s determination,” holding that redacted information was exempt from disclosure under National Security Act, 50 U.S.C. § 403(d)(3) (predecessor to 50 U.S.C. § 3024(i)(1)), and Exemption 3); *Fitzgibbon v. CIA*, 911 F.2d 755, 762 (D.C. Cir. 1990) (noting that in determining whether withheld information relates to intelligence sources and methods for purposes of § 403(d)(3) and Exemption 3, “we accord substantial weight and due consideration to the [agency’s] affidavits”); *Nat’l Sec’y Archive Fund, Inc. v. CIA*, 402 F. Supp. 2d 211, 216 (D.D.C. 2005) (“Courts evaluating Exemption 3 claims must accord the same substantial weight to the agency’s judgment as with Exemption 1 claims.” (citing *Sims*, 471 U.S. at 1179)); *James Madison Project v. CIA*, 607 F. Supp. 2d 109, 126-27 (D.D.C. 2009) (“Bearing in mind its obligation to give ‘substantial weight and deference’ to the [agency’s] declaration, the court determines that all of the information withheld falls within the scope of the National Security Act” (citing *Fitzgibbon*, 911 F.2d at 766)). The Supreme Court has recognized, moreover, that the scope of

intelligence sources and methods protected by the National Security Act is extremely broad, and extends to “all sources of intelligence that provide, or are engaged to provide, information the [Intelligence Community] needs to perform its statutory duties with respect to foreign intelligence.” *Sims*, 471 U.S. at 169-70.³

The NICM plainly relates to intelligence sources and methods and thus falls squarely within the scope of the National Security Act. Koch Decl. ¶ 27 (explaining that “all information in the withheld record relates to intelligence sources and methods”). No showing of harm is necessary to withhold information under Exemption 3 and the National Security Act. *See Elec. Privacy Info Ctr. v. NSA*, 678 F.3d 926, 931 (D.C. Cir. 2012); *Fitzgibbon*, 911 F.2d at 764; *Hayden v. NSA*, 608 F.2d 1381, 1390 (D.C. Cir. 1979); *Cable News Network v. FBI*, 384 F. Supp. 3d 19, 32 (D.D.C. 2019). In enacting the National Security Act, Congress made the determination that unauthorized disclosure of information relating to intelligence sources and methods would be harmful. *See Sims*, 471 U.S. at 170-73; *cf. Elec. Privacy Info. Ctr.*, 678 F.3d at 931. Nevertheless, the ODNI has demonstrated that public disclosure of the NICM would cause harm, because its release “is reasonably likely to significantly impair the ODNI and [the intelligence community’s] ability to carry out core missions of gathering, analyzing, and integrating intelligence.” Koch Decl. ¶ 27.

As the ODNI has logically and plausibly explained, the NICM relates to intelligence sources and methods and is therefore exempt from disclosure under Exemption 3 and the National Security Act.

³ *Sims* addressed Section 102(d)(3), a predecessor provision within the National Security Act, which authorized the Director of the CIA to protect intelligence sources and methods. *See id.* at 169. The Intelligence Reform and Terrorism Prevention Act of 2004 amended the National Security Act, and provided that the DNI “shall protect intelligence sources and methods from unauthorized disclosure.” 50 U.S.C. § 403-1(i)(1), Pub. L. No. 108-458, 118 Stat. 3638.

IV. The ODNI Has Released All Reasonably Segregable, Non-Exempt Information

Finally, the ODNI's declaration establishes its compliance with FOIA's requirement that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). With respect to this requirement, an agency is "entitled to a presumption that [it] complied with the obligation to disclose reasonably segregable material." *Hodge v. FBI*, 703 F.3d 575, 582 (D.C. Cir. 2013) (quotation marks omitted).

Here, there is no basis to disturb the presumption that the ODNI has disclosed all reasonably segregable material in response to Plaintiff's FOIA request. The ODNI's declarant has affirmed that ODNI conducted a review and released all reasonably segregable, non-exempt information in the 26 pages produced to Plaintiff. *See Koch Decl.* ¶ 28. Plaintiff does not challenge any of the redactions to those pages. With respect to the NICM, the ODNI determined that "neither the record nor portions of the record may be released" because such disclosure "would reveal classified and statutorily protected information that is itself exempt from disclosure under Exemptions 1 and 3." *Id.* ¶ 29. The ODNI has affirmed that "[a]ny such release or acknowledgment, in whole or in part, would cause damage to the national security." *Id.* Indeed, "the information withheld in full has been through a thorough declassification review on two separate occasions and both reviews 'confirmed yet again that disclosure of additional details surrounding Mr. Khashoggi's murder would undermine U.S. intelligence sources and methods.'" *Koch Decl.* ¶ 18 & Ex. B. Accordingly, the ODNI properly withheld the NICM in its entirety.

CONCLUSION

For the foregoing reasons, the Court should grant summary judgment in favor of the ODNI.

Dated: November 9, 2020
New York, New York

Respectfully submitted,

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

OPEN SOCIETY JUSTICE INITIATIVE,)	
)	
Plaintiff,)	No. 1:20-cv-06625 (PAE)
)	
v.)	
)	
OFFICE OF THE DIRECTOR OF NATIONAL)	
INTELLIGENCE)	
)	
Defendant.)	

**DECLARATION OF GREGORY M. KOCH,
DIRECTOR, INFORMATION MANAGEMENT OFFICE,
OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE**

I, Gregory M. Koch, declare as follows:

I. INTRODUCTION

1. I am the Director of the Information Management Office (“IMO”), under the Chief Operating Officer for the Office of the Director of National Intelligence (“ODNI”). I have held this position since October 9, 2020. Prior to my current position, I held various senior and supervisory roles in the ODNI, including as Deputy Director and Acting Director of IMO, Chief of Classification Management, as well as Senior Associate General Counsel for litigation in the Office of General Counsel. In addition, I held other senior and supervisory roles in the Executive Branch and within the Intelligence Community (“IC”) including serving as Chief of Classification Management at the Central Intelligence Agency, as well as serving three years in the Executive Office of the President as Deputy Director (and Acting Director) of Access Management at the National Security Council. In total, I have spent over thirteen years in the U.S. Government handling and overseeing Freedom of Information Act (“FOIA”), classification, and

declassification matters, and I am recognized as a FOIA and classification/declassification subject matter expert. Prior to my U.S. Government experience, I was a civil litigation attorney in the State of New York. I earned a Juris Doctorate degree from St. John's University School of Law, and a Bachelor of Arts degree in Political Science from the State University of New York at Binghamton.

2. As part of my current duties, I am responsible for facilitating the implementation of information management-related Executive orders, laws, regulations, and ODNI policy. This function entails controlling information throughout its life cycle and includes the areas of records management, classification management and declassification, prepublication and disclosure, and responding to requests under the FOIA and the Privacy Act. In my current capacity, I administer and manage ODNI's Classification Management and Records Management programs, which, among other things, establish and implement ODNI's classification and markings policies through the creation of directives and security classification guides, in collaboration with subject matter experts.

3. Under a written delegation of authority by the Director of National Intelligence ("DNI") pursuant to Executive Order 13526, *Classified National Security Information*, I hold original classification authority at the "TOP SECRET" level. See Exec. Order No. 13526 § 1.3(c), 75 Fed. Reg. 707, 708 (Dec. 29, 2009) [hereinafter "E.O. 13526"]. I am authorized, therefore, to make original classification and declassification decisions for intelligence information up to and including the TOP SECRET level. In my current position, I am the final decision-making authority regarding the initial processing of FOIA requests for ODNI. I am also responsible for the classification review of ODNI documents and information that may be the subject of court proceedings, information provided to the Congress, or public requests for information under the

FOIA, 5 U.S.C. § 552, as amended, as well as the Privacy Act of 1974, 5 U.S.C. § 552a, as amended.

4. Through the exercise of my official duties, I have become familiar with this civil litigation and the underlying FOIA request. I make the following statements based upon my personal knowledge and information made available to me in my official capacity.

II. RESPONSIBILITIES AND AUTHORITIES OF THE DIRECTOR OF NATIONAL INTELLIGENCE

5. Through the exercise of my official duties, I support the DNI. Congress created the position of the DNI in the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, §§ 1011(a) and 1097, 118 Stat. 3638, 3643-62, 3698-99 (2004) (amending Sections 102 through 104 of Title 1 of the National Security Act of 1947). The responsibilities and authorities of the DNI are set forth in the National Security Act of 1947, as amended. 50 U.S.C. §§ 3001–3234 [hereinafter the National Security Act]. Subject to the authority, direction, and control of the President, the DNI serves as the head of the IC, and as the principal adviser to the President, the National Security Council, and the Homeland Security Council for intelligence matters related to the national security. 50 U.S.C. § 3023(b)(1), (2). The National Security Act also created the ODNI. 50 U.S.C. § 3025(a). The function of the ODNI is to assist the DNI in carrying out his or her duties and responsibilities under the Act and other applicable provisions of law, and to carry out such other duties as may be prescribed by the President or by law. 50 U.S.C. § 3025(b).

6. The responsibilities and authorities of the DNI include ensuring that national intelligence is provided to the President, heads of the departments and agencies of the Executive Branch, the Chairman of the Joint Chiefs of Staff and senior military commanders, and Congress. 50 U.S.C. § 3024(a)(1). The DNI is charged with establishing the objectives of; determining the requirements and priorities for; and managing and directing the tasking, collection, analysis,

production, and dissemination of national intelligence by elements of the IC. 50 U.S.C. § 3024(f)(1)(A). The DNI's other authorities include coordination of relations between elements of the IC and the intelligence or security services of foreign governments or international organizations on intelligence matters and monitoring and implementing the execution of the National Intelligence Program. See, e.g., 50 U.S.C. §§ 3024(c), (k), (n).

7. The DNI is statutorily required to “protect intelligence sources and methods from unauthorized disclosure.” 50 U.S.C. § 3024(i)(1). Consistent with this responsibility, the DNI establishes and implements guidelines for the IC for the classification of information under applicable law, Executive orders, or other Presidential directives, and for access to and dissemination of intelligence. 50 U.S.C. § 3024(i)(2)(A), (B). Similarly, section 1.3(b)(8) of Executive Order 12333, as amended, mandates that the DNI “[s]hall protect, and ensure that programs are developed to protect, intelligence sources, methods, and activities from unauthorized disclosure.” 46 Fed. Reg. 59941 (Dec. 4, 1981), as amended by Exec. Order No. 13470, 73 Fed. Reg. 45325, 453287 (July 30, 2008).

III. ODNI FOIA POLICY AND PROCEDURE

8. ODNI responds to all perfected FOIA requests in compliance with FOIA and in a manner that is fair and reasonable to each requester. Because ODNI receives hundreds of FOIA requests each year, it generally follows a “first-in, first-out” system for processing them.

9. When IMO receives a FOIA request, it assigns an individualized case number to it. IMO then assesses whether intelligence information is sought and if the acknowledgement of whether or not ODNI possesses such information would itself reveal classified information or intelligence sources or methods. Where this is not the case, IMO tasks relevant records custodians who are likely to have responsive records to conduct a search. IMO may use searches conducted

in response to prior or similar requests as a starting point for responding to the current request. IMO also sends an Acknowledgement Letter to the requester acknowledging receipt of the FOIA request and indicating the assigned case number.

10. Because ODNI assists the DNI in carrying out his duties and responsibilities as the head of the IC and the principal adviser to the President, the National Security Council, and the Homeland Security Council for intelligence matters related to the national security, many of ODNI's records include information from other agencies who contribute to the all-source intelligence often provided by the DNI to policymakers.

IV. PLAINTIFF'S FOIA REQUEST AND ODNI'S RESPONSE

11. By email dated July 20, 2020, Plaintiff, the Open Society Justice Initiative ("OSJI"), sent a FOIA request to IMO seeking the following records:

"Reports (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."

12. By letter dated July 22, 2020, IMO acknowledged receipt of OSJI's FOIA request, granted its request for a fee waiver, denied the request for expedited processing, and assigned the request tracking number DF-2020-00301.

13. On August 19, 2020, Plaintiff filed its complaint in the instant case.

14. By letter dated October 8, 2020, ODNI provided Plaintiff with its response, documenting that 26 pages were being released and maintaining ODNI's determination that the remaining document must be withheld pursuant to FOIA exemptions (b)(1), (b)(3), and (b)(6). Finally the letter asserted that the remaining record was "denied in full pursuant to FOIA exemptions (b)(1) and (b)(3)."

15. In sum, ODNI produced in whole or in part 26 pages of responsive records, consisting of correspondence from ODNI to various members of Congress. One other responsive record reviewed by ODNI was withheld in full, which as discussed below is a two-page National Intelligence Council Memorandum February 7, 2020 provided to Congress in response to sections 1277 and 5714 of the FY 20 NDAA. I understand that Plaintiff is challenging neither the sufficiency of the search nor the withholdings taken in the 26 pages ODNI released in whole or in part. Therefore, this declaration addresses only the record withheld in full.

V. INFORMATION AT ISSUE

16. As noted above, the ODNI ultimately produced in whole or in part 26 responsive pages in this case. ODNI determined that it could produce in whole or in part these records responsive to Plaintiff's request because the records, as released, did not reveal any classified or statutorily protected information.

17. The DNI's February 20, 2020 letters to Congressional Leadership and the appropriate Congressional Committees¹ which were produced to Plaintiff and are attached as Exhibit A, "respond[] to sections 1277 and 5714 of the National Defense Authorization Act for Fiscal Year 2020 (P.L. 116-92) ('FY 20 NDAA')" and describe the legal requirements of those sections of the FY 20 NDAA. As the DNI stated:

Section 1277 provides for an unclassified report from the Director of National Intelligence, which may include a classified annex, consisting of 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." Section 1277 further provides that the report include "a list of foreign persons that the Director of National Intelligence has high confidence . . . were responsible for, or

¹ Specifically these letters were sent to: the Speaker of the House, Senate Majority Leader, House and Senate Minority Leaders, Chairman and Vice Chairmen of the Senate Select Committee on Intelligence, Chairman and Ranking Member of the House Permanent Select Committee on Intelligence, Chairman and Ranking Member of the Senate Foreign Relations Committee, and the Chairman and Ranking Member of the House Foreign Affairs Committee.

complicit in, ordering, controlling, or otherwise directing an act or acts contributing to or causing the death of Jamal Khashoggi; . . . knowingly and materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services in support of, [such activities described above]; . . . or impeded the impartial investigation of the killing of Jamal Khashoggi, including through the tampering of evidence relating to the investigation."

Section 5714 of the FY20 NDAA provides for an unclassified report from the Director of National Intelligence on the death of Jamal Khashoggi, consistent with protecting sources and methods, including "identification of those who carried out, participated in, ordered, or were otherwise complicit in or responsible for the death of Jamal Khashoggi."

The DNI concluded, "[c]onsistent with the protection of sources and methods, the Office of the Director of National Intelligence cannot provide additional information pursuant to sections 1277 and 5714 of the FY20 NDAA at the unclassified level. Nonetheless, we are transmitting under separate cover a classified annex that supplements this letter with additional information."

18. ODNI is unable to provide Plaintiff with additional detail concerning the February 7, 2020 two-page National Intelligence Council Memorandum beyond the detail in the 26 pages already provided. Doing so would reveal classified and statutorily protected information that is itself exempt from disclosure under FOIA Exemptions 1 and 3; namely, classified intelligence information, as well as the intelligence priorities and capabilities and sensitive details about methods and activities, or lack thereof, in this area of inquiry. As the DNI confirmed in his July 21, 2020 letter to the Chairman and Vice Chairman of the Senate Select Committee on Intelligence² and which is attached as Exhibit B, the information withheld in full has been through a thorough declassification review on two separate occasions and both reviews "confirmed yet again that disclosure of additional details surrounding Mr. Khashoggi's murder would undermine U.S. intelligence sources and methods. . . ." This letter was provided to Plaintiff on 8 October 2020.

² Copies of this letter were also sent to Senator Ron Wyden, and the Chairman of the House Permanent Select Committee on Intelligence, Congressman Adam Schiff.

The DNI stated that the sole remaining document's current classification "is the lowest possible classification that can be given to this intelligence without significantly threatening the national security interests of the U.S."

A. Exemption 1

19. Exemption 1 provides that FOIA does not require the production of records that are: "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). For the reasons stated below, I have determined that the information withheld is currently and properly classified.

20. Section 1.1(a) of E.O. 13526 provides that information may be originally classified only if all of the following conditions are met: (1) an original classification authority is classifying the information; (2) the information is owned by, produced by or for, or is under the control of the U.S. Government; (3) the information falls within one or more of the categories of information listed in section 1.4 of E.O. 13526; and (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in some level of damage to the national security, and the original classification authority is able to identify or describe the damage.

21. As an original classification authority, I have determined that withheld information responsive to Plaintiff's request is currently and properly classified. This information is owned by and is under the control of the U.S. Government. As described below, the information falls within classification categories § 1.4(c) and § 1.4(d) of E.O. 13526 because it concerns "intelligence activities (including covert action), [or] intelligence sources or methods" and "foreign relations or

foreign activities of the United States.” Further, its unauthorized disclosure could reasonably be expected to result in damage to the national security.

22. None of the information at issue has been classified in order to conceal violations of law, inefficiency or administrative error; prevent embarrassment to a person, organization or agency; restrain competition; or prevent or delay the release of information that does not require protection in the interests of national security. Further, the responsive information is properly marked in accordance with § 1.6 of E.O. 13526.

23. The information withheld pursuant to Exemption 1 describes properly classified intelligence information. Release of the information provided by ODNI to Congress in response to sections 1277 and 5714 of the FY 20 NDAA would reveal intelligence activities and intelligence sources and methods such as collection capacity, or lack thereof, and the existence or non-existence of relationships with foreign entities. The disclosure of such intelligence activities and information relating to intelligence sources and methods can permit foreign intelligence services and other groups to disrupt IC activities and/or exploit perceived weaknesses, thereby compromising intelligence operations and impairing the national security of the United States.

24. Additionally, information withheld pursuant to Exemption 1 describes particular intelligence interests of the U.S. Government. Intelligence interests are synonymous with intelligence sources and methods. Intelligence interests show the strategic direction of the U.S.’ intelligence practice. As the head of the IC, particular topics that are of interest to the DNI would be revealing of the DNI’s and the U.S. Government’s intelligence objectives. Such a revelation, through the disclosure of the withheld information, would reveal details of the IC’s collection efforts, or lack thereof. As a result, the IC’s efforts may be thwarted or made more difficult, reducing its effectiveness, requiring a diversion of resources, and resulting in a loss of valuable

intelligence. Furthermore, disclosure could reasonably be expected to cause irreparable harm and impair the DNI and the IC's ability to carry out its core functions by revealing the subjects and areas of interest, and the depth of the IC's knowledge therein. Moreover, information about the DNI's or any IC element's interest in a particular area or event may benefit a foreign intelligence service or terrorist organization by enabling it to redirect its resources to circumvent IC intelligence activities, and generally enhance its intelligence or counterintelligence activities at the expense of the U.S. national security. Accordingly, Exemption 1 protects this information from disclosure.

B. Exemption 3

25. FOIA Exemption 3 protects information that is specifically exempted from disclosure by statute. A statute authorizing withholding under Exemption 3 must (A)(i) require that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (A)(ii) establish particular criteria for withholding or refer to particular types of matters to be withheld. 5 U.S.C. § 552(b)(3).

26. Section 102A(i)(1) of the National Security Act provides that "the [DNI] shall protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 3024(i)(1). The sources and methods provision of the National Security Act has long been held to qualify as a withholding statute in accordance with FOIA Exemption 3. The National Security Act applies in this case to preclude disclosure of the withheld information as a whole.

27. Moreover, the protections authorized by the National Security Act apply to the same information for which Exemption 1 was asserted to protect intelligence sources and methods; all information in the withheld record relates to intelligence sources or methods. Although I understand the ODNI does not need to show that disclosure would be harmful in order to protect intelligence sources and methods under FOIA Exemption 3 and the National Security Act, I note

that the release of the information withheld under FOIA Exemptions 1 and 3 is reasonably likely to significantly impair the ODNI and IC's ability to carry out core missions of gathering, analyzing, and integrating intelligence.

C. Segregability

28. With regard to ODNI's production of the 26 pages to the Plaintiff, ODNI conducted a review and released all reasonably segregable, non-exempt information.

29. With regard to the remainder of the response to Plaintiff's request, ODNI has determined that the neither the record nor portions of the record may be released pursuant to the exemptions identified above. As explained in this declaration, doing so would reveal classified and statutorily protected information that is itself exempt from disclosure under Exemptions 1 and 3. Any such release or acknowledgment, in whole or in part, would cause damage to the national security.

VI. CONCLUSION

I certify under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 9 day of November 2020.



Gregory M. Koch
Director, Information Management Office

Exhibit A

UNCLASSIFIED

OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE
WASHINGTON, DC 20511

The Honorable Nancy Pelosi
Speaker
U.S. House of Representatives
Washington, DC 20515

FEB 20 2020

Dear Speaker Pelosi:

(U) This letter responds to sections 1277 and 5714 of the *National Defense Authorization Act for Fiscal Year 2020* (P.L. 116-92) (“FY 20 NDAA”). Section 1277 provides for an unclassified report from the Director of National Intelligence, which may include a classified annex, consisting of 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.” Section 1277 further provides that the report include “a list of foreign persons that the Director of National Intelligence has high confidence . . . were responsible for, or complicit in, ordering, controlling, or otherwise directing an act or acts contributing to or causing the death of Jamal Khashoggi; . . . knowingly and materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services in support of, [such activities described above]; . . . or impeded the impartial investigation of the killing of Jamal Khashoggi, including through the tampering of evidence relating to the investigation.”

(U) Section 5714 of the FY20 NDAA provides for an unclassified report from the Director of National Intelligence on the death of Jamal Khashoggi, consistent with protecting sources and methods, including “identification of those who carried out, participated in, ordered, or were otherwise complicit in or responsible for the death of Jamal Khashoggi.” Consistent with the protection of sources and methods, the Office of the Director of National Intelligence cannot provide additional information pursuant to sections 1277 and 5714 of the FY20 NDAA at the unclassified level. Nonetheless, we are transmitting under separate cover a classified annex that supplements this letter with additional information.

(U) If you have additional questions, you may contact Legislative Affairs at (b)(3), (b)(6)

(b)(3), (b)(6)

(b)(3), (b)(6)

Assistant DNI for Legislative Affairs

UNCLASSIFIED

UNCLASSIFIED

OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE
WASHINGTON, DC 20511

FEB 20 2020

The Honorable Mitch McConnell
Majority Leader
United States Senate
Washington, DC 20510

Dear Mr. Leader:

(U) This letter responds to sections 1277 and 5714 of the *National Defense Authorization Act for Fiscal Year 2020* (P.L. 116-92) (“FY 20 NDAA”). Section 1277 provides for an unclassified report from the Director of National Intelligence, which may include a classified annex, consisting of 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.” Section 1277 further provides that the report include “a list of foreign persons that the Director of National Intelligence has high confidence . . . were responsible for, or complicit in, ordering, controlling, or otherwise directing an act or acts contributing to or causing the death of Jamal Khashoggi; . . . knowingly and materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services in support of, [such activities described above]; . . . or impeded the impartial investigation of the killing of Jamal Khashoggi, including through the tampering of evidence relating to the investigation.”

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(b)(3), (b)(6)

Assistant DNI for Legislative Affairs

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OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE
WASHINGTON, DC 20511

The Honorable Kevin McCarthy
Minority Leader
U.S. House of Representatives
Washington, DC 20515

FEB 20 2020

Dear Leader McCarthy:

(U) This letter responds to sections 1277 and 5714 of the *National Defense Authorization Act for Fiscal Year 2020* (P.L. 116-92) (“FY 20 NDAA”). Section 1277 provides for an unclassified report from the Director of National Intelligence, which may include a classified annex, consisting of 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.” Section 1277 further provides that the report include “a list of foreign persons that the Director of National Intelligence has high confidence . . . were responsible for, or complicit in, ordering, controlling, or otherwise directing an act or acts contributing to or causing the death of Jamal Khashoggi; . . . knowingly and materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services in support of, [such activities described above]; . . . or impeded the impartial investigation of the killing of Jamal Khashoggi, including through the tampering of evidence relating to the investigation.”

(U) Section 5714 of the FY20 NDAA provides for an unclassified report from the Director of National Intelligence on the death of Jamal Khashoggi, consistent with protecting sources and methods, including “identification of those who carried out, participated in, ordered, or were otherwise complicit in or responsible for the death of Jamal Khashoggi.” Consistent with the protection of sources and methods, the Office of the Director of National Intelligence cannot provide additional information pursuant to sections 1277 and 5714 of the FY20 NDAA at the unclassified level. Nonetheless, we are transmitting under separate cover a classified annex that supplements this letter with additional information.

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(b)(3), (b)(6)

Assistant DNI for Legislative Affairs

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OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE
WASHINGTON, DC 20511

FEB 20 2020

The Honorable Charles E. Schumer
Minority Leader
United States Senate
Washington, DC 20510

Dear Mr. Leader:

(U) This letter responds to sections 1277 and 5714 of the *National Defense Authorization Act for Fiscal Year 2020* (P.L. 116-92) (“FY 20 NDAA”). Section 1277 provides for an unclassified report from the Director of National Intelligence, which may include a classified annex, consisting of 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.” Section 1277 further provides that the report include “a list of foreign persons that the Director of National Intelligence has high confidence . . . were responsible for, or complicit in, ordering, controlling, or otherwise directing an act or acts contributing to or causing the death of Jamal Khashoggi; . . . knowingly and materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services in support of, [such activities described above]; . . . or impeded the impartial investigation of the killing of Jamal Khashoggi, including through the tampering of evidence relating to the investigation.”

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(b)(3), (b)(6)

Assistant DPM for Legislative Affairs

UNCLASSIFIED

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OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE
WASHINGTON, DC 20511

The Honorable Richard Burr
Chairman
Select Committee on Intelligence
United States Senate
Washington, DC 20510

FEB 20 2020

The Honorable Mark Warner
Vice Chairman
Select Committee on Intelligence
United States Senate
Washington, DC 20510

Dear Chairman Burr and Vice Chairman Warner:

(U) This letter responds to sections 1277 and 5714 of the *National Defense Authorization Act for Fiscal Year 2020* (P.L. 116-92) (“FY 20 NDAA”). Section 1277 provides for an unclassified report from the Director of National Intelligence, which may include a classified annex, consisting of 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.” Section 1277 further provides that the report include “a list of foreign persons that the Director of National Intelligence has high confidence . . . were responsible for, or complicit in, ordering, controlling, or otherwise directing an act or acts contributing to or causing the death of Jamal Khashoggi; . . . knowingly and materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services in support of, [such activities described above]; . . . or impeded the impartial investigation of the killing of Jamal Khashoggi, including through the tampering of evidence relating to the investigation.”

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OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE
WASHINGTON, DC 20511

(U) If you have additional questions, you may contact Legislative Affairs at (b)(3), (b)(6)

(b)(3), (b)(6)



Assistant ~~DN~~ for Legislative Affairs

UNCLASSIFIED

UNCLASSIFIED

OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE
WASHINGTON, DC 20511

The Honorable Adam B. Schiff
Chairman
Permanent Select Committee on Intelligence
U.S. House of Representatives
Washington, DC 20515

FEB 20 2020

The Honorable Devin Nunes
Ranking Member
Permanent Select Committee on Intelligence
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Schiff and Ranking Member Nunes:

(U) This letter responds to sections 1277 and 5714 of the *National Defense Authorization Act for Fiscal Year 2020* (P.L. 116-92) (“FY 20 NDAA”). Section 1277 provides for an unclassified report from the Director of National Intelligence, which may include a classified annex, consisting of 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.” Section 1277 further provides that the report include “a list of foreign persons that the Director of National Intelligence has high confidence . . . were responsible for, or complicit in, ordering, controlling, or otherwise directing an act or acts contributing to or causing the death of Jamal Khashoggi; . . . knowingly and materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services in support of, [such activities described above]; . . . or impeded the impartial investigation of the killing of Jamal Khashoggi, including through the tampering of evidence relating to the investigation.”

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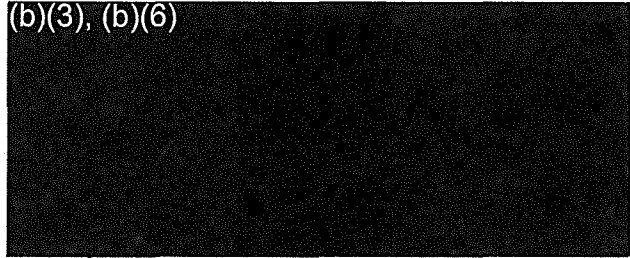
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(b)(3), (b)(6)



Assistant DNI for Legislative Affairs

UNCLASSIFIED

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OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE
WASHINGTON, DC 20511

The Honorable James E. Risch
Chairman
Committee on Foreign Relations
United States Senate
Washington, DC 20510

FEB 20 2020

The Honorable Robert M. Menendez
Ranking Member
Committee on Foreign Relations
United States Senate
Washington, DC 20510

Dear Chairman Risch and Ranking Member Menendez:

(U) This letter responds to sections 1277 and 5714 of the *National Defense Authorization Act for Fiscal Year 2020* (P.L. 116-92) (“FY 20 NDAA”). Section 1277 provides for an unclassified report from the Director of National Intelligence, which may include a classified annex, consisting of 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.” Section 1277 further provides that the report include “a list of foreign persons that the Director of National Intelligence has high confidence . . . were responsible for, or complicit in, ordering, controlling, or otherwise directing an act or acts contributing to or causing the death of Jamal Khashoggi; . . . knowingly and materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services in support of, [such activities described above]; . . . or impeded the impartial investigation of the killing of Jamal Khashoggi, including through the tampering of evidence relating to the investigation.”

(U) Section 5714 of the FY20 NDAA provides for an unclassified report from the Director of National Intelligence on the death of Jamal Khashoggi, consistent with protecting sources and methods, including “identification of those who carried out, participated in, ordered, or were otherwise complicit in or responsible for the death of Jamal Khashoggi.” Consistent with the protection of sources and methods, the Office of the Director of National Intelligence cannot provide additional information pursuant to sections 1277 and 5714 of the FY20 NDAA at the unclassified level. Nonetheless, we are transmitting under separate cover a classified annex that supplements this letter with additional information.

UNCLASSIFIED

UNCLASSIFIED

OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE
WASHINGTON, DC 20511

(U) If you have additional questions, you may contact Legislative Affairs at (b)(3), (b)(6)

(b)(3), (b)(6)

(b)(3), (b)(6)



Assistant DNI for Legislative Affairs

UNCLASSIFIED

UNCLASSIFIED

OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE
WASHINGTON, DC 20511

The Honorable Eliot L. Engel
Chairman
Committee on Foreign Affairs
U.S. House of Representatives
Washington, DC 20515

FEB 20 2020

The Honorable Michael T. McCaul
Ranking Member
Committee on Foreign Affairs U.S. House of Representatives
Washington, DC 20515

Dear Chairman Engel and Ranking Member McCaul:

(U) This letter responds to sections 1277 and 5714 of the *National Defense Authorization Act for Fiscal Year 2020* (P.L. 116-92) (“FY 20 NDAA”). Section 1277 provides for an unclassified report from the Director of National Intelligence, which may include a classified annex, consisting of 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.” Section 1277 further provides that the report include “a list of foreign persons that the Director of National Intelligence has high confidence . . . were responsible for, or complicit in, ordering, controlling, or otherwise directing an act or acts contributing to or causing the death of Jamal Khashoggi; . . . knowingly and materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services in support of, [such activities described above]; . . . or impeded the impartial investigation of the killing of Jamal Khashoggi, including through the tampering of evidence relating to the investigation.”

(U) Section 5714 of the FY20 NDAA provides for an unclassified report from the Director of National Intelligence on the death of Jamal Khashoggi, consistent with protecting sources and methods, including “identification of those who carried out, participated in, ordered, or were otherwise complicit in or responsible for the death of Jamal Khashoggi.” Consistent with the protection of sources and methods, the Office of the Director of National Intelligence cannot provide additional information pursuant to sections 1277 and 5714 of the FY20 NDAA at the unclassified level. Nonetheless, we are transmitting under separate cover a classified annex that supplements this letter with additional information.

UNCLASSIFIED

UNCLASSIFIED

OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE
WASHINGTON, DC 20511

(U) If you have additional questions, you may contact Legislative Affairs at (b)(3), (b)(6)

(b)(3), (b)(6)

(b)(3), (b)(6)



Assistant DNI for Legislative Affairs

UNCLASSIFIED

Exhibit B

~~TOP SECRET//NOFORN~~

DIRECTOR OF NATIONAL INTELLIGENCE
WASHINGTON, DC

JUL 21 2020

The Honorable Marco Rubio
Acting Chairman
Select Committee on Intelligence
United States Senate
Washington, DC 20510

The Honorable Mark R. Warner
Vice Chairman
Select Committee on Intelligence
United States Senate
Washington, DC 20510

Acting Chairman Rubio and Vice Chairman Warner:

(U) Thank you for your letter of 02 March 2020, regarding the report issued by the Office of the Director of National Intelligence (ODNI) pursuant to sections 1277 and 5714 of the National Defense Authorization Act for Fiscal Year 2020 (NDAA), P.L. 116-92.

~~(S//NF)~~ During my confirmation hearing on 05 May 2020, I committed to review all the underlying intelligence and the ODNI's prior responses related to Washington Post columnist Jamal Khashoggi. I have recently completed this review and have consulted with the leadership of the Intelligence Community (IC) elements that have contributed to the IC's understanding of Mr. Khashoggi's murder, (b)(1), (b)(3)

(U//~~FOUO~~) Most critically, my review and conversations with other IC leaders confirmed that we have kept the U.S. Congress fully and currently informed on this issue as required by law. You will recall that the Committee's full membership has been briefed on the issue at the compartmented level and that the National Intelligence Council produced a downgraded memorandum (NICM (b)(3)) in February of this year to ensure broader congressional interest in the issue was addressed.

(U//~~FOUO~~) I was also pleased to confirm that the process for declassifying the information required by Sections 1277 and 5714 was conducted consistent with law, IC policy, and applicable Executive Orders. This included appropriate consultations, assessments of risk to sources and methods, and the impact on future collections as specifically permitted by Section 1277(b)(2) and Section 5714(a). In response to your concerns about the ODNI's compliance

Classified By: (b)(3), (b)(6)
Derived From: ODNI CG
Declassify On: 20451231

~~TOP SECRET//NOFORN~~

~~TOP SECRET//NOFORN~~

with Sections 1277 and 5714, this process was again conducted to ensure that any information that could be presented in an UNCLASSIFIED format was provided as required.

~~(TS//NF)~~ However, these reviews confirmed yet again that the disclosure of additional details surrounding Mr. Khashoggi's murder would undermine U.S. intelligence sources and methods. (b)(1), (b)(3)

(b)(1), (b)(3) I have determined that the downgraded NICM (b)(3) is the lowest possible classification that can be given to this intelligence without significantly threatening the national security interests of the United States.

(U//~~FOUO~~) Finally, I have determined that there is only a marginal "public interest" argument for this declassification given the substantial public discourse on this topic, to include official actions and statements by the U.S. Government on this issue. These include:

- (U) U.S. Department of the Treasury economic sanctions of 18 November 2018, under Executive Order 13818 against 17 individuals believed to be involved in the murder of Mr. Khashoggi;
- (U) U.S. Secretary of State's 08 April 2019, use, in-part, of unclassified information to inform public designation 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;
- (U) The U.S. Senate's unanimous passage on 17 January 2019, of Senate Joint Resolution 69 citing attribution for the murder; and
- (U) The United Nations Human Rights Council's 17 June 2019, report: "Special Rapporteur on extrajudicial, summary or arbitrary executions: Investigation into the unlawful death of Mr. Jamal Khashoggi" citing no less than six human rights violations by the Kingdom of Saudi Arabia.

(U) If you have any questions, you may contact Legislative Affairs at (b)(3), (b)(6)

Sincerely,


John Ratcliffe

~~TOP SECRET//NOFORN~~

~~TOP SECRET//NOFORN~~

DIRECTOR OF NATIONAL INTELLIGENCE
WASHINGTON, DC

JUL 21 2020

The Honorable Ron Wyden
United States Senate
Washington, DC 20510

Senator Wyden:

(U) Thank you for your letter of 17 June 2020, regarding the report issued by the Office of the Director of National Intelligence (ODNI) pursuant to section 5714 of the National Defense Authorization Act for Fiscal Year 2020 (NDAA), P.L. 116-92.

~~(S//NF)~~ As you referenced in your letter, during my 05 May 2020 confirmation hearing, I committed to review all the underlying intelligence and the ODNI's prior responses related to Washington Post columnist Jamal Khashoggi. I have recently completed this review and have consulted with the leadership of the Intelligence Community (IC) elements that have contributed to the IC's understanding of Mr. Khashoggi's murder. ~~(b)(1), (b)(3)~~

(U//~~FOUO~~) Most critically, my review and conversations with other IC leaders confirmed that we have kept the U.S. Congress fully and currently informed on this issue as required by law. You will recall that the Committee's full membership has been briefed on the issue at the compartmented level and that the National Intelligence Council produced a downgraded memorandum (NICM ~~(b)(3)~~) in February of this year to ensure broader congressional interest in the issue was addressed.

(U//~~FOUO~~) I was also pleased to confirm that the process for declassifying the information required by Section 5714 was conducted consistent with law, IC policy, and applicable Executive Orders. This included appropriate consultations, assessments of risk to sources and methods, and the impact on future collections as specifically permitted by Section 5714(a). In response to your concerns about the ODNI's compliance with Section 5714, this process was again conducted to ensure that any information that could be presented in an UNCLASSIFIED format was provided as required.

~~(TS//NF)~~ However, these reviews confirmed yet again that the disclosure of additional details surrounding Mr. Khashoggi's murder would undermine U.S. intelligence sources and methods. ~~(b)(1), (b)(3)~~

~~(b)(1), (b)(3)~~ I have determined that the downgraded NICM ~~(b)(3)~~ is the lowest possible classification that can be given to this intelligence without significantly threatening the national security interests of the United States.

Classified By: ~~(b)(1), (b)(3)~~
Derived From: ODNI CG
Declassify On: 20451231

~~TOP SECRET//NOFORN~~

~~TOP SECRET//NOFORN~~

(U//~~FOUO~~) Finally, I have determined that there is only a marginal “public interest” argument for this declassification given the substantial public discourse on this topic, to include official actions and statements by the U.S. Government on this issue. These include:

- (U) U.S. Department of the Treasury economic sanctions of 18 November 2018, under Executive Order 13818 against 17 individuals believed to be involved in the murder of Mr. Khashoggi;
- (U) U.S. Secretary of State’s 08 April 2019, use, in-part, of unclassified information to inform public designation 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;
- (U) The U.S. Senate’s unanimous passage on 17 January 2019, of Senate Joint Resolution 69 citing attribution for the murder; and
- (U) The United Nations Human Rights Council’s 17 June 2019, report: “Special Rapporteur on extrajudicial, summary or arbitrary executions: Investigation into the unlawful death of Mr. Jamal Khashoggi” citing no less than six human rights violations by the Kingdom of Saudi Arabia.

(U) If you have any questions, you may contact Legislative Affairs at (b)(3), (b)(6)

Sincerely,


John Ratcliffe

~~TOP SECRET//NOFORN~~

~~TOP SECRET//NOFORN~~

DIRECTOR OF NATIONAL INTELLIGENCE
WASHINGTON, DC

JUL 21 2020

The Honorable Adam B. Schiff
Chairman
Permanent Select Committee on Intelligence
U.S. House of Representatives
Washington, DC 20515

Chairman Schiff:

(U) Thank you for your letter of 02 March 2020, regarding the report issued by the Office of the Director of National Intelligence (ODNI) pursuant to sections 1277 and 5714 of the National Defense Authorization Act for Fiscal Year 2020 (NDAA), P.L. 116-92.

~~(S//NF)~~ During my confirmation hearing on 05 May 2020, I committed to review all the underlying intelligence and the ODNI's prior responses related to Washington Post columnist Jamal Khashoggi. I have recently completed this review and have consulted with the leadership of the Intelligence Community (IC) elements that have contributed to the IC's understanding of Mr. Khashoggi's murder (b)(1), (b)(3)

(U//~~FOUO~~) Most critically, my review and conversations with other IC leaders confirmed that we have kept the U.S. Congress fully and currently informed on this issue as required by law. You will recall that the Committee's full membership has been briefed on the issue at the compartmented level and that the National Intelligence Council produced a downgraded memorandum (NICM (b)(3)) in February of this year to ensure broader congressional interest in the issue was addressed.

(U//~~FOUO~~) I was also pleased to confirm that the process for declassifying the information required by Sections 1277 and 5714 was conducted consistent with law, IC policy, and applicable Executive Orders. This included appropriate consultations, assessments of risk to sources and methods, and the impact on future collections as specifically permitted by Section 1277(b)(2) and Section 5714(a). In response to your concerns about the ODNI's compliance with Sections 1277 and 5714, this process was again conducted to ensure that any information that could be presented in an UNCLASSIFIED format was provided as required.

Classified By: (b)(3), (b)(6)
Derived From: ODNI CG
Declassify On: 20451231

~~TOP SECRET//NOFORN~~

~~TOP SECRET//NOFORN~~

~~(TS//NF)~~ However, these reviews confirmed yet again that the disclosure of additional details surrounding Mr. Khashoggi's murder would undermine U.S. intelligence sources and methods, (b)(1), (b)(3)

(b)(1), (b)(3) per Section 1277(a)(2). I have determined that the downgraded NICM (b)(3) is the lowest possible classification that can be given to this intelligence without significantly threatening the national security interests of the U.S.

(U//~~FOUO~~) Finally, I have determined that there is only a marginal "public interest" argument for this declassification given the substantial public discourse on this topic, to include official actions and statements by the U.S. Government on this issue. These include:

- (U) U.S. Department of the Treasury economic sanctions of 18 November 2018, under Executive Order 13818 against 17 individuals believed to be involved in the murder of Mr. Khashoggi;
- (U) U.S. Secretary of State's 08 April 2019, use, in-part, of unclassified information to inform public designation 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;
- (U) The U.S. Senate's unanimous passage on 17 January 2019, of Senate Joint Resolution 69 citing attribution for the murder; and
- (U) The United Nations Human Rights Council's 17 June 2019, report: "Special Rapporteur on extrajudicial, summary or arbitrary executions: Investigation into the unlawful death of Mr. Jamal Khashoggi" citing no less than six human rights violations by the Kingdom of Saudi Arabia.

(U) If you have any questions, you may contact Legislative Affairs at (b)(3), (b)(6)

Sincerely,


John Ratcliffe

Cc:

The Honorable Devin Nunes

~~TOP SECRET//NOFORN~~

AUDREY STRAUSS
Acting United States Attorney for the
Southern District of New York
By: NATASHA TELEANU
PETER ARONOFF
Assistant U.S. Attorneys



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

OPEN SOCIETY JUSTICE INITIATIVE,
Plaintiff,
v.

OFFICE OF THE DIRECTOR OF NATIONAL
INTELLIGENCE,
Defendant.

20 Civ. 06625 (PAE)

NOTICE OF MOTION FOR SUMMARY JUDGMENT

PLEASE TAKE NOTICE that, upon the accompanying Memorandum of Law in Support of Motion for Summary Judgment, as well as the declaration of Gregory M. Koch in support thereof, defendant the Office of the Director of National Intelligence (the “ODNI”), by its attorney, Audrey Strauss, Acting United States Attorney for the Southern District of New York, hereby moves this Court for an order pursuant to Federal Rule of Civil Procedure 56(a) entering summary judgment in favor of the ODNI.

Dated: November 9, 2020
New York, New York

Respectfully submitted,

AUDREY STRAUSS
Acting United States Attorney

By: /s/ Natasha W. Teleanu
NATASHA W. TELEANU
PETER ARONOFF
Assistant United States Attorneys

