

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

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ELECTRONIC PRIVACY		)
INFORMATION CENTER,		)
		)
Plaintiff,		)
		)
v.		)
		)
OFFICE OF THE DIRECTOR		)
OF NATIONAL INTELLIGENCE		)
		)
Defendant.		)
_____		)

Case No. 17-cv-0163 RC

**MOTION FOR SUMMARY JUDGMENT**

Pursuant to 5 U.S.C. § 552(b)(1), (3), Federal Rule of Civil Procedure 56, and Local Rule 7, Defendant, the Office of the Director National Intelligence (“ODNI” or “Defendant”) respectfully moves for summary judgment. The reasons for this Motion are set forth in the Memorandum of Points and Authorities in Support of Defendant’s Motion for Summary Judgment, the Statement of Material Facts as to Which There Is No Genuine Issue, and the Declaration of Edward Gistaro (as well as the exhibits thereto). A proposed order is filed concurrently herewith.

Dated: June 26, 2017

Respectfully submitted,

CHAD A. READLER  
Acting Assistant Attorney General

MARCIA BERMAN  
Assistant Branch Director

*/s/ Jennie L. Kneedler*  
JENNIE L. KNEEDLER  
Trial Attorney

United States Department of Justice  
Civil Division, Federal Programs Branch  
20 Massachusetts Ave., N.W.  
Washington, D.C. 20001  
Tel. (202) 305-8662  
Fax (202) 616-8470  
Email: [Jennie.L.Kneedler@usdoj.gov](mailto:Jennie.L.Kneedler@usdoj.gov)  
D.C. Bar # 500261

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Case No. 17-cv-0163 RC

**DEFENDANT’S STATEMENT OF MATERIAL FACTS**  
**AS TO WHICH THERE IS NO GENUINE ISSUE**

Pursuant to Local Rule 7(h)(1), Defendant respectfully submits the following statement of material facts as to which there is no genuine issue:

1. The Director of National Intelligence (“DNI”) serves as the head of the U.S. Intelligence Community (“IC”) and the principal advisor to the President and National Security Council for intelligence matters related to the national security. Declaration of Edward Gistaro (“Gistaro Decl.”) ¶ 5.

2. The National Security Act of 1947, as amended, created the Office of the Director of National Intelligence (“ODNI”) to assist the DNI in carrying out his responsibilities and duties. *Id.* ¶ 8.

3. In December of 2016, President Obama instructed the DNI, James Clapper, to prepare an intelligence report addressing the motivation and scope of Russian efforts to influence the 2016 U.S. presidential election. *Id.* ¶ 9. DNI Clapper in turn

assigned the task of preparing the report to the National Intelligence Council (“NIC”). *Id.* ¶ 10.

4. The NIC is a key component of the ODNI that is responsible for leading analysis across the Intelligence Community to inform policy deliberations. As the Deputy Director of National Intelligence for Intelligence Integration, Mr. Gistaro oversees the activities and operations conducted by the NIC. *Id.* ¶¶ 1, 10. National Intelligence Officers (“NIO”) work in the NIC and serve as principal subject matter experts to the DNI and national security decisionmakers. *Id.* ¶ 11.

5. The Vice Chair of the NIC supervised two NIOs with relevant subject matter expertise, and a team of experienced intelligence officers from the Central Intelligence Agency (“CIA”), the Federal Bureau of Investigation (“FBI”), and the National Security Agency (“NSA”), in assembling the intelligence report based on intelligence available to the IC as of December 29, 2016. *Id.* ¶¶ 12-14. The Vice Chair and the two NIOs are experts with respect to identifying information that, standing alone or working in concert with other information (including unclassified information), could jeopardize U.S. intelligence sources, methods, activities, and national security if released to the public. *Id.*

6. The report was completed on January 5, 2017 and was classified at the Top Secret level. The report was properly classified Top Secret in accordance with ODNI’s classification guidelines because it contained content that was classified by providing agencies as Top Secret. *Id.* ¶ 16.

7. On January 6, 2017, the U.S. Intelligence Community published a declassified version of the classified assessment. *Id.* ¶ 22. When President Obama

directed ODNI to prepare an intelligence report assessing Russian efforts to influence the 2016 US presidential election, DNI Clapper determined from the onset that the IC would proactively share with the public all information contained in the report that safely could be released without jeopardizing intelligence sources, methods, and activities. *Id.* ¶ 18. To that end, in December 2016, DNI Clapper directed the NIC to prepare a declassified version of the report for public release. *Id.* ¶ 19.

8. DNI Clapper decided to disseminate information to the public in a declassified report, as opposed to a redacted version of the classified report, because a declassified report would convey the greatest amount of information to the public without jeopardizing intelligence sources, methods, and activities. *Id.* ¶ 20a.

9. Releasing a redacted version of the classified report not only would have required redacting the classified portions of the report, but a significant amount of unclassified information would also have to have been redacted to fully protect U.S. intelligence sources, methods, and activities. To an experienced reader, such as a foreign intelligence analyst, the unclassified information, if left unredacted, would illustrate factual associations and relationships between the redacted and unredacted portions. These associations and relationships would then provide valuable, contextual clues to foreign intelligence organizations concerning the type, subject matter, and amount of classified intelligence the United States currently possesses or is capable of gathering. The only way to prevent this possibility would be to redact significant amounts, or even all, of the unclassified information to properly conceal and protect U.S. sources, methods, and activities. *Id.* ¶ 20b.

10. On the other hand, a declassified report would decontextualize the unclassified information, because the unredacted sections of the report would not be surrounded by, or filled with, conspicuously redacted portions. The unclassified content would have no association or relationship with the redacted content in a declassified version, and thus could be safely released in full to the American public without jeopardizing intelligence activities, sources, and methods. This resulted in a greater overall amount of information being made available to the public. *Id.* ¶ 20c.

11. The NIC worked on the classified report and the declassified report simultaneously. This gave the NIC time to carefully and thoughtfully consider, in consultation with contributing agencies, what information could be provided to the public without harming national security. *Id.* ¶ 21.

12. The declassified report contained the unclassified content of the classified report including all of the conclusions regarding Russian interference with the 2016 election. *Id.* ¶ 22.

13. On January 9, 2017, Plaintiff submitted a FOIA request to the ODNI for a copy of the report by the U.S. Intelligence Community “Assessing Russian Activities and Intentions in Recent U.S. Elections.” ODNI understood the request to seek a copy of the classified report. The request also sought a fee waiver and expedited processing. *See id.* ¶ 23 & Ex. 1.

14. In a letter dated January 17, 2017, ODNI acknowledged receipt of Plaintiff’s FOIA request on January 10, 2017, granted Plaintiff’s request for a fee waiver, and denied Plaintiff’s request for expedited processing. *Id.* ¶ 24 & Ex. 2.

15. After receiving Plaintiff's FOIA request and the filing of this action, the NIC re-evaluated the contents of the classified report to determine if it could be publicly released, with appropriate redactions. *Id.* ¶ 25.

16. The NIC subject matter experts and the Vice Chair concluded, based on their experience with classification standards, their direct knowledge of the sensitive information contained in the classified report, and their understanding of the capabilities of foreign intelligence operations to uncover classified information by pairing the declassified report with a partially, or even fully, redacted version of the classified report, that release of a redacted version of the classified report would assist foreign intelligence operations with developing and enhancing their understanding of U.S. intelligence sources, methods and activities. *Id.* ¶ 26. More specifically, release of a redacted report would be of particular assistance to Russian intelligence, which would use the declassified report and a redacted copy of the classified report to discern the volume of intelligence the United States possesses with respect to Russian attempts to influence the 2016 election. This would reveal the maturity of the United States' intelligence efforts and expose information about the Intelligence Community's capabilities, including sources and methods. *Id.*

17. In a letter dated May 2, 2017, ODNI responded to Plaintiff's FOIA request saying that it had located the document responsive to Plaintiffs' request, but that, "[a]fter a thorough review," ODNI determined that the document must be withheld in full pursuant to Exemptions 1 and 3. *Id.* ¶ 28 & Ex. 3. Specifically, the letter stated that the information was currently and properly classified pursuant to Executive Order 13526, Section 1.4(c), (d). *Id.*, Ex. 3. The May 2, 2017 letter identified the relevant Exemption

3 statute as the National Security Act of 1947, as amended, 50 U.S.C. § 3024(i)(1), which protects information pertaining to intelligence sources and methods. *Id.*

18. The Director of National Intelligence delegated Mr. Gistaro original classification authority at the Top Secret level. *See* Executive Order 13526 §§ 1.1(a)(1), 1.3(c); Gistaro Decl. ¶ 2. Mr. Gistaro determined that the classified report remains properly classified Top Secret, based on his experience, knowledge of the contents of the report, and understanding of the sensitive intelligence gathered, produced and provided to ODNI by the contributing agencies. *See* Gistaro Decl. ¶ 17.

19. Mr. Gistaro ensured that the procedural requirements of Executive Order 13526 were followed, including the proper identification and marking of the classified assessment. *See id.*

20. The information in the classified report is under the control of the United States Government. *Id.* ¶ 15. The intelligence provided by the CIA, FBI, and NSA for the classified report falls within the scope of one or more of four types of information. *Id.*

21. First, some of the information contained in the classified report consists of intelligence obtained from signal intelligence (SIGINT) collected by the NSA. The NSA produces SIGINT by collecting, processing, and analyzing foreign electromagnetic signals to obtain intelligence information necessary to the national defense, national security, and conduct of foreign affairs. The SIGINT provided to the NIC by the NSA for inclusion in the classified report qualifies as intelligence activities, sources, or cryptology, and as foreign activities of the United States, pursuant to Executive Order 13526 § 1.4(c) and (d), and was previously classified by the NSA as either Secret or Top

Secret. Revealing the SIGINT in the classified report to the public or to foreign authorities could reasonably be expected to cause serious or exceptionally grave danger to the national security. *Id.* ¶ 15a.

22. Second, some of the information contained in the classified report consists of intelligence gathered by clandestine human sources (HUMINT). The HUMINT provided to the NIC by the CIA for inclusion in the classified report qualifies as, or otherwise reveals, intelligence activities and sources, and foreign activities of the United States, pursuant to Executive Order 13526 § 1.4(c) and (d), and was previously classified by the CIA as either Secret or Top Secret. Clandestine human sources are uniquely situated to report on specific subjects and to provide critical information that cannot be obtained otherwise. The Intelligence Community takes all reasonable and necessary measures to ensure that human sources are not compromised because their exposure would subject them to capture, imprisonment, torture, and death. Such exposure would also impair the Intelligence Community's ability to recruit similarly situated individuals in the future. Release of the human intelligence in the classified report to the public or to foreign authorities could reasonably be expected to expose human intelligence sources to serious or exceptionally grave danger. *Id.* ¶ 15b.

23. Third, the classified report contains details that would disclose intelligence methods. Intelligence methods are the techniques, procedures, tradecrafts, and means by which the Intelligence Community accomplishes its mission. The intelligence provided to the NIC by the CIA, NSA, and FBI for inclusion in the classified report qualifies as, or otherwise reveals, intelligence activities and methods, as well as foreign activities of the United States, pursuant to Executive Order 13526 § 1.4(c) and (d), and was previously

classified by the CIA, NSA or FBI as either Secret or Top Secret. By their very nature, intelligence methods are revealing of intelligence sources and vice versa. Therefore, knowledge that a particular method is being employed can be used by foreign intelligence to pinpoint the availability and identity of a particular source or group of sources. It would also enable foreign intelligence to impair or capture human assets, counter U.S. intelligence efforts, and otherwise provide entities hostile to the United States with a threatening, and possibly decisive, advantage over U.S. national security. Release of the information in the classified report revealing intelligence methods to the public or to foreign authorities could reasonably be expected to cause serious or exceptionally grave danger to national security. *Id.* ¶ 15c.

24. Fourth, the classified report contains information regarding intelligence activities. Intelligence activities are the operations that the Intelligence Community conducts to protect and preserve U.S. national security. This intelligence provided to the NIC by the CIA, the NSA, and the FBI for inclusion in the classified report illustrates intelligence and/or foreign activities of the United States pursuant to Executive Order 13526 § 1.4(c) and/or (d), and was previously classified by the NSA, the CIA, or the FBI as either Secret or Top Secret. Activities rely on intelligence sources, embody intelligence methods, and reflect U.S. intelligence interests, objectives and capabilities. Knowledge of U.S. intelligence activities provides foreign governments with information that can assist them in detecting, tracking and exposing U.S. intelligence sources and methods, as well as impairing the United States' overall intelligence strategy. Release of the information in the report revealing intelligence activities to the public or to foreign

authorities could reasonably be expected to cause serious or exceptionally grave danger to the national security. *Id.* ¶ 15d.

25. The information falling within one or more of these four categories that was included in the classified report retains its original classification. *Id.* ¶ 15.

26. Secret and Top Secret information is interwoven with unclassified information throughout the classified report. *Id.* ¶ 31.

27. Even if the classified information were blocked out from the classified report, a qualified reviewer could still use the unclassified, unredacted portions, and the context they provide, to identify the nature and substance of the redacted portions, including, among other things, the relative strengths, availabilities, and maturity of U.S. human intelligence and SIGINT capabilities. By pairing a redacted version of the classified report with the contents of the declassified report, the subject matters of the redacted texts could be identified, and, from there, the volume of the redactions would reveal the relative strength and maturity of U.S. intelligence sources, methods, and activities. *Id.*

28. Even if the specific contents of the redacted portions could not be fully identified by foreign intelligence organizations, this would still constitute a significant and detrimental exposure of U.S. intelligence activities, sources, and methods. It would also reveal the comparative weight of U.S. human intelligence and signal intelligence capabilities. For example, it is likely that a skilled reviewer could determine whether the United States currently has human or signal intelligence sources in specific areas. Russia would be in a better position to allocate its counter-intelligence resources to address critical areas where U.S. intelligence capabilities are revealed to be the strongest (as

evidenced by the amount and the volume of the redacted text) and could also tailor its countermeasures to account for the type of intelligence the United States has been able to collect. *Id.*

29. Public revelation of the types of information sought by the Plaintiff could result in the compromise of existing U.S. intelligence sources and methods, would give the Russians the opportunity to change their tactics to avoid U.S. detection, could prove fatal to U.S. human intelligence sources, and would roll-back human intelligence, signal intelligence, and other intelligence activities designed to protect U.S. national security. *Id.* ¶ 33.

30. Based on his 27 years of experience as a U.S. intelligence officer, including his knowledge and experience with intelligence operations, classification, and established methods of gleaning useful intelligence information from seemingly benign, innocuous records (or portions thereof), it is Mr. Gistaro's reasoned opinion that release of a properly redacted version of the classified report would provide the American public with no information not already available in the declassified report, but would certainly provide foreign intelligence services with valuable information that could be used, alone or in conjunction with other information, to jeopardize the physical safety of U.S. human intelligence sources, uncover U.S. intelligence methods, and identify, understand, and impair critical U.S. intelligence activities. Mr. Gistaro agrees that the NIC's conclusion that release of the classified report, though heavily, or even fully, redacted, would be very helpful to Russian intelligence in their ongoing efforts to interfere with the U.S. electoral process, and would jeopardize the safety and effectiveness of the intelligence

community's critical, valuable, and in some cases, vulnerable sources, methods, and activities, is reasonable. *Id.* ¶¶ 30, 32, 34.

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Case No. 17-cv-0163 RC

**DEFENDANT’S MEMORANDUM OF POINTS AND AUTHORITIES IN  
SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

Respectfully submitted: June 26, 2017

CHAD A. READLER  
Acting Assistant Attorney General

MARCIA BERMAN  
Assistant Branch Director

*/s/ Jennie L. Kneedler*  
JENNIE L. KNEEDLER  
Trial Attorney  
United States Department of Justice  
Civil Division, Federal Programs Branch  
20 Massachusetts Ave., N.W.  
Washington, D.C. 20001  
Tel. (202) 305-8662  
Fax (202) 616-8470  
Email: Jennie.L.Kneedler@usdoj.gov  
D.C. Bar # 500261

*Attorneys for Defendant*

## I. INTRODUCTION

This action concerns a Freedom of Information Act (“FOIA”) request by Plaintiff, the Electronic Privacy Information Center (“EPIC” or “Plaintiff”), to the Office of the Director for National Intelligence (“ODNI”) for a copy of the classified assessment of the U.S. Intelligence Community (“IC”) assessing Russian activities and intentions in recent U.S. elections.

On January 6, 2017, the U.S. Intelligence Community published a version of the assessment, describing it as “a declassified version of a highly classified assessment that has been provided to the President and to recipients approved by the President.” Intelligence Community Assessment, “Assessing Russian Activities and Intentions in Recent U.S. Elections” (ICA 2017-01D), Background at 1 (Jan. 6, 2017) (“Declassified Assessment”), *available at* [https://www.dni.gov/files/documents/ICA\\_2017\\_01.pdf](https://www.dni.gov/files/documents/ICA_2017_01.pdf). This declassified version was prepared so that the IC could share with the public all information contained in the classified report that could be safely released without jeopardizing intelligence sources, methods, and activities. *See* Declaration of Edward Gistaro (“Gistaro Decl.”) ¶ 20.

After receiving Plaintiff’s FOIA request, subject matter experts in the National Intelligence Council (“NIC”), which prepared the classified assessment, re-evaluated the contents of the classified report to determine if any portion of it could be publicly released. Gistaro Decl. ¶¶10-14, 25. These experts concluded that release of a redacted version of the classified report would assist foreign intelligence operations with developing and enhancing their understanding of U.S. intelligence sources, methods, and activities, and thus could reasonably be expected to cause serious or exceptionally grave

damage to the national security. *Id.* ¶¶ 26-27. Therefore, ODNI properly denied Plaintiff’s request in full pursuant to Exemptions 1 and 3, and, as discussed in further detail below, Defendant’s Motion for Summary Judgment should be granted.

## **II. BACKGROUND**

### **A. Preparation of the Classified Assessment**

In December of 2016, President Obama instructed the Director of National Intelligence (“DNI”), James Clapper,<sup>1</sup> to prepare an intelligence report addressing the motivation and scope of Russian efforts to influence the 2016 U.S. presidential election. Gistaro Decl. ¶ 9. DNI Clapper in turn assigned the task of preparing the report to the NIC, a key component of the ODNI<sup>2</sup> that is responsible for leading analysis across the Intelligence Community to inform policy deliberations. *Id.* ¶ 10. In his capacity as Deputy Director of National Intelligence for Intelligence Integration, Mr. Gistaro oversees the activities and operations conducted by the NIC. *Id.*

The Vice Chair of the NIC supervised two national intelligence officers (“NIO”)<sup>3</sup> with relevant subject matter expertise, and a team of experienced intelligence officers from the Central Intelligence Agency (“CIA”), the Federal Bureau of Investigation (“FBI”), and the National Security Agency (“NSA”), in assembling the report based on

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<sup>1</sup> The DNI serves as the head of the U.S. Intelligence Community and the principal advisor to the President and National Security Council for intelligence matters related to the national security. *Id.* ¶ 5; *see also id.* ¶¶ 6-7 (describing the responsibilities and authorities of ODNI).

<sup>2</sup> The National Security Act of 1947, as amended, created the ODNI to assist the DNI in carrying out his responsibilities and duties. *Id.* ¶ 8.

<sup>3</sup> National Intelligence Officers work in the NIC and serve as principal subject matter experts to the DNI and national security decisionmakers. *Id.* ¶ 11.

intelligence available to the IC as of December 29, 2016. *Id.* ¶¶ 12-14. The Vice Chair and the two NIOs are experts with respect to identifying information that, standing alone or working in concert with other information (including classified information), could jeopardize U.S. intelligence sources, methods, activities and national security if released to the public. *Id.*

The report was completed on January 5, 2017 and was classified at the Top Secret level because it contains information classified by other intelligence agencies as Top Secret, which, if revealed to unauthorized recipients, could reasonably be expected to endanger U.S. intelligence assets, impair U.S. intelligence activities, and otherwise cause exceptionally grave damage to the national security of the United States. *Id.* ¶¶ 15-17 (discussing types of information, and citing, *inter alia*, Executive Order 13,526 § 1.4(c), (d)).

**B. Preparation of the Declassified Assessment**

On January 6, 2017, the U.S. Intelligence Community published a declassified version of the classified report. *Id.* ¶ 22. When President Obama instructed ODNI to prepare an intelligence report assessing Russian efforts to influence the 2016 US presidential election, DNI Clapper determined from the onset that the IC would proactively share with the public all information contained in the report that safely could be released without jeopardizing intelligence sources, methods, and activities. *Id.* ¶ 18. To that end, in December 2016, DNI Clapper directed the NIC to prepare a declassified version of the report for public release. *Id.* ¶ 19.

DNI Clapper's decision to prepare a declassified report, as opposed to a redacted version of the classified report, was based on which type of release would convey the

greatest amount of information to the public without jeopardizing intelligence sources, methods, and activities. The consensus within ODNI was that releasing a redacted version of the classified report would result in less information being made public. Not only would it have required redacting the classified portions of the report, but a significant amount of unclassified information would also have to have been redacted to fully protect U.S. intelligence sources, methods, and activities. To an experienced reader, such as a foreign intelligence service analyst, the unclassified information, if left unredacted, would illustrate factual associations and relationships between the redacted and unredacted portions. These associations and relationships would then provide valuable, contextual clues to foreign intelligence organizations concerning the type, subject matter, and amount of classified intelligence the United States currently possesses or is capable of gathering. The only way to prevent this possibility would be to redact significant amounts, or even all, of the unclassified information as well, to properly conceal and protect U.S. sources, methods and activities. *Id.* ¶ 20a, b.

On the other hand, a declassified report would decontextualize the unclassified information, because the unredacted sections of the report would not be surrounded by, or filled with, conspicuously redacted portions. The unclassified content would have no association or relationship with the redacted content in a declassified version, and thus could be safely released in full to the American public without jeopardizing intelligence activities, sources, and methods. This would result in a greater overall amount of information being made available to the American public. *Id.* ¶ 20c.

The NIC worked on the classified report and the declassified report simultaneously, which provided it with time to carefully and thoughtfully consider, in

consultation with contributing agencies, what information could be provided to the public without harming national security. *Id.* ¶ 21. The declassified report contains the unclassified content of the classified report, including all of the conclusions regarding Russian interference with the U.S. 2016 presidential election. *Id.* ¶ 22; *see also* Declassified Assessment at i (“This report is a declassified version of a highly classified assessment. This document’s conclusions are identical to the highly classified assessment, but this document does not include the full supporting information, including specific intelligence on key elements of the influence campaign. Given the redactions, we made minor edits purely for readability and flow.”).

**C. Plaintiff’s FOIA Request and This Action**

On January 9, 2017, Plaintiff submitted a FOIA request to the ODNI seeking a copy of the report by the U.S. Intelligence Community “Assessing Russian Activities and Intentions in Recent U.S. Elections.” The request also sought a fee waiver and expedited processing. *See* Gistaro Decl. ¶ 23 & Ex. 1. In a letter dated January 17, 2017, ODNI acknowledged receipt of Plaintiff’s FOIA request on January 10, 2017, granted Plaintiff’s request for a fee waiver, and denied Plaintiff’s request for expedited processing. *Id.* ¶ 24 & Ex. 2.

On January 25, 2017, Plaintiff filed its Complaint, ECF No. 1, and on February 10, 2017, it filed the Amended Complaint, ECF No. 6. Pursuant to a schedule proposed by the parties, this Court ordered that Defendant process and release all non-exempt portions of the record responsive to Plaintiff’s FOIA request on or before May 3, 2017. Minute Order (Apr. 3, 2017).

**D. The ODNI's Processing of the FOIA Request**

After receiving Plaintiff's FOIA request and the filing of this action, the NIC re-evaluated the contents of the classified report to determine if it could be publicly released, with appropriate redactions. Gistaro Decl. ¶ 25. The NIC subject matter experts, including the Vice Chair, concluded, based on their experience with classification standards, their direct knowledge of the sensitive information contained in the classified report, and their understanding of the capabilities of foreign intelligence operations to uncover classified information by pairing the declassified report with a partially, or even fully, redacted version of the classified report, that release of a redacted version of the classified report would assist foreign intelligence operations with developing and enhancing their understanding of U.S. intelligence sources, methods and activities. More specifically, release of a redacted report would be of particular assistance to Russian intelligence, which would use the declassified report and a redacted copy of the classified report to discern the volume of intelligence the United States possesses with respect to Russian attempts to influence the 2016 election. This would reveal the maturity of U.S. intelligence's efforts and expose information about the Intelligence Community's capabilities, including sources and methods. *Id.* ¶ 26.

In a letter dated May 2, 2017, ODNI responded to Plaintiff's FOIA request saying that it had located the document responsive to Plaintiffs' request, but that, "[a]fter a thorough review," ODNI determined that the document must be withheld in full pursuant to Exemptions 1 and 3. Gistaro Decl. ¶ 28 & Ex. 3. Specifically, the letter stated that the information was currently and properly classified pursuant to Executive Order 13526, Section 1.4(c), (d). *Id.* Exemption 3 applies to information exempt from disclosure by

statute. *Id.* The May 2, 2017 letter identified the relevant statute as the National Security Act of 1947, as amended, 50 U.S.C. § 3024(i)(1), which protects information pertaining to intelligence sources and methods. *Id.*

### **III. ARGUMENT**

#### **A. Legal Standard**

“Most FOIA cases can be resolved on summary judgment.” *Elec. Privacy Info. Ctr. v. Dep’t of Justice*, 82 F. Supp. 3d, 307, 314 (D.D.C. 2015). A court reviews an agency’s response to a FOIA request *de novo*. 5 U.S.C. § 552(a)(4)(B). “The defendant in a FOIA case must show that its search for responsive records was adequate, that any exemptions claimed actually apply, and that any reasonably segregable non-exempt parts of records have been disclosed after redaction of exempt information.” *Light v. DOJ*, 968 F. Supp. 2d 11, 23 (D.D.C. 2013).

#### **B. The ODNI Conducted an Adequate Search**

A defendant agency is entitled to summary judgment in a FOIA case with respect to the adequacy of its search if the agency shows “that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.” *Oglesby v. U.S. Dep’t of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). Here, ODNI understood Plaintiff to be seeking a copy of the classified report, and ODNI located it. Gistaro Decl. ¶ 23. Therefore, no additional search was required.

#### **C. ODNI Properly Withheld the Responsive Record Pursuant to Applicable Exemptions**

The 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) (citation omitted).

Congress recognized “that legitimate governmental and private interests could be harmed by release of certain types of information and provided nine specific exemptions under which disclosure could be refused.” *FBI v. Abramson*, 456 U.S. 615, 621 (1982). While these exemptions are to be “narrowly construed,” *id.* at 630, courts must not fail to give them “meaningful reach and application.” *John Doe*, 493 U.S. at 152.

“An agency that has withheld responsive documents pursuant to a FOIA exemption can carry its burden to prove the applicability of the claimed exemption by affidavit.” *Larson v. Dep’t of State*, 565 F.3d 857, 862 (D.C. Cir. 2009). “Summary judgment is warranted on the basis of agency affidavits when the affidavits describe the justifications for nondisclosure with reasonably specific detail . . . and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.” *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007) (quotations omitted). “Ultimately, an agency’s justification for invoking a FOIA exemption is sufficient if it appears ‘logical’ or ‘plausible.’” *Id.* at 374-75 (citation omitted).

Here, the information withheld “implicat[es] national security, a uniquely executive purview.” *Ctr. for Nat’l Sec. Studies v. DOJ*, 331 F.3d 918, 926-27 (D.C. Cir. 2003) (“both the Supreme Court and this Court have expressly recognized the propriety of deference to the executive in the context of FOIA claims which implicate national security”); *see also Larson*, 565 F.3d at 865 (“Today we reaffirm our deferential posture in FOIA cases regarding the ‘uniquely executive purview’ of national security.”). The DC Circuit has “consistently deferred to executive affidavits predicting harm to the

national security, and have found it unwise to undertake searching judicial review.” *Ctr. for Nat’l Sec. Studies*, 331 F.3d at 927.

Defendant is entitled to summary judgment with regard to its application of Exemptions 1 and 3 to the contents of the classified report because the Gistaro Declaration provides detailed justifications for the withholding of the information contained therein.

***1. The ODNI Properly Withheld Information Pursuant to Exemption 1***

First, ODNI properly withheld the classified report pursuant to FOIA Exemption 1. This exemption protects from disclosure 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). Pursuant to Executive Order 13526, which “prescribes a uniform system for classifying, safeguarding, and declassifying national security information,” an agency may classify information if 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 United States Government;
3. the information falls within one or more of the categories of information listed in section 1.4 of [the Executive Order]; and
4. the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, . . . and the original classification authority is able to identify or describe the damage.

“Classified National Security Information,” Executive Order 13526 § 1.1(a), 75 Fed. Reg. 707.

A court “accord[s] substantial weight to an agency’s affidavit concerning the details of the classified status of the disputed record because the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects [*sic*] might occur as a result of a particular classified record.” *Larson*, 565 F.3d at 864 (quotation omitted); *see also Am. Civil Liberties Union v. U.S. DOD*, 628 F.3d 612, 619 (D.C. Cir. 2011) (“courts lack the expertise necessary to second-guess such agency opinions in the typical national security FOIA case”); *Ctr. for Nat’l Sec. Studies*, 331 F.3d at 927 (“[W]e have consistently deferred to executive affidavits predicting harm to the national security, and have found it unwise to undertake searching judicial review.”).

The Gistaro Declaration demonstrates that the ODNI has adhered to the procedures set forth in Executive Order 13526 in determining that the information in the classified assessment is indeed classified. *See* Gistaro Decl. ¶¶ 15-17. The Director of National Intelligence has delegated to Mr. Gistaro original classification and declassification authority at the Top Secret Level. *See* Executive Order 13526 §§ 1.1(a)(1), 1.3(c); Gistaro Decl. ¶ 2. Mr. Gistaro reviewed the classified report and determined that it remains currently and properly classified Top Secret, based on classification determinations made by other intelligence agencies that provided the Secret and Top Secret contents of the report. Gistaro Decl. ¶¶ 15-17. Mr. Gistaro also ensured that the procedural requirements of Executive Order 13526 were followed, including the proper identification and marking of the classified assessment. *See id.* ¶¶ 16-17.

The classified report also meets the substantive requirements of Executive Order 13526. The information in the classified report is under the control of the United States

Government. *Id.* ¶ 15. The Gistaro Declaration also explains that the intelligence provided by the CIA, FBI and NSA for inclusion in the classified report falls within the scope of one or more of four types of information, all of which qualify as information regarding intelligence activities, intelligence sources or methods, or cryptology, and/or foreign activities of the United States. It further explains that the report was classified at the Top Secret level because it contains information that, if released to unauthorized recipients, could reasonably be expected to cause serious or exceptionally grave damage to the national security of the United States. *See id.* ¶¶ 15-17; Exec. Order 13526 § 1.2(a)(1), (2) (defining Top Secret and Secret classification levels); § 1.4(c), (d) (describing classification categories for intelligence activities, intelligence sources or methods, or cryptology, and foreign activities of the United States); *see also* 32 C.F.R. § 2001.21(b)(2) (“For documents containing information classified at more than one level, the overall marking shall be the highest level.”). Mr. Gistaro determined that the classified report remains properly classified Top Secret, based on his experience, knowledge of the contents of the report, and understanding of the sensitive intelligence gathered, produced and provided to ODNI by the contributing agencies. *See* Gistaro Decl. ¶ 17.

First, some of the information contained in the classified report consists of intelligence obtained from signal intelligence (SIGINT) collected by the NSA. The NSA produces SIGINT by collecting, processing, and analyzing foreign electromagnetic signals to obtain intelligence information necessary to the national defense, national security, and conduct of foreign affairs. The SIGINT provided to the NIC by the NSA for inclusion in the classified report qualifies as intelligence activities, sources or

cryptology, and as foreign activities of the United States, pursuant to Executive Order 13526 § 1.4(c), (d), and was previously classified by NSA at the Secret or Top Secret level. Release of the classified SIGINT in the report to the public or to foreign authorities could reasonably be expected to cause serious or exceptionally grave danger to national security. Gistaro Decl. ¶ 15a.

Second, some of the information contained in the report consists of intelligence gathered by clandestine human sources. These individuals are often uniquely situated to report on specific subjects and to provide critical information that cannot otherwise be obtained. The human intelligence provided to the NIC by the CIA for inclusion in the classified report qualifies as, or otherwise reveals, intelligence activities and sources, and foreign activities of the United States, pursuant to Executive Order 13526 § 1.4(c), (d), and was previously classified by the CIA at the Secret or Top Secret level. The Intelligence Community takes necessary measures to ensure that human sources are not compromised because their exposure would subject them to capture, imprisonment, torture, and death. Such exposure would also impair the Intelligence Community's ability to recruit similarly situated individuals in the future. Release of the classified human intelligence in the report to the public or foreign authorities could reasonably be expected to expose human intelligence sources to serious or exceptionally grave danger and would present an equally serious or exceptionally grave danger to national security. *Id.* ¶ 15b.

Third, the report contains details that would disclose intelligence methods – the techniques, procedures, tradecrafts, and means by which the Intelligence Community accomplishes its mission. The intelligence provided to the NIC by the CIA, the FBI, and

the NSA for inclusion in the classified report qualifies as, or otherwise reveals, intelligence activities and methods, as well as foreign activities of the United States, pursuant to Executive Order 13526 § 1.4(c), (d), and was previously classified by the CIA, NSA, or FBI at the Secret or Top Secret level. By their very nature, intelligence methods are revealing of intelligence sources and vice versa. Therefore, knowledge that a particular method is being employed can be used by foreign intelligence to pinpoint the availability and identity of a particular source or group of sources. It would also enable foreign intelligence to impair or capture human assets, counter U.S. intelligence efforts, and otherwise provide entities hostile to the United States with a threatening, and possibly decisive, advantage over U.S. national security. Release of the information revealing intelligence methods to the public or foreign authorities could reasonably be expected to cause serious or exceptionally grave danger to national security. *Id.* ¶ 15c.

And fourth, the classified report contains information regarding intelligence activities – the operations that the Intelligence Community conducts to protect and preserve U.S. national security. The intelligence included in the classified report that was provided to the NIC by the CIA, the FBI, and the NSA illustrates intelligence and/or foreign activities of the United States pursuant to Executive Order 13526 § 1.4(c) and (d), and was previously classified by the CIA, the NSA, or the FBI as either Secret or Top Secret. Activities rely on intelligence sources, embody intelligence methods, and reflect U.S. intelligence interests, objectives and capabilities. Knowledge of U.S. intelligence activities provides foreign governments with information that can assist them in detecting, tracking and exposing U.S. intelligence sources and methods, as well as impairing the United States' overall intelligence strategy. Release of the information in

the report revealing intelligence activities to the public or to foreign authorities could reasonably be expected to cause serious or exceptionally grave danger to national security. *Id.* ¶ 15d.

Given the subject matter of the classified report, as well as the nature of the intelligence contained therein, the ODNI's justifications for invoking FOIA Exemption 1 with respect to the types of information discussed above are certainly logical and plausible, especially given the deference afforded to agency affidavits predicting harm to the national security. *See Larson*, 565 F.3d at 862, 865; Gistaro Decl. ¶ 33 (saying public revelation of the types of information sought by the Plaintiff could result in the compromise of existing U.S. intelligence sources and methods, would give the Russians the opportunity to change their tactics to avoid U.S. detection, could prove fatal to U.S. human intelligence sources, and would roll-back human intelligence, signal intelligence, and other intelligence activities designed to protect U.S. national security).<sup>4</sup> Therefore, the ODNI has sustained its burden of justifying withholding the report pursuant to Exemption 1. *See Larson*, 565 F.3d at 863-70 (holding that the CIA and the NSA sufficiently demonstrated that information regarding intelligence sources and signal intelligence was properly classified, without needing to review a supplemental classified declaration proffered by the NSA).

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<sup>4</sup> If the Court concludes that ODNI has not supplied sufficient justifications for withholding this information, Defendant can provide a classified declaration for the Court's *in camera*, *ex parte* review. *Arieff v. U.S. Dep't of Navy*, 712 F.2d 1462, 1469 (D.C. Cir. 1983) (authorizing review of *in camera* declarations, when necessary, in FOIA cases).

**2. The ODNI Properly Withheld Information Pursuant to Exemption 3**

Exemption 3 permits agencies to withhold from disclosure records that are “specifically exempted from disclosure by statute.” 5 U.S.C. § 552(b)(3). Under this exemption, the ODNI “need only show that the statute claimed is one of exemption as contemplated by Exemption 3 and that the withheld material falls within the statute.”

*Larson*, 565 F.3d at 865.

In this case, the ODNI invokes Section 102A(i)(1) of the National Security Act of 1947, as amended (now codified at 50 U.S.C. § 3024(i)(1)) which requires the Director of National Intelligence to “protect intelligence sources and methods from unauthorized disclosure.” *See also* Gistaro Decl. ¶ 30. It is well established that Section 102A(i)(1) is an exemption 3 statute. *See Larson*, 565 F.3d at 865 (referencing 50 U.S.C. § 403–1(i)(1), now codified at 50 U.S.C. § 3024(i)(1)) (citation omitted); *see also DiBacco v. U.S. Army*, 795 F.3d 178, 183, 197 (D.C. Cir. 2015) (same). In fact, the Supreme Court has recognized the “wide-ranging authority” provided by the National Security Act to protect intelligence sources and methods. *See CIA v. Sims*, 471 U.S. 159, 169-70, 177 (1985). Thus, the only remaining question is whether the withheld material relates to intelligence sources and methods. The discussion in the Gistaro Declaration demonstrates that it does, by explaining the information contained in the classified report regarding signal intelligence sources, human intelligence sources, intelligence methods, and intelligence activities. Gistaro Decl. ¶¶ 15, 20b, 30; *see also Larson*, 565 F.3d at 865, 868 (“easily” concluding, based on agency affidavits, that withheld information related to intelligence sources and methods, and thus was properly withheld under

Exemption 3). Therefore, the ODNI has properly withheld information pursuant to Exemption 3.

**D. The ODNI Has Demonstrated that the Entire Classified Assessment Must Be Withheld in Full**

FOIA requires 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). ODNI has shown that no portion of the classified report can be released without jeopardizing national security.

As explained above, in December 2016 DNI Clapper directed the NIC to prepare a declassified version of the classified report because he determined that the IC would proactively share with the public all information contained in the report that safely could be released without jeopardizing intelligence sources, methods, and activities. Gistaro Decl. ¶¶ 18-20.

DNI Clapper decided to disseminate information to the public in a separate declassified report, as opposed to a redacted version of the classified report, because, in order to fully protect U.S. intelligence sources, methods, and activities, a significant amount of unclassified information in the classified report would also need to be redacted. To an experienced reader, such as a foreign intelligence service analyst, the unclassified information, if left unredacted, would illustrate factual associations and relationships between the redacted and unredacted portions. These associations and relationships would then provide valuable, contextual clues to foreign intelligence organizations concerning the type, subject matter, and amount of classified intelligence the United States currently possesses or is capable of gathering. The only way to prevent

this possibility would be to redact significant amounts, or even all, of the unclassified information to properly conceal and protect U.S. sources, methods, and activities. *Id.* ¶ 20b.

On the other hand, a declassified report would decontextualize the unclassified information, because the unredacted sections of the report would not be surrounded by, or filled with, conspicuously redacted portions. The unclassified content would have no association or relationship with the redacted content in a declassified version, and thus could be safely released in full to the American public without jeopardizing intelligence activities, sources, and methods. This would result in a greater overall amount of information being made available to the American public. *Id.* ¶ 20c.

The NIC worked on the classified report and the declassified report simultaneously, which provided it with time to carefully and thoughtfully consider, in consultation with contributing agencies, what information could be provided to the public without harming national security. *Id.* ¶ 21. The declassified report contained the unclassified content of the classified report including all of the conclusions regarding Russian interference with the 2016 U.S. presidential election. *Id.* ¶ 22.

Moreover, the NIC re-evaluated the contents of the classified report after receiving Plaintiff's FOIA request and the filing of this action, to determine if it could be publicly released, with appropriate redactions. *Id.* ¶ 25. The NIC subject-matter experts, including the Vice Chair, concluded, based on their experience with classification standards, their direct knowledge of the sensitive information contained in the classified report, and their understanding of the capabilities of foreign intelligence operations to uncover classified information by pairing the declassified report with a partially, or even

fully, redacted version of the classified report, that release of a redacted version of the classified report would assist foreign intelligence operations with developing and enhancing their understanding of U.S. intelligence sources, methods and activities. More specifically, release of a redacted report would be of particular assistance to Russian intelligence, which would use the declassified report and a redacted copy of the classified report to discern the volume of intelligence the United States possesses with respect to Russian attempts to influence the 2016 election. This would reveal the maturity of the United States' intelligence efforts and expose information about the Intelligence Community's capabilities, including sources and methods, that could reasonably be expected to cause serious or exceptionally grave danger to national security. *Id.* ¶ 26.

In his capacity as the Deputy Director of National Intelligence for Intelligence Integration, Mr. Gistaro oversees the activities and operations conducted by the NIC. *Id.* ¶ 10. Based on his 27 years of experience as an intelligence officer, and in his capacity as an original classification authority, Mr. Gistaro agrees that a heavily or fully redacted version of the classified report cannot be released without jeopardizing national security information properly classified as Secret or Top Secret. *Id.* ¶ 30.

Specifically, Mr. Gistaro, who reviewed both reports, notes that, within the classified report, Secret and Top Secret information is interwoven with unclassified information throughout the document. Even if the classified information were blocked out, a qualified reviewer could still use the unclassified, unredacted portions, and the context they provide, to identify the nature and substance of the redacted portions, including the relative strengths, availabilities, and maturity of U.S. human intelligence and SIGINT capabilities. This could be readily achieved by pairing a redacted version of

the classified report with the contents of the unclassified report. Through this pairing, the subject matters of the redacted texts could be identified, and from there, the volume of the redactions would reveal the relative strength and maturity of U.S. intelligence sources, methods, and activities. *Id.* ¶¶ 30-31.

Even if the specific content of the redacted portions could not be fully identified by foreign intelligence organizations, it would still constitute a significant and detrimental exposure of U.S. intelligence activities, sources, and methods because a redacted report would reveal the comparative weight of the United States' human intelligence and signal intelligence capabilities. For example, a skilled reviewer could determine whether the United States currently has human or signal intelligence sources in specific areas. Russia would also be in a better position to allocate its counterintelligence resources to address critical areas where U.S. intelligence capabilities are revealed to the strongest (as evidenced by the amount and volume of redacted text) and could tailor its countermeasures to account for the type of intelligence the United States has been able to collect. *Id.*; see *Larson*, 565 F.3d at 864 (“Minor details of intelligence information may reveal more information than their apparent insignificance suggests because much like a piece of jigsaw puzzle, each detail may aid in piecing together other bits of information even when the individual piece is not of obvious importance in itself.”); *Sims*, 471 U.S. at 178 (cautioning that “[w]hat may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context”); *Ctr. for Nat’l Sec. Studies*, 331 F.3d at 928 (noting that “courts have relied on similar mosaic arguments in the context of national security”).

Based on his 27 years of experience as a U.S. intelligence officer, including his knowledge and experience with intelligence operations, classification, and established methods of gleaning useful intelligence information from seemingly benign, innocuous records (or portions thereof), it is Mr. Gistaro's reasoned opinion that release of a properly redacted version of the classified report would provide the American public with no information not already available in the declassified report, but would certainly provide foreign intelligence services with valuable information that could be used, alone or in conjunction with other information, to jeopardize the physical safety of U.S. human intelligence sources, uncover U.S. intelligence methods, and identify, understand, and impair critical U.S. intelligence activities. Mr. Gistaro agrees that the NIC's conclusion that release of the classified report, though heavily, or even fully, redacted, would be very helpful to Russian intelligence in their ongoing efforts to interfere with the U.S. electoral process, and would jeopardize the safety and effectiveness of the intelligence community's critical, valuable, and in some cases, vulnerable sources, methods, and activities, is reasonable. Gistaro Decl. ¶¶ 32, 34.

Therefore, the ODNI has demonstrated that release of a redacted version of the classified report would cause serious or exceptionally grave damage to U.S. intelligence efforts and national security. *Id.* ¶ 34; *see Johnson v. Exec. Office for U.S. Attorneys*, 310 F.3d 771, 776-77 (D.C. Cir. 2002) (agency demonstrated there was no reasonably segregable non-exempt information where it submitted affidavit showing that agency had conducted line-by-line review of each document withheld in full); *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007) ("Agencies are entitled to a

presumption that they complied with the obligation to disclose reasonably segregable material.”). Defendant’s Motion for Summary Judgment should be granted.

**IV. CONCLUSION**

For the foregoing reasons, the Court should grant Defendant’s Motion for Summary Judgment.



National Security Archive,  
Suite 701, Gelman Library, The George Washington University,  
2130 H Street, NW, Washington, D.C., 20037,  
Phone: 202/994-7000, Fax: 202/994-7005, [nsarchiv@gwu.edu](mailto:nsarchiv@gwu.edu)