IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER Plaintiff, v. OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, Defendant.	Case No. 17-cv-0163 RC

PLAINTIFF'S REPLY IN SUPPORT OF THE CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiff Electronic Privacy Information Center ("EPIC") respectfully submits the following Reply in support of the Cross-motion for Summary Judgment. Neither the Gistaro declaration nor the Razsi declaration provide an adequate basis to sustain the withholding of the contents of the entire document sought by EPIC, a document that has been previously excerpted and released by the agency itself. The agency also misconstrues the central purpose of the FOIA when it attempts to characterize the original document that is central to this dispute as a "different format" from an edited version the agency chose to release. The agency's generic "national security" claims fail to rebut its obligation to release "reasonable segregable" portions of records. Nor does the suggestion that "sources and methods" (which EPIC does not seek) may be contained in the report obviate the obligation to release those sections of the Complete Assessment that describe the scope of the Russian cyber attack on the United States, information that should be made fully available to the American public.

ARGUMENT

Despite the ODNI's attempt to recast a legal disclosure obligation as a "penalty" for the agency, Def.'s Opp'n 1, EPIC only seeks the agency's compliance with the Freedom of Information Act. In particular, EPIC seeks public disclosure of segregable portions of a single record that has been the focus of extraordinary public interest: the report detailing a foreign power's attack on the democratic processes of United States. The ODNI continues to take the extreme position that no part of the Complete Assessment may be released to EPIC, despite the fact that the agency has previously released excerpts from the report.

The agency's arguments should be rejected for three reasons. First, the ODNI ignored the waiver affected by the release of the Public Assessment, Office of the Dir. of Nat'l Intelligence, *Assessing Russian Activities and Intentions in Recent US Elections* (2017), Ex. 1. Second, none of the cases cited by the agency permit the withholding-in-full of a document that the agency has conceded contains substantial unclassified and declassified material. Finally, the agency has not provided a sufficiently detailed description that would permit EPIC and the Court to evaluate the basis of the agency's claims. The Court should therefore conduct *in camera* review to ensure that all unclassified and declassified segregable material is released to the public, in accordance with the FOIA.

I. The ODNI has not established a legal basis to withhold material under Exemptions 1 and 3 when that information has already been officially acknowledged.

The very cases cited in the ODNI's Exemption 1 analysis, including *Wolf v. CIA*, 473 F.3d 370 (D.C. Cir. 2007), make clear that an agency cannot withhold under Exemption 1 material that has been officially acknowledged. *Wolf*, 473 F.3d at 378–80. None of the other cases cited by the agency, Def.'s Opp'n 4–5, involved a record that included substantial portions

of unclassified and declassified material that had been officially acknowledged by the agency. The cases relied upon by ODNI are simply not relevant to the question before this Court, which is whether the ODNI can withhold material in an agency record where that same material has already been released.

There can be no question that the ODNI has officially acknowledged material in the Complete Assessment. As EPIC detailed in its Memorandum, information that has been previously disclosed by an agency cannot be withheld pursuant to even an otherwise valid exemption claims where the "plaintiff points to specific information in the public domain that appears to duplicate that being withheld." *Afshar v. Dep't of State,* 702 F.2d 1125, 1130 (D.C. Cir. 1983). The information must be (1) "as specific as the information previously released," (2) "match the information previously disclosed," and (3) "already have been made public through an official and documented disclosure. *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990) (citing *Afshar,* 702 F.2d at 1133); Pl.'s Mem. 20. The facts before the Court in this case clearly satisfy these criteria. There is no dispute that the Complete Assessment contains material which "duplicate[s]" certain material in ODNI's Public Assessment. *Afshar*, 702 F.2d at 1130. All filings before this Court at the Summary Judgment stage, from both the Plaintiff and the Defendant, now confirm this fact. Def.'s Reply in Supp. of its Mot. for Summ. J. and Mem. of Points and Auth. in Opp. to Pl.'s Cross-Mot. for Summ. J. ("Def.'s Reply") 12–13, ECF No. 22 ("there is unclassified and declassified content in the classified report that is substantively identical to information contained in the declassified report."); Razsi Decl. ¶ 8, ECF No. 22-1. *See also* Def.'s Mem. 5, ECF No. 17 (stating the Public Assessment "contains the unclassified content of the classified report, including all of the conclusions regarding Russian interference with the U.S. 2016 presidential election"); Gistaro Decl. ¶ 22, ECF No. 17-1; Pl.'s Mem.) 8, 19,

20, ECF No. 19-1. In its Opposition, the ODNI never squarely addresses the legal impact of its prior disclosure of material in the Complete Assessment.

Instead, the ODNI mischaracterizes the central aim of FOIA—to make available records in possession of the agency to the public. For example, the agency claims that it cannot release the previously disclosed material in a different form, *i.e.* the release of the original record sought by EPIC, because the reader could distinguish material that had been declassified for public release from unclassified material. Def.'s Opp'n 14. This point both has no bearing whether official acknowledgment has waived the agency's exemption claims and is entirely unpersuasive. Materials "normally immunized from disclosure under FOIA lose their protective cloak once disclosed . . . 'the logic of FOIA' mandates that where information requested 'is truly public, then enforcement of an exemption cannot fulfill its purposes.'" *Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999). Any claim that damage to national security would be caused by a second "release" must be viewed with skepticism, and would undermine the very essence of the "official acknowledgment" and "public domain" cases. The government runs the risk that a source of intelligence may be gleaned anytime the resulting intelligence is declassified and made public. Still, the government does declassify material, whether of its own volition or as a result of the public's use of the FOIA.

The ODNI also attempts to rely on cases including *Mead Data Ctr. v. Dep't of Air Force*, 566 F.2d 242 (D.C. Cir. 1977), and *Hayden v. NSA*, 608 F.2d 1381 (D.C. Cir. 1979), where the records at issue did not include previously released material. Def.'s Opp'n 14. The D.C. Circuit has made clear that "when information has been 'officially acknowledged,' its disclosure may be compelled even over an agency's otherwise valid exemption claim." *Afshar,* 702 F.2d 1125, 1133 (D.C. Cir. 1983). This principle has been reaffirmed in many cases. *See, e.g.*, *Fitzgibbon v.*

CIA, 911 F.2d 755 (D.C. Cir. 1990); *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007); *Niagara Mohawk Power Corp. v. Dep't of Energy,* 169 F.3d 16, 19 (D.C. Cir. 1999); *Public Citizen v. Dep't of State,* 11 F.3d 198, 201–03 (D.C. Cir. 1993); *Davis v. DOJ,* 968 F.2d 1276, 1279–80 (D.C. Cir. 1992); *Cottone v. Reno*, 193 F.3d 550, 554–56 (D.C. Cir. 1999).

The logic of these cases allows the public to "question [the] withholding" of what the government states is undisclosable material because information has previously been officially acknowledged. *See, e.g.*, *Afshar*, 702 F.2d 1125 ("publicly known information cannot be withheld under exemptions 1 and 3"); *Niagara Mohawk Power Corp. v. U.S. Dep't of Energy*, 169 F.3d 16, 19 (D.C. Cir. 1999) ("[T]he logic of FOIA compels the result: if identical information is truly public, then enforcement of an exemption cannot fulfill its purposes."). The ODNI attempts to claim the opposite: that disclosure of the same information on the record does not require it to release *any* portion of the Complete Assessment. Def.'s Opp'n 14–15. But the cases cited by the ODNI are easily distinguishable and do not support the agency's position. In *Assassination Archives & Research Ctr. v. CIA*, 334 F.3d 55 (D.C. Cir. 2003), the Court only ruled against the plaintiff's official acknowledgment argument because the prior disclosure alleged by the plaintiff was not "as specific as" nor did it 'match[]' the material sought. 334 F.3d at 60. In contrast, the ODNI concedes in this case that "identical" material is contained in the record. Def.'s Reply 12–13 ("there is unclassified and declassified content in the classified report that is substantively identical to information contained in the declassified report"); Razsi Decl. ¶ 8. *See also* Def.'s Mem. 5 (stating the Public Assessment "contains the unclassified content of the classified report, including all of the conclusions regarding Russian interference with the U.S. 2016 presidential election"); Gistaro Decl. ¶ 22.

In *Assassination Archives*, the contents of the document at issue, a CIA Compendium on

"Cuban Personalities," were unknown, aside from that the record generally represented "the pool in 1962 of potential intelligence sources or targets of CIA intelligence collection" and the agency had never "released any portion of the document in any form at any time" *Id*. at 61. The plaintiff's sole support for "official disclosure" by the Agency was the CIA's disclosure of certain records concerning some Cuban operatives pursuant to an act of Congress. *Id*. at 61.

In another case relied on by the ODNI, *Students Against Genocide v. Dep't of State*, 257 F.3d 828 (D.C. Cir. 2001), the D.C. Circuit again applied the official acknowledgment doctrine while denying the plaintiff's claim on grounds obviously distinct from this case's apparent prior disclosure. While disclosure by the government of *some* photographs of human rights violations in Bosnia did not warrant disclosure of different photographs of the same type, the Court repeated that that the D.C. "circuit has held that the government may not rely on an otherwise valid exemption to justify withholding information that is already in the public domain.'" *Id.* at 836. *See also Public Citizen v. Dep't of State*, 11 F.3d 198, 160 (D.C. Cir. 1993) (applying without questioning the *Afshar* test as "the law of this circuit").

The ODNI cannot escape the conclusion that it may not validly claim Exemptions 1 and 3 to withhold the Complete Assessment where here, unlike in *Assassination Archives* and *Students Against Genocide*, the government has previously disclosed "substantively identical" information contained in the Complete Assessment. Def.'s Opp'n 12–13. Indeed, the ODNI implicitly concedes this point in its Exemption 3 argument, where it states that the agency "need only show that the information in the classified report *that is not in the declassified report* relates to intelligence sources and methods." Def.'s Opp'n 11–12 (emphasis added).

II. The ODNI has failed to release reasonably segregable portions of the Complete Assessment.

In Opposition, the ODNI not only argues that it can withhold material that has been

previously released, but also doubles down on the position that it cannot even release the page numbers from the classified report. Def.'s Opp'n 15–16. In support of this implausible argument, the government seeks to rely on deference to its agency declarations, but "deference is not equivalent to acquiescence." *Campbell v. DOJ*, 164 F.3d 20, 30 (D.C. Cir. 1998). The ODNI has a burden to "provide a detailed justification for its non-segregability," *Johnson v. EOUSA*, 310 F.3d 771, 776 (D.C. Cir. 2002) (internal quotation marks omitted). ODNI's reiteration of the declarants' years of experience aside, the ODNI has failed to release reasonably segregable portions of the Complete Assessment. Instead the ODNI continues to assert the implausible position that even the number of pages contained in the Complete Assessment cannot be released to the public for a document about which the agency has made prior public disclosures. Further, the ODNI refuses to provide a detailed explanation to allow the EPIC and this Court to fully evaluate the validity of the agency's extreme position.

The ODNI's segregability position is not supported by caselaw and is unreasonable particularly light of the public disclosures already made by the government. As a simple matter of common sense, an argument that disclosure of mere pages numbers would jeopardize national security is implausible; left only to wonder at the full content of the pages—some of which could well be blank or filled with full page photographs—the numbers of the pages says little even about the quantity of material available on the subject of the report at the date of publication.

The cases that the ODNI relies upon to support its decision not to provide any segregated material are readily distinguishable. For instance, in *Soto v. Dep't of State*, 118 F. Supp. 3d 355 (D.D.C. 2015), the agency withheld certain documents in full under Exemption 3, based on a statute providing for the confidentiality of certain records "pertaining to the issuance or refusal of visas or permits to enter the United States." 118 F. Supp. 3d at 365. The agency in *Soto* explained that the

withholdings consisted primarily of printouts of specific searches conducted in processing visa applications that would fall, logically and plausibly, within a statute for withholding records concerning the "issuance or refusal of visas." *Id.* at 370-71. Such facts are a far cry from the present case, where the ODNI has already made prior public disclosures concerning the record at issue, and which contains unclassified and declassified content. Def.'s Opp'n 12–13; Razsi Decl. ¶ 8; Def.'s Mem. 5; Gistaro Decl. ¶ 22.

The agency must provide a "detailed justification" for its non-segregability. *Johnson v. EOUSA*, 310 F.3d at 776 (quoting *Mead* 566 F.2d at 261). In light of the agency's prior disclosures, the agency's decision to withhold the Complete Assessment in full must be treated with skepticism, especially where the agency has taken the extreme position that not even page numbers can be disclosed. A robust explanation description of the contents of the record is necessary for "both litigants and judges… to test the validity of the agency's claim that the non-exempt material is not segregable." *Mead* 566 F.2d at 369. For precisely this reason, EPIC believes camera review is necessary to resolve the agency's segregability claims in this case.

Contrary to the ODNI's claims, the publication of the Declassified Assessment does not vitiate the ODNI responsibility under the FOIA to release reasonably segregable portions of the original Classified Assessment. Def.'s Opp'n 16. Attempting to deflect this responsibility, the ODNI selectively quotes a footnote in *Mead*, which states a court may consider the content of the requested record in assessing an agency withholding. 566 F.2d at 261 n.55. Yet the ODNI excludes the remainder of this footnote, including the holding that this consideration "does not mean that a court should approve an agency withholding because of the court's low estimate of the value to the requestor of the information withheld." *Id*. "FOIA mandates disclosure of information, not solely disclosure of helpful information." *Stolt–Nielsen Transp. Grp. v. United States,* 534 F.3d 728, 734

(D.C. Cir. 2008). Additionally, because there is only a single record at issue in this case and the agency has already previously reviewed the information for declassification and public release, "there is no plausible argument here that segregating and producing" portions of the complete Assessment "to commit significant time and resources." *EPIC v. DHS*, 926 F. Supp. 2d 311, 316 (D.D.C. 2013) (citing *Mead Data,* 566 F.2d at 261 n. 55).

Other cases cited by the ODNI are also distinguishable because, unlike the present case, they did not include an unequivocal official acknowledgement by the agency of a portion of the record sought. In *Assassination Archives*, for example, the Court accepted that no material was reasonably segregable because release of the Compendium would "specify precisely which Cuban nationals were and were not of interest to the CIA," including revealing "names" or "number of names" of Cuban nationals of interest to the CIA, and the agency had never "released any portion of the document in any form at any time." *Assassination Archives*, 334 F.3d at 58 n.3, 59. Here, the agency refuses to release unclassified and declassified information that the agency previously publicized, as well as structural information such as page numbers. Nor was such a prior disclosure at issue in *Larson v. U.S. Dep't of State*, 565 F.3d 857, 863 (D.C. Cir. 2009). In asking the Court to sign off on its refusal even to release the number of pages in a document sought under the FOIA—even after having made prior public disclosures of the document's content—the ODNI goes too far.

In a closely analogous case, *EPIC v. NSA*, an agency eventually released a Presidential Directive to EPIC following an appeal to the D.C. Circuit. *EPIC v. NSA*, No. 13-5269, 2014 WL 12596363, at *1 (D.C. Cir. July 31, 2014) (vacating the district court decision in part following release of NSPD-54). In that case EPIC sought the release of National Security Presidential Directive 54 ("NSPD 54"), a top secret directive concerning cyber security policy and the legal authorities for the NSA to undertake surveillance in the United States. *See* Ex. 1. In 2009, the White

House released a "public summary" of the Directive, but failed to release the original text of NSPD-54. EPIC pursued successfully the release of the complete text of the original Directive. EPIC's suit for release of NSPD-54 also revealed significant discrepancies between the original document and the public version provided by the agency.[1] *EPIC v. NSA* made clear the central purpose of the FOIA—to make available to the public the actual document in the possession of the agency sought by the requester. The processing and release of the original document should also occur in this case.

CONCLUSION

For the foregoing reasons, the Court should order *in camera* review, grant EPIC's Cross-Motion for Summary Judgment and deny the ODNI's Motion for Summary Judgment.

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Respectfully submitted,

MARC ROTENBERG
EPIC President and Executive Director

/s/ Alan Jay Butler
ALAN JAY BUTLER
Senior Counsel
Electronic Privacy Information Center
1718 Connecticut Ave., NW
Suite 200
Washington, DC 20009

Counsel for Plaintiff

[1] https://epic.org/foia/nsa/nspd-54/appeal/#nspd-54.