RECORD NO. 11-5282

ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

In The

United States Court of Appeals

For The District of Columbia Circuit

JUDICIAL WATCH, INC.,

***Plaintiff – Appellee*,**

v.

UNITED STATES SECRET SERVICE,

***Defendant – Appellant*,**

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,

Amicus Curiae for Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF *AMICI CURIAE* CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINTON, ELECTRONIC FRONTIER FOUNDATION, OPENTHEGOVERNMENT.ORG, AND PROJECT ON GOVERNMENT OVERSIGHT IN SUPPORT OF APPELLEE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), *amici curiae* Citizens for Responsibility and Ethics in Washington ("CREW"), Electronic Frontier Foundation ("EFF"), OpenTheGovernment.org, and Project on Government Oversight ("POGO") hereby submit their Certificate as to Parties, Rulings, and Related Cases as follows:

A. Parties and *Amici*. Plaintiff-appellee is Judicial Watch, Inc. and defendant-appellant is the United States Secret Service. CREW has been granted leave to participate as *amicus curiae* in this Court. Also appearing as *amici curiae* with CREW are EFF, OpenTheGovernment.org, and POGO. No *amici* appeared before the district court.

B. Rulings Under Review. Under review are the order and memorandum opinion of the district court issued on August 17, 2011. *Judicial Watch, Inc. v. United States Secret Service*, No. 1:09-cv-02312-BAH (D.D.C.) (Judge Beryl A. Howell). The district court opinion is available at 803 F. Supp. 2d 51, and page 95 of the Joint Appendix.

C. Related Cases. This case has not previously been before this Court or any other court. Counsel for *amici curiae* is aware of no other related cases pending before this Court or any other court within the meaning of D.C. Circuit Rule 28(a)(1)(c).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *amici curiae* Electronic Frontier Foundation, OpenTheGovernment.org, and the Project on Government Oversight submit this corporate disclosure statement.[1]

EFF does not have a parent company, and is not a publicly-held company with a 10% or greater ownership interest. EFF is a non-profit, non-partisan corporation, organized under section 501(c)(3) of the Internal Revenue Code.

OpenTheGovernment.org is a project of the Fund for Constitutional Government, which does not have a parent company, and is not a publicly-held company with a 10% or greater ownership interest. The Fund for Constitutional Government is a non-profit, non-partisan corporation, organized under section 501(c)(3) of the Internal Revenue Code.

POGO does not have a parent company, and is not a publicly-held company with a 10% or greater ownership interest. POGO is a non-profit, non-partisan corporation, organized under section 501(c)(3) of the Internal Revenue Code.

[1] CREW already has filed a corporate disclosure statement with the Court.

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INTEREST OF *AMICI CURIAE*[1]

CREW is a non-profit, non-partisan corporation organized under section 501(c)(3) of the Internal Revenue Code. Through a combined approach of research, advocacy, public education, and litigation, CREW seeks to protect the rights of citizens to be informed about the activities of government officials and to ensure the integrity of those officials. Toward that end, CREW frequently files Freedom of Information Act ("FOIA") requests to access and make publicly available government documents that reflect on, or relate to, the integrity of government officials and their actions. CREW filed multiple requests in the past with the U.S. Department of Homeland ("DHS") for Secret Service records of visits to the White House by identified individuals. When DHS refused to provide the requested records, CREW brought lawsuits that culminated in a settlement with the government whereby the White House agreed to make the majority of visitor logs available on-line dating back to September 2009, with updates made every 90 to 120 days thereafter. JA34.

[1] *Amici* confirm that no party's counsel authorized this brief in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person, other than *amici*, their members, or their counsel, contributed money that was intended to fund preparing or submitting the brief. This brief is filed on behalf of CREW with leave of the Court and on behalf of the other *amici curiae* with the consent of counsel for all parties in the case.

CREW participates as an *amicus* in this case to preserve continued public access to these valuable records irrespective of the occupants of the White House. Such access permits the public "to be informed about 'what their government is up to,'" *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989) (quotation omitted), an interest at the core of the FOIA.

EFF is a not-for-profit membership organization with offices in San Francisco, California and Washington, D.C. EFF works to inform policymakers and the general public about civil liberties and privacy issues related to technology, and to act as a defender of those rights and liberties. In support of its mission, EFF frequently files FOIA requests to access a broad range of documents created by a variety of federal agencies. Because the definition of "agency records" is a fundamental, threshold issue under the FOIA, manipulation of the term, as this Court has recognized, undermines the basic structure and purpose of the statute. EFF participates as an *amicus* in this case to protect the public's ability to access government information, access that would otherwise be denied if this Court accepts the government's position here that the White House unilaterally may assert "control" over records created and possessed by an agency.

OpenTheGovernment.org is a coalition of consumer and good government groups, environmentalists, journalists, library groups, labor and others, united to make the federal government a more open place in order to make us safer,

strengthen public trust through government accountability, and support our democratic principles. OpenTheGovernment.org's coalition transcends partisan lines and includes progressives, libertarians, and conservatives.

Founded in 1981, POGO is a non-partisan independent watchdog that champions good government reforms. POGO's investigations into corruption, misconduct, and conflicts of interest achieve a more effective, accountable, open and ethical federal government. Specifically, FOIA is a vital tool that allows for the full or partial disclosure of previously unreleased government documents. POGO's interest in this case is to assist this Court in a proper analysis of the consequences of allowing FOIA to be unjustly expanded to throw a blanket of secrecy over the entire White House and agencies operating therein. If such a standard is imposed, a vast cache of records would be withheld from the public, media, Members of Congress, and others who use FOIA as a tool to learn about the operations of the federal government, and seek to hold it accountable. These policy implications are supportive of, but distinct from, the issues raised in Judicial Watch's brief.

RELEVANT STATUTES AND REGULATIONS

The relevant statute at issue is the Freedom of Information Act, 5 U.S.C. § 552, and has been reproduced in the Addendum to this Brief.

SUMMARY OF ARGUMENT

In the fall of 2009, recognizing the value of transparency and the accountability it brings to a democracy, President Obama launched a new policy and practice of posting the vast majority of White House visitor records on-line, with updates every 90 to 120 days.[2] These records have provided unique access to information of great value to the public, such as the identities of those with access to White House officials and the corresponding ability to influence White House policies. Newspaper articles abound based, in part, on information gleaned from these records.

At the same time, however, the Obama administration has insisted these records are accessible only as a matter of presidential policy and grace, refusing to allow access through the FOIA. Just as it argued four years ago when this issue first came before this Court, the government now maintains such access would implicate serious constitutional and policy concerns by forcing the president to forego either Secret Service protection or confidentiality in those who visit the White House. According to the government, these special concerns and the president's special status exempt this case from the methodology dictated by the Supreme Court for determining agency record status.

[2] The records at issue here do not fall within this policy as they were generated prior to September 2009.

The intervening years have revealed the fallacy of these arguments. The nearly wholesale disclosure afforded by the president's visitor records policy has not led him to forego Secret Service protection, nor has this disclosure threatened any of his constitutional prerogatives or national security interests. The government's legal arguments, expressed in language nearly identical to that of its previous briefs, fare no better. Precedent makes clear the White House visitor records are in the control of the Secret Service, the agency that created the records in the performance of its statutory responsibilities, notwithstanding the fact that those records include some information provided by White House staff. Not only has the Secret Service integrated the visitor logs into its files, but it uses those records for official agency business, namely clearing visitors into the White House complex. Given that such use is "the decisive factor" in determining agency record status under the FOIA, *Judicial Watch, Inc. v. Fed. Hous. Fin. Agency*, 646 F.3d 924, 927-28 (D.C. Cir. 2011) (quoting *Consumer Fed'n of Am. v. Dep't of Agric.*, 455 F.3d 283, 288 (D.C. Cir. 2006)), the district court properly concluded the visitor logs responsive to Judicial Watch's FOIA request are agency records of the U.S. Department of Homeland Security ("DHS"), the agency within which the Secret Service is housed.

In arguing to the contrary, the government rests primarily on post-hoc documentation created by the White House to buttress its claim of control over the

requested records. This documentation, however, does not alter the fact that while the Secret Service is in the process of clearing visitors and facilitating their access to the White House complex, it uses and exercises control over these records. Nor does the burden the government claims White House staff must bear to review requested visitor records for possible exempt material transform these records into non-agency records beyond the reach of the FOIA. Accepting this rationale would permit the president to transform any agency records into non-agency records simply by asserting an interest in the records and claiming a burden their review would impose on presidential staff to protect otherwise exempt material. Burdens such as these have never been recognized under the FOIA as sufficient to transform agency records into non-agency records, and this case should be no exception.

ARGUMENT

I. THE RECORDS AT ISSUE ARE NOT EXEMPT FROM THE AGENCY RECORD ANALYSIS MANDATED BY THE SUPREME COURT.

Under the two-part test enunciated by the Supreme Court in *U.S. Dep't of Justice v. Tax Analysts*, materials requested under the FOIA are "agency records" if they are (1) either created or obtained by the agency, and (2) under agency control at the time the FOIA request is made. 492 U.S. 136, 145 (1989). The Supreme Court adopted the first factor to ensure, consistent with the FOIA's

legislative history, "records *acquired* by an agency" in "performing [its] official duties" as well as records generated within an agency are available to the public through the FOIA. *Id.* at 144 (quoting *Forsham v. Harris*, 445 U.S. 169, 184 (1980) (emphasis in original)). As to the second factor, the Supreme Court explained "[b]y control, we mean that the materials have come into the agency's possession in the legitimate conduct of its official duties." *Id.* at 145. The control requirement also "focuses on an agency's possession of the requested materials . . ." *Id.* at 147. In fashioning this test, the Supreme Court paid close attention to "FOIA's goal of giving the public access to all nonexempted information received by an agency as it carries out its mandate." *Id.* at 147.

The D.C. Circuit has added a gloss to this analysis, looking to the "totality of the circumstances," and taking care that "'[t]he term "agency records" . . . not be manipulated to avoid the basic structure of the FOIA . . .'" *Consumer Fed'n of Am. v. Dep't of Agric.*, 455 F.3d at 287 (quoting *Bureau of Nat'l Affairs, Inc. v. U.S. Dep't of Justice*, 742 F.2d 1484, 1494 (D.C. Cir. 1984) ("*BNA*")). Rather than a rigid and "compartmentalized" control or use analysis, "the inquiry necessarily must focus on a variety of factors surrounding the creation, possession, control, and use of the document by an agency." *BNA*, 742 F.2d at 1490 (citation omitted).

Toward that end, this Circuit has identified four factors bearing on agency control:

> (1) the intent of the document's creator to retain or relinquish control over the records; (2) the ability of the agency to use and dispose of the record as it sees fit; (3) the extent to which agency personnel have read or relied upon the document; and (4) the degree to which the document was integrated into the agency's record system or files.

Burka v. U.S. Dep't of Health & Human Servs., 87 F.3d 580, 515 (D.C. Cir. 1996).[3]

Notwithstanding this precedent, the government asks this Court to bypass the approach of *Tax Analysts* and treat the White House's expression of intent to control visitor logs, prepared after the issue of their record status had been raised, as outcome determinative. According to the government, because the visitor logs involve information implicating the president, who is exempt from the FOIA, and are derived from information supplied, at least in part, from presidential staff, the *Tax Analysts* factors do not apply. Subjecting White House visitor records to the

[3] Of note, the D.C. Circuit first articulated these factors in *Tax Analysts v. U.S. Dep't of Justice*, 845 F.3d 1060 (D.C. Cir. 1980), an articulation undisturbed by the Supreme Court's subsequent decision in the case. Specifically, the D.C. Circuit noted "agency possession is one necessary facet," *id.* at 1067, as is "evidence surrounding the creation and transmittal of a document indicating that its creator intended to retain control." *Id.* at 1068. In addition, "[a]gencies must use or rely on the document to perform agency business, and integrate it into their files, before it may be deemed an 'agency record.'" *Id.* (citation omitted).

FOIA, the government contends, is tantamount to subjecting the president to the FOIA, something Congress refused to do.

The government gleans support for its position in prior cases from this Circuit involving records generated by or at the direction of Congress, specifically *United We Stand Am., Inc. v. IRS*, 359 F.3d 595 (D.C. Cir. 2004), *vacated in part on other grounds*, 724 F.2d 201 (D.C. Cir. 1984) (per curiam) ("*United We Stand*"); *Paisley v. CIA*, 712 F.2d 686 (D.C. Cir. 1983); *Holy Spirit Ass'n for the Unification of World Christianity v. CIA*, 636 F.2d 838 (D.C. Cir. 1980), *vacated in part and remanded*, 455 U.S. 997 (1982) ("*Holy Spirit*"); and *Goland v. CIA*, 607 F.2d 339 (D.C. Cir. 1978). The special policy considerations that played a part in this Circuit's treatment of documents obtained from or at the direction of Congress, however, do not apply to records like the visitor logs that are agency-created for agency purposes and, at most, indirectly implicate presidential interests.

In *Goland*, for example, the court addressed the agency record status of a congressional hearing transcript shared with the agency for a very limited purpose and over which Congress continued to retain control. The court applied a more truncated analysis than that subsequently mandated by *Burka* to look only at the circumstances surrounding the creation of the document and the conditions under

which it was transferred to the agency. *Goland CIA*, 607 F.2d at 347-48.[4] From this the court concluded the transcript was not an agency record subject to the FOIA because Congress had never relinquished control over it. *Id.* at 347.

Policy considerations played a key role in the court's decision, namely the "dilemma" Congress would otherwise face of either "surrender[ing] its constitutional prerogative of maintaining secrecy" or "suffer[ing] an impairment of its oversight role." *Id.* at 346. But, as the D.C. Circuit explained subsequently in *United We Stand*, "these policy considerations [are] unique to the congressional context." *United We Stand*, 359 F.3d at 599. They draw their unique character from the constitutionally authorized oversight Congress exercises over agencies that are part of a separate branch of government. *See Goland*, 607 F.2d at 346. *See also Paisley*, 712 F.2d at 694 (recognizing the "special policy considerations" at play with congressionally generated records, including maintaining Congress' "vital function as overseer of the Executive Branch").[5]

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[4] The *Goland* court did not consider directly the extent to which the agency had relied on the document or the extent to which the document was integrated into agency files, two factors required by *Burka*, but noted "the CIA retains the Transcript solely for internal reference purposes." 607 F.2d at 347.

[5] The *Paisley* court expressly declined to opine "on whether a different analysis would be warranted were the creating body other than Congress." *Id.* at 694 n.30.

Here, by contrast, the documents at issue raise no such concerns as they were generated by an agency that is subject to the FOIA, and at most implicate interests of the president who is part of (and indeed heads) the same branch of government as the agency. Consequently, ordering their disclosure raises no comparable "dilemma" and interferes with no comparable "constitutional prerogative," as it will not disturb any oversight role one branch of government exercises over another branch of government.

As a further policy justification, the government argues just as Congress has a constitutional "'right to keep its own materials confidential,'" so too the president "has a right to maintain confidentiality with respect to visitors to the White House Complex . . ." Br. at 26-27 (quoting *United We Stand*, 359 F.3d at 499 (internal quote omitted)). This apples-to-oranges comparison provides no basis to ignore the *Tax Analyst* approach. The interest in confidentiality Congress may have *in its own records* differs significantly from the interest the president may have in records created by an agency in the performance of agency business. If that interest, standing alone, were enough to transmute the character of otherwise agency records into non-agency records, the president would have the power to remove from the reach of the FOIA, and therefore the public, virtually any and all federal records simply through the assertion of a freestanding interest. No precedent here or anywhere else supports such a broad assertion of presidential

prerogative.[6] Indeed, were the government's arguments accepted, they would subvert the statutory directives of the FOIA, a pro-disclosure statute. *See Consumer Fed'n of Am. v. Dep't of Agric.*, 455 F.3d at 287 (the term "'agency records'" should not be manipulated "to avoid the basic structure of the FOIA . . ." (quotation omitted)).

Beyond setting forth the special policy considerations that apply to records generated by or at the direction of Congress, these decisions lay down a patchwork of approaches to determine agency record status that, at bottom, are different iterations of the same theme captured by *Burka*. So, for example, while *Goland*, *Holy Spirit*, and *Paisley* focused on congressional control, not agency control, as part of a two-step analysis, that focus "reflect[s] the considerations that underlie the second [*Burka*] factor: the agency's ability to use or dispose of the record as it

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[6] In fact, this Circuit has rejected the notion that the president's proximity to the records and the purpose for which they were created exempts such records from the FOIA. In *Ryan v. Dep't of Justice*, 617 F.2d 781, 789 (D.C. Cir. 1980), the court refused to treat records compiled to advise the president as non-agency records, reasoning:

> Many cabinet officers, like the Attorney General, or the Office of Legal Counsel under him, act as advisors to the President for many of their important functions; yet they are not members of the presidential staff or exclusively presidential advisors, and are thus not exempt from FOIA requirements.

Id.

sees fit." *United We Stand*, 359 F.3d at 600. Further, while *United We Stand* purported to renounce the remaining *Burka* factors when "the agency creates and possesses the document in the legitimate conduct of its official duties," *id.* at 603, that language is lifted directly from the Supreme Court's explanation in *Tax Analysts* of what constitutes "control" for agency record purposes. *See Tax Analysts*, 492 U.S. at 145. Thus, it hardly can we construed as establishing a radical new approach to determining agency record status under the FOIA.

II. RECORDS OF WHITE HOUSE VISITS CREATED AND USED BY THE SECRET SERVICE IN THE PERFORMANCE OF ITS STATUTORY DUTIES ARE AGENCY RECORDS SUBJECT TO THE FOIA.

A. The Secret Service Creates Or Obtains The White House Visitor Records.

The Secret Service appears to concede the first *Tax Analysts* factor points to agency record status, a concession supported fully by the process by which the visitor records are created. The Secret Service creates both the Workers and Visitors Entry System ("WAVES") and the Access Control Records System ("ACR") records from information the agency receives about potential visitors. The agency then performs background checks for each potential visitor, inputs this information into records stored on agency computers, and verifies the identification of visitors at the time of their visits. JA8-9, 19-20.

Rather than focus on the process by which the records are created, the government points to the role White House personnel play in providing the content of the records, suggesting implicitly this transforms them into presidential records. The FOIA, however, deals with documents, "not information in the abstract," *Forsham v. Harris*, 445 U.S. 169, 185 (1980), and elevating the contents of the records over their creation "would insulate records that contain information supplied, perhaps even gleaned, from an external, non-agency source, even if the information represents only a part of the records as it does here." *CREW v. U.S. Dep't of Homeland Sec.*, 527 F. Supp. 2d 76, 91 (D.D.C. 2007). Applying this precedent, the district court here properly concluded, "[r]egardless of what information may be supplied by outside actors, the WAVES and ACR records are largely generated by the Secret Service, and are undisputedly obtained by the Secret Service." JA102. Accordingly, the visitor records are created or obtained by the Secret Service.

B. The Secret Service Controls The White House Visitor Records.

As records under the control of the Secret Service, the visitor logs also satisfy the second prong of the *Tax Analysts* test, as expanded upon by the four-factor *Burka* test. The government disputes this conclusion, devoting the bulk of its brief to arguing the visitor logs are under the control of the White House. As

evidence of this control, the government points to a memorandum of understanding ("MOU") executed in 2006 that states the WAVES and ACR records "are at all times Presidential records . . . not the records of an 'agency' subject to the Freedom of Information Act." JA14. According to the government, the MOU "provides the clearest possible evidence that the White House, and not the Secret Service, has 'exclusive control of the disputed documents.'" Br. at 23 (citations omitted). This reliance is misplaced and ignores the other indicia of control, all of which weigh unmistakably in favor of treating these records as agency records subject to the FOIA.

1. The Intent Of The Documents' Creator.

First, although the district court concluded here the MOU reflected an intent by the Secret Service to relinquish control to the White House,[7] the court failed to take into account the self-serving nature of this evidence. The MOU was manufactured after the Secret Service created many of the visitor records sought in previous FOIA requests and after the Secret Service was sued for those records. *See, e.g.*, *CREW v. U.S. Dep't of Homeland Sec.*, 527 F. Supp. 2d at 92 n.22.[8]

[7] JA103-104.

[8] For these reasons the district court in that case treated the MOU with "skepticism," but determined the intent of the Secret Service was to relinquish control over the visitor records once a visit was completed. *Id.* at 92 and n.22.

In a series of cases, this Court has emphasized only "*contemporaneous* and *specific* instructions . . . to the agencies, limiting either the use or disclosure of the documents" will suffice as evidence of control by some entity other than the agency in possession of the documents. *United We Stand*, 359 F.3d at 602 (quoting *Paisley*, 712 F.2d at 694) (emphasis in original). Accordingly, in *Holy Spirit*, the court gave no weight to a letter sent from the Clerk of the House of Representatives to the agency in evaluating the agency's control because the letter was written following the FOIA request at issue, the resulting litigation, and long after the records had been transferred. Likewise, in *Paisley*, the court rejected "one-sided correspondence initiated long after the original creation and transfer of the documents" as "*post hoc* rationalization . . ." 712 F.2d at 695. And in *United We Stand*, this Circuit found the agency had control notwithstanding the belief of a congressional committee that confidentiality was critical to its work and its "practice of retaining control over its communications with the [agency] . . ." 359 F.3d at 602.

Under this precedent, the MOU between the White House and the Secret Service fails to evidence an intent by the Secret Service to relinquish control over the visitor logs. Executed after litigation ensued over the agency status of the

logs, the MOU represents the same kind of "*post hoc* rationalization" the *Paisley* court rejected out of hand. 712 F.2d at 695.[9]

2. The Secret Service's Ability To Use And Dispose Of The Records.

The second *Burka* factor, the agency's ability to use and dispose of the records as it sees fit, also weighs against the Secret Service. As the district court noted, the agency's own declarations and its actions demonstrate the Secret Service has a "clear" ability to use the visitor records in performing its statutory responsibilities. JA105. Specifically,

> the Secret Service uses the records for two main purposes, 'to perform background checks to determine the existence of any protective concern' and 'to verify the admissibility at the time of visit.'

Id. (quoting JA85, ¶ 5).

Similarly, the Secret Service disposes of the records as it sees fit, as evidenced in part by its "longstanding" practice of erasing WAVES records once copies are transferred to the White House. JA9. Moreover, while the MOU reflects a policy that requires the Secret Service to transfer copies of the records to the Office of Records Management once it is done with the records, the agency has

[9] For similar reasons, the letter sent by the vice president's counsel purportedly confirming the vice president's exclusive control over records relating to visits to the vice president's resident and sent months after the MOU was executed carries no weight.

nevertheless "consistently continued to maintain copies of these records on its systems, and has not sufficiently explained any restriction on its use or disposition of these documents." JA105. Relying on the actual manner in which the Secret Service uses the requested records, not its subjective intent, the district court properly concluded this factor does not weigh in favor of the agency. *See Judicial Watch, Inc. v. Fed. Hous. Fin. Agency*, 646 F.3d at 927-28 (quoting *Consumer Fed'n of Am. v. Dep't of Agric.*, 455 F.3d at 288 (use is "the decisive factor" in determining agency record status under the FOIA)).

3. The Extent To Which Agency Personnel Have Read Or Relied On The Documents.

In the face of unimpeachable evidence that the Secret Service has relied upon the WAVES and ACR records to perform its statutorily mandated protective function, the government argued below that because this use was limited, the third *Burka* factor tips in favor of the Secret Service. But, as the district court found, "[t]his 'limited' reliance is directly tied to the purpose of the records in the first place." JA106. Thus, regardless of their eventual transfer to another entity, the visitor records are "agency records" under the FOIA because their use by the Secret Service correlates precisely to the purpose for which they were created.

On appeal, the government points to the express language of the MOU granting the Secret Service only "temporary physical possession" of the

documents and suggests the White House retains "complete and exclusive legal control." Br. at 24 (quoting JA14, ¶ 18). This, of course, begs the question of what constitutes legal control for purposes of the FOIA. On that issue, the agency's actual practices are far more revealing than the post-hoc rationalization contained in the MOU.

4. The Degree To Which The Secret Service Integrated The Records Into The Agency's System Or Files.

The final *Burka* factor, the degree to which the Secret Service has integrated the visitor records into the agency's system or files, also demonstrates agency control. The records "reside on the Secret Service's servers," and even after transfer the agency "retained copies." JA107 (quoting JA81-82, ¶¶ 11). That the Secret Service retained at least some of the records for only a brief period of time does not alter this conclusion. *See CREW v. U.S. Dep't of Homeland Sec.*, 527 F. Supp. 2d at 96 (D.D.C. 2007) ("The length of time a record is saved skirts the salient issue of whether it was integrated into the agency's record system in the first place.").

* * * *

In sum, while the *Burka* analysis requires consideration of four factors, at root it is an effort to ascertain agency control based on the totality of the circumstances. Here, all four factors weigh in favor of treating the White House

visitor records as agency records subject to the FOIA. The Secret Service has actual possession of the records, which it uses to perform its statutorily mandated protective function. To otherwise allow a post-hoc statement of intent to dictate the status of the records would "make[] the determination of 'agency records' turn on the intent of the creator of the document" something the Supreme Court specifically has eschewed. *Tax Analysts*, 492 U.S. at 147.

III. ANY LEGITIMATE INTEREST OF THE WHITE HOUSE CAN BE ADEQUATELY PROTECTED THROUGH THE FOIA'S EXEMPTIONS.

Commensurate with the broad range of information falling within the scope of "agency records" covered by the FOIA, the statute's exemptions are intended to protect a broad range of interests that may be asserted by, or on behalf of governmental and non-agency sources of information contained in an agency's records. *See August v. FBI*, 328 F.3d 697, 699 (D.C. Cir. 2003) (quoting *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989)). Thus, individual tax return information is exempt from disclosure under Exemption 3, *Tax Analysts v. IRS*, 214 F.3d 179 (D.C. Cir. 2000), while confidential contract pricing information may be withheld under Exemption 4, *McDonnell Douglas Corp. v. Dep't of the Air Force*, 375 F.3d 1182, 1190 (D.C. Cir. 2004), even though both categories of information come from non-governmental sources. Here, the Secret Service's "ready recourse in Exemption 5" confirmed for the district court the agency record

status of the visitor logs. JA109 (quoting *CREW v. U.S. Dep't of Homeland Sec.*, 527 F. Supp. 2d at 99).

Invoking the doctrine of constitutional avoidance, the government argues the FOIA's exemptions inadequately protect the constitutional prerogatives of the president. As an initial matter, this doctrine does not apply because, as the district court found, "the Court is not faced with an interpretation of an ambiguous statute," a necessary prerequisite to the doctrine's application. JA108.

The government also errs in suggesting resort the statutory exemption scheme Congress established in the FOIA for protecting governmental and non-governmental interests would "implicate[] the President's interest 'in maintaining the autonomy of [his] office and safeguarding the confidentiality of [his] communications.'" Br. at 29 (quoting *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 385 (2004)). To the contrary, such asserted confidentiality interests are precisely the type of concern to be litigated within the framework of Exemption 5. That process:

> calls upon the court to strike a balance between the twin values of transparency and accountability of the executive branch on the one hand, and on the other hand, protection of Presidential decisionmaking and the President's ability to obtain candid, informed advice.

Judicial Watch v. Dep't of Justice, 365 F.3d 1108, 1112 (D.C. Cir. 2004). In language that responds directly to the confidentiality interest asserted by the government here, the Court noted, "[a]t core, the presidential communications privilege is rooted in the President's 'need for confidentiality in the communications of his office.'" *Id.* at 115 (quoting *United States v. Nixon*, 418 U.S. 683, 712-13 (1974)). Further, it is "*derived from separation-of-powers concerns* and anchored in FOIA Exemption 5." *United States v. Pollard*, 416 F.3d 48, 61 (D.C. Cir. 2005) (Rogers, J., concurring in part and dissenting in part) (emphasis added). Therefore, Exemption 5 presents the appropriate solution to the separation-of-powers problems raised by the government, not the government's radical and unprecedented approach of exempting these records from the FOIA altogether. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) ("That Congress had the Government's executive privilege specifically in mind in adopting Exemption 5 is clear.") (citations omitted).

Having failed to explain why the available exemptions do not sufficiently protect the president's confidential communications, the government falls back on burden arguments, suggesting the president, vice president, and their staff must be protected from bearing the burden of actually processing the records plaintiff seeks. Br. at 31. There is, in fact, nothing extraordinary about imposing such a burden on White House staff. Indeed, a Department of Justice ("DOJ")

memorandum issued in 1993 explicitly recognizes, "[i]n processing FOIA requests, agencies searching for responsive records occasionally find White House-originated records (or *records containing White House-originated information*) that are located in their files."[10] The memorandum instructs that when agency records responsive to FOIA requests contain information that originated in the White House Office or the Office of the Vice President, agencies are to forward those records to the Office of the Counsel to the President or the Office of the Counsel to the Vice President for consultation with respect to issues such as the applicability of the FOIA's exemptions and "assertion[s] of privilege." *Id.* at ¶¶ 1, 2. Adherence to this established and longstanding consultation process is all that the district court's decision here would require.[11] As for any undue

[10] U.S. Department of Justice, FOIA Update: FOIA Memo on White House Records, 1993, Vol. XIV, No. 3, at 6-8 (*available at*: http://www.justice.gov/oip/foia_updates/Vol_XIV_3/page4.htm (emphasis added)).

[11] Notably, the DOJ memorandum recognizes when agencies find "White House-originated records" or "records containing White House-originated information" in their files, they must process disclosure requests for those records in compliance with the FOIA's requirements. While the memorandum also recognizes the "possib[ility] that a record originating in the White House Office . . will be one over which the White House Office . . . has retained control, in which case it will not be an 'agency record' subject to the FOIA," *id.* at ¶ 1, that scenario is not applicable here. The government has never suggested the records at issue here "originated" in the White House Office, only that the records contain "information . . . provided by authorized White House passholders . . ." Br. at 30.

burden this would impose, the district court found, on the record below, "the defendant has not met its burden to establish that the search requested by the plaintiff is so unreasonable as to require a blanket rejection." JA112 (citation omitted). The government offers no basis here to disturb that finding.

Reinforcing this conclusion is the practice of the past two and one-half years under which the Obama administration has periodically posted visitor records on-line for public access. Much like the operation of the FOIA's exemptions, the administration's disclosure policy provides the White House the opportunity to redact certain personal and national security information. JA32. Having borne that burden already, the administration is hard-pressed to argue such a burden alone justifies exempting the records from the FOIA.

CONCLUSION

Accepting the radical position of the government here on the agency record status of White House visitor logs would deny the public access to important records documenting both the manner in which the Secret Service performs its protective function and the influences brought to bear on White House policies

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As the district court found, "[regardless of what information may be supplied by outside actors, the WAVES and ACR records are largely generated by the Secret Service, and are undisputedly obtained by the Secret Service." JA102.

and proposals.[12] The government's position raises very troubling implications beyond the facts of this case. If, as the government maintains, the White House can declare by unilateral fiat that it "controls" an agency's records simply because the president and vice president have an ongoing interest in the records "for various historical and informational purposes," Br. at 30-31 (quotation omitted), the FOIA will be rendered essentially a dead letter and a substantial amount of government information will be put beyond the public's reach. The Court should therefore affirm the judgment of the district court that the visitor logs are "agency records" within the scope of the FOIA.

Respectfully Submitted,

DATED: May 8, 2012

/s/ Anne L. Weismann

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[12] The government contends the request at issue "does not implicate the basic purpose of the FOIA: to shed light on agency action." Br. at 30. This is demonstrably false; the Secret Service creates and uses these records in fulfillment of its core mission of protecting the president and vice-president. *See CREW v. U.S. Dep't of Homeland Sec.*, 527 F. Supp. 2d at 93-94 (citing 18 U.S.C. §§ 3056, 3056A).

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Dated: May 8, 2012

/s/ Anne L. Weismann
Counsel for Amici Curiae

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I hereby certify that on this 8th day of May, 2012, I caused this Brief of *Amici Curiae* to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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ADDENDUM

TABLE OF CONTENTS

5 USC § 552 - Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:
(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—
(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;
(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;
(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;
(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and
(E) each amendment, revision, or repeal of the foregoing.
Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.
(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—
(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;
(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;
(C) administrative staff manuals and instructions to staff that affect a member of the public;
(D) copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and
(E) a general index of the records referred to under subparagraph (D);

unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D). However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—
(i) it has been indexed and either made available or published as provided by this paragraph; or
(ii) the party has actual and timely notice of the terms thereof.
(3)
(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which
(i) reasonably describes such records and
(ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.
(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record

is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.
(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.
(D) For purposes of this paragraph, the term "search" means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.
(E) An agency, or part of an agency, that is an element of the intelligence community (as that term is defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a (4))) shall not make any record available under this paragraph to—
(i) any government entity, other than a State, territory, commonwealth, or district of the United States, or any subdivision thereof; or
(ii) a representative of a government entity described in clause (i).
(4)
(A)
(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.
(ii) Such agency regulations shall provide that—
(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;
(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and
(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.
In this clause, the term "a representative of the news media" means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term "news" means information that is

about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of "news") who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section—

(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii) (II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed $250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: Provided, That the court's review of the matter shall be limited to the record before the agency.

(viii) An agency shall not assess search fees (or in the case of a requester described under clause (ii)(II), duplication fees) under this subparagraph if the agency fails to comply with any time limit under paragraph (6), if no unusual or exceptional circumstances (as those terms are defined for purposes of paragraphs (6)(B) and (C), respectively) apply to the processing of the request.
(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).
(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.
[(D) Repealed. Pub. L. 98–620, title IV, § 402(2),Nov. 8, 1984, 98 Stat. 3357.]
(E)
(i) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.
(ii) For purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either—
(I) a judicial order, or an enforceable written agreement or consent decree; or
(II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.
(F)
(i) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily

responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.
(ii) The Attorney General shall—
(I) notify the Special Counsel of each civil action described under the first sentence of clause (i); and
(II) annually submit a report to Congress on the number of such civil actions in the preceding year.
(iii) The Special Counsel shall annually submit a report to Congress on the actions taken by the Special Counsel under clause (i).
(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.
(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.
(6)
(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—
(i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and
(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.
The 20-day period under clause (i) shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency's regulations under this section to receive requests under this section. The 20-day period shall not be tolled by the agency except—

(I) that the agency may make one request to the requester for information and toll the 20-day period while it is awaiting such information that it has reasonably requested from the requester under this section; or
(II) if necessary to clarify with the requester issues regarding fee assessment. In either case, the agency's receipt of the requester's response to the agency's request for information or clarification ends the tolling period.
(B)
(i) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.
(ii) With respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A), the agency shall notify the person making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. To aid the requester, each agency shall make available its FOIA Public Liaison, who shall assist in the resolution of any disputes between the requester and the agency. Refusal by the person to reasonably modify the request or arrange such an alternative time frame shall be considered as a factor in determining whether exceptional circumstances exist for purposes of subparagraph (C).
(iii) As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular requests—
(I) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;
(II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or
(III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.
(iv) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for the aggregation of certain requests by the same requestor, or by a group of requestors acting in concert, if the agency reasonably believes that such requests actually constitute a single request, which would

otherwise satisfy the unusual circumstances specified in this subparagraph, and the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated.
(C)
(i) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.
(ii) For purposes of this subparagraph, the term "exceptional circumstances" does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.
(iii) Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing a request (or a modified request) under clause (ii) after being given an opportunity to do so by the agency to whom the person made the request shall be considered as a factor in determining whether exceptional circumstances exist for purposes of this subparagraph.
(D)
(i) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for multitrack processing of requests for records based on the amount of work or time (or both) involved in processing requests.
(ii) Regulations under this subparagraph may provide a person making a request that does not qualify for the fastest multitrack processing an opportunity to limit the scope of the request in order to qualify for faster processing.
(iii) This subparagraph shall not be considered to affect the requirement under subparagraph (C) to exercise due diligence.
(E)
(i) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records—
(I) in cases in which the person requesting the records demonstrates a compelling need; and
(II) in other cases determined by the agency.
(ii) Notwithstanding clause (i), regulations under this subparagraph must ensure—

(I) that a determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 days after the date of the request; and
(II) expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing.
(iii) An agency shall process as soon as practicable any request for records to which the agency has granted expedited processing under this subparagraph. Agency action to deny or affirm denial of a request for expedited processing pursuant to this subparagraph, and failure by an agency to respond in a timely manner to such a request shall be subject to judicial review under paragraph (4), except that the judicial review shall be based on the record before the agency at the time of the determination.
(iv) A district court of the United States shall not have jurisdiction to review an agency denial of expedited processing of a request for records after the agency has provided a complete response to the request.
(v) For purposes of this subparagraph, the term "compelling need" means—
(I) that a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or
(II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.
(vi) A demonstration of a compelling need by a person making a request for expedited processing shall be made by a statement certified by such person to be true and correct to the best of such person's knowledge and belief.
(F) In denying a request for records, in whole or in part, an agency shall make a reasonable effort to estimate the volume of any requested matter the provision of which is denied, and shall provide any such estimate to the person making the request, unless providing such estimate would harm an interest protected by the exemption in subsection (b) pursuant to which the denial is made.
(7) Each agency shall—
(A) establish a system to assign an individualized tracking number for each request received that will take longer than ten days to process and provide to each person making a request the tracking number assigned to the request; and
(B) establish a telephone line or Internet service that provides information about the status of a request to the person making the request using the assigned tracking number, including—
(i) the date on which the agency originally received the request; and
(ii) an estimated date on which the agency will complete action on the request.
(b) This section does not apply to matters that are—

(1)
(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;
(2) related solely to the internal personnel rules and practices of an agency;
(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute—
(A)
(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or
(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and
(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.
(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information
(A) could reasonably be expected to interfere with enforcement proceedings,
(B) would deprive a person of a right to a fair trial or an impartial adjudication,
(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy,
(D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source,
(E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or
(F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
(9) geological and geophysical information and data, including maps, concerning wells.
Any 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. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.
(c)
(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and—
(A) the investigation or proceeding involves a possible violation of criminal law; and
(B) there is reason to believe that
(i) the subject of the investigation or proceeding is not aware of its pendency, and
(ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings,
the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.
(2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.
(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.
(d) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.
(e)

(1) On or before February 1 of each year, each agency shall submit to the Attorney General of the United States a report which shall cover the preceding fiscal year and which shall include—
(A) the number of determinations made by the agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;
(B)
(i) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information; and
(ii) a complete list of all statutes that the agency relies upon to authorize the agency to withhold information under subsection (b)(3), the number of occasions on which each statute was relied upon, a description of whether a court has upheld the decision of the agency to withhold information under each such statute, and a concise description of the scope of any information withheld;
(C) the number of requests for records pending before the agency as of September 30 of the preceding year, and the median and average number of days that such requests had been pending before the agency as of that date;
(D) the number of requests for records received by the agency and the number of requests which the agency processed;
(E) the median number of days taken by the agency to process different types of requests, based on the date on which the requests were received by the agency;
(F) the average number of days for the agency to respond to a request beginning on the date on which the request was received by the agency, the median number of days for the agency to respond to such requests, and the range in number of days for the agency to respond to such requests;
(G) based on the number of business days that have elapsed since each request was originally received by the agency—
(i) the number of requests for records to which the agency has responded with a determination within a period up to and including 20 days, and in 20-day increments up to and including 200 days;
(ii) the number of requests for records to which the agency has responded with a determination within a period greater than 200 days and less than 301 days;
(iii) the number of requests for records to which the agency has responded with a determination within a period greater than 300 days and less than 401 days; and
(iv) the number of requests for records to which the agency has responded with a determination within a period greater than 400 days;
(H) the average number of days for the agency to provide the granted information beginning on the date on which the request was originally filed, the median

number of days for the agency to provide the granted information, and the range in number of days for the agency to provide the granted information;
(I) the median and average number of days for the agency to respond to administrative appeals based on the date on which the appeals originally were received by the agency, the highest number of business days taken by the agency to respond to an administrative appeal, and the lowest number of business days taken by the agency to respond to an administrative appeal;
(J) data on the 10 active requests with the earliest filing dates pending at each agency, including the amount of time that has elapsed since each request was originally received by the agency;
(K) data on the 10 active administrative appeals with the earliest filing dates pending before the agency as of September 30 of the preceding year, including the number of business days that have elapsed since the requests were originally received by the agency;
(L) the number of expedited review requests that are granted and denied, the average and median number of days for adjudicating expedited review requests, and the number adjudicated within the required 10 days;
(M) the number of fee waiver requests that are granted and denied, and the average and median number of days for adjudicating fee waiver determinations;
(N) the total amount of fees collected by the agency for processing requests; and
(O) the number of full-time staff of the agency devoted to processing requests for records under this section, and the total amount expended by the agency for processing such requests.
(2) Information in each report submitted under paragraph (1) shall be expressed in terms of each principal component of the agency and for the agency overall.
(3) Each agency shall make each such report available to the public including by computer telecommunications, or if computer telecommunications means have not been established by the agency, by other electronic means. In addition, each agency shall make the raw statistical data used in its reports available electronically to the public upon request.
(4) The Attorney General of the United States shall make each report which has been made available by electronic means available at a single electronic access point. The Attorney General of the United States shall notify the Chairman and ranking minority member of the Committee on Government Reform and Oversight of the House of Representatives and the Chairman and ranking minority member of the Committees on Governmental Affairs and the Judiciary of the Senate, no later than April 1 of the year in which each such report is issued, that such reports are available by electronic means.
(5) The Attorney General of the United States, in consultation with the Director of the Office of Management and Budget, shall develop reporting and performance

guidelines in connection with reports required by this subsection by October 1, 1997, and may establish additional requirements for such reports as the Attorney General determines may be useful.
(6) The Attorney General of the United States shall submit an annual report on or before April 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subparagraphs (E), (F), and (G) of subsection (a)(4). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.
(f) For purposes of this section, the term—
(1) "agency" as defined in section 551 (1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency; and
(2) "record" and any other term used in this section in reference to information includes—
(A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and
(B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.
(g) The head of each agency shall prepare and make publicly available upon request, reference material or a guide for requesting records or information from the agency, subject to the exemptions in subsection (b), including—
(1) an index of all major information systems of the agency;
(2) a description of major information and record locator systems maintained by the agency; and
(3) a handbook for obtaining various types and categories of public information from the agency pursuant to chapter 35 of title 44, and under this section.
(h)
(1) There is established the Office of Government Information Services within the National Archives and Records Administration.
(2) The Office of Government Information Services shall—
(A) review policies and procedures of administrative agencies under this section;
(B) review compliance with this section by administrative agencies; and
(C) recommend policy changes to Congress and the President to improve the administration of this section.

(3) The Office of Government Information Services shall offer mediation services to resolve disputes between persons making requests under this section and administrative agencies as a non-exclusive alternative to litigation and, at the discretion of the Office, may issue advisory opinions if mediation has not resolved the dispute.
(i) The Government Accountability Office shall conduct audits of administrative agencies on the implementation of this section and issue reports detailing the results of such audits.
(j) Each agency shall designate a Chief FOIA Officer who shall be a senior official of such agency (at the Assistant Secretary or equivalent level).
(k) The Chief FOIA Officer of each agency shall, subject to the authority of the head of the agency—
(1) have agency-wide responsibility for efficient and appropriate compliance with this section;
(2) monitor implementation of this section throughout the agency and keep the head of the agency, the chief legal officer of the agency, and the Attorney General appropriately informed of the agency's performance in implementing this section;
(3) recommend to the head of the agency such adjustments to agency practices, policies, personnel, and funding as may be necessary to improve its implementation of this section;
(4) review and report to the Attorney General, through the head of the agency, at such times and in such formats as the Attorney General may direct, on the agency's performance in implementing this section;
(5) facilitate public understanding of the purposes of the statutory exemptions of this section by including concise descriptions of the exemptions in both the agency's handbook issued under subsection (g), and the agency's annual report on this section, and by providing an overview, where appropriate, of certain general categories of agency records to which those exemptions apply; and
(6) designate one or more FOIA Public Liaisons.
(l) FOIA Public Liaisons shall report to the agency Chief FOIA Officer and shall serve as supervisory officials to whom a requester under this section can raise concerns about the service the requester has received from the FOIA Requester Center, following an initial response from the FOIA Requester Center Staff. FOIA Public Liaisons shall be responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.