

Freedom Through Justice Foundation

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September 23, 2011

VIA E-MAIL & FIRST-CLASS MAIL

Christopher Kurt
FOIA Officer
U.S. Office of Special Counsel
1730 M St., N.W. Suite 218
Washington, DC 20036-4505
ckurt@osc.gov

Re: Freedom of Information Act Request

Dear Mr. Kurt:

We write on behalf of the Freedom Through Justice Foundation, a 501(c)(3) nonprofit, nonpartisan public interest firm that uses public policy and legal reform strategies to ensure greater transparency in government, protect taxpayer interests and promote social and economic freedoms. We write out of the public concern that taxpayer-funded agencies are not subject to political or financial abuse. Accordingly, we write to request certain documents pursuant to the Freedom of Information Act (“FOIA”).¹ This request covers three distinct issues: 1) the full compliance of ethics waivers under Executive Order 13490, 2) the Hatch Act, and 3) the White House status as an “agency” under ethics rules but not under FOIA.

Ethics Waivers

On January 21, 2009, President Obama issued Executive Order 13490 (“E.O.”), requiring every appointee in every executive agency to sign an ethics pledge concerning their communications with lobbyists or participation on matters related to their prior lobbying activities.² On April 22, 2010, the Office of Government Ethics (“OGE”) issued a memorandum finding “several situations in which ethics officials issued waivers . . . after employees acted in particular matters from which they should have been recused, or otherwise engaged in conduct that was prohibited.”³

Over a year later, it appears the President’s pledge to avoid conflicts of interest and protect honesty in government has failed. Since President Obama’s inauguration, he has not yet fulfilled his promise to create an independent agency to investigate congressional ethics

¹ 5 U.S.C. § 552.

² Exec. Order No. 13,490, 74 C.F.R. 4673 (2009).

³ Don W. Fox, MEMORANDUM TO DESIGNATED AGENCY ETHICS OFFICIALS, Re: *Guidance on Waivers Under 18 U.S.C. § 208(b), Authorizations Under 5 C.F.R. § 2635.502(d), and Waivers of Requirements under Agency Supplemental Regulations*, U.S. Office of Government Ethics, Apr. 22, 2010, available at http://www.usoge.gov/ethics_guidance/daeograms/dgr_files/2010/do10005.html.

violations.⁴ The President waived his own rules intended to limit the role of former lobbyists in the White House within 24 hours of implementing them.⁵ *National Journal* reported that, “over the course of its first year, the administration waived some portion of the ethics order for 21 of its top personnel.”⁶

While OGE’s memorandum provided no further guidance regarding the enforcement of the E.O., it reiterated what ethics officials should already know, “that waivers and authorizations must be issued prospectively in order to be valid.”⁷ The E.O. clearly states that an individual must be issued a waiver to work on otherwise prohibited matters “prior to the appointee commencing work.”⁸ However, the OGE memorandum asserts that OGE was made aware of waivers issued after employees engaged in prohibited conduct or acted in matters from which they should have been recused.⁹

In addition to the OGE’s findings of conflicts of interest and other prohibited conduct, Administration officials may also be failing to comply with other sections of the E.O. In particular, we are troubled by the Administration’s issuance of waivers to individuals who do not appear to qualify for an exemption. Section 3 of the E.O. states:

Sec. 3. Waiver. (a) The Director of the Office of Management and Budget, or his or her designee, in consultation with the Counsel to the President or his or her designee, may grant to any current or former appointee a written waiver of any restrictions contained in the pledge signed by such appointee if, and to the extent that, the Director of the Office of Management and Budget, or his or her designee, certifies in writing (i) that the literal application of the restriction is inconsistent with the purposes of the restriction, or (ii) that it is in the public interest to grant the waiver. A waiver shall take effect when the certification is signed by the Director of the Office of Management and Budget or his or her designee.
(b) The public interest shall include, but not be limited to, exigent circumstances relating to national security or to the economy. *De minimis* contact with an executive agency shall be cause for a waiver of the restrictions contained in paragraph 3 of the pledge.¹⁰

While we do not dispute the validity of many of the waivers granted to individuals working on matters relating to the economy or national security, we are concerned waivers may have been granted to Administration officials or agency employees who are not within the purview of Section 3 of the E.O. For example, it is unclear how officials at the Department of

⁴ Kevin Friedl, *Ethics Reform*, NATIONAL JOURNAL, Jan. 21, 2010, available at http://www.nationaljournal.com/njonline/no_20100121_5942.php.

⁵ *Id.*

⁶ *Id.*

⁷ *Supra* note 3, at *id.*

⁸ *Supra* note 2, § 4(a).

⁹ *Supra* note 3, at *id.*

¹⁰ *Supra* note 2, §3 (emphasis added).

Education, Department of Labor, and the Peace Corps,¹¹ qualified for waivers based on “exigent circumstances relating to national security or to the economy[.]”

Hatch Act Concerns

Recent news reports have suggested that federal funds and property may have been used for political purposes, which raise Hatch Act¹² concerns. Accordingly, we write to request certain documents, pursuant to the Freedom of Information Act (“FOIA”), which may shed light on this controversy.

The *New York Times* reported that the Democratic National Committee (“DNC”) used the White House Blue Room to hold a campaign fundraiser¹³ and that, while President Obama attended the fundraiser,¹⁴ the meeting did not appear on his public schedule.¹⁵ According to a *Politico* report, all thirty guests were donors to President Obama’s 2008 campaign.¹⁶ Further, according to a *New York Times* article, the DNC organized and sponsored the event.¹⁷ The reports of the DNC meeting at the White House spurred congressional investigations, led by the Committee on Oversight and Government Reform at the U.S. House of Representatives.¹⁸ Committee Chairman Darrell Issa noted that the meeting’s non-appearance on the President’s calendar “call[ed] into question its official nature.”¹⁹ According to one anonymous attendee, “It was policy-focused, but everyone knew why they were there.”²⁰

More recently, numerous communications between the White House and the DNC have allegedly occurred. For instance, on the weekend of September 9, 2011, both the DNC and the

¹¹ The Administration provided waivers to the Executive Order to Joseph Main (Department of Labor), Margot Rogers (Department of Education), James Shelton (Department of Education), Naomi Walker (Department of Labor), and Aaron Williams (Peace Corps). See REPORT ON EXECUTIVE ORDER 13490, ETHICS BRANCH COMMITMENTS BY EXECUTIVE PERSONNEL, Mar. 31, 2010, available at http://oge.gov/directors_corner/reports/rpt_exorder13490.pdf.

¹² 5 U.S.C. §§ 7321 *et seq.*

¹³ Nicholas Confessore, *Obama Seeks to Win Back Wall St. Cash*, N.Y. TIMES, June 12, 2011, available at http://www.nytimes.com/2011/06/13/us/politics/13donor.html?_r=2 (“The event, organized by the Democratic National Committee, kicked off an aggressive push by Mr. Obama to win back the allegiance of one of his most vital sources of campaign cash”).

¹⁴ *Id.*

¹⁵ Josh Gerstein, *Carney defends Obama meeting Wall Street donors at White House*, POLITICO, June 14, 2011, available at http://www.politico.com/blogs/joshgerstein/0611/Carney_defends_Obama_meeting_financeworld_donors_at_White_House.html?showal.

¹⁶ Josh Gerstein, *All at DNC Blue Room meeting with Obama were donors*, POLITICO, June 26, 2011, available at http://www.politico.com/blogs/joshgerstein/0611/All_at_DNC_Blue_Room_meeting_with_Obama_were_donors.html

¹⁷ Nicholas Confessore, *Obama Seeks to Win Back Wall St. Crash*, N.Y. Times, June 12, 2011 available at <http://www.nytimes.com/2011/06/13/us/politics/13donor.html>.

¹⁸ See, e.g., Josh Gerstein and Jake Sherman, *Issa seeks DNC records of White House meeting*, POLITICO, July 13, 2011, available at <http://www.politico.com/news/stories/0711/58908.html>.

¹⁹ Letter from Chairman Darrell Issa to Kathryn Ruemmler, July 11, 2011, available at http://www.politico.com/static/PPM153_camp.html

²⁰ Josh Gerstein, *Donor meeting at White House draws fire*, POLITICO, June 20, 2011, available at http://www.politico.com/news/stories/0611/57389_Page2.html#ixzz1XyAgzFrm

Obama for America campaign's major donors came together to be briefed by White House officials.²¹ When the President announced the American Jobs Act, the DNC had already purchased the domain name www.americanjobsact.com—a day before the name of the proposal was made public.²² The DNC has also developed a major advertising campaign to support the American Jobs Act²³ and intends to run those ads in major swing states.²⁴

The Office of Special Counsel takes the position that the Hatch Act regulations permit only the most senior White House staff members to participate in partisan political activity in government buildings during the workday.²⁵ We are concerned which employees are exempt from the Hatch Act regulations and why.

Definition of Agency Under Ethics Rules Versus FOIA

The White House has claimed that the Office of Administration White House Counsel's office is not an agency for FOIA purposes.²⁶ The Office of Government Ethics, however, identifies K. Colleen Wallace as the Designated Agency Ethics Official for the White House Office of Administration/Executive Office of the President.²⁷ It would appear that the White House does not consider itself an agency for FOIA purposes but does consider itself an agency for ethics purposes.

The American people have a right to know the Administration is enforcing its own ethics rules and complying with the Hatch Act. We fully support the Administration's stated goal in elevating transparency. However, the issuance of waivers to individuals who may not be eligible is troubling and may expose an inability to ensure full compliance with the Administration's own directives. Above all, any individuals who have violated the President's E.O. must be held accountable. Otherwise, the strict requirements of the Executive Order lack the legitimacy of enforcement. Furthermore, the Freedom Through Justice Foundation is concerned that taxpayer-funds, as well as the White House itself, may have been used for prohibited political purposes.

²¹ Lynn Sweet, *Democratic National Committee Fall Meeting in Chicago Friday, Saturday. Illinois DNC Chair Mike Madigan to Surface at Event*, CHICAGO SUN-TIMES, Sept. 8, 2011, http://blogs.suntimes.com/sweet/2011/09/democratic_national_committee_11.html.

²² Ben Smith, *Jobs Act Website Gets Political*, POLITICO, Sept. 13, 2011, http://www.politico.com/blogs/bensmith/0911/Jobs_Act_website_gets_political.html.

²³ Daniel Strauss, *DNC Launches Ad Campaign To Promote Obama Jobs Plan*, THE HILL, Sept. 12, 2011, <http://thehill.com/blogs/blog-briefing-room/news/180819-dnc-promotes-obama-jobs-plan-with-ad-campaign>; Erica Werner, *DNC Ad Campaign to Promote Obama Jobs Plan*:

Group Focusing on Politically Key States to Rally the Public Behind a Divided Congress, MSNBC, Sept. 12, 2011, http://www.msnbc.msn.com/id/44486501/ns/politics-more_politics/#.TnDwCdT46rY.

²⁴ See Steve Tetreault, *Democrats Target Las Vegas to Promote Obama Jobs Plan*, LAS VEGAS REVIEW-JOURNAL, Sept. 12, 2011, <http://www.lvrj.com/news/democrats-target-las-vegas-to-promote-obama-jobs-plan-129673333.html?ref=333>

²⁵ See OFFICE OF SPECIAL COUNSEL, INVESTIGATION OF POLITICAL ACTIVITIES BY WHITE HOUSE AND FEDERAL AGENCY OFFICIALS DURING THE 2006 MIDTERM ELECTIONS 33-34 (2011)

²⁶ The White House, *Office of Administration – FOIA*, <http://www.whitehouse.gov/administration/eop/oa/foia/>.

²⁷ Office of Governmental Ethics, *Designated Agency Ethics Officials List*, Aug. 12, 2011, available at [www.usoge.gov/Program-Management/DAEO-list-\(as-of-Aug-12,-2011\)](http://www.usoge.gov/Program-Management/DAEO-list-(as-of-Aug-12,-2011)).

So we can better understand these underlying issues surrounding 1) the full compliance of Executive Order 13490, 2) the Hatch Act, and 3) the White House status as an “agency” please provide responses to the following requests.

Please produce the following, from the time period of January 1, 2009, to present:

1. All documents referring or relating to findings of potential violations of Executive Order 13490 (E.O.) including
 - a. All documents concerning recommendations for civil action proceedings to the Attorney General.
 - b. All documents concerning consultation with each federal agency regarding agency debarment proceedings against former appointees found to have violated the E.O.
2. All documents referring or relating to findings concerning gifts, communications and other lobbying activities from formerly registered lobbyists who are currently deregistered as defined by the Lobbying Disclosure Act (“LDA”), 2 U.S.C. § 1601, *et seq.* and prohibited by the E.O.
3. All documents referring or relating to findings that formerly registered lobbyists have engaged in lobbying activities despite not being officially registered under the LDA.
4. All documents referring or relating to any gifts to covered executive employees received from 501(c)(3) corporations and media organizations, including any documents which conclude that gifts from these organizations are not prohibited under the LDA or the E.O.
5. All documents referring or relating to any case in which a waiver was granted without consultation with the Counsel to the President.
6. All documents referring or relating the conflict of interest screening databases used by OSC, OGE, and/or accessible by each federal agency.
7. All documents referring or relating communications made by Senior White House officials related to issuance of waivers to officials at the Department of Labor, Department of Education, and Peace Corps.
8. All documents referring or relating to communications made by Senior White House officials related to issuance of waivers which were granted to appointees following their commencement of work on prohibited issues.
9. All documents referring or relating to communications between the OSC and the former Office of Political Affairs at the White House.
10. All documents referring or relating to communications between the OSC and the OGE concerning:

- a. potential or actual violations of Executive Order 13490 Ethics Waivers
 - b. Hatch Act violations, or
 - c. The status of White House offices as “agencies” for FOIA and ethics rules.
11. All documents referring or relating to OSC findings of partisan political activity conducted by White House staff and other Executive Branch employees.
 12. All documents referring or relating to official White House e-mails which were sent over a server owned by the Democratic National Committee (“DNC”).
 13. All documents referring or relating to OSC findings concerning violations of the Presidential Records Act.
 14. All documents referring or relating to OSC findings of political e-mails sent over a government server.
 15. All documents referring or relating to the Hatch Act, 5 U.S.C. 7321, *et seq.*—including reports, database records, and other documents—which detail violations, concerns or other notations referring or relating to actual, potential or prospective violations of the Hatch Act or the Presidential Records Act.
 16. All documents referring or relating to OSC’s definitions of Hatch-Act-exempt federal employees and/or which identify those exempt employees.
 17. All documents, including e-mail communications, referring or relating to the March 7, 2011, Blue Room event, including, but not limited to, draft and finalized invitation lists, RSVP notices, and communications with non-federal parties including the DNC.
 18. All notes, transcripts, or other documents or communications which were generated either during or as a result of the March 7, 2011 Blue Room event.
 19. All documents, including e-mail communications, referring or relating to any other DNC-planned events that have used any room of the White House, the Eisenhower Executive Office Building, the New Executive Office Building, or any other federal property on or off the White House grounds, or any other DNC-planned events for which such use was discussed or proposed.
 20. All documents and materials relating to the production of the “Dinner with Barack and Joe” presidential campaign fundraising video, including any raw video footage or script-related materials.
 21. All documents referring or relating to the use of federal personnel for fundraising purposes, including having federal employees attend fundraising events.
 22. All documents, including e-mail communications and receipts, referring or relating to solicitations made to White House employees by: the DNC, Obama for America, or any other political fundraising entity concerning donations or other contributions.

23. All documents inviting or encouraging federal personnel to attend any White House event sponsored or planned in whole or in part by the DNC.
24. All documents between any federal personnel and any personnel, officers, agents, or representatives of the DNC or any DNC-affiliated committee referring or relating to the American Jobs Act of 2011. This request shall also capture all documents referring or relating to communications between any federal personnel and any personnel, officers, agents, or representatives of the DNC or any DNC affiliated committee referencing the American Jobs Act of 2011.
25. All documents and internal communications which reference the DNC and/or any DNC-affiliated committee and the American Jobs Act of 2011.
26. All documents, including e-mail communications, referring to, relating to, or including as an author or recipient, any federal personnel and
 - a. any personnel, officers, agents, or representatives of the Paper, Allied-Industrial, Chemical and Energy Workers International Union (“PACE”) or
 - b. any personnel, officers, agents, or representatives of the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International Union (also known as the “United Steelworkers” or “USW”).
27. All documents referring or relating to, or including as a recipient or respondent, Patrick Gaspard, the DNC’s Executive Director; Jim Messina, the Political Director of the Obama for America re-election campaign; Martin Nesbitt, the Treasurer of the Obama for America re-election campaign; Madeline Talbott, the former director of Project Vote in Chicago; and/or the “Presidential Partners” entity—including its relationship to the PACE and/or the USW.
28. All documents referring or relating to the purported distinction between certain White House entities, such as Office of Administration, as “agencies” for Office of Government Ethics purposes but not for FOIA purposes.
29. All documents referring or relating to communications between the OSC and Members of Congress, including but not limited to Committee Chairmen and/or Ranking Members, referring or relating to
 - a. Ethics waivers,
 - b. The White House Blue Room Event of March 7, 2011,
 - c. Any event coordinated between the White House and the DNC, or
 - d. The Hatch Act.

Freedom Through Justice Qualifies Under the Non-Commercial Fee Category

The Freedom Through Justice Foundation requests a waiver of both search and duplication fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 5 U.S.C. § 552(a)(4)(A)(iii). The Freedom Through Justice Foundation is a 501(c)(3), not-for-profit, representative of the news

media and has no commercial purpose in requesting information. Freedom Through Justice has no commercial, trade or profit interests and is organized and operated to publish or broadcast news to the general public. Freedom Through Justice will use its editorial skills to turn raw materials into a distinct work.

Freedom Through Justice Is Entitled to a Complete Waiver of Fees

Freedom Through Justice requests a waiver of fees as a representative of the news media under 5 U.S.C. § 552(a)(4)(A)(ii)(II). The disclosure of the requested information is likely to contribute significantly to public understanding of the operations and activities of the government and is not primarily in the commercial interest of the requester pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). *See, e.g., Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 814 n.3 (2d Cir. 1994); *Prison Legal News v. Lappin*, 436 F. Supp. 2d 17, 27 n.5 (D.D.C. 2006).

The subject matter of the requested records specifically concerns identifiable “operations or activities of the government.” The disclosable portions of the requested information will be meaningfully informative in relation to this request. This disclosure will contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons. Freedom Through Justice has a dynamic and diverse staff whose range of expertise includes a combined 15 years of government oversight, investigative reporting, and federal public interest litigation experience.

Production of Documents and Contact Information

We call your attention to President Obama’s January 21, 2009 Memorandum concerning the Freedom of Information Act, in which he states:

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA. . . . The presumption of disclosure should be applied to all decisions involving FOIA.²⁸

If any responsive record or portion thereof is claimed to be exempt from production under FOIA, please provide sufficient identifying information with respect to each allegedly exempt record or portion thereof to allow us to assess the propriety of the claimed exemption. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). In addition, any reasonably segregable portion of a responsive record must be provided, after redaction of any allegedly exempt material. 5 U.S.C. § 552(b).

In an effort to facilitate record production within the statutory time limit, the Freedom Through Justice Foundation prefers to accept documents in electronic format (e.g. e-mail, .pdfs).

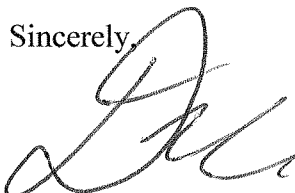
²⁸ PRESIDENT BARACK OBAMA, *Memorandum for the Heads of Executive Departments and Agencies, Subject: Freedom of Information Act*, Jan. 21, 2009, available at <http://www.whitehouse.gov/the-press-office/freedom-information-act>.

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When necessary, the Freedom Through Justice Foundation will accept the “rolling production” of documents.

If you do not understand this request or any portion thereof, or if you feel you require clarification of this request or any portion thereof, please contact us immediately via J. Keith Gates (Keith.Gates@ftjfoundation.org) or Tyler Martinez (Tyler.Martinez@ftjfoundation.org) or at 703-875-8625. We look forward to receiving the requested documents and a waiver of both search and duplication costs within twenty (20) business days. Thank you for your cooperation.

Sincerely,



Daniel Epstein
Executive Director
Freedom Through Justice Foundation

Encl. “Responding to Records Requests” and “Definitions” for the purposes of this request.