

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

CAUSE OF ACTION, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	1:12-cv-1342 (JEB)
	)	
NATIONAL ARCHIVES AND	)	<b><u>HEARING REQUESTED</u></b>
RECORDS ADMINISTRATION,	)	
	)	
Defendant.	)	
_____	)	

**PLAINTIFF’S OPPOSITION TO DEFENDANT’S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF AND PLAINTIFF’S CROSS- MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

Plaintiff, Cause of Action, respectfully opposes Defendant’s Motion to Dismiss or in the alternative for Summary Judgment (“Def.’s Motion”), and files Plaintiff’s Cross-Motion for Summary Judgment (“Plaintiff’s Cross-Motion”) under Rule 56 of the Federal Rules of Civil Procedure and Local Rule 7(h), and requests that this Court issue an Order denying Defendant’s Motion, and granting Plaintiff’s Motion, thereby issuing judgment in favor of Cause of Action on the grounds that no genuine issue as to any material fact exists, and Cause of Action is entitled to judgment as a matter of law. Attached in support of Plaintiff’s Cross-Motion are Plaintiff’s Memorandum of Points and Authorities in Support of its Motion for Summary Judgment, and Plaintiff’s Statement of Material Facts Not In Dispute in Support of its Motion for Summary Judgment. A proposed Order consistent with the relief requested herein is also attached.

**REQUEST FOR HEARING**

Plaintiff, Cause of Action, hereby respectfully requests, pursuant to Local Rule 7(f), a hearing on its Opposition to Defendant’s Motion to Dismiss, or in the Alternative for Summary Judgment, and Plaintiff’s Cross-Motion for Summary Judgment.

Dated: December 19, 2012

Respectfully submitted,

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TABLE OF CONTENTS

	<u>Page</u>
PLAINTIFF’S OPPOSITION TO DEFENDANT’S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF AND PLAINTIFF’S CROSS-MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF .....	i
TABLE OF CONTENTS .....	iii
PLAINTIFF’S OPPOSITION TO DEFENDANT’S MOTION TO DISMISS OR IN THE ALTERNATIVE MOTION FOR SUMMARY JUDGMENT .....	1
SUMMARY OF ARGUMENT .....	1
STATEMENT OF FACTS .....	2
STANDARD OF REVIEW .....	2
ARGUMENT .....	2
I. Legislative records are not automatically subject to FOIA but may be transformed into agency records .....	2
A. Records transferred to NARA for archival can come into the possession and control of NARA .....	3
1. NARA’s reliance on the Presidential Recordings and Materials Preservation Act (“PRMPA”) and the Presidential Records Act (“PRA”) is misplaced. ....	4
B. Subjecting the FCIC records to FOIA would neither undermine NARA’s administrative scheme nor result in the improper disclosure of sensitive information .....	7
II. The FCIC records became agency records when transferred into the possession and control of NARA .....	9
A. The cases considering control as a relevant factor apply under these specific circumstances .....	9
B. Use trumps Angelides’ intent in determining the status of the FCIC records .....	11
III. Defendant’s Motion for Summary Judgment fails because it does not comply with Local Civil Rule 7(h) . ....	12
CONCLUSION .....	13

PLAINTIFF’S STATEMENT OF MATERIAL FACTS NOT IN DISPUTE IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT .....14

MEMORANDUM IN SUPPORT OF PLAINTIFF’S CROSS-MOTION FOR SUMMARY JUDGMENT ..... 20

    SUMMARY OF ARGUMENT ..... 21

    STATEMENT OF FACTS ..... 22

    STANDARD OF REVIEW ..... 27

    ARGUMENT ..... 29

        I. For purposes of FOIA, the Archives possessed and controlled the Commission documents ..... 29

            A. Neither Congress nor the FCIC intended for the Archives to relinquish its statutory authority and control under 44 U.S.C. § 2108 ..... 31

            B. NARA disposed of the Commission’s records ..... 33

            C. NARA and its personnel read and relied upon the Commission’s records ..... 35

            D. The Commission’s documents were integrated into the Archive’s system ..... 37

        II. The FCIC records were formerly legislative records, not congressional records, and can be subject to FOIA ..... 38

            A. The FCIC records were formerly legislative records, not congressional records ..... 39

            B. The Archives incorrectly applied case law in the District of Columbia Circuit regarding the status of congressional records ..... 40

            C. The instructions of former FCIC Chairman Phil Angelides to restrict access do not govern the status of the FCIC records ..... 41

CONCLUSION ..... 44

**PLAINTIFF’S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS  
OPPOSITION TO THE DEFENDANT’S MOTION TO DISMISS OR IN THE  
ALTERNATIVE FOR SUMMARY JUDGMENT**

Plaintiff, Cause of Action, Inc. (“CoA” or “Plaintiff”), pursuant to Fed.R.Civ.P. 12(d), 56(a) and (c), and Local Rule 7(h), hereby files this Memorandum of Points and Authorities (“Plaintiff’s Opposition”) in Opposition to Defendant National Archives and Records Administration’s (“NARA” or “Defendant”), Motion to Dismiss or in the Alternative for Summary Judgment (“Defs.’ Motion”). A proposed Order is attached hereto.

Plaintiff is filing a Motion to Strike the Declarations of Thomas E. Mills and Robert Matthew Fulgham, Jr. or in the Alternative to Take Limited Discovery. Defendants Motion contains no Statement of Material Facts Not in Dispute in violation of Fed. R. Civ. P. 56(c) and Local Rule 7(h)(1).<sup>1</sup>

**SUMMARY OF THE ARGUMENT**

CoA disputes the argument presented in Defs.’ Motion. Legislative records are not automatically subject to FOIA when transferred into the custody of NARA; however, they are transformed into agency records when an agency is in possession of and exercises control over the records in question. *U.S. Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 144 (1989); *Burka v. U.S. Dep’t of Health & Human Servs.*, 87 F.3d 508, 515 (D.C. Cir. 1996). Despite Defendant’s assertion, records transferred to NARA for archival can come into the possession and control of NARA. Moreover, subjecting the FCIC records to FOIA would neither undermine NARA’s administrative scheme nor result in the improper disclosure of sensitive information. In this instance, the FCIC records became agency records when transferred into the possession and control of NARA: the D.C. Circuit cases considering control as a relevant factor apply under these specific circumstances; and NARA’s use of the records trumps Chairman Angelides’ intent in determining

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<sup>1</sup> Plaintiff reserves the right to amend its Opposition to include further statements of material facts in dispute.

their status. Finally, Defendant's Motion for Summary Judgment fails because it does not comply with Local Civil Rule 7(h).

### **STATEMENT OF FACTS**

Plaintiff adopts and incorporates as if fully set forth herein its Statement of Facts, as set forth on pages 9-13 of Plaintiff's Memorandum in Support of its Cross-Motion for Summary Judgment, is incorporated herein by reference.

### **STANDARD OF REVIEW**

Plaintiff adopts and incorporates as if fully set forth herein its Standard of Review, as set forth on pages 14-16 of Plaintiff's Memorandum in Support of the Cross-Motion for Summary Judgment, is incorporated herein by reference.

### **ARGUMENT**

#### **I. Legislative records are not automatically subject to FOIA but may be transformed into agency records.**

FOIA expressly exempts "the Congress" from its definition of agency, 5 U.S.C. § 551(1)(A).<sup>2</sup> Thus, Defendant correctly states that legislative records are not automatically subject to FOIA when transferred into the custody of an agency. Mot. to Dismiss at 1, 14, 15. However, as *Tax Analysts* states and the *Burka* line expands, legislative records become subject to FOIA when an agency exercises control over the records transferred into its possession. *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144 (1989); *Burka v. U.S. Dep't of Health & Human Servs.*, 87 F.3d 508, 515 (D.C. Cir. 1996); *see also Holy Spirit Ass'n v. CIA*, 636 F.2d 838, 840-42 (D.C. Cir. 1980) (holding that documents transmitted from Congress to the CIA for "safekeeping" became agency

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<sup>2</sup> Defendants' Motion cites to *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 145 (1980) for the holding that this FOIA exemption covers all entities within the legislative branch. Plaintiff's note that the Supreme Court did not specifically make this ruling, but recited this principal in its recitation of the U.S. District Court's ruling below.

records subject to FOIA: “Congress failed to express with sufficient clarity its intent to retain control”).

**A. Records transferred to NARA for archival can come into the possession and control of NARA.**

While acknowledging that NARA is an executive agency subject to FOIA, Defendant maintains that “NARA is unique within the Federal government as its mission includes the preservation of records . . .” and that, for this reason, the FCIC records cannot become agency records subject to FOIA. Defs.’ Mot. at 10. However, the Supreme Court has clearly held that records obtained by and under the control of an executive agency are agency records subject to FOIA. *Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989). Moreover, this test has been applied by the District of Columbia Circuit to congressional records transferred into the possession of executive agencies. *Paisley v. CIA*, 712 F.2d 686, 694-95 (D.C. Cir. 1983) (holding that records were subject to FOIA because official congressional committee did not manifest intent to retain control of documents when sent to CIA); *Holy Spirit Ass’n for the Unification of World Christianity v. CIA*, 636 F.2d 838, 842-43 (D.C. Cir. 1980) (rejecting argument that records remained under control of Congress when transferred from official congressional committee to CIA for “safekeeping”).

While “control” has no precise definition and “may well change as relevant factors assume varying importance,” the D.C. Circuit has identified “four factors relevant to a determination of whether an agency exercises sufficient control over a document to render it an ‘agency record.’” *CREW v. U.S. Dep’t of Homeland Security*, 527 F. Supp. 2d 76, 92 (D.D.C. 2007) (quoting *Crooker v. U.S. Parole Comm’n*, 730 F.2d 1, 5 (1st Cir. 1984) and *Burka v. U.S. Dep’t of Health & Human Serv.*, 87 F.3d 508, 515 (D.C. Cir. 1996)). Application of the four *Burka* factors determines whether the FCIC records have come under the control of NARA. Thus, Defendant’s argument that legislative records cannot become agency records subject to FOIA fails as a matter of law.

2. NARA's reliance on the Presidential Recordings and Materials Preservation Act ("PRMPA") and the Presidential Records Act ("PRA") is misplaced.

NARA's Motion vainly attempts to draw an analogy between the PRMPA and the PRA and its contention that the FCIC records are legislative records not subject to FOIA. This argument is erroneous on a number of levels.

In the first instance, the PRMPA, 44 U.S.C. § 2111 note § 101, and the PRA, 44 U.S.C. §§ 2202, 2203(f), and other Congressional statutes serve as the basis for Exemption 3 exclusions under FOIA, although NARA's control of the FCIC records, absent an Exemption 3 exclusion, or any other exclusion, would render such records subject to FOIA. 44 U.S.C. § 2204(c)(1) under the PRA reveals Congressional intent to subject agency records under NARA's control to FOIA. Any record under NARA's control is subject to FOIA unless a specific FOIA Exemption is applicable. Accordingly, as NARA concedes the issue of control, and does not claim a specific FOIA Exemption, their Motion fails as a matter of law.

Secondly, Defendant's citation to and discussion of *Ricchio v. Kline*, 773 F.2d 1389 (D.C. Cir. 1985) does not support their notion that despite NARA's complete control of the records, "FOIA could not be used to obtain the records because they were covered solely by the PRMPA." Defs.' Mot. at 11. *Ricchio* did not address the question of whether the Presidential transcripts—when in the hands of NARA—were "agency records" subject to FOIA. *Ricchio*, 773 F.2d at 1391 ("The arguments of the parties have been largely directed to the correctness of the district court's ruling that the transcripts are not "agency records" under the Information Act. We pretermitt that question. . . ."). The fact of the matter is that NARA's custody and control had nothing to do with the Court's decision. The Presidential transcripts were not subject to FOIA because Congress laid out in the PRMPA a "comprehensive, carefully tailored and detailed procedure" for the Nixon Presidential Materials, which obviated the application of FOIA:

In the [PRMA] Congress provided a comprehensive, carefully tailored and detailed procedure designed to protect both the interest of the public in obtaining disclosure of President Nixon's papers and of President Nixon in protecting the confidentiality of Presidential conversations and deliberations ... The underlying tapes themselves not only are not subject to the [FOIA] but concededly are covered by section 101(a) of the [PRMA].

*Id.* at 1395 (internal citation omitted). That is, the narrowly tailored and comprehensive PRMA superseded FOIA because Congress clearly expressed its will that such records only be disclosed under the PRMA. *Ricchio's* ruling had absolutely nothing to do with NARA's custody and control of the records. The District of Columbia Circuit amplified *Ricchio's* doctrine of supersession in *Lake v. Rubin*, 162 F.3d 113, 116 (D.C. Cir. 1998) ("Congress has dealt with disclosure of the same information through 'comprehensive, carefully tailored and detailed' provisions 'designed to protect both the interest of' those seeking the information and the interest in 'confidentiality.'" (citing *Ricchio*) (other citation omitted); *see also, Gardner v. United States of America*, 213 F.3d 735, 741 (D.C. Cir. 2000); *Julian v. U.S. Dep't. of Justice*, 806 F.2d 1411, 1420 (9th Cir. 1986) (finding *Ricchio* "inapposite" in argument to displace FOIA by the Parole Commission and Reorganization Act of 1976 (PCRA), 18 U.S.C.S. § 4201 *et seq.*).

Thirdly, Defendant admits more than it knows when citing to the PRMPA, and the PRA and its legislative history at pages 11-13 of its Motion to Dismiss. NARA fails to recognize that Presidential records are not subject to FOIA not because of any issue even remotely involving custody or control by NARA, but because Congress has enacted legislation explicitly stating that such records are not subject to FOIA. Congress did not do so here under FERA, or under FCIC guidelines or rules. NARA speculates that the inclusion of the last sentence of 44 U.S.C. § 2204(c)(1)<sup>3</sup> by Congress would have been unnecessary if NARA's custody and control of Presidential records made such records subject to FOIA. Defs.' Mot. at 11-12. This is tortured logic indeed. NARA fails to recognize, or apparently comprehend, that the White House is not an agency

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<sup>3</sup> "... for the purposes of [5 U.S.C. 552(b)(5)] such [Presidential records] shall be deemed to be records of [NARA]."

for the purposes of FOIA, a determination made by Congress. FOIA applies to “the Executive Office of the President,” 5 U.S.C. § 552(f), but this term does not include either “the President’s immediate personal staff” or any part of the Executive Office of the President “whose sole function is to advise and assist the President.” *Meyer v. Bush*, 981 F.2d 1288, 1292 n. 1 (D.C. Cir. 1993) (quoting H.R. Rep. No. 1380, 93d Cong., 2d Sess. 14 91974)); *see also, e.g., Soucie v. David*, 448 F.2d 1067, 1075 (D.C. Cir. 1971).<sup>4</sup>

Lastly, NARA confuses and conflates accepting records for deposit at the Archives, and controlling those records and altering their format. These are completely different operational activities.<sup>5</sup> Toward this end, the Federal Regulations discussed by NARA at pages 13-14 of its Motion, are tailored specifically for Presidential, Judicial and Congressional records, for which Congress has enacted specific laws which govern whether FOIA is applicable or not. The essence of the issue is not whether Presidential, Judicial or legislative records “retain their original character” after transfer to NARA, but rather whether NARA has obtained these records and thereafter controlled the records by means of changing and altering their formatting, which NARA concedes it did for the purposes of transmission to the House Oversight Committee, and production for Peter J. Wallison’s review. Defs.’ Mot. at 14; Declaration of Peter J. Wallison (“Wallison Decl.”), Pl’s. Mat. Facts, Ex. 11, ¶¶ 14-15; Declaration of Daniel Z. Epstein (“Epstein Decl.”), Pl’s. Mat. Facts, Ex. 10, ¶¶ 7, 10-11.

**B. Subjecting the FCIC records to FOIA would neither undermine NARA’s administrative scheme nor result in the improper disclosure of sensitive information.**

NARA alleges that Plaintiff’s demand would undermine its orderly scheme for processing legislative records. FOIA affects NARA’s existing administrative scheme for processing and

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<sup>4</sup> This means, among other things, that the parts of the Executive Office of the President known as the “White House Office” are not subject to FOIA, while other parts of said Executive Office are subject to FOIA.

<sup>5</sup> NARA’s citation to and discussion of regulations regarding access to certain types of records likewise misses the mark: the “character” of a record, be it from the Presidential, Judicial or legislative branch, can be changed by virtue of NARA’s alteration of that record when under its control.

releasing records is at once irrelevant and immaterial to the present dispute. First, NARA exercised sufficient control over former legislative records, and in so doing transformed those records into agency records subject to FOIA. Second, the unique actions presented in this case, namely, the decision of Sarah Zuckerman—assumedly at the direction of Chairman Angelides—to strike out the FOIA provision of the Transfer Agreement, without putting that decision to a full vote of the FCIC, was *ultra vires* and irrelevant to the administrative scheme at NARA for processing and releasing records. Third, NARA violated the “achievement of the legislative goals of orderly processing and protection of the rights of all affected persons” when the Archivist deferred to a Commission’s chair decision that was not subject to the approval of the Commission. Moreover, the public interest involved in the achievement of legislative goals clearly balances toward disclosure.

The fact that the chief investigative committee of Congress sought these records also indicates that these records are uniquely distinguishable from the vast collection of records received by the Center for Legislative Archives. NARA actively processed the FCIC records in order to produce them to the House Committee on Oversight and Government Reform (“the Oversight Committee”). NARA has already ordered and processed the records for submission to the Oversight Committee. In fact, NARA formatted the FCIC records on searchable form on electronic disks in the “form of database files, which were subsequently uploaded into Concordance, a form of discovery management software, by the Oversight Committee.” Epstein Decl., Pl’s. Mat. Facts, ¶¶ 7, 10-11. Cause of Action merely requests duplicates of those files—no material burden is presented on NARA. Orderly processing for purposes of this litigation occurred on the date records were provided to the Oversight Committee. Plaintiff is not seeking to have NARA expedite its orderly processing of the records, including “systematic organization, indexing, or finding aid development”—it merely seeks the same records provided to the Oversight Committee. NARA is duly mistaken in believing that CoA is asking for the burdensome processing of records.

NARA further alleges that applying FOIA to the FCIC records could cause the improper release of sensitive information. Defs.' Mot. at 18-21. However, NARA's arguments in this regard are vague and highly speculative. Under FOIA Exemption 4, an agency can show that the information is (A) a trade secret or (B) information that is (1) commercial or financial, (2) obtained from a person, and (3) privileged or confidential. 5 U.S.C. § 552(b)(4). While admitting, as it must, that any restricted information within the FCIC records may be covered by one of FOIA's nine exemptions, Defendant goes on to state that "a very real subset of information" may not be protected under 5 U.S.C. § 552(b), then makes an illogical quantum leap in stating that "applying FOIA could nullify restrictions that both the legislative agency and the Archivist thought were 'necessary or desirable in the public interest[.]' 44 U.S.C. § 2108(a)." Defs.' Mot. at 18-19. The apposite case law renders NARA's manufactured concerns in this regard disingenuous at best. *See, e.g., McKinley v. Bd. of Governors of the Fed. Reserve Sys.*, 849 F. Supp. 2d 47, 60-61 (D.D.C. 2012) (discussing the applicability of FOIA Exemption 4 to banks and other financial institutions as "persons" under 5 U.S.C. §§ 551(2), 552(b)(4)); *Holy Spirit Ass'n for the Unification of World Christianity v. CIA*, 636 F.2d 838, 842-44 (D.C. Cir. 1980) (discussing records generated by Congress and the CIA under FOIA Exemptions 1, 3, 5 and 6, as well as the constitutional protection of the legislative process under the Speech or Debate Clause of the Federal Constitution).

Finally, to reiterate, Plaintiff is not asking this court to rule that legislative commissions and their records are subject to FOIA. CoA is only asking that FOIA be applied to records that are no longer legislative in nature because they have become sufficiently controlled by NARA.

## **II. The FCIC records became agency records when transferred into the possession and control of NARA.**

Defendant alleges that a line of District of Columbia Circuit cases considering agency control as a relevant factor are not applicable under the specific circumstances of this case.

Alternatively, Defendant alleges that the FCIC records at issue remain legislative records exempt from FOIA because Chairman Angelides intended to retain control over the records. NARA misrepresented and, accordingly, inaccurately applied the cases decided in the District of Columbia Circuit; thus, these arguments fail as a matter of law. Moreover, the FCIC records were transferred into the custody and control of NARA and are, therefore, subject to FOIA.

**A. The cases considering control as a relevant factor apply under these specific circumstances.**

Defendant alleges that a line of District of Columbia Circuit cases evaluating agency control arise only in the context of an ongoing oversight relationship between Congress and an executive agency. Defs.' Mot. at 21. Thus, Defendant argues that NARA's control of the FCIC records is irrelevant to the status of the records. Defs.' Mot. at 21. Defendant has, however, ignored District of Columbia Circuit cases evaluating agency control in other contexts.

First, *Paisley* does not purport to consider control only in the context of congressional oversight. Defendant argues that "a control-based framework makes sense in the usual course, where "[m]any agencies . . . must work frequently and closely with congressional committees on matters of budget and policy or on individual cases." Defs.' Mot. at 23 (quoting *Paisley v. CIA*, 712 F.2d 686, 696 (D.C. Cir. 1983)). However, NARA provided no legal support for its assertion that control is considered only in the context of ongoing congressional oversight.

Second, Defendant has ignored *Burka v. HHS* and a line of subsequent cases not involving congressional oversight. Despite Defendant's argument that control is considered only in the context of congressional oversight, the four *Burka* factors evidencing control were determinative as to the question of whether private records became agency records subject to FOIA. In *Burka*, this Circuit held that data tapes created by a contractor were agency records subject to FOIA because the U.S. Department of Health & Human Services exercised extensive supervisory authority which evidenced "constructive control." *Burka v. U.S. Dep't of Health & Human Servs.*, 87 F.3d 508, 515

(D.C. Cir. 1996). *Burka* remains bedrock law in this Circuit and the U.S. District Courts for D.C. as a logical, and necessary, extension of *Tax Analysts*, as interpreted and applied. More recently, this Circuit relied on the *Burka*'s control analysis when determining whether records created by Fannie Mae and Freddie Mac—then private entities—became agency records in the possession of the Federal House Finance Agency. *Judicial Watch, Inc., v. Fed. Hous. Fin. Agency*, 646 F.3d 924, 927 (D.C. Cir. 2011).

Lastly, NARA has ignored a line of D.C. Circuit cases evaluating agency control in the context of judicial records. In *Carson v. U.S. Dep't of Justice*, this Circuit held that a presentence report originating in the federal court system became an agency record subject to FOIA in the hands of the Parole Commission. 631 F.2d 1008, 1011 (D.C. Cir. 1980). *Carson* held that the reports were agency records when transferred into the possession and control of the Parole Commission. *Id.* This Circuit also subsequently applied the control test in *Lykins v. U.S. Dep't of Justice*, 725 F.2d 1455, 1461 (D.C. Cir. 1984) (“To the extent that the Parole Commission has control of the presentence report -- as we held in *Carson* -- the ‘policies’ of the Virginia District Court do not override appellant’s right under FOIA to see the report.”).

Defendant provides no support for its claim that cases considering control as a relevant factor arise in the “unique context” of Congress’s ongoing interaction with executive agencies, i.e., congressional oversight. Agency control is relevant to the status of records, regardless of whether the records originated in Congress, the federal courts, an executive agency, or the private sector. In this instance, control is relevant to the status of records originating in an independent, legislative-branch commission.

**B. Use trumps Angelides’ intent in determining the status of the FCIC records.**

For the foregoing reasons, agency control is the relevant factor in assessing the status of the FCIC records transferred into the custody of NARA. Moreover, the D.C. Circuit has held that the

four *Burka* factors are relevant to a determination of whether an agency, in this case NARA, exercises sufficient control over documents to render them “agency records.” The *Burka* analysis is a “totality of the circumstances test,” or a balancing test, in which FOIA’s presumption of disclosure is in full effect: the term “agency records” shall not be “manipulated to avoid the basic structure of FOIA.” *Consumer Fed’n of Am. v. Dep’t of Agric.*, 455 F.3d 283, 287 (D.C. Cir. 2006). When evaluating the four *Burka* factors in their totality, use of the records is decisive; if there is a conflict between the first factor assessing intent and the three remaining factors assessing use, then “use trumps intent.” *CREW v. U.S. Dep’t of Homeland Security*, 527 F. Supp. 2d 76, 97 (D.D.C. 2007); *Judicial Watch v. U.S. Secret Serv.*, 803 F. Supp. 2d 51, 57-61 (D.D.C. 2011); *McKinley v. Bd of Governors of Fed. Reserve Sys.*, 849 F. Supp. 2d 47, 57-58 n.5 (D.D.C. 2012).

Even assuming that intent is decisive under certain circumstances, i.e., the clearly expressed intent of Congress, Chairman Angelides’ intent is not determinative. First, Congress did not clearly express its intent to control documents produced under the Fraud Enforcement Recovery Act of 2009 (“FERA”). Second, Chairman Angelides—who is not a Member of Congress—cannot not express the will of Congress. Third, Angelides’ intent to restrict access to the FCIC records is inconsistent with the statutory language of 44 U.S.C. § 2108(a). Finally, his intent is inconsistent with congressional intent, as the purpose of the FERA was to use transparency to shine sunlight on the financial crisis. Pub. Law No. 111-21, § 5, 123 Stat. 1617 (2009). The expressed intent of Chairman Angelides to retain control over the FCIC records is not a relevant consideration.

Taken together, Defendant’s arguments that the FCIC records are exempt from FOIA fail as a matter of law. Legislative records, in this case the FCIC records, become agency records subject to FOIA when an agency such as NARA exercises control over the records transferred into its possession.

**III. Defendant’s Motion for Summary Judgment fails because it does not comply with Local Civil Rule 7(h).**

Defendant's Motion sets forth no statement of material facts not in dispute. Local Rule 7(h) provides, in pertinent part, that "[e]ach motion for summary judgment ***shall*** be accompanied by a statement of material facts as to which the moving party contends there is no genuine issue, which ***shall*** include references to the parts of the record relied on to support the statement." L.Civ.R. 7(h) (emphasis added). This Court has emphasized the importance of full compliance with Local Rule 7(h):

Quite clearly, the rule does not permit a party to file an additional statement of material facts after the principal briefing on a party's motion for summary judgment has been completed and an opposition has already been filed. Such a filing not only contradicts the plain language of this rule, but also violates the principal intent behind the requirements LLCvR 7(h) to ensure that all parties are aware of and work from the same set of material facts in discussing and responding to the merits of the relevant motion(s) for summary judgment. Moreover, the Court repeatedly advised the parties that they are required to "comply ***fully*** with Local Civil LCvR 7(h)" and that it "may strike pleadings not in Conformity with these rules." [citation omitted]

*Sloan v. Urban Title Servs., Inc.*, 652 F.Supp.2d 51, 55-56 (D.D.C. 2009); *Baptiste v. Bureau of Prisons*, 554 F.Supp.2d 1, 2 (D.D.C. 2008) (motion for summary denied for failure to provide a statement of material facts not in dispute); *See also Lewis v. Schafer*, 571 F.Supp.2d 54, 56 (D.D.C. 2008) (defendant's motion for summary judgment was construed by the Court solely as a motion to dismiss because defendant failed to file statement of material facts not in dispute, citing *Baptiste, supra*).

Accordingly, on this basis alone, the Defendant's Motion in the Alternative for Summary Judgment fails for violating Local Rule 7(h), and should be denied on that basis alone.

### **CONCLUSION**

For the reasons set forth above, and any to be advanced at a hearing thereon, Plaintiff, Cause of Action, Inc., hereby respectfully requests that this Court enter an Order denying Defendant's

Motion to Dismiss or in the Alternative for Summary Judgment. An appropriate proposed Order is attached.

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

CAUSE OF ACTION, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	1:12-cv-1342 (JEB)
	)	
NATIONAL ARCHIVES AND	)	
RECORDS ADMINISTRATION,	)	
	)	
	)	
Defendant.	)	
_____	)	

**PLAINTIFF’S STATEMENT OF MATERIAL FACTS NOT IN DISPUTE**

Plaintiff, Cause of Action, provides the following statement of material facts not in dispute, pursuant to Rule 56 of the Federal Rules of Civil Procedure and Rule 7(h) of the Local Civil Rules of the United States District Court for the District of Columbia, in support of its motion for summary judgment in this case, which arises under the Freedom of Information Act, 5 U.S.C. § 552.

1. On March 19, 2012, Attorney General Eric Holder issued a policy statement that the Department of Justice “will defend a denial of a FOIA request *only if* (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law. Attached as Exhibit 1 (emphasis added).
  
2. The Fraud Enforcement and Recovery Act of 2009 (“FERA”), enacted May 20, 2009, was passed by Congress in response to the financial crisis of 2008 with the stated purpose of “improv[ing] enforcement of mortgage fraud, securities and commodities fraud, financial institution fraud and other frauds related to Federal

assistance and relief programs, for the recovery of funds lost to these fraud, and for other purposes.” FERA, Pub. L. No. 111-21, 123 Stat. 1617 (2009).

3. Section 5 of FERA established the Financial Crisis Inquiry Commission (“Commission” or “FCIC”) to examine the causes of the crisis and to report its findings before Congress. *Id.* §§ 5(a), 5(c), 5(h). The Commission was also to report its findings to the President and, if appropriate, refer any potential violations of law to the Attorney General and State attorneys general. *Id.* §§ 5(c), 5(h).
4. FERA explicitly prohibited Members of Congress and their staffs from serving as members of the Commission. *Id.* § 5(b)(2)(B).
5. FERA did not expressly exempt the Commission, or other agencies in possession or control of FCIC records, from compliance with the Freedom of Information Act, 5 U.S.C. § 552 *et seq.* (“FOIA”). FERA, Pub. L. No. 111-21, 123 Stat. 1617 (2009).
6. FERA required the Commission to issue its report on December 15, 2010. *Id.* § 5(h)(1).
7. The Commission interviewed more than seven hundred (700) witnesses and conducted nineteen (19) days of hearings from September 17, 2009, to September 23, 2010, in cities across the United States. Fin. Crisis Inquiry Comm’n, The Fin. Crisis Inquiry Rep., Appendix B, 545, attached as Exhibit 2.
8. The Commission’s report, accompanied by dissents, was submitted on January 27, 2011. Press Release, Fin. Crisis Inquiry Comm’n, Financial Crisis Inquiry Commission Releases Report on the Causes of the Financial Crisis, (Jan. 27, 2011) *available at* [http://fcic-static.law.stanford.edu/cdn\\_media/fcic-news/2011-0127-fcic-releases-report.pdf](http://fcic-static.law.stanford.edu/cdn_media/fcic-news/2011-0127-fcic-releases-report.pdf), attached as Exhibit 3.
9. FERA stated that the Commission “shall terminate 60 days after the date” on which the final report was submitted. FERA § 5(i)(1). Upon its termination, no agency or

entity succeeded the FCIC in function. *Id.* No provision of FERA dictated the preservation or dissemination of the Commission's records upon its termination. FERA, Pub. L. No. 111-21, 123 Stat. 1617 (2009).

10. On February 10, 2011, FCIC Chairman Phil Angelides wrote the Archivist of the United States David Ferriero stating that the FCIC would soon be terminated and that the FCIC's records would be deposited with the National Archives and Records Administration ("the Archives" or "NARA"). Compl. ("Compl.") Ex. 1. The letter requested that the Archives impose a five-year categorical bar on public access to all Commission records that were not yet publically available. *Id.* It also stated that each Commissioner and certain staff should have immediate and continuing access to the records. *Id.*
11. On February 11, 2011, the Commission transferred legal custody of its records to the Archives by completing Standard Form 258 ("SF-258"), an Agreement to Transfer Records to the National Archives of the United States. Compl. Ex. 2.
12. The SF-258 explicitly states that records held by the Archives are governed by the Federal Records Act, and subject to the FOIA. Compl. Ex. 2 ("Terms of Agreement"); Blank Standard Form 258, attached as Exhibit 4.
13. The Commission's agent, Sarah Zuckerman, drew a line through the sentence in the SF-258, under the Terms of Agreement section, which stated that that the records are subject to the Freedom of Information Act. Compl. Ex. 2.
14. The Terms of Agreement section of the SF-258 provides that the transfer of FCIC records is in accordance with 44 U.S.C. § 2108. *Id.*
15. The Commission ceased to exist on February 13, 2011. Compl. Ex. 1.
16. Prior to termination, the FCIC shared select records to Stanford Law School for Stanford to make publicly available. *About the FCIC at Stanford Law School,*

FCIC.LAW.STANFORD.EDU, <http://fcic.law.stanford.edu/about/stanford> (last visited Dec. 5, 2012). Attached as Exhibit 5.

17. On February 18, 2011, the Committees on Oversight and Government Reform and Financial Services of the House of Representatives requested that the Archives provide copies of certain FCIC records in its custody. Attached as Exhibit 6.
18. The Archives voluntarily released the FCIC records upon request by the Committees, and without being subject to a congressional subpoena. Compl. ¶¶ 26-29; Declaration of Daniel Z. Epstein (“Epstein Decl.”), attached as Exhibit 10, ¶¶ 7-8.
19. The Archives provided the FCIC records in an electronic database, and the documents were in a searchable format. Epstein Decl., attached as Exhibit 10, ¶¶ 7, 10-11.
20. On October 3, 2011, Cause of Action submitted a Freedom of Information Act request to the Archives in order to review the records that the Commission submitted to the Oversight and Financial Services Committees. Compl. Ex. 3.
21. On the date of Cause of Action’s request, the Archives was the possessor of the FCIC documents at issue. Compl. Ex. 4.
22. On December 1, 2011, the Archives denied Cause of Action’s FOIA request, stating the Commission’s records were legislative in character and therefore beyond the reach of FOIA. Compl. Ex. 4. The Archives later acknowledged that the SF-258, under the Terms of Agreement section, had been altered when the records were deposited. Compl. Ex. 7.
23. Cause of Action has exhausted its administrative remedies. Compl. Ex. 7. Cause of Action appealed its denial, Compl. Ex. 5, which the Archives affirmed, Compl. Ex. 7. The denial of this request is the subject of the present litigation. Compl. Exs. 4-7.

24. On July 13, 2011, the minority staff of the House Oversight Committee released a report impugning former Commissioner Peter Wallison for violating “the Commission’s ethics provisions.” Democratic Staff, *An Examination of Attacks against the Financial Crisis Inquiry Commission* 5, 12 (July 13, 2011). Attached as Exhibit 7.
25. On March 13, 2012, former FCIC Commissioner Peter Wallison wrote NARA, requesting access to FCIC records in order to respond to the statements made in the July 13, 2012 report from the minority staff of the Committee on Oversight and Government Reform of the U.S. House of Representatives. Attached as Exhibit 8.
26. On April 5, 2012, Commissioner Wallison wrote NARA General Counsel Gary Stern confirming a March 29, 2012, telephone call. Attached as Exhibit 9.
27. In his letter, Mr. Wallison stated that Mr. Stern said Wallison “could look at what [NARA] sent to the Committee, but no one working on [Wallison’s] behalf could do so.” Ex. 9.
28. In this same letter, Wallison said “you [Gary Stern] explained that NARA has the originals of all documents, including the materials provided to the Hon. Darrel (*sic*) Issa, Chairman of the Committee. You stated that NARA will allow me to review these records on-site, but that I am not allowed to engage counsel for that purpose.” Ex. 9.
29. On April 18, 2012, Mr. Stern responded to Mr. Wallison. Compl. Ex. 8. Mr. Stern did not correct or dispute Wallison’s statement that he was not allowed to access the records with counsel or that NARA had provided the FCIC documents to the House Oversight Committee. *Id.* Instead, Mr. Stern affirmed that Wallison’s access would be “limited to the persons named in the request letter from the former Chairman of

the Commission, and thus does not extend to other persons, including representatives of the named persons.” Compl. Ex. 8.

30. Cause of Action is non-profit, non-partisan organization that uses investigative, legal, and communications tools to educate the public on how government accountability and transparency protects taxpayer interests and economic opportunity and is concerned about how the Commission conducted its investigation of the financial crisis. Epstein Decl., Ex. 10, ¶ 2.

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

CAUSE OF ACTION, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	1:12-cv-1342 (JEB)
	)	
NATIONAL ARCHIVES AND	)	
RECORDS ADMINISTRATION,	)	
	)	
	)	
Defendant.	)	
_____	)	

**PLAINTIFF’S MEMORANDUM OF POINTS AND AUTHORITIES  
IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT**

Plaintiff, Cause of Action (“CoA”), respectfully moves for summary judgment in this case, which arises under the Freedom of Information Act (“FOIA”). On February 13, 2011, the Financial Crisis Inquiry Commission (“Commission” or “FCIC”) deposited its records with the National Archives Administration (“Archives” or “NARA”). CoA submitted a FOIA request to the National Archive Records Administration (“Archives” or “NARA”) in a letter dated October 3, 2011 seeking all Commission documents that the Archives had voluntarily submitted to the House Committee on Oversight and Government Reform (“House Oversight Committee”). The Archives denied CoA’s FOIA request by letter dated December 1, 2011, stating that the records CoA sought were not agency records subject to FOIA. CoA appealed by letter dated January 5, 2012. The Archives affirmed its denial of CoA’s FOIA request by letter dated February 6, 2012, stating that CoA had exhausted its administrative remedies. Despite the Archives’ contention, the Archives possesses and controls the Commission’s records, making them agency records subject to FOIA. Accordingly, there is no genuine issue of material fact, and CoA is entitled to judgment as a matter of law. A Statement of Material Facts Not in Dispute (“Pl’s. Mat. Facts”) and a proposed Order are attached hereto.

### **SUMMARY OF THE ARGUMENT**

CoA asserts that, for purposes of FOIA, NARA possessed and controlled the FCIC records at the time of CoA's FOIA request on October 3, 2011. FOIA does not define "agency records." Rather, the Supreme Court has articulated a two-part test to determine whether records are agency records subject to the FOIA: (1) the agency must create or obtain the records; and (2) the agency must control the records at the time of the FOIA request. The District of Columbia Circuit has set forth a four-part test to evaluate whether an agency is in control of the records it possesses. The essential element of this analysis, which balances all four factors under the totality of the circumstances, is that use of the records is decisive. Simply put, "use trumps intent."

Applying the four factors in this particular case, neither Congress nor the FCIC intended for NARA to relinquish its statutory authority and control under 44 U.S.C. § 2108. Congress did not express its intent to control the FCIC records under FERA. The FCIC expressed its explicit intent, in writing, to transfer both physical custody and ultimate control of the records to NARA, without exception. Moreover, NARA disposed of the FCIC records under its control by providing said records to the House Oversight Committee and the House Financial Services Committee, as well as former Commissioner Peter J. Wallison. In so doing, and in other ways, NARA personnel read and relied upon the FCIC records. This transfer of FCIC records by NARA was clearly in the legitimate conduct of NARA's official duties. Lastly, the FCIC records were integrated into the Archive's system because the records were incorporated into NARA's computer system.

It is precisely the use and control of the FCIC records by NARA that subjects said records to FOIA. While NARA argues that the records retained their character as legislative records not subject to FOIA, FCIC's genesis as a temporary legislative commission renders their records legislative, not congressional, records. When NARA exercised its absolute degree of control over these records, they became agency records. NARA confuses and conflates accepting records for deposit with fundamental control and altering of the format of these records.

Furthermore, NARA incorrectly, and illogically, applies case law in the District of Columbia Circuit regarding the status of Congressional records to the facts of this case. In so doing, NARA ignores the centrality of the four-factor test for determining agency records subject to FOIA. Toward this end, the instructions contained in a February 10, 2011, letter from Phil Angelides, then Chairman of the FCIC Commission, attempting to restrict future access to FCIC records from FOIA, do not carry the imprimatur of Congress nor express congressional intent with regard to such future disposition of the records.

### **STATEMENT OF FACTS**

Congress enacted the Fraud Enforcement and Recovery Act of 2009 (“FERA”) in May 2009 in response to the banking and mortgage crisis of 2008 with the stated purpose of improving the enforcement of mortgage, securities and financial institution fraud, and for recovering funds lost to these frauds. Pub. Law No. 111-21, § 2, 123 Stat. 1617 (2009). In the final section of this statute, section 5 of FERA, Congress established the Financial Crisis Inquiry Commission (“Commission” or “FCIC”) to examine the causes of the crisis and report its findings to Congress. 123 Stat. at 1625. The Commission was also to report its findings to the President and, if necessary, refer any potential violations of law it uncovered to the Attorney General. *Id.* at 1630. FERA explicitly required the Commission to issue its report on December 15, 2011. *Id.* Within 60 days of completing this task, FERA required that the Commission be terminated. *Id.* Upon its termination, no agency or entity succeeded the Commission in function. *Id.* No provision of FERA addressed the preservation or dissemination of the Commission’s records after its termination. *Id.* at 1617-30.

To investigate the financial crisis, the Commission interviewed more than seven hundred (700) witnesses and conducted nineteen (19) days of hearings from September 17, 2009, to September 23, 2010, in cities across the United States. Pl.’s. Mat. Facts, Exs. 2-3. When the Commission issued its 662-page report on January 27, 2011, more than a month after the statutory deadline, it had exercised all its powers and fulfilled all its duties. Pl.’s. Mat. Facts, Ex. 3; FERA §

5(i). With its Final Report complete, “the Commission’s work comes to a close.” FIN. CRISIS INQUIRY COMM’N, THE FIN. CRISIS INQUIRY REPORT xiii (2011).

On February 10, 2011, FCIC Chairman Phil Angelides wrote to the Archivist of the United States David Ferriero stating that the FCIC would soon be terminated and its records would be deposited with the National Archives and Records Administration (“the Archives” or “NARA”). Compl. Ex. 1. The letter requested that the Archives impose a five-year categorical bar on public access to all FCIC records that were not yet publically available. Compl. Ex. 1. It also requested that the Commission’s records would not be subject to the FOIA until February 13, 2016. Compl. Ex. 1. Angelides asked that the Commissioners and certain staff have immediate and continuing access to the records. Compl. Ex. 1.<sup>6</sup> (“[A]fter February 13, 2011, it is important that the ten Commissioners and the designated members of the Commission staff and advisors have continuing access to the Commission’s records once the records are transferred to NARA.”). Although no provisions of FERA addressed the preservation or dissemination of the Commission’s records, the FCIC gave copies of select records to Stanford Law School to create a website containing information that the Commission had made public during its investigation.<sup>7</sup> Pl’s. Mat. Facts, Ex. 5.

On February 11, 2011, the Commission transferred legal custody of its records to the Archives by completing a Standard Form 258 (“SF-258” or “Transfer Agreement”), an Agreement to Transfer Records to the National Archives of the United States. Compl. Ex. 2. This form explicitly states that records held by the Archives are governed by the Federal Records Act and are subject to FOIA. Compl. Ex. 2. The SF-258 explicitly states, under the “Terms of Agreement” section at the top of the document, that “[t]he transferring agency certifies that any restrictions on

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<sup>6</sup> This letter is almost a verbatim replica of the letter that the 9/11 Commission submitted to the Archives on August 20, 2004 requesting the Archives restrict public access. Fulgham Decl., Tab D.

<sup>7</sup> A frozen copy of the FCIC website is also archived on CyberCemetery, an electronic archive of government web sites that have ceased operation. CyberCemetery is hosted by the University of North Texas Libraries, which were designated as an Affiliate Archives of NARA in 2006. Under this agreement, UNT Libraries provide access to the defunct web site while NARA holds legal accession rights. CyberCemetery, UNT Digital Library, <http://digital.library.unt.edu/explore/collections/GDCC/> (last accessed on Dec. 14, 2012).

the use of these records are in conformance with the requirements of 5 U.S.C. 552.” Pl’s. Mat. Facts, Ex. 4; Compl. Ex. 2. In contravention of the Instructions accompanying the SF-258, and presumably violating the pattern and practice of both agencies and NARA<sup>8</sup>, Commission employee Sarah Zuckerman—at the direction of former FCIC Chairman Angelides—drew a line through the language, quoted above, that subjected the records to FOIA. Compl. Ex. 2. Nothing in the Instructions to the SF-258 allow for striking language embedded in the Terms of Agreement.<sup>9</sup> Mr. Fulgham’s Declaration claims that Ms. Zuckerman’s action in striking language from the Agreement reflected “the parties intent to negate any possibility that the Freedom of Information Act, 5 U.S.C. § 552, would apply to these materials.” Fulgham Decl. at ¶ 33. The central premise of Defendant’s Motion, however mistaken and misguided, that the FCIC records remain legislative records not subject to FOIA, which NARA claims is absolutely clear and cannot be challenged, is belied by the actions of both Ms. Zuckerman and NARA in executing the SF-258. Simply put, if the status of the FCIC records is as crystal clear as NARA contends, there would have been no need for Ms. Zuckerman to strike the 5 U.S.C. § 552 language from the SF-258. These facts are a textbook example of overreach, on the part of both NARA and the FCIC, in attempting to exclude records that are *prima facie* subject to FOIA from disclosure to the citizens of the United States, violating the express will of Congress under both the FERA’s and the FOIA’s bias towards disclosure—and as expressed by the current Executive Branch. Pl’s. Mat. Facts, Ex. 1. Memorandum from Attorney General Eric Holder for Heads of Exec. Dep’ts and Agencies (Mar. 19, 2009) (on file with author) (“Holder Memo”).

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<sup>8</sup> NARA’s Motion does not state whether such a practice, essentially altering the concrete essential terms of an agreement or contract, is normal procedure or part of the pattern and practice of either federal agencies or NARA in executing the SF-258. *See* Fulgham Decl. at ¶ 33. It is clearly unusual to strike out a concrete, and essential, term of the Agreement, given that Part 12, and the attachment of the Angelides letter under Part 14, address the issue that so concerned the FCIC in the transmission of its records, i.e., that the public not have access under FOIA.

<sup>9</sup> NARA does not include the Instructions portion of SF-258 in Tab A to the Fulgham Declaration. A sample SF-258, Instructions included, is attached as Ex. 3 to the Statement of Material Facts Not In Dispute.

On February 13, 2011, the Commission ceased to exist. Compl. Ex. 1. On February 18, 2011, in response to alleged corruption within the Commission, both the House Oversight Committee and the House Financial Services Committee asked the Archives to provide all Commission records, particularly those containing “internal work product of the FCIC, including emails memoranda and financial accounting records.” Pl’s. Mat. Facts, Ex. 6. The Archives voluntarily released these records to the Committees without being subject to a congressional subpoena. Declaration of Daniel Z. Epstein (“Epstein Decl.”), Pl’s. Mat. Facts, Ex. 10 at ¶ 8.

On July 13, 2011, the minority staff of the House Oversight Committee released a report impugning former Commissioner Peter Wallison for violating “the Commission’s ethics provisions.” Pl’s. Mat. Facts, Ex. 7; Declaration of Peter J. Wallison (“Wallison Decl.”), Pl’s. Mat. Facts, Ex. 11 at ¶ 6.

On March 13, 2012, former Commissioner Peter Wallison wrote the Archives requesting access to the Commission’s records in order to respond to the statements made in the July 2011 minority report. Pl’s. Mat. Facts, Ex. 7 at 9-12 and Ex. 8; Wallison Decl., Pl’s. Mat. Facts, Ex. 11 at ¶ 6.

On April 5, 2012, Commissioner Wallison wrote to NARA General Counsel Gary Stern confirming the details of a phone conversation held between them on March 29, 2012. Pl’s. Mat. Facts, Ex. 9; Wallison Decl., Pl’s. Mat. Facts, Ex. 11 at ¶ 12. In his letter, Mr. Wallison stated that Mr. Stern told him that he could “look at what [NARA] sent to the Committee, but no one working on [Wallison’s] behalf could do so.” Pl’s. Mat. Facts, Ex. 9. Mr. Wallison also stated that “you [Gary Stern] explained that NARA has the originals of all documents, including the materials provided to the Hon. Darrel [1] Issa, Chairman of the [House Oversight] Committee. You stated that NARA will allow me to review these records on-site, but that I am not allowed to engage counsel for that purpose.” Pl’s. Mat. Facts, Ex. 9; Wallison Decl., Pl’s. Mat. Facts, Ex. 11 at ¶¶ 11-12.

On April 18, 2012, Mr. Stern responded to Mr. Wallison. Compl., Ex. 8. Mr. Stern did not correct or dispute that NARA had provided the FCIC documents to the House Oversight Committee; nor did Mr. Stern dispute that the Archives refused to allow counsel to accompany Wallison while he accessed Commission records. Compl., Ex. 8; Wallison Decl., Pl's. Mat. Facts, Ex. 11 at ¶ 14. Instead, Mr. Stern affirmed that Wallison's access would be "limited to the persons named in the request letter from the former Chairman of the Commission, and thus does not extend to other persons, including representatives of the named persons." Compl., Ex. 8.

Neither the House Oversight Committee nor the House Financial Services Committee published a formal report about potential corruption within the Commission. Cause of Action (CoA) is a non-profit, non-partisan organization that uses "investigative, legal, and communications tools to educate the public on how government accountability and transparency protects taxpayer interests and economic opportunity." Epstein Decl., Pl's. Mat. Facts, Ex. 10 at ¶ 2. In this vein, CoA sought the documents that the Archives sent to the Committees to independently evaluate how the Commission conducted its investigation of the financial crisis. Compl. ¶ 3.

On October 3, 2011, CoA submitted a FOIA request to the Archives seeking the records that the Commission submitted to the Oversight and Financial Services Committees. Compl. Ex. 3. The Archives denied CoA's FOIA request on December 1, 2011, stating that the Commission's records were legislative in character and therefore beyond the reach of FOIA. Compl. Ex. 4. CoA exhausted its administrative remedies: it appealed its denial on January 5, 2012, which the Archives denied on February 6, 2012. Compl. Exs. 5, 7. In its denial, the Archives cited the Transfer Agreement that had been altered when the records were deposited. Compl. Ex. 7. The denial of this request is the subject of the present litigation. Compl. at ¶¶ 5-42.

### **STANDARD OF REVIEW**

“Congress enacted FOIA to promote transparency across the government.” *Judicial Watch, Inc. v. U.S. Secret Service*, 803 F. Supp. 2d 51, 54 (D.D.C. 2011) (citing *Quick v. U.S. Dep't of Commerce, Nat'l Inst. of Standards & Tech.*, 775 F. Supp. 2d 174, 179 (D.D.C. 2011)). The Supreme Court has explained that FOIA is “a means for citizens to know ‘what the[ir] government is up to.’ This phrase should not be dismissed as a convenient formalism. It defines a structural necessity in a real democracy.” *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171-72 (2004) (internal citations omitted). “The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

The current Executive Branch of the Federal Government has also weighed in on the standards to be followed by agency heads with regard to FOIA requests. “The [FOIA], 5 U.S.C. § 552, reflects our nation’s fundamental commitment to open government . . . . As President Obama instructed in his January 21 [2009] FOIA Memorandum, ‘The [FOIA] should be administered with a clear presumption: In the face of doubt, openness prevails.’ This presumption has two important implications. First, an agency should not withhold information simply because it may do so legally. . . . Second, whenever an agency determines that it cannot make full disclosure of a requested record, it must consider whether it can make partial disclosure.” Pl’s. Mat. Facts, Holder Memo., Ex.1 at 1. Furthermore, the Attorney General directed that “the Department of Justice will defend a denial of a FOIA requests only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law.” *Id* at 2.

In a FOIA case, when evaluating a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court must “treat the complaint’s factual allegations as true . . . and

must grant plaintiff ‘the benefit of all inferences that can be derived from the facts alleged.’”

*Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113 (D.C. Cir. 2000), quoting *Schuler v. United States*, 617 F.2d 605, 608 (D.C. Cir. 1979) (citations omitted). In defeating a Rule 12(b)(6) motion, “a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *See also Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when the pleaded factual content “allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* (citing *Twombly*, 550 U.S. at 556). However, notice pleading rules are “not meant to impose a great burden on plaintiff.” *Dura Pharms., Inc. v. Broudo*, 554 U.S. 336, 347 (2005). Moreover, “detailed factual allegations” are not necessary to withstand a Rule 12(b)(6) motion, and plaintiffs may survive a 12(b)(6) motion even if “recovery is very remote and unlikely.” *Twombly*, 550 U.S. at 556 (citing *Schuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

Therefore, applying the above principles, if CoA demonstrates that it has stated a claim upon which relief can be granted, defendant’s Rule 12(b)(6) motion must be denied.

When “a defendant files a motion under Rule 12(b)(6) that is supported by declarations and documentary evidence ‘outside the pleadings [that] are presented to and accepted by the court, the motion must be treated as one for summary judgment and disposed of as provided in *Rule 56.*” *Walsh v. FBI*, 2012 U.S. Dist. LEXIS 166329, at \*5 (D.D.C. Nov. 21, 2012) (emphasis added) citing *Calhoun v. Dep’t of Justice*, 693 F. Supp. 2d 89, 90-91 (D.D.C. 2010) quoting Fed. R. Civ. P. 12(d). “If the evidence presented ‘is subject to conflicting interpretations, or reasonable persons might differ as to its significance, summary judgment is improper.’” *Id.* (citing *Etheridge v. FedChoice Federal Credit Union*, 789 F. Supp. 2d 27, 32 (D.D.C. 2011)). The court “must draw all reasonable inferences in favor of a non-moving party.” *Id.* (citing *Brown v. F.B.I.*, 675 F. Supp. 2d

122, 125 (D.D.C. 2009)). The court must grant the motion if the requestor proves through pleadings, affidavits and any discovery that there is no genuine issue of material fact. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Safety Research & Strategies v. U.S. Dep't of Transp.*, No. 12-551, 2012 U.S. Dist. LEXIS 160187, at \*4-5 (D.D.C. Nov. 8, 2012).

“In considering a motion for summary judgment on a FOIA claim, a court may rely upon an agency’s affidavits so long as they ‘contain sufficient detail’ and ‘are not controverted by contrary evidence.’” *Walsh v. FBI*, No. 11-2214, 2012 U.S. Dist. LEXIS 166329, at \*6 (D.D.C. Nov. 21, 2012) (citations omitted). “Agency affidavits are afforded a ‘presumption of good faith’ and can be rebutted only with evidence that the agency did not act in good faith.” *Id.* (citing *Defenders of Wildlife v. Dep't of the Interior*, 314 F. Supp. 2d 1, 8 (D.D.C. 2004)).

Specifically, in a FOIA action regarding the meaning of “agency records,” the agency, not the requestor, bears the burden “to disprove, that the materials sought are not ‘agency records’ or have not been ‘improperly’ withheld.” *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 n.3 (1989), *citing* S. Rep. No. 813, 89th Cong., 1st Sess., 8 (1965); H.R. Rep. No. 1497, 89th Cong., 2d Sess., 9 (1966).

## ARGUMENT

### **I. For purposes of FOIA, the Archives possessed and controlled the Commission documents.**

Records are not subject to FOIA simply because they have been transferred into the custody of an agency. Defs.’ Motion at 1, 14, 15. Instead, as *Tax Analysts* states and the *Burka* line expands, an agency must exercise control over the transferred records for those records to become subject to FOIA. *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144 (1989); *Burka v. U.S. Dep't of Health & Human Servs.*, 87 F.3d 508, 515 (D.C. Cir. 1996). Under the *Tax Analysts* test, the FCIC records were in NARA’s possession and control. This is so because under the *Tax Analysts* test, the Transfer Agreement manifested NARA’s intent to control the FCIC records,

NARA disposed of these records to third parties without FCIC permission, and NARA relied upon and integrated these records in uniquely preparing and formatting the records for former FCIC Commissioner Peter J. Wallison. It is patently obvious, then, that NARA controlled the FCIC records at the time of CoA's FOIA request on October 3, 2011.

NARA's assertion that "[a]t bottom, Cause of Action's lawsuit rests on a single premise—that legislative records transferred into NARA's legal custody become Agency records subject to FOIA" reflects a fundamental misrepresentation of CoA's core argument as well as the pertinent case law in this Court and the District of Columbia Circuit. Defs.' Mot. at 15. The transfer of legislative records does not magically convert them into agency records. Rather, it is NARA's absolute possession and control of the FCIC records that compels the conclusion that those records are agency records as a matter of law.<sup>10</sup> As a result of NARA's actions, the FCIC records have lost their protection from FOIA's bias towards disclosure. The term "agency records" is not defined in FOIA. In the absence of a statutory definition, the Supreme Court articulated a two-part test to assess whether records are "agency records" subject to FOIA. First, the agency must either create or obtain the records, and second, the agency must control the records at the time of the FOIA request. *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144 (1989). The D.C. Circuit has articulated a four-part test to evaluate whether an agency is in "control" of the records it possesses:

- (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.

*Tax Analysts v. Dep't of Justice*, 269 U.S. App. D.C. 315, 845 F.2d 1060, 1069 (D.C. Cir. 1988); cited by *Burka*, 87 F.3d at 515. *Burka* remains bedrock law in the D.C. Circuit and the U.S. District Court for D.C., as a logical, and necessary, extension of *Tax Analysts*, as interpreted and applied.

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<sup>10</sup> NARA's control over the records even extended to the terms and conditions, as well as the format, under which the records were produced. Wallison Decl., Pl's. Mat. Facts, Ex. 11 at ¶¶ 15-16; Epstein Decl., Pl's. Mat. Facts, Ex. 10 at ¶¶ 10-11. These terms were clearly inconsistent, depending upon the recipient.

The *Burka* analysis is a “totality of the circumstances test,” or a balancing test, in which FOIA’s presumption of disclosure is in full effect: the term “agency records” shall “not be manipulated to avoid the basic structure of FOIA . . .” *Consumer Fed’n of Am. v. Dep’t of Agric.*, 455 F.3d 283, 287 (D.C. Cir. 2006). When evaluating the four *Burka* factors in their totality, use of the records is decisive; if there is a conflict between the first factor assessing intent, and the three remaining factors assessing use, “use trumps intent.” *Judicial Watch v. U.S. Secret Serv.*, 803 F. Supp. 2d 51, 57-61 (D.D.C. 2011); *McKinley v. Bd of Gov. of Fed. Reserve*, 849 F. Supp. 2d 47, 58 n.5 (D.D.C. 2012).

**A. Neither Congress nor the FCIC intended for the Archives to relinquish its statutory authority and control under 44 U.S.C. § 2108.**

The FCIC was a temporary legislative commission created by Congress in the Fraud Enforcement and Recovery Act of 2009 (“FERA”). Pub. Law No. 111-21, § 5, 123 Stat. 1617, 1625 (2009). For the FCIC records to be subject to congressional control, Congress must offer express intent to that effect. *See Goland v. CIA*, 607 F.2d 339, 347 (D.C. Cir. 1979); *Paisley v. CIA*, 712 F.2d 686, 694-95 (D.C. Cir. 1983); *Holy Spirit Ass’n for the Unification of World Christianity v. CIA*, 636 F.2d 838, 842-43 (D.C. Cir. 1980); *United We Stand v. IRS*, 359 F.3d 595, 601-02 (D.C. Cir. 2004). Congress never expressed its intent to control the FCIC records in the FERA: they were not transferable under the congressional documents provision of the Federal Records Act. 44 U.S.C. § 2118; *Holy Spirit*, 636 F.2d at 843 (“[W]e hold that, even if these CIA-created records were once congressional documents . . . they subsequently lost their exemption as congressional records when Congress failed to retain control over them.”); they were not marked “secret,” *Goland*, 607 F.2d at 347; Congress provided no contemporaneous or specific instruction on how the documents were to be within its control, *Paisley*, 712 F.2d at 694-95; nor were the documents produced within or by an official congressional committee, *see, e.g., United We Stand*, 359 F.3d at

601-02.<sup>11</sup> Therefore, because Congress did not state otherwise when creating the FCIC, section 2108 of the Federal Records Act governs the deposit of the FCIC records. Moreover, section 2108(a) of the Federal Records Act specifically governs the facts of this case when it describes the Archives' authority to grant access to the records generated by a temporary agency that has no successor in function—as was true of the FCIC. 44 U.S.C. § 2108(a). Section 2108(a) gives the Archivist discretion to modify any restrictions placed on access to the records, so long as those restrictions are in the public interest. *Id.*

Furthermore, the Commission itself intended to relinquish control over the documents when it deposited its records with the Archives. In a letter dated February 10, 2011, Commission Chairman Phil Angelides stated in a letter to the Archivist of the United States David Ferriero (“Angelides letter”):

When the Financial Crisis Inquiry Commission (the “Commission”) terminates, by statute, on February 13, 2011, ***the records of the Commission will be transferred to the National Archives and Records Administration (NARA) for preservation and public access.***

(emphasis added) Compl. Ex. 1. This letter expresses an explicit intent to transfer both physical custody and ultimate control of Commission’s records to NARA, without exception. That is, Mr. Angelides’s specific intent was to “relinquish control over the records.” *Burka v. U.S. Dep’t of Health & Human Servs.*, 87 F.3d 508, 515 (D.C. Cir. 1996); *Tax Analysts v. Dep’t. of Justice*, 845 F.2d 1060, 1069 (D.C. Cir. 1988) (citation omitted), *aff’d on other grounds*, 492 U.S. 136 (1989).

Angelides’s letter then describes the “criteria under which these records should be made available.” Compl. Ex. 1. The letter states Mr. Angelides’s position that, with the exception of certain FCIC records that the Commission had previously released to the public, NARA should impose a five-year categorical ban on public access to FCIC records. However, NARA selectively

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<sup>11</sup> See discussion, *infra* at Section II., at 21-25, on why FCIC records are legislative, not congressional, and why FCIC is a legislative entity, not an official congressional committee.

applied Angelides's restrictions, thereby taking control over the records by exercising its own discretion. For example, NARA denied former FCIC Commissioner Peter Wallison full access to the documents, despite that fact that the Angelides letter specifically provided for such access. Wallison Decl., Pl's. Mat. Facts, Ex. 11 at ¶¶ 9-10, 12, 14-15; Compl. Ex. 1. Subsequently, in full contradiction and disregard of Angelides's letter, NARA released the Commission records *in toto* to both the House Oversight Committee and the House Financial Services Committee, as well as respective staff for the Committees, in electronic format on electronic disks. Epstein Decl., Pl's. Mat. Facts, Ex. 10 at ¶¶ 10-11. Unlike the letter in *United We Stand America, Inc.*, which set forth "the Joint Committee's directive and expectation of confidentiality . . .," Angelides's letter, in relinquishing control of the FCIC records to NARA, allowed NARA to exercise its discretion, in full control and use of the records, to violate the terms of the letter. 359 F.3d at 601-02.

#### **B. NARA disposed of the Commission's records**

NARA not only had the legal ability to use the FCIC records; NARA also used its statutory authority to modify restrictions placed on the records by former FCIC Chairman Phil Angelides and voluntarily disposed of the records to the House Oversight and House Financial Services Committees. NARA received the FCIC records from the Commission on or around February 11, 2011, when a Commission employee and the Archivist signed the Standard Form 258 (SF-258), granting NARA full custody of the records. Compl. Ex. 2. In a letter accompanying the SF-258, Angelides stated that the records already made available by the FCIC "should continue to be made publicly available by NARA." Compl. Ex. 1. Angelides added that "access to the records should be provided to the ten members of the Commission . . . and the following members of the Commission staff and advisors . . . certain . . . administrative staff of the Commission." Compl. Ex. 1.

On February 13, 2012, the FCIC was terminated by statute with no successor in function, and, accordingly, the FCIC retained no copies of its records. FERA § 5(i); Compl. Ex. 1. Upon

transfer to NARA by the FCIC of all records not already made public, NARA had exclusive and complete custody of the documents. Compl. Ex. 1. On or around February 18, 2011, the chairmen and ranking members of the House Oversight Committee and the House Financial Services Committee requested that NARA provide the Committees all the “internal work product of the FCIC, including e-mails, memoranda and financial accounting records.” PI’s Mat. Facts, Ex. 6. NARA was not legally compelled by subpoena to submit these documents, yet NARA produced many or all of the requested FCIC records to the Committees. Compl. ¶¶ 25-26; Epstein Decl., PI’s Mat. Facts, Ex. 10 at ¶¶ 6-11. NARA provided these documents in a concatenated form, or a form in which they were otherwise “assembled, organized, cataloged, or combined” in a searchable manner. Compl. ¶ 27; Epstein Decl., PI’s Mat. Facts, Ex. 10 at ¶¶ 10-11; *but see* Fulgham Decl. ¶ 38 (stating that were FCIC records to fall under FOIA, such requirement for production would “interfere with the [Archive’s] ability to orderly process the records and make them available to researchers in an organized fashion.”).

On July 13, 2011, the Democratic Staff of the House Oversight Committee published a thirty-seven-page report examining the attacks against the FCIC, specifically alleging that the internal memoranda produced by NARA showed that former Commissioner Peter Wallison “violated the Commission’s ethics provisions ...” PI’s Mat. Facts, Ex. 7 at 5, 12-14. On March 13, 2012, Wallison sought access to the FCIC records, with counsel, in order to collect information to respond to the defamatory allegations of the minority staff of the Oversight Committee. PI’s Mat. Facts, Ex. 8. In a phone call on March 29, 2012, between Mr. Wallison and NARA General Counsel Gary Stern, Mr. Stern informed Mr. Wallison that he was permitted “to review these records on-sight ....” but that he was “not allowed to engage counsel for that purpose.” PI’s Mat. Facts, Ex. 9 (Apr. 5, 2012 letter from Wallison to Stern); Compl. Ex. 8 (Apr. 18, 2012 letter from Stern to Wallison). Wallison objected to this restriction, stating that if he were called to testify he would be accompanied by counsel and his counsel “...would certainly be entitled to examine and

draw from everything [he] might be entitled to see.” Pl’s. Mat. Facts, Ex. 9. Former FCIC Chairman Phil Angelides placed no such restriction on access to the records. *See* Compl. Ex. 1.

These facts demonstrate not only that NARA had statutory authority to control the FCIC records, as is made clear by Congress in 44 U.S.C. § 2018, but also that NARA exercised this authority and used the records when it voluntarily disclosed them to the Oversight and Financial Services Committees, and when it prohibited Commissioner Wallison from accessing records with his counsel.

**C. NARA and its personnel read and relied upon the Commission’s records.**

NARA’s statutory purpose is to preserve all records transferred into its custody. 44 U.S.C. §§ 2108, 2110, 2203(f)(2). On February 13, 2012, the original FCIC records were transferred from the FCIC into the exclusive custody of NARA. Compl. Ex. 1. NARA provided the FCIC records to Members and staff of both the House Oversight Committee and the House Financial Services Committee. Epstein Decl., Pl’s. Mat. Facts, Ex. 10 at ¶¶ 7-9. Despite the fact that no subpoenas were issued from these respective committees, NARA performed the following tasks in response to February 18, 2011, letter from the Committees: (1) integrated the FCIC records into compatible electronic format on electronic discs; (2) concatenated and/or otherwise assembled, organized, catalogued, and combined the records in a searchable database format; (3) created database files for certain of the FCIC records, which were subsequently loaded into Concordance, a form of discovery management software, by the Oversight Committee; and (4) created database files of the FCIC records. Epstein Decl., Pl’s. Mat. Facts, Ex. 10 at ¶¶ 10-11; Complaint at ¶¶ 24-29. Accordingly, it is clear that NARA and its personnel, at a minimum, were required to both read and rely upon the FCIC records in order to legally, competently and properly perform the tasks enumerated above in providing the records to the respective Committees and their staff. Furthermore, the Fulgham Declaration makes it abundantly clear that NARA has read and relied upon the FCIC records at issue: “As stated above, the [Archives] is currently preserving and proceeding to describe the

FCIC's records. In preparation for screening, we intend to consult with the agencies that provided information to the FCIC to better understand the sensitivities in the records and ensure consistent review in keeping with statutory requirements.<sup>12</sup> In sum, the [Archives] is duly processing FCIC records with the intent to eventually make the records publicly available to all." Fulgham Decl. at ¶ 35. Mr. Fulgham, NARA's Assistant Director in the Center for Legislative Archives, has admitted that NARA has read and relied upon the FCIC documents.

The law in this Court and the District of Columbia Circuit is clear regarding the third *Burka* factor. As stated by Judge Royce C. Lamberth in *CREW v. United States Dep't. of Homeland Security*, "[T]he Court concludes that use trumps intent." 527 F. Supp. 2d 76, 97-98 (D.D.C. 2007); *see also Judicial Watch, Inc. v. Fed. Hous. Fin. Agency*, 646 F.3d 924, 926 (D.C. Cir. 2011) ("Control means 'the materials have come into the agency's possession in the legitimate conduct of its official duties.'"). There can be no question that NARA's interactions with and use of the FCIC records is performed "...in the legitimate conduct of its official duties." *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 145 (1989). These documents were legally, and legitimately, transferred under 44 U.S.C. § 2108(a), giving the Archivist the control to modify access and use of the documents it receives from a temporary legislative agency. Defendant cannot dispute that it has read and relied upon the FCIC records in the legitimate and ordinary performance of its official duties and in furtherance of its mission as "the depository of the permanently valuable historical records and documents of the Federal Government of the United States of America." Defs.' Motion, Mills Decl. ¶ 6. For example, NARA's formatting of the FCIC records in electronic format on electronic disks, as well as the cataloguing, organizing and assembling of these records as database files in a searchable format, for production *in toto* to the House Oversight Committee, is indisputably action by NARA in the legitimate and ordinary performance of its official duties. *See*

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<sup>12</sup> In contempt of question, NARA must have determined these same "sensitivities" when producing the FCIC records to the respective Congressional Committees, which exercise, at a minimum, would require reading and relying upon those records.

Epstein Decl., Pl's. Mat. Facts, Ex.10 at ¶¶ 7, 10-11. The only legal conclusion that can be drawn, given the undisputed facts in this case, is that the third *Burka* factor weighs conclusively in favor of Cause of Action.

**D. The Commission's documents were integrated into the Archive's system**

Documents are integrated into an agency's records if they are incorporated into an agency's computer system, *Judicial Watch, Inc. v. U.S. Secret Serv.*, 803 F. Supp. 2d 51, 60 (D.D.C. 2011) and accessed by agency employees, *Consumer Fed'n of Am. v. Dep't of Agric.*, 455 F.3d 283, 289-90 (D.D.C. 2006). Documents are not integrated if they are segregated for the purpose of FOIA exclusion. *United We Stand*, 359 F.3d at 607. NARA's statutory purpose is to preserve all records transferred into its custody. 44 U.S.C. §§ 2108, 2110, 2203(f)(2). On February 13, 2012, the original FCIC records were transferred from the FCIC into the exclusive custody of NARA.

NARA submitted the FCIC records to the House Committees in a searchable format as database files: the documents "... had been concatenated or otherwise assembled, organized, cataloged, or combined ..." Compl. ¶ 27. This demonstrates that the documents had already been integrated into the Archive's system and were made sufficiently searchable and accessible for the Committees to evaluate their content. This is true despite NARA's claim that it needs at least five years to "...orderly process the records and make them available to researchers in an organized fashion." Fulgham Decl. ¶ 38. Additionally, although the FCIC records are purportedly stored in the section of the Archives for legislative records, the Center for Legislative Archives, Mills Decl. ¶ 21, the purpose is for ease of preservation and storage, not to avoid the reach of FOIA. *Id.* For these reasons, the FCIC records have been integrated into NARA's system.

Given these factors, the Commission's documents were under both the custody and control of NARA at the time of Cause of Action's FOIA request, and are therefore subject to FOIA.

**II. The FCIC records were formerly legislative records, not congressional records, and can be subject to FOIA.**

Records obtained by and under the control of an executive agency are agency records subject to FOIA. *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989). Yet NARA inaccurately suggests that its custody and control of the FCIC records is irrelevant to the question of whether they are subject to FOIA. Defs.' Mot. at 21. NARA claims that the relevant question is whether Commissioner Angelides clearly intended "to establish controls to restrict future access to its records." Defs.' Mot. at 21. NARA misrepresents and, accordingly, incorrectly applies the D.C. Circuit cases discussed in its memorandum. These cases apply to the control of congressional records, not legislative agency records. *See, e.g., Paisley v. CIA*, 712 F.2d 686, 694-95 (D.C. Cir. 1983) (at issue are congressional documents sent to FBI and CIA); *Goland v. CIA*, 607 F.2d 339, 347 (D.C. Cir. 1978) (at issue was a congressional transcript sent to CIA). The term "congressional records," refers to the records of "the House, the Senate, or their official Committees." H.R. Res. 5, 101st Cong. (1989) (enacted); S. Res. 474, 96th Cong. (1980) (enacted); Mot. to Dismiss at 2. Members of Congress sit on the official committees of the House and the Senate, including the standing committees, select committees, special committees, joint committees, and conference committees. JUDY SCHNEIDER, CONG. RESEARCH SERV., RS20794, THE COMMITTEE SYSTEM IN THE U.S. CONGRESS 1-2 (2003). Official committees are housed on congressional property. However, legislative agency records (hereinafter "legislative records") are records produced by a legislative entity that is not the House, Senate, or one of their official committees. 44 U.S.C. § 2901(14). Congressional records are beyond the reach of FOIA, 5 U.S.C. § 551(1)(A), and receive special protection under the Federal Records Act. 44 U.S.C. § 2118; *see also Goland v. CIA*, 607 F.2d 339, 346 (D.C. Cir. 1978) (noting Congress's "constitutional prerogative of maintaining secrecy"). Furthermore, congressional records are transferred pursuant to a special regime under which the records remain the "permanent property" of the House and "subject to the orders" of the Senate,

leaving the Archivist with no discretion to control congressional records. H.R. Res. 5, 101st Cong. (1989) (enacted as Rule VII of the Rules of the House of Representatives); S. Res. 474 96th Cong. (1980) (enacted as Rule XI of the Rules of the Senate); *see also* 44 U.S.C. § 2118. Legislative records, in contrast, are subject to transfer under a different provision of the Federal Records Act, 44 U.S.C. § 2108(a), which gives the Archivist discretion to exercise control of these records independent of the depositing entity. Accordingly, records transferred in this manner can be subject to FOIA if the receiving agency, in this case NARA, both obtains the records and exercises control over them. *Tax Analysts*, 492 U.S. at 144-45.

**A. The FCIC records were formerly legislative records, not congressional records.**

The FCIC records were—prior to transfer by the FCIC—legislative records, not congressional records. The FCIC is not and was not an official congressional committee. The FCIC is not identified within the official committee structure of Congress.<sup>13</sup> Instead, it was a “temporary, independent investigative body created by law and made up of private citizens.” *The House Explained*, U.S. HOUSE OF REP., <http://www.house.gov/content/learn/> (click commissions) (last visited Dec. 13, 2012). The FCIC was comprised of private citizens; no Member of Congress could serve on the Commission. FERA § 5(b)(2)(B). Unlike official congressional committees, the FCIC was not located on congressional property, but took residence in private office space at 1717 Pennsylvania Avenue, N.W., Suite 800, Washington, D.C. 20006.<sup>14</sup> Furthermore, the FCIC’s documents were subject to transfer under 44 U.S.C. § 2108, and not § 2118 governing the transfer of congressional documents. Compl. Ex. 2. Under this same provision of the Federal Records Act, § 2108, NARA has accepted the records of legislative branch support agencies including the Congressional Budget Office, the Government Printing Office, and the former Office of

<sup>13</sup> Comprehensive lists of the official committees can be found online. Committees, United States Senate, [http://www.senate.gov/pagelayout/committees/d\\_three\\_sections\\_with\\_teasers/committees\\_home.htm](http://www.senate.gov/pagelayout/committees/d_three_sections_with_teasers/committees_home.htm) (last visited Dec. 5, 2012); Committee Information, Office of the Clerk, U.S. House of Representatives, [http://clerk.house.gov/committee\\_info/index.aspx](http://clerk.house.gov/committee_info/index.aspx) (last visited Dec. 5, 2012).

<sup>14</sup> *See* Letterhead (Oct. 1, 2010), [http://fcic-static.law.stanford.edu/cdn\\_media/fcic-testimony/TBTF/Dick%20Fuld%20Follow%20Up.pdf](http://fcic-static.law.stanford.edu/cdn_media/fcic-testimony/TBTF/Dick%20Fuld%20Follow%20Up.pdf).

Technology Assessment. *See Center for Legislative Archives*, NAT'L ARCHIVES, <http://www.archives.gov/legislative/research/> (last visited Dec. 13, 2012). The FCIC records were legislative records, not congressional records.

**B. The Archives incorrectly applied case law in the District of Columbia Circuit regarding the status of congressional records.**

NARA arbitrarily expands the holdings of three narrowly decided D.C. Circuit cases to support its argument that FCIC records remain exempt from FOIA. *See* Defs.' Mot. at 21-26, *citing United We Stand Am., Inc. v. IRS*, 359 F.3d 595 (D.C. Cir. 2004); *Paisley v. CIA*, 712 F.2d 686 (D.C. Cir. 1983); and *Goland v. CIA*, 607 F.2d 339 (D.C. Cir. 1978). NARA cites these cases to assert that the FCIC records remain legislative records exempt from FOIA because the FCIC intended to restrict future access to those records. Defs.' Mot. at 24. However, in *Goland*, an official standing committee of the U.S. House of Representatives sent a stenographic transcript of its hearing—held in executive session—to the CIA for its internal reference. *Goland*, 607 F.2d at 347. Because of the nature of its creation and the secrecy of the information, and because the transcript was clearly marked “Secret” before being transmitted to the CIA, the D.C. Circuit concluded that the transcript remained under the control of the House of Representatives. *Id.* Under the control of Congress, not the CIA, the transcript remained a congressional record exempt from FOIA. *Id.*

In *United We Stand America, Inc.*, an official joint committee of Congress submitted a request for tax information to the IRS, stating that “*This document* is a Congressional record . . . [and] may not be disclosed without the prior approval of the Joint Committee.” 359 F.3d at 600-01 (emphasis added). When the information submitted by the IRS to the Joint Committee was requested under FOIA, the Court concluded that only the Joint Committee’s request (and any specific reference to that request) was congressional material exempt from FOIA. *Id.* at 601. The Court held that the IRS response was an agency record subject to FOIA: it was created and

possessed by the agency, and was not brought under the control of Congress since the Joint Committee failed to express any intent to keep the response secret. *Id.* at 603.

In *Paisley*, an official select committee of the Senate created certain records but affixed no “external indicia of control or confidentiality,” despite having stamped at least seven other documents as secret, and submitted no “contemporaneous and specific” instructions to the CIA regarding its use of the documents. 712 F.2d at 694. The D.C. Circuit concluded that the documents sent to the CIA were agency records in the possession and control of the CIA, thus subject to FOIA, because Congress expressed no congressional intent to maintain control over the records. *Id.* at 695.

Each of these cases insists upon Congress’s “constitutional prerogative” to keep its records secret. *Goland*, 607 F.2d at 346. However, they do not support NARA’s assertion that the chairman of a temporary, unelected commission established within the legislative branch—but reporting to executive and legislative officials—can retain control of commission documents by proclaiming his intent to do so.

**C. The instructions of former FCIC Chairman Phil Angelides to restrict access do not govern the status of the FCIC records.**

CoA asserts that NARA’s argument regarding control of the documents in assessing classification attempts to put the cart in front of the horse. Indeed NARA’s assertion that control as a relevant factor only arises “in the unique context of Congress’s ongoing interaction with executive agencies . . .” is simply incorrect and disputed by the case law in this Court and the District of Columbia Circuit.<sup>15</sup> Defs.’ Mot. at 21. Conspicuously absent from NARA’s argument in this regard is any mention of the *Burka* case and the four factor analysis so crucial to determining agency control. “Indeed, cases decided both before and after *Tax Analysts* that employed the four-factor analysis to determine agency control did not involve documents that were created and possessed by the agency ‘in the legitimate conduct of its official duties.’” *United We Stand*, 359 F.3d at 602-03.

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<sup>15</sup> *Burka*, for example, did not involve interactions between Congress and an agency, nor any Congressional oversight issues.

This case involves documents that were clearly possessed and conclusively utilized by NARA. The issue of agency control cannot be separated from a proper analysis of whether the documents are subject to FOIA.

Chairman Angelides's instruction to restrict access to the FCIC records is inconsistent with congressional intent. The purpose of the FERA was wholly public: it sought to ensure greater transparency and to protect the public from future financial fallout. The FCIC was created by Congress to provide a thorough examination of "the causes, domestic and global, of the current financial and economic crisis in the United States." FERA § 5(a). The FCIC was granted subpoena power and was authorized to send criminal referrals to the U.S. Attorney General and the state attorneys general. *Id.* §§ 5(c)(4), 5(d)(2). At the end of its investigation, the FCIC was required to submit "to the President and to the Congress a report containing [its] findings and conclusions," and the chairman was required to appear before the Senate Banking Committee and the House Financial Services Committee. *Id.* § 5(h). The purpose of the law was to shine sunlight on the financial crisis. As professed by Senate Majority Leader Harry Reid when he announced his appointments to the Commission:

"As President Obama has said on several occasions, sunlight is the best disinfectant. The American people are entitled to a thorough examination of what went wrong. The men and women who we appoint to this commission must help the public gain a full understanding of why our system failed us in the past and I am confident that we have chosen the right people to lead that effort. Learning from these mistakes of the past through a transparent process is an important part of America's road to full financial recovery."

Press Release, U.S. Senate Democrats, Reid, Pelosi Announce Appointments to the Financial Crisis Inquiry Commission (July 15, 2009) *available at* <http://democrats.senate.gov/2009/07/15/reid-pelosi-announce-appointments-to-the-financial-crisis-inquiry-commission>. Speaker of the House Nancy Pelosi reiterated the importance of transparency when making her appointments to the Commission:

“The American people deserve nothing less than a full explanation of why so many people lost their homes, their life’s savings, and their hard-earned pensions. To avoid a financial crisis of this magnitude in the future, the commission will conduct a thorough, systematic, and non-partisan examination of the failures in both government and financial markets. The men and women we are appointing today bring great experience and credibility to the work of the Commission.”

*Id.* As also described by Securities & Exchange Commission (“SEC”) Chairman Mary Schapiro in her testimony before the FCIC, “[T]he work of the [FCIC] is essential to helping policymakers *and the public* better understand the causes of the recent financial crisis and build a better regulatory structure.” *Testimony Concerning the State of the Financial Crisis: Before the Financial Crisis Inquiry Commission*, Jan. 14, 2010 (statement of Chairman Mary L. Schapiro, U.S. Securities & Exchange Commission) (emphasis added) *available at* <http://www.sec.gov/news/testimony/2010/ts011410mls.htm>. However, NARA asserts that the FCIC records remain exempt from FOIA because the Commission intended to establish its control to restrict future access to the records. Defs.’ Mot. at 21. NARA fails to recognize that neither Commissioner Angelides nor the FCIC represent the will of Congress. At most, Commissioner Angelides’s instructions were evidence of *his* intent to restrict access. As established above, Congress intended for these records to be publicly available. The instructions of Chairman Angelides letter do not carry the weight of Congress, nor is he authorized to unilaterally override the expressed will of Congress.

Finally, the intent of a former chairman of a temporary legislative agency terminated by Congress is not relevant to NARA’s control. As required by the enacting law, the FCIC ceased to exist on February 13, 2011. Compl. Ex. 1; FERA § 5(i)(1). Prior to the FCIC’s termination, all records were transferred to NARA. Defs. Mot. at 5-6. Upon the termination of the FCIC, the Archivist was authorized “to relax, remove, or impose restrictions on such agency’s records.” 44 U.S.C. § 2108(a). As a result, NARA has unrestrained discretion to determine what, if any, restrictions should be placed on disclosure of FCIC records, so long as the Archivist believes that

the action is “in the public interest.” *Id.* The statute makes no reference to the intentions of the former agency head; there is no indication that any restrictions placed on the records prior to termination are binding on NARA. *Id.* At the time CoA submitted its FOIA request, NARA had possession and control of the FCIC records.

### CONCLUSION

For the reasons set forth above, and any to be advanced at a hearing thereon, Cause of Action has demonstrated there is no genuine issue of material fact and is entitled to summary judgment as a matter of law.

DATED: December 19, 2012

Respectfully submitted,

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# EXHIBIT 1



Office of the Attorney General

Washington, D.C. 20530

March 19, 2009

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: THE ATTORNEY GENERAL

SUBJECT: The Freedom of Information Act (FOIA)

The Freedom of Information Act (FOIA), 5 U.S.C. § 552, reflects our nation's fundamental commitment to open government. This memorandum is meant to underscore that commitment and to ensure that it is realized in practice.

A Presumption of Openness

As President Obama instructed in his January 21 FOIA Memorandum, "The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails." This presumption has two important implications.

First, an agency should not withhold information simply because it may do so legally. I strongly encourage agencies to make discretionary disclosures of information. An agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption.

Second, whenever an agency determines that it cannot make full disclosure of a requested record, it must consider whether it can make partial disclosure. Agencies should always be mindful that the FOIA requires them to take reasonable steps to segregate and release nonexempt information. Even if some parts of a record must be withheld, other parts either may not be covered by a statutory exemption, or may be covered only in a technical sense unrelated to the actual impact of disclosure.

At the same time, the disclosure obligation under the FOIA is not absolute. The Act provides exemptions to protect, for example, national security, personal privacy, privileged records, and law enforcement interests. But as the President stated in his memorandum, "The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears."

Pursuant to the President's directive that I issue new FOIA guidelines, I hereby rescind the Attorney General's FOIA Memorandum of October 12, 2001, which stated that the Department of Justice would defend decisions to withhold records "unless they lack a sound

Memorandum for Heads of Executive Departments and Agencies  
Subject: The Freedom of Information Act

Page 2

legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records."

Instead, the Department of Justice will defend a denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law. With regard to litigation pending on the date of the issuance of this memorandum, this guidance should be taken into account and applied if practicable when, in the judgment of the Department of Justice lawyers handling the matter and the relevant agency defendants, there is a substantial likelihood that application of the guidance would result in a material disclosure of additional information.

FOIA Is Everyone's Responsibility

Application of the proper disclosure standard is only one part of ensuring transparency. Open government requires not just a presumption of disclosure but also an effective system for responding to FOIA requests. Each agency must be fully accountable for its administration of the FOIA.

I would like to emphasize that responsibility for effective FOIA administration belongs to all of us—it is not merely a task assigned to an agency's FOIA staff. We all must do our part to ensure open government. In recent reports to the Attorney General, agencies have noted that competing agency priorities and insufficient technological support have hindered their ability to implement fully the FOIA Improvement Plans that they prepared pursuant to Executive Order 13392 of December 14, 2005. To improve FOIA performance, agencies must address the key roles played by a broad spectrum of agency personnel who work with agency FOIA professionals in responding to requests.

Improving FOIA performance requires the active participation of agency Chief FOIA Officers. Each agency is required by law to designate a senior official at the Assistant Secretary level or its equivalent who has direct responsibility for ensuring that the agency efficiently and appropriately complies with the FOIA. That official must recommend adjustments to agency practices, personnel, and funding as may be necessary.

Equally important, of course, are the FOIA professionals in the agency who directly interact with FOIA requesters and are responsible for the day-to-day implementation of the Act. I ask that you transmit this memorandum to all such personnel. Those professionals deserve the full support of the agency's Chief FOIA Officer to ensure that they have the tools they need to respond promptly and efficiently to FOIA requests. FOIA professionals should be mindful of their obligation to work "in a spirit of cooperation" with FOIA requesters, as President Obama has directed. Unnecessary bureaucratic hurdles have no place in the "new era of open Government" that the President has proclaimed.

Memorandum for Heads of Executive Departments and Agencies  
Subject: The Freedom of Information Act

Page 3

Working Proactively and Promptly

Open government requires agencies to work proactively and respond to requests promptly. The President's memorandum instructs agencies to "use modern technology to inform citizens what is known and done by their Government." Accordingly, agencies should readily and systematically post information online in advance of any public request. Providing more information online reduces the need for individualized requests and may help reduce existing backlogs. When information not previously disclosed is requested, agencies should make it a priority to respond in a timely manner. Timely disclosure of information is an essential component of transparency. Long delays should not be viewed as an inevitable and insurmountable consequence of high demand.

In that regard, I would like to remind you of a new requirement that went into effect on December 31, 2008, pursuant to Section 7 of the OPEN Government Act of 2007, Pub. L. No. 110-175. For all requests filed on or after that date, agencies must assign an individualized tracking number to requests that will take longer than ten days to process, and provide that tracking number to the requester. In addition, agencies must establish a telephone line or Internet service that requesters can use to inquire about the status of their requests using the request's assigned tracking number, including the date on which the agency received the request and an estimated date on which the agency will complete action on the request. Further information on these requirements is available on the Department of Justice's website at [www.usdoj.gov/oip/foiapost/2008foiapost30.htm](http://www.usdoj.gov/oip/foiapost/2008foiapost30.htm).

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Agency Chief FOIA Officers should review all aspects of their agencies' FOIA administration, with particular focus on the concerns highlighted in this memorandum, and report to the Department of Justice each year on the steps that have been taken to improve FOIA operations and facilitate information disclosure at their agencies. The Department of Justice's Office of Information Policy (OIP) will offer specific guidance on the content and timing of such reports.

I encourage agencies to take advantage of Department of Justice FOIA resources. OIP will provide training and additional guidance on implementing these guidelines. In addition, agencies should feel free to consult with OIP when making difficult FOIA decisions. With regard to specific FOIA litigation, agencies should consult with the relevant Civil Division, Tax Division, or U.S. Attorney's Office lawyer assigned to the case.

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or equity by any party against the United States, its departments, agencies, instrumentalities or entities, its officers, employees, agents, or any other person.

# EXHIBIT 2

## APPENDIX B: LIST OF HEARINGS AND WITNESSES

### **Public Meeting of the FCIC, Washington, DC, September 17, 2009**

Statements by commissioners

### **Roundtable Discussion, Washington, DC, October 20, 2009**

Martin Baily, Senior Fellow in Economic Studies, Brookings Institution

Simon Johnson, Ronald A. Kurtz Professor of Entrepreneurship, Sloan School of Management, Massachusetts Institute of Technology

Hal S. Scott, Nomura Professor and Director of the Program on International Financial Systems, Harvard Law School

Joseph Stiglitz, Professor, Columbia Business School, Graduate School of Arts and Sciences (Department of Economics) and the School of International and Public Affairs

John B. Taylor, Mary and Robert Raymond Professor of Economics and the Bowen H. and Janice Arthur McCoy Senior Fellow at the Hoover Institution, Stanford University

Luigi Zingales, Robert C. McCormack Professor of Entrepreneurship and Finance and the David G. Booth Faculty Fellow, University of Chicago Booth School of Business

### **Roundtable Discussion, Washington, DC, November 16, 2009**

David A. Moss, The John G. McLean Professor, Harvard Business School

Carmen M. Reinhart, Professor of Economics and Director of the Center for International Economics, University of Maryland

### **Public Hearing, Washington, DC, Day 1, January 13, 2010**

#### *Session 1: Financial Institution Representatives*

Lloyd C. Blankfein, Chairman of the Board and Chief Executive Officer, Goldman Sachs Group, Inc.

James Dimon, Chairman of the Board and Chief Executive Officer, JPMorgan Chase & Co.

John J. Mack, Chairman of the Board, Morgan Stanley

Brian T. Moynihan, Chief Executive Officer and President, Bank of America Corporation

#### *Session 2: Financial Market Participants*

Michael Mayo, Managing Director and Financial Services Analyst, Calyon Securities (USA) Inc.

J. Kyle Bass, Managing Partner, Hayman Advisors, LP

Peter J. Solomon, Founder and Chairman, Peter J. Solomon Company

#### *Session 3: Financial Crisis Impacts on the Economy*

Mark Zandi, Chief Economist and Co-founder, Moody's Economy.com  
 Kenneth T. Rosen, Chair, Fisher Center for Real Estate and Urban Economics, University of California, Berkeley  
 Julia Gordon, Senior Policy Counsel, Center for Responsible Lending  
 C. R. "Rusty" Cloutier, President and Chief Executive Officer, MidSouth Bank, N.A., Past Chairman, Independent Community Bankers Association

**Public Hearing, Washington, DC, Day 2, January 14, 2010**

*Session 1: Current Investigations into the Financial Crisis—Federal Officials*

Eric H. Holder Jr., Attorney General, U.S. Department of Justice  
 Lanny A. Breuer, Assistant Attorney General, Criminal Division, U.S. Department of Justice  
 Sheila C. Bair, Chairman, U.S. Federal Deposit Insurance Corporation  
 Mary L. Schapiro, Chairman, U.S. Securities and Exchange Commission

*Session 2: Current Investigations into the Financial Crisis—State and Local Officials*

Lisa Madigan, Attorney General, State of Illinois  
 John W. Suthers, Attorney General, State of Colorado  
 Denise Voigt Crawford, Commissioner, Texas Securities Board, and President, North American Securities Administrators Association, Inc.  
 Glenn Theobald, Chief Counsel, Miami-Dade County Police Department; Chairman, Mayor Carlos Alvarez Mortgage Fraud Task Force

**Forum to Explore the Causes of the Financial Crisis, American University Washington College of Law, Washington, DC, Day 1, February 26, 2010**

*Session 1: Interconnectedness of Financial Institutions; "Too Big to Fail"*

Randall Kroszner, Norman R. Bobins Professor of Economics, University of Chicago

*Session 2: Macroeconomic Factors and U.S. Monetary Policy*

Pierre-Olivier Gourinchas, Associate Professor of Economics, University of California, Berkeley

*Session 3: Risk Taking and Leverage*

John Geanakoplos, James Tobin Professor of Economics, Yale University

*Session 4: Household Finances and Financial Literacy*

Annamaria Lusardi, Joel Z. and Susan Hyatt Professor of Economics, Dartmouth University; Research Associate at the National Bureau of Economic Research

**Forum to Explore the Causes of the Financial Crisis, American University Washington College of Law, Washington, DC, Day 2, February 27, 2010**

*Session 5: Mortgage Lending Practices and Securitization*

Chris Mayer, Paul Milstein Professor of Real Estate, Columbia University; Visiting Scholar at the Federal Reserve Bank of New York and Research Associate at the National Bureau of Economic Research

*Session 6: Government-Sponsored Enterprises and Housing Policy*

Dwight Jaffee, Willis Booth Professor of Banking, Finance, and Real Estate; Co-chair, Fisher Center for Real Estate and Urban Economics, University of California, Berkeley

*Session 7: Derivatives and Other Complex Financial Instruments*

Markus Brunnermeier, Edwards S. Sanford Professor of Economics, Princeton University

*Session 8: Firm Structure and Risk Management*

Anil Kashyap, Edward Eagle Brown Professor of Economics and Finance and Richard N. Rosett  
Faculty Fellow, University of Chicago

*Session 9: Shadow Banking*

Gary Gorton, Professor of Finance, School of Management, Yale University

**Public Hearing on Subprime Lending and Securitization and Government-Sponsored Enterprises (GSEs), Rayburn House Office Building, Room 2123, Washington, DC, Day 1, April 7, 2010**

*Session 1: The Federal Reserve*

Alan Greenspan, Former Chairman, Board of Governors of the Federal Reserve System

*Session 2: Subprime Origination and Securitization*

Richard Bitner, Managing Director of Housingwire.com; Author, *Confessions of a Subprime Lender: An Insider's Tale of Greed, Fraud, and Ignorance*

Richard Bowen, Former Senior Vice President and Business Chief Underwriter, CitiMortgage, Inc.

Patricia Lindsay, Former Vice President, Corporate Risk, New Century Financial Corporation

Susan Mills, Managing Director of Mortgage Finance, Citi Markets & Banking, Global Securitized Markets

*Session 3: Citigroup Subprime-Related Structured Products and Risk Management*

Murray C. Barnes, Former Managing Director, Independent Risk, Citigroup, Inc.

David C. Bushnell, Former Chief Risk Officer, Citigroup, Inc.

Nestor Dominguez, Former Co-head, Global Collateralized Debt Obligations, Citi Markets & Banking, Global Structured Credit Products

Thomas G. Maheras, Former Co-chief Executive Officer, Citi Markets & Banking

**Public Hearing on Subprime Lending and Securitization and Government-Sponsored Enterprises (GSEs), Rayburn House Office Building, Room 2123, Washington, DC, Day 2, April 8, 2010**

*Session 1: Citigroup Senior Management*

Charles O. Prince, Former Chairman of the Board and Chief Executive Officer, Citigroup, Inc.

Robert Rubin, Former Chairman of the Executive Committee of the Board of Directors, Citigroup, Inc.

*Session 2: Office of the Comptroller of the Currency*

John C. Dugan, Comptroller, Office of the Comptroller of the Currency

John D. Hawke Jr., Former Comptroller, Office of the Comptroller of the Currency

**Public Hearing on Subprime Lending and Securitization and Government-Sponsored Enterprises (GSEs), Rayburn House Office building, Room 2123, Washington, DC, Day 3, April 9, 2010**

*Session 1: Fannie Mae*

Robert J. Levin, Former Executive Vice President and Chief Business Officer, Fannie Mae

Daniel H. Mudd, Former President and Chief Executive Officer, Fannie Mae

*Session 2: Office of Federal Housing Enterprise Oversight*

Armando Falcon Jr., Former Director, Office of Federal Housing Enterprise Oversight

James Lockhart, Former Director, Office of Federal Housing Enterprise Oversight

**Public Hearing on the Shadow Banking System, Dirksen Senate Office Building,  
Room 538, Washington DC, Day 1, May 5, 2010**

*Session 1: Investment Banks and the Shadow Banking System*

Paul Friedman, Former Senior Managing Director, Bear Stearns  
Samuel Molinaro Jr., Former Chief Financial Officer and Chief Operating Officer, Bear Stearns  
Warren Spector, Former President and Co-chief Operating Officer, Bear Stearns

*Session 2: Investment Banks and the Shadow Banking System*

James E. Cayne, Former Chairman and Chief Executive Officer, Bear Stearns  
Alan D. Schwartz, Former Chief Executive Officer, Bear Stearns

*Session 3: SEC Regulation of Investment Banks*

Charles Christopher Cox, Former Chairman, U.S. Securities and Exchange Commission  
William H. Donaldson, Former Chairman, U.S. Securities and Exchange Commission  
H. David Kotz, Inspector General, U.S. Securities and Exchange Commission  
Erik R. Sirri, Former Director Division of Trading & Markets, U.S. Securities and Exchange Commission

**Public Hearing on the Shadow Banking System, Dirksen Senate Office Building,  
Room 538, Washington DC, Day 2, May 6, 2010**

*Session 1: Perspective on the Shadow Banking System*

Henry M. Paulson Jr., Former Secretary, U.S. Department of the Treasury

*Session 2: Perspective on the Shadow Banking System*

Timothy F. Geithner, Secretary, U.S. Department of the Treasury; Former President, Federal Reserve Bank of New York

*Session 3: Institutions Participating in the Shadow Banking System*

Michael A. Neal, Vice Chairman, General Electric; Chairman and Chief Executive Officer, GE Capital  
Mark S. Barber, Vice President and Deputy Treasurer, GE Capital  
Paul A. McCulley, Managing Director, PIMCO  
Steven R. Meier, Chief Investment Officer, State Street

**Public Hearing on Credibility of Credit Ratings, the Investment Decisions Made  
Based on Those Ratings, and the Financial Crisis, The New School Arnhold Hall,  
Theresa Lang Community & Student Center, 55 West 13th Street, 2nd Floor, New  
York, NY, June 2, 2010**

*Session 1: The Ratings Process*

Eric Kolchinsky, Former Team Managing Director, US Derivatives, Moody's Investors Service  
Jay Siegel, Former Team Managing Director, Moody's Investors Service  
Nicolas S. Weill, Group Managing Director, Moody's Investors Service  
Gary Witt, Former Team Managing Director, US Derivatives, Moody's Investors Service

*Session 2: Credit Ratings and the Financial Crisis*

Warren E. Buffett, Chairman and Chief Executive Officer, Berkshire Hathaway  
Raymond W. McDaniel, Chairman and Chief Executive Officer, Moody's Corporation

*Session 3: The Credit Rating Agency Business Model*

Brian M. Clarkson, Former President and Chief Operating Officer, Moody's Investors Service  
(written testimony only due to a medical emergency)  
Mark Froeba, Former Senior Vice President, US Derivatives, Moody's Investors Service  
Richard Michalek, Former Vice President/Senior Credit Officer, Moody's Investors Service

**Public Hearing on the Role of Derivatives in the Financial Crisis, Dirksen Senate Office Building, Room 538, Washington, DC, Day 1, June 30, 2010**

*Session 1: Overview of Derivatives*

Michael Greenberger, Professor, University of Maryland School of Law  
 Steve Kohlhagen, Former Professor of International Finance, University of California, Berkeley, and former Wall Street derivatives executive  
 Albert "Pete" Kyle, Charles E. Smith Chair Professor of Finance, University of Maryland  
 Michael Masters, Chief Executive Officer, Masters Capital Management, LLC

*Session 2: American International Group, Inc. and Derivatives*

Joseph J. Cassano, Former Chief Executive Officer, American International Group, Inc. Financial Products  
 Robert E. Lewis, Senior Vice President and Chief Risk Officer, American International Group, Inc.  
 Martin J. Sullivan, Former Chief Executive Officer, American International Group, Inc.

*Session 3: Goldman Sachs Group, Inc. and Derivatives*

Craig Broderick, Managing Director, Head of Credit, Market, and Operational Risk, Goldman Sachs Group, Inc.  
 Gary D. Cohn, President and Chief Operating Officer, Goldman Sachs Group, Inc.

**Public Hearing on the Role of Derivatives in the Financial Crisis, Dirksen Senate Office Building, Room 538, Washington DC, Day 2, July 1, 2010**

*Session 1: American International Group, Inc. and Goldman Sachs Group, Inc.*

Steven J. Bensinger, Former Executive Vice President and Chief Financial Officer, American International Group, Inc.  
 Andrew Forster, Former Senior Vice President and Chief Financial Officer, American International Group, Inc. Financial Services  
 Elias F. Habayeb, Former Senior Vice President and Chief Financial Officer, American International Group, Inc. Financial Services  
 David Lehman, Managing Director, Goldman Sachs Group, Inc.  
 David Viniar, Executive Vice President and Chief Financial Officer, Goldman Sachs Group, Inc.

*Session 2: Derivatives: Supervisors and Regulators*

Eric R. Dinallo, Former Superintendent, New York State Insurance Department  
 Gary Gensler, Chairman, Commodity Futures Trading Commission  
 Clarence K. Lee, Former Managing Director for Complex and International Organizations, Office of Thrift Supervision

**Public Hearing on Too Big to Fail: Expectations and Impact of Extraordinary Government Intervention and the Role of Systemic Risk in the Financial Crisis, Dirksen Senate Office Building, Room 538, Washington DC, Day 1, September 1, 2010**

*Session 1: Wachovia Corporation*

Scott G. Alvarez, General Counsel, Board of Governors of the Federal Reserve System  
 John H. Corston, Acting Deputy Director, Division of Supervision and Consumer Protection, U.S. Federal Deposit Insurance Corporation  
 Robert K. Steel, Former President and Chief Executive Officer, Wachovia Corporation

*Session 2: Lehman Brothers*

Thomas C. Baxter, Jr., General Counsel and Executive Vice President, Federal Reserve Bank of New York

Richard S. “Dick” Fuld Jr., Former Chairman and Chief Executive Officer, Lehman Brothers  
Harvey R. Miller, Business Finance & Restructuring Partner, Weil, Gotshal & Manges, LLP  
Barry L. Zubrow, Chief Risk Officer, JPMorgan Chase & Co.

**Public Hearing on Too Big to Fail: Expectations and Impact of Extraordinary Government Intervention and the Role of Systemic Risk in the Financial Crisis, Dirksen Senate Office Building, Room 538, Washington DC, Day 2, September 2, 2010**

*Session 1: The Federal Reserve*

Ben S. Bernanke, Chairman, Board of Governors of the Federal Reserve System

*Session 2: The Federal Deposit Insurance Corporation*

Sheila C. Bair, Chairman, U.S. Federal Deposit Insurance Corporation

**Public Hearing on the Impact of the Financial Crisis—Greater Bakersfield, Kern County Board of Supervisors Chambers, 1115 Truxtun Avenue, Bakersfield, CA, September 7, 2010**

*Session 1: Welcome*

Congressman Kevin McCarthy, California’s 22nd District  
Ray Watson, Kern County Supervisor, District 4  
Irma Carson, Bakersfield City Councilwoman, Ward 1

*Session 2: Local Banking*

Arnold Cattani, Chairman, Mission Bank  
Steve Renock, President and CEO, Kern Schools Federal Credit Union  
D. Linn Wiley, Vice Chairman, CVB Financial Corporation and Citizens Business Bank

*Session 3: Residential and Community Real Estate*

Gregory D. Bynum, President, Gregory D. Bynum and Associates, Inc.  
Warren Peterson, Warren Peterson Construction, Inc.

*Session 4: Local Housing Market*

Gary Crabtree, Principal Owner, Affiliated Appraisers  
Lloyd Plank, Lloyd E. Plank Real Estate Consultants

*Session 5: Foreclosures and Loan Modifications*

Brenda Amble, Escrow Manager, Ticolor Title  
Laurie McCarty, Coldwell Banker Preferred  
Jeannie McDermott, Small Business Owner

*Session 6: Forum for Public Comment*

James Stephen Urner  
Marvin Dean  
Marie Vasile

**Public Hearing on the Impact of the Financial Crisis—State of Nevada, University of Nevada, Las Vegas, Student Union Building, Las Vegas, NV, September 8, 2010**

*Session 1: Economic Analysis of the Impact of the Financial Crisis on Nevada*

Jeremy Aguero, Principal, Applied Analysis

*Session 2: The Impact of the Financial Crisis on Businesses of Nevada*

Steve Hill, Founder, Silver State Materials Corporation; Immediate Past Chairman, Las Vegas Chamber of Commerce  
William E. Martin, Vice Chairman and Chief Executive Officer, Service 1st Bank of Nevada

Wally Murray, President and Chief Executive Officer, Greater Nevada Credit Union  
Philip G. Satre, Chairman, International Gaming Technology (IGT); Chairman, NV Energy, Inc.

*Session 3: The Impact of the Financial Crisis on Nevada Real Estate*

Daniel G. Bogden, United States Attorney, State of Nevada  
Gail Burks, President and Chief Executive Officer, Nevada Fair Housing Center  
Brian Gordon, Principal, Applied Analysis  
Jay Jeffries, Former Southwest Regional Sales Manager, Fremont Investment & Loan

*Session 4: The Impact of the Financial Crisis on Nevada Public and Community Services*

Andrew Clinger, Director of the Department of Administration, Chief of the Budget Division, State of Nevada  
Jeffrey Fontaine, Executive Director, Nevada Association of Counties  
David Fraser, Executive Director, Nevada League of Cities  
Dr. Heath Morrison, Superintendent, Washoe County School District

*Session 5: Forum for Public Comment*

**Public Hearing on the Impact of the Financial Crisis—Miami, Florida, Florida International University, Modesto A. Madique Campus, Miami, FL, September 21, 2010**

*Session 1: Overview of Mortgage Fraud*

William K. Black, Associate Professor of Economics and Law, University of Missouri–Kansas City  
Ann Fulmer, Vice President of Business Relations, Interthinx; Co-founder, Georgia Real Estate Fraud Prevention and Awareness Coalition  
Henry N. Pontell, Professor of Criminology, Law & Society and Sociology, University of California, Irvine

*Session 2: Uncovering Mortgage Fraud in Miami*

Dennis J. Black, President, D. J. Black & Company  
Edward Gallagher, Executive Officer, Economic Crimes Bureau, Mortgage Fraud Task Force, Miami-Dade Police Department  
Jack Rubin, Senior Vice President, JPMorgan Chase Bank  
Ellen Wilcox, Special Agent, Florida Department of Law Enforcement

*Session 3: The Regulation, Oversight, and Prosecution of Mortgage Fraud in Miami*

J. Thomas Cardwell, Commissioner, Office of Financial Regulation, State of Florida  
Wilfredo A. Ferrer, United States Attorney, Southern District of Florida  
R. Scott Palmer, Special Counsel and Chief of the Mortgage Fraud Task Force, Office of the Attorney General, State of Florida

**Public Hearing on the Impact of the Financial Crisis—Sacramento, California Department of Education, Sacramento, CA, September 23, 2010**

*Session 1: Overview of the Sacramento Housing and Mortgage Markets and the Impact of the Financial Crisis on the Region*

Mark Fleming, Chief Economist, CoreLogic

*Session 2: Mortgage Origination, Mortgage Fraud and Predatory Lending in the Sacramento Region*

Karen J. Mann, President and Chief Appraiser, Mann and Associates Real Estate Appraisers & Consultants  
Thomas C. Putnam, President, Putnam Housing Finance Consulting

Kevin Stein, Associate Director, California Reinvestment Coalition  
Benjamin B. Wagner, United States Attorney, Eastern District of California

*Session 3: The Mortgage Securitization Chain: From Sacramento to Wall Street*

Vicki Beal, Senior Vice President, Transaction Management, Clayton Holdings, LLC  
Kurt Eggert, Professor of Law, Chapman University School of Law  
D. Keith Johnson, Former President and Chief Executive Officer, Washington Mutual's Long Beach Mortgage

*Session 4: The Impact of the Financial Crisis on Sacramento Neighborhoods and Families*

Pam Canada, Chief Executive Officer, NeighborWorks Home Ownership Center-Sacramento Region

Mona Tawatao, Regional Counsel, Legal Services of Northern California  
Bruce Wagstaff, Agency Administrator, County of Sacramento Countywide Services Agency  
Clarence Williams, President, California Capital Financial Development Corporation  
Henry W. Wirz, President and Chief Executive Officer, SAFE Credit Union

*Public Testimony Presented*

Allen Carpenter  
Lovie M. Hollis  
Nia Lavulo

# EXHIBIT 3



## Media Advisory

For Immediate Release  
January 27, 2011

Media Inquiries:  
Tucker Warren 202-292-1346  
[twarren@fcic.gov](mailto:twarren@fcic.gov)

# Financial Crisis Inquiry Commission Releases Report on the Causes of the Financial Crisis

*This Crisis was Avoidable – a Result of Human Actions, Inactions  
and Misjudgments; Warning Signs Were Ignored*

(Washington, DC) – Today the Financial Crisis Inquiry Commission delivered the results of its investigation into the causes of the financial and economic crisis. The Commission concluded that the crisis was avoidable and was caused by:

- Widespread failures in financial regulation, including the Federal Reserve’s failure to stem the tide of toxic mortgages;
- Dramatic breakdowns in corporate governance including too many financial firms acting recklessly and taking on too much risk;
- An explosive mix of excessive borrowing and risk by households and Wall Street that put the financial system on a collision course with crisis;
- Key policy makers ill prepared for the crisis, lacking a full understanding of the financial system they oversaw;
- And systemic breaches in accountability and ethics at all levels.

“Despite the expressed view of many on Wall Street and in Washington that the crisis could not have been foreseen or avoided, there were warning signs. The greatest tragedy would be to accept the refrain that no one could have seen this coming and thus nothing could have been done. If we accept this notion, it will happen again” said Phil Angelides, Chairman of the Commission.

The Commission’s report also offers conclusions about specific components of the financial system that contributed significantly to the financial meltdown. Here the Commission concluded that: collapsing mortgage-lending standards and the mortgage securitization pipeline lit and spread the flame of contagion and crisis, over-the-counter derivatives contributed significantly to this crisis, and the failures of credit rating agencies were essential cogs in the wheel of financial destruction.

The Commission also examined the role of government sponsored enterprises (GSEs), with Fannie Mae serving as the case study. The Commission found that the GSEs contributed to the crisis but were not a primary cause. They had a deeply flawed business model and suffered from many of the same failures of corporate governance and risk management seen in other financial firms but ultimately followed rather than led Wall Street and other lenders in purchasing subprime and other risky mortgages.

The Commission’s report, which was delivered to the President and Congress this morning, contains the data and evidence collected in the Commission’s inquiry, the conclusions of the Commission based on that inquiry, and accompanying dissents. The Commission’s conclusions were drawn from the review of millions of pages of documents, interviews with more than 700 witnesses, and 19 days of public hearings in New York, Washington, D.C., and communities across the country that were hit hard by the crisis. The reports and accompanying dissents are available to the public on the Commission’s website at [FCIC.gov](http://FCIC.gov),

through the Government Printing Office, and as a paperback and an e-book published by PublicAffairs wherever books are sold.

The Commission's statutory instructions set out 22 specific topics for inquiry and called for the examination of the collapse of major financial institutions that failed or would have failed if not for exceptional assistance from the government. This report fulfills that mandate. In addition, The Commission was instructed to refer to the attorney general of the United States and any appropriate state attorney general any person that the Commission found may have violated the laws of the United States in relation to the crisis. Where the Commission found such potential violations, it referred those matters to the appropriate authorities.

While much has already been written on the financial crisis, this report:

- Is the first official government report on what caused the crisis;
- Explains the *causes* of the crisis – how it came to be that in 2008 our nation was forced to choose between risking the collapse of our financial system and economy, or committing trillions of taxpayer dollars to rescue major corporations and our financial markets;
- Ties together many aspects of the crisis in a way that has not been done to date;
- Is based on documents never before made public and more than 700 interviews;
- Includes substantial new facts and data on issues and events of the financial crisis.

The Commission's report is not the sole repository of what the panel found. The Commission's website at [FCIC.gov](http://FCIC.gov) will host a wealth of information beyond what could be presented in its report. It will contain a stockpile of materials – including documents and emails, video of the Commission's public hearings, audio recordings, summaries and transcripts of interviews, testimony and supporting research – that can be studied for years to come.

###

### **Work of the Commission**

In the course of its research and investigation, the Commission reviewed millions of pages of documents, interviewed more than 700 witnesses, and held 19 days of public hearings in New York, Washington, D.C., and communities across the country that were hard hit by the crisis. The Commission also drew from a large body of existing work about the crisis developed by congressional committees, government agencies, academics, journalists, legal investigators, and many others.

The Commission conducted research into broad and sometimes arcane subjects, such as mortgage lending and securitization, derivatives, corporate governance, and risk management. To bring these subjects out of the realm of the abstract, it conducted case study investigations of specific financial firms—and in many cases specific facets of these institutions—that played pivotal roles. Those institutions included American International Group (AIG), Bear Stearns, Citigroup, Countrywide Financial, Fannie Mae, Goldman Sachs, Lehman Brothers, Merrill Lynch, Moody's, and Wachovia. The Commission also looked more generally at the roles and actions of scores of other companies.

The Commission studied relevant policies put in place by successive Congresses and administrations. It also examined the roles of policy makers and regulators, including at the Federal Deposit Insurance Corporation, the Federal Reserve, the Federal Reserve Bank of New York, the Department of Housing and Urban Development, the Office of the Comptroller of the Currency, the Office of Federal Housing Enterprise Oversight (and its successor, the Federal Housing Finance Agency), the Office of Thrift Supervision, the Securities and Exchange Commission, and the Treasury Department.

The operations of the Commission will conclude on February 13, 2011.

For more, visit [FCIC.gov](http://FCIC.gov)

# EXHIBIT 4

<b>AGREEMENT TO TRANSFER RECORDS TO THE NATIONAL ARCHIVES OF THE UNITED STATES</b>	1. INTERIM CONTROL NO. <i>(NARA Use Only)</i>
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**TERMS OF AGREEMENT**

<p>The records described below and on the attached _____ pages are deposited in the National Archives of the United States in accordance with 44 U.S.C. 2107. The transferring agency certifies that any restrictions on the use of these records are in conformance with the requirements of 5 U.S.C. 552.</p> <p>In accordance with 44 U.S.C. 2108, custody of these records becomes the responsibility of the Archivist of the United States at the time of transfer of the records. It is agreed that these records will be administered in accordance with the provisions of 44 U.S.C. Chapter 21, 36 CFR XII, 36 CFR Part 1256 and such other rules and regulations as may be prescribed by the Archivist of the United States (the Archivist). Unless specified and justified below, no restrictions of the use of these records will be imposed</p>	<p>other than the general and specific restrictions on the use of records in the National Archives of the United States that have been published in 36 CFR Part 1256 or in the <i>Guide to the National Archives of the United States</i>. The Archivist may destroy, donate or otherwise dispose of any containers, duplicate copies, unused forms, blank stationery, nonarchival printed or processed material, or other nonrecord material in any manner authorized by law or regulation. Without further consent, the Archivist may destroy deteriorating or damaged documents after they have been copied in a form that retains all of the information in the original document. The Archivist will use the General Records Schedule and any applicable records disposition schedule (SF 115) of the transferring agency to dispose of nonarchival materials contained in this deposit.</p>
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2A. AGENCY APPROVAL Signature _____ Date _____	3A. NARA APPROVAL Signature _____ Date _____
2B. NAME, TITLE, MAILING ADDRESS  	3B. NAME, TITLE, MAILING ADDRESS  

**RECORDS INFORMATION**

4A. RECORDS SERIES TITLE  	
4B. DATE SPAN OF SERIES _____ <i>(Attach any additional description)</i>	
5A. AGENCY OR ESTABLISHMENT  	9. PHYSICAL FORMS <input type="checkbox"/> Paper Documents <input type="checkbox"/> Posters <input type="checkbox"/> Paper Publications <input type="checkbox"/> Maps and Charts <input type="checkbox"/> Microfilm / Microfiche <input type="checkbox"/> Arch / Eng Drawings <input type="checkbox"/> Electronic Records <input type="checkbox"/> Motion / Sound / Video <input type="checkbox"/> Photographs <input type="checkbox"/> Other <i>(Specify):</i> _____
5B. AGENCY MAJOR SUBDIVISION  	10. VOLUME: _____ CONTAINERS: _____ Cu. Mtr. _____ (Cu. Ft. _____) Number _____ Type _____
5C. AGENCY MINOR SUBDIVISION  	11. DATE RECORDS ELIGIBLE FOR TRANSFER TO THE ARCHIVES  
5D. UNIT THAT CREATED RECORDS  	12. ARE RECORDS FULLY AVAILABLE FOR PUBLIC USE? <input type="checkbox"/> YES <input type="checkbox"/> NO <i>(If no, attach limits on use and justification.)</i>
5E. AGENCY PERSON WITH WHOM TO CONFER ABOUT THE RECORDS Name: _____ Telephone Number: (____) _____	13. ARE RECORDS SUBJECT TO THE PRIVACY ACT? <input type="checkbox"/> YES <input type="checkbox"/> NO <i>(If yes, cite Agency System Number and Federal Register volume and page number of most recent notice and attach a copy of this notice.)</i>
6. DISPOSITION AUTHORITY  	14. ATTACHMENTS <input type="checkbox"/> Agency Manual Excerpt <input type="checkbox"/> Listing of Records Transferred <input type="checkbox"/> Additional Description <input type="checkbox"/> NA Form 14097 or Equivalent <input type="checkbox"/> Privacy Act Notice <input type="checkbox"/> Microfilm Inspection Report <input type="checkbox"/> Other <i>(specify):</i> _____ <input type="checkbox"/> SF(s) 135
7. IS SECURITY CLASSIFIED INFORMATION PRESENT? <input type="checkbox"/> NO <input type="checkbox"/> YES LEVEL: <input type="checkbox"/> Confidential <input type="checkbox"/> Secret <input type="checkbox"/> Top Secret SPECIAL MARKINGS: <input type="checkbox"/> RD/FRD <input type="checkbox"/> SCI <input type="checkbox"/> NATO <input type="checkbox"/> Other _____ INFORMATION STATUS: <input type="checkbox"/> Segregated <input type="checkbox"/> Declassified	8. CURRENT LOCATION OF RECORDS _____ Agency (Complete 8A only) _____ Federal Records Center (Complete 8B only)
8A. ADDRESS  _____ _____	8B. FRC ACCESSION NUMBER _____ CONTAINER NUMBER(S) _____ FRC LOCATION _____

**NARA PROVIDES**

15. SHIPPING INSTRUCTIONS TO AGENCIES/REMARKS REGARDING DISPOSITION  	RG _____
16. RECORDS ACCEPTED INTO THE NATIONAL ARCHIVES OF THE UNITED STATES Signature _____ Date _____	17. NATIONAL ARCHIVES ACCESSION NO. _____

## INSTRUCTIONS

**GENERAL:** This form may be initiated by the transferring agency or the National Archives and Records Administration (NARA). Prepare a separate SF 258 for each series or SF 115 item being transferred.

**WHEN INITIATED BY AN AGENCY:** The agency completes blocks 2 and 4 through 14 using the instructions below. Block 2 must be signed and dated. Send the original to the appropriate address 60 days before the records are to be transferred to the National Archives.

**WHEN INITIATED BY NARA:** NARA completes blocks 1 and 4 through 14 and sends the original to the transferring agency's records officer. The agency completes block 2, completes or corrects blocks 4 through 14. Block 2 must be signed and dated. The agency sends the original to the appropriate address 60 days before the records are to be transferred to the National Archives.

**MAILING ADDRESS:** Mail the completed form to either the address below or to the appropriate National Archives regional archives.

Accessions Control Staff (NN-E)  
Office of the National Archives  
National Archives and Records Administration  
8601 Adelphi Road  
College Park, MD 20740-6001

If you do not know the address of the appropriate regional archives, telephone the Accessions Control Staff at 301-713-6655.

\* \* \*

1. **INTERIM CONTROL AGENCY:** *Leave blank.* NARA will fill in.

2. **AGENCY APPROVAL:** The agency records officer having the delegated authority to transfer the records with NARA should sign and date the form here (2A) and provide his/her name, title and mailing address (2B).

3. **NARA APPROVAL:** When a proposal to transfer records to the National Archives of the United States is approved, the appropriate NARA official completes 3A and 3B.

4A/B. **RECORDS SERIES TITLE/DATE SPAN OF SERIES:** The information provided should include a records series title, a statement of how the records are arranged, dates of coverage, and sufficient detail to describe the body of records being transferred. If access to the records is gained or facilitated through an index, box list, or other finding aid, include it with the records being transferred. Indicate the appropriate disposition authority number if the index is scheduled separately. If the records are in a Federal records center (FRC) attach each applicable SF 135, Records Transmittal and Receipt. For electronic records, describe any related documentation.

5. Fully identify the unit (5D) that created or organized the records. Usually this is not the agency's records management office. Place the creating unit within its organizational hierarchy (5A-5C). For example, the responsible unit is a branch (5D), within a division (minor subdivision) (5C), within an office (major subdivision) (5B), and within the agency or major component of a department (5A). Block 5A should be the official or legal name of the agency or bureau as published in the *U.S. Government Manual*. In block 5E include the name and telephone number (including the area code) of a person who should be contacted if NARA has any questions about the records. If the originating agency no longer exists, provide the name of the contact person at the successor agency.

6. **DISPOSITION AUTHORITY:** This citation must be included. It can be either the item number assigned to the records within a records disposition schedule (SF 115) approved by NARA or the item number assigned to the records within an agency records disposition manual based on a NARA-approved SF 115. If the agency manual number is used, attach a copy of the pertinent pages from the agency manual.

7. **IS SECURITY CLASSIFIED INFORMATION PRESENT?** If the records contain security classified information, check "Yes" and indicate the highest level of classification present. Indicate any additional applicable national security special access restrictions (e.g., Sensitive

Compartmented Information - SCI or North Atlantic Treaty Organization - NATO). Restricted Data and Formerly Restricted Data - RD/FRD - refers to information subject to the Atomic Energy Act of 1954. Check "Segregated" to indicate that security classified records have been segregated from unclassified records or information subject to special access restrictions has been segregated from other classified information. Check "Declassified" to indicate whether any records have been declassified, and provide both the authority for declassification and a description of the declassified records.

8. **CURRENT LOCATION OF RECORDS:** Check the appropriate box for the current location of the records. If the records currently are in a Federal records center, complete 8B. If the records are located in the transferring agency or other location, complete 8A.

8A. For records located in the transferring agency or other location, provide a complete address.

8B. For records located in a Federal records center, name the center, provide the FRC accession number and container number(s), and the FRC location.

9. **PHYSICAL FORM(S):** Check all the boxes that apply to the records included in the transfer.

10. **VOLUME:** Include both the cubic feet of the records and the number and type of containers holding the records. For example:

Cu. ft. 15; Number 15; Type FRC boxes.

Provide separate volume figures for each physical type of records, continuing on a separate sheet as necessary.

11. **DATE RECORDS ELIGIBLE FOR TRANSFER TO THE ARCHIVES:** Indicate the date the records are eligible for deposit in the National Archives. This date is determined by the disposition instructions for each item in the approved SF 115 or agency manual.

12. **ARE THE RECORDS FULLY AVAILABLE FOR PUBLIC USE?** If the records are exempt from release pursuant to the FOIA, 5 U.S.C. 552(b)(1)-(9) and (c)(1)-(3), this must be fully justified. List all exemptions that apply. If exemption (b)(1) is cited, complete block 7 accordingly. If (b)(3) is cited, include the full citation for the relevant statute. If the records are subject to copyright, identify affected items and the copyright holder.

13. **ARE THESE RECORDS SUBJECT TO THE PRIVACY ACT?** The National Archives is required to notify the public, through the *Federal Register*, when it takes custody of records subject to the provisions of the Privacy Act, 5 U.S.C. 552a. The originating agency should use this block to indicate whether the records covered by this SF 258 are part of a Privacy Act "system of records" and include a citation to and a copy of the Privacy Act notice published by the agency for the system. NARA will use the transferring agency's notice to inform the public, through the *Federal Register*, that the records have been transferred to the National Archives and that no further modification of them is possible.

14. **ATTACHMENTS:** Check the appropriate box(es) and indicate the attachment(s) being submitted with this form.

15. **SHIPPING INSTRUCTIONS TO AGENCIES/REMARKS REGARDING DISPOSITION:** NARA uses this space to provide shipping instructions relating to transfers.

16. **RECORDS ACCEPTED INTO THE NATIONAL ARCHIVES OF THE UNITED STATES:** The appropriate NARA representative signs block 16 after the records have been received at a NARA facility and NARA has confirmed that the records received are the records described in block 4. Transfers to NARA are not final until NARA has signed block 16. NARA sends the agency a copy of the completed form.

17. **NATIONAL ARCHIVES ACCESSION NO.:** NARA assigns this unique, permanent control number to each transfer of records.

# EXHIBIT 5



About the FCIC at SLS (/about)

The Report (/report)

Hearings & Testimony (/hearings)

Resource Library (/resource)

## FCIC AT STANFORD LAW

FCIC at Stanford Law  
(/about/stanford)

History of the Commission  
(/about/history)

Work of the Commission  
(/about/work)

Biographies  
(/about/biographies)

**Phil Angelides**  
Chairman  
(/about/biographies/phil-angelides)

**Hon. Bill Thomas**  
Vice Chairman  
(/about/biographies/bill-thomas)

**Brooksley Born**  
Commissioner  
(/about/biographies/brooksley-born)

**Byron S. Georgiou**  
Commissioner  
(/about/biographies/byron-s-georgiou)

**Bob Graham**  
Commissioner  
(/about/biographies/bob-graham)

**Keith Hennessey**  
Commissioner  
(/about/biographies/keith-hennessey)

**Douglas Holtz-Eakin**  
Commissioner  
(/about/biographies/douglas-holtz-eakin)

**Heather H. Murren, CFA**  
Commissioner  
(/about/biographies/heather-h-murren)

**John W. Thompson**  
Commissioner  
(/about/biographies/john-

The Financial Crisis Inquiry Commission (FCIC) created a website dedicated to reporting on matters related to its mission and purpose but by federal mandate the operations of the FCIC ceased to exist on February 13, 2011. However, the FCIC believed it was in the public interest to allow information related to its findings to continue to be made available on a publicly available website. In this capacity, the Rock Center for Corporate Governance at Stanford University and the Robert Crown Law Library at Stanford Law School (SLS) have agreed to host the new website and make the data more accessible in the coming years.

The Rock Center for Corporate Governance is a leading national center to advance the understanding and practice of corporate governance and Stanford Law School is a leading center for empirical legal analysis and interdisciplinary research.

The "official" archival FCIC website will be maintained by the "cybercemetery", a joint venture of the United States Government Printing Office and the University of North Texas Libraries. The CyberCemetery is an archive of government websites that have ceased operation (usually websites of defunct government agencies and commissions that have issued a final report). See <http://www.cybercemetery.unt.edu/archive/fcic/20110310172443/http://fcic.gov/> (<http://www.cybercemetery.unt.edu/archive/fcic/20110310172443/http://fcic.gov/>).

**Peter J. Wallison**  
Commissioner  
(/about/biographies/peter-j-wallison)

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Staff (/about/staff)

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Policies (/about/policies)

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FAQs (/about/faqs)

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[Home \(/\)](#) | [About the FCIC at SLS \(/about\)](#) | [The Report \(/report\)](#) | [Hearings & Testimony \(/hearings\)](#) | [Resource Library \(/resource\)](#) | [Contact Us \(http://www.stanford.edu/dept/law/forms/fcic/contact.fb\)](#)

This is the live, searchable Financial Crisis Inquiry Commission (FCIC) website hosted by [Stanford University's Rock Center for Corporate Governance \(http://rockcenter.stanford.edu/\)](http://rockcenter.stanford.edu/) and [Stanford Law School \(http://www.law.stanford.edu/\)](http://www.law.stanford.edu/).

To visit the frozen FCIC website, which is a federal record managed on behalf of the National Archives and Records Administration, please visit: <http://www.cybercemetery.unt.edu/archive/fcic/20110310172443/http://fcic.gov/> (<http://www.cybercemetery.unt.edu/archive/fcic/20110310172443/http://fcic.gov/>)

# EXHIBIT 6

**Congress of the United States**  
**Washington, DC 20515**

February 18, 2011

The Honorable David S. Ferriero  
Archivist of the United States  
National Archives and Records Administration  
700 Pennsylvania Avenue, NW  
Washington, DC 20408

Dear Mr. Ferriero:

It is our understanding that the National Archives and Records Administration (NARA) is in possession of records from the Financial Crisis Inquiry Commission (FCIC). The FCIC is the subject of an investigation by the Committees on Oversight and Government Reform and Financial Services of the House of Representatives. The records of the FCIC in NARA's possession are necessary to the Committees' investigation. We are writing to request that NARA provide electronic copies of these records to the Committees.

Specifically, the records of interest to the Committees consist of the internal work product of the FCIC, including e-mails, memoranda and financial accounting records. Mr. Matt Fulgham, Assistant Director of the Center for Legislative Archives at NARA, has informed us that this material was transferred to NARA electronically and can be copied onto electronic storage media for delivery to our Committees. We request that NARA produce to the Committees identical copies of the internal work product of the FCIC that was provided to NARA.

We request that you provide the requested documents and information as soon as possible, but no later than 5:00 p.m. on Friday, February 25, 2011. When producing documents to the Committees, please deliver production sets to: (1) the Majority Staff of the House Oversight and Government Reform Committee in Room 2157 of the Rayburn House Office Building; (2) the Minority Staff of the House Oversight and Government Reform Committee in Room 2471 of the Rayburn House Office Building; (3) the Majority Staff of the House Financial Services Committee in Room 2129 of the Rayburn House Office Building, and; (4) the Minority Staff of the House Financial Services Committee in Room B-371A of the Rayburn House Office Building.

The Honorable David S. Ferriero  
February 18, 2011  
Page 2

If you have any questions about this request, please contact Brien Beattie of the House Oversight and Government Reform Committee Staff at (202) 225-5074.

Sincerely,



Darrell Issa  
Chairman  
Committee on Oversight  
and Government Reform



Spencer Bachus  
Chairman  
Committee on Financial Services



Patrick McHenry  
Chairman  
Subcommittee on TARP, Financial  
Services, and Bailouts of Public and  
Private Programs



Randy Neugebauer  
Chairman  
Subcommittee on Oversight and  
Investigations

cc: The Honorable Elijah E. Cummings, Ranking Minority Member,  
Committee on Oversight and Government Reform  
The Honorable Barney Frank, Ranking Minority Member,  
Committee on Financial Services  
The Honorable Mike Quigley, Ranking Member  
Subcommittee on TARP, Financial Services, and Bailouts of Public  
and Private Programs  
The Honorable Michael Capuano, Ranking Member  
Subcommittee on Oversight and Investigations

# EXHIBIT 7



## **AN EXAMINATION OF ATTACKS AGAINST THE FINANCIAL CRISIS INQUIRY COMMISSION**

**Democratic Staff  
Committee on Oversight and Government Reform  
U.S. House of Representatives**

**Prepared for Ranking Member Elijah E. Cummings**

**July 13, 2011**

**<http://democrats.oversight.house.gov/>**

## TABLE OF CONTENTS

<b>Executive Summary .....</b>	<b>3</b>
<b>Background .....</b>	<b>7</b>
<b>I. Work Guided by Politics Rather Than Fact-Finding .....</b>	<b>9</b>
<b>II. Campaign to Blame Economic Crisis on Government Housing Policy .....</b>	<b>11</b>
<b>A. Wallison Leaked Confidential Information .....</b>	<b>12</b>
<b>B. Other Republicans Called Wallison a “Parrot” for Pinto .....</b>	<b>15</b>
<b>C. Wallison Inaccurately Claimed Commission Ignored AEI Position ...</b>	<b>16</b>
<b>D. All Other Republican Commissioners Rejected AEI Position .....</b>	<b>18</b>
<b>III. Questions About Vice Chairman Thomas and the CEO of a Political Consulting Firm .....</b>	<b>21</b>
<b>IV. Unsubstantiated Allegations by Chairman Issa .....</b>	<b>25</b>
<b>A. Financial Mismanagement .....</b>	<b>25</b>
<b>B. Conflicts of Interest and Partisan Staff .....</b>	<b>27</b>
<b>C. Decision to Delay Report .....</b>	<b>29</b>
<b>D. Disclosure of Confidential Information .....</b>	<b>31</b>

## EXECUTIVE SUMMARY

In the wake of the most severe economic crisis since the Great Depression, Congress established the Financial Crisis Inquiry Commission in May 2009 to “examine the causes, domestic and global, of the current financial and economic crisis in the United States.” There were ten Commissioners, including six Democrats and four Republicans, led by Democratic Chairman Phil Angelides and Republican Vice Chairman Bill Thomas.

In July 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act. Based on testimony from former Federal Reserve Chairman Alan Greenspan and others that there had been deficient regulation of the financial markets leading up to the crisis, the Dodd-Frank Act included significant new protections for consumers of financial products.

House Republicans voted almost unanimously against the Dodd-Frank Act. On the day it passed the Senate, then-House Minority Leader John Boehner stated: “I think it ought to be repealed.” Since then, House Republicans have been aggressive in their efforts to repeal the Act and prevent its protections from being implemented.

On July 27, 2010, then-Ranking Member Issa announced an investigation into the activities of the Commission. In a letter to Chairman Angelides, Ranking Member Issa wrote that, although he had hoped that the Commission would “be able to conduct a fair and effective investigation which would help Congress as it considered financial regulatory reform legislation,” he was launching his investigation in part because “the Administration and congressional Democrats have instead chosen to ram through a partisan financial regulation bill before the FCIC has completed its work.”

Ranking Member Issa made a number of allegations focused almost exclusively on Democratic Commissioners and staff. He asserted that “potential financial mismanagement” caused the Commission to “run out of money”; that “commissioners and staff of the FCIC may have conflicts of interest”; that some senior staff had “extensive ties” to “partisan Democrat politics”; and that the decision to delay the Commission’s final report by a month and a half was caused by “continued management problems.”

As part of Chairman Issa’s investigation, he requested a wide range of internal Commission documents. In response, the Committee has now obtained more than 400,000 e-mails, memoranda, draft reports, and other documents from both Democratic and Republican Commissioners and staff.

These documents indicate that Chairman Issa’s allegations are largely unsubstantiated, and this report addresses each allegation in turn. In contrast, the documents raise significant new questions about whether Republican Commissioners geared their efforts on the Commission toward helping House Republicans in their campaign to repeal the Dodd-Frank Act, rather than determining the facts that led to the economic crisis. The documents also raise a host of new ethical questions about Republican Commissioners and staff, including evidence that they leaked confidential information to outside parties on multiple occasions.

### ***Work Guided by Politics Rather Than Fact-Finding***

Although the purpose of the Commission was supposed to be to conduct in-depth fact-finding to determine the causes of the economic crisis, internal Commission documents obtained by the Committee include e-mails from a Republican Commissioner urging his colleagues to use their positions on the Commission to help House Republicans in their efforts to repeal the Dodd-Frank Act.

For example, on November 3, 2010, the day after the mid-term congressional elections in which Republicans took control of the House, Republican Commissioner Peter Wallison e-mailed Republican Commissioner Douglas Holtz-Eakin: “It’s very important, I think, that what we say in our separate statements not undermine the ability of the new House GOP to modify or repeal Dodd-Frank.”

The next day, he sent a similar e-mail to Vice Chairman Thomas, attaching an article entitled “GOP Pledges Major Changes to Dodd-Frank, Fannie and Freddie, CFPB.” He wrote: “Garrett [Rep. Scott Garrett] has also suggested in the past a complete repeal of Dodd-Frank. This effort should not be undermined. That law will suppress economic growth because it was based on the idea that more regulation was necessary. Boehner also said yesterday that changing this law was a priority.”

By December, Republican Commissioners had decided not to join the Commission’s report. Instead, they issued their own paper on December 15 providing dissenting views about the causes of the economic crisis. In addition, on January 27, 2011, Commissioner Wallison wrote in his dissenting views that “the Dodd-Frank Act was legislative overreach and unnecessary.” He added: “The appropriate policy choice was to reduce or eliminate the government’s involvement in the residential mortgage markets, not to impose significant new regulation on the financial system.”

On January 3, 2011, *Politico* reported that Chairman Issa planned to hold a hearing with Chairman Angelides and Vice Chairman Thomas “to determine whether there was any agreement in relation to the cause of the meltdown.” Two days later, Chairman Issa joined several other Members in introducing H.R. 87 to repeal the Dodd-Frank Act in its entirety.

### ***Campaign to Blame Economic Crisis on Government Housing Policy***

Internal Commission documents indicate that Commissioner Wallison used his position to promote a theory of the economic crisis supported by Chairman Issa and put forth by Edward Pinto, a Resident Fellow at the American Enterprise Institute (AEI). This theory, that government housing policy was the primary cause of the nation’s economic crisis, was ultimately rejected as flawed by every other member of the Commission.

Before joining AEI in 1999, Commissioner Wallison served as White House Counsel and as General Counsel at the Treasury Department under President Reagan where, according to his biography, “he had a significant role in the development of the Reagan administration’s

proposals for the deregulation of the financial services industry.” Mr. Pinto is a former Fannie Mae official whose work at AEI focuses “on the role of housing policies in the financial crisis.”

Internal Commission documents indicate that Commissioner Wallison violated the Commission’s ethics provisions by leaking confidential information to Mr. Pinto on several occasions. In response to one of these violations, the Commission’s General Counsel concluded that Commissioner Wallison disclosed “a confidential Commission staff memorandum” to Mr. Pinto, and that this “was a violation of the Commission’s Ethics Guidelines, and our written confidentiality agreement with the Federal Reserve.”

Internal Commission e-mails indicate that Republican Vice Chairman Thomas and his staff became worried that Commissioner Wallison was unduly influenced by AEI. In one exchange, Vice Chairman Thomas’ special assistant referred to Commissioner Wallison as “intractable” and wrote: “Everyone agrees that there is simply no way to make Peter happy.” Later in the exchange, he wrote:

I can’t tell re: who is the leader and who is the follower. If Peter is really a parrot for Pinto, he’s putting a lot of faith in the guy.

In response, a colleague at Vice Chairman Thomas’ law firm wrote: “I think wmt [William M. Thomas] is going to push to find out if pinto is being paid by anyone.”

Despite repeated claims by Commissioner Wallison that the Commission failed to consider AEI’s position that the economic crisis was caused by government housing policies, internal Commission documents demonstrate that Commission staff went above and beyond in fully considering the AEI position, and that all of the other Commissioners—including the three other Republicans—rejected this position as fundamentally flawed.

For example, Republican Commissioner Holtz-Eakin sent an e-mail to Vice Chairman Thomas stating: “I continue to think that Peter overplays the mortgage issue.” In addition, the separate dissent issued by Republican Commissioners Thomas, Hennessey, and Holtz-Eakin stated that such “single-cause explanations” are “too simplistic.”

Chairman Angelides sent an e-mail to Commissioner Wallison explaining that the Commission staff had fully considered the AEI position, but concluded it was “flawed.” He added: “the staff has spent more time responding to your questions and requests for information than any other Commissioner.”

### ***Questions About Vice Chairman Thomas and the CEO of a Political Consulting Firm***

Internal Commission documents raise questions about the extent to which Vice Chairman Thomas and his Commission staff were providing information to, and receiving information from, a CEO of a political consulting firm who is also employed by the Vice Chairman’s law firm.

Alex Brill is the CEO of Matrix Global Advisors, a firm that provides “economic and political consulting services for clients seeking to effect change in Washington” and “works with clients spanning a variety of industries and has advised both small firms and large corporations,” including a “Wall Street investment bank” seeking insights into “financial services legislation.”

Mr. Brill is also an Economic Policy Advisor at the law firm of Buchanan, Ingersoll, and Rooney in Washington, DC, where Vice Chairman Thomas is a Senior Advisor, and where Mr. Brill “provides clients with economic and legislative insight” into “financial markets and policies affecting capital investment.” Mr. Brill is also a Research Fellow at AEI and previously served as “senior advisor to former chairman of the House Ways and Means Committee Bill Thomas.”

Although some Commissioners utilized non-Commission staff for scheduling, appointments, and other administrative functions, Mr. Brill received confidential information about the Commission’s work and provided substantive input based on that information. According to the internal Commission documents, Mr. Brill was provided:

- copies of outlines of internal drafts of Commission staff memos;
- information about internal conversations among Commissioners and staff about deliberations regarding potential witnesses for upcoming hearings;
- a media advisory that had not yet been made public;
- information about the Commission’s plans to investigate foreign banks (including the identities of target banks); and
- information about how the Commission staff would treat specific corporations under investigation (such as Citigroup).

Committee staff have identified no record of Mr. Brill being an official, employee, consultant, contractor, or adviser to the Commission. Similarly, Committee staff have identified no record of Mr. Brill signing a confidentiality agreement.

The documents produced to the Committee do not indicate whether Mr. Brill conveyed any of this internal Commission information to corporate clients, entities represented by his company or his law firm, or any other outside parties. However, Mr. Brill’s law firm aggressively markets his services by stating that they “use this influence to advance causes and cases for clients all over the nation.”

As the culmination of a year-long investigation, Chairmen Issa and McHenry scheduled a hearing on these matters for July 13, 2011. Despite previous reports, Chairman Issa did not invite Vice Chairman Thomas to testify. For this reason, on July 1, 2011, Ranking Members Cummings and Quigley requested that Committee staff conduct a bipartisan staff interview of Vice Chairman Thomas, as they had done with Chairman Angelides. Chairman Issa declined to grant this request. Instead, he notified the Committee that the hearing had been postponed indefinitely.

## BACKGROUND

The Financial Crisis Inquiry Commission was established by the Fraud Enforcement and Recovery Act of 2009, which was passed by Congress and signed by the President in May 2009.<sup>1</sup> The Commission was created in the wake of the most severe financial crisis in the United States since the Great Depression to “examine the causes, domestic and global, of the current financial and economic crisis in the United States.”<sup>2</sup>

The Act authorized the appropriation of “such sums as are necessary.”<sup>3</sup> The Commission received an initial appropriation of \$8 million from the Supplemental Appropriations Act of 2009 (enacted June 24, 2009).<sup>4</sup> The Commission was subsequently appropriated an additional \$1.8 million by the Supplemental Appropriations Act of 2010, which was enacted on July 29, 2010.<sup>5</sup>

The Commission was required to “submit to the President and to the Congress a report containing the findings and conclusions of the Commission on the causes of the current financial and economic crisis in the United States” on December 15, 2010, and it was then to “terminate 60 days after the date on which the final report is submitted.”<sup>6</sup>

On November 17, 2010, the Commission announced it “had resolved, by majority vote, to deliver its report in January 2011, rather than on December 15, 2010.”<sup>7</sup> The Commission indicated that this delay would “allow the Commission to produce and disseminate a report which best serves the public interest and more fully informs the President, the Congress and the American people about the facts and causes of the crisis.”<sup>8</sup> On December 15, 2010, the four Republican commissioners, Bill Thomas, Peter Wallison, Keith Hennessey, and Douglas Holtz-Eakin, sent to the President and Congress a nine-page primer entitled “Financial Crisis Primer: Questions and Answers on the Cause of the Financial Crisis.”<sup>9</sup>

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<sup>1</sup> P.L. 111-21.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> P.L. 111-32.

<sup>5</sup> P.L. 111-212.

<sup>6</sup> P.L. 111-21.

<sup>7</sup> Financial Crisis Inquiry Commission, *Financial Crisis Inquiry Commission Announces New Date for Final Report* (Nov. 17, 2010).

<sup>8</sup> *Id.*

<sup>9</sup> Republican Commissioners on the Financial Crisis Inquiry Commission, *Financial Crisis Primer: Questions and Answers on the Causes of the Financial Crisis* (Dec. 15, 2010) (online at <http://keithhennessey.com/wp-content/uploads/2010/12/Financial-Crisis-Primer.pdf>).

The Commission issued its final report on January 27, 2011.<sup>10</sup> The report concluded that “the crisis was avoidable” and was caused by “[w]idespread failures in financial regulation,” “[d]ramatic breakdowns in corporate governance,” and “[a]n explosive mix of excessive borrowing and risk by households and Wall Street,” among other factors.<sup>11</sup> The Commission also published on its website “nearly 2,000 documents and more than 300 witness interviews in audio, transcript or summary form” on which its report was based.<sup>12</sup>

The six Democratic Commissioners voted in favor of the report.<sup>13</sup> The four Republican Commissioners issued two separate dissenting views. Commissioners Bill Thomas, Keith Hennessey, and Douglas Holtz-Eakin issued a joint dissenting statement.<sup>14</sup> Commissioner Peter Wallison issued a separate dissenting statement.<sup>15</sup>

The Commission ceased work on February 13, 2011. The Commission’s website is now maintained by the Rock Center for Corporate Governance at Stanford University, and materials associated with its work were deposited at the National Archives and Records Administration.<sup>16</sup>

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<sup>10</sup> Financial Crisis Inquiry Commission, *Financial Crisis Inquiry Commission Releases Report on the Causes of the Financial Crisis* (Jan. 27, 2010) (online at [http://fcic-static.law.stanford.edu/cdn\\_media/fcic-news/2011-0127-fcic-releases-report.pdf](http://fcic-static.law.stanford.edu/cdn_media/fcic-news/2011-0127-fcic-releases-report.pdf)).

<sup>11</sup> *Id.*

<sup>12</sup> Financial Crisis Inquiry Commission, *Financial Crisis Inquiry Commission Releases Additional Material and Concludes Work* (Feb. 10, 2011) (online at [http://fcic-static.law.stanford.edu/cdn\\_media/fcic-news/Press\\_Release\\_2.10.11.pdf](http://fcic-static.law.stanford.edu/cdn_media/fcic-news/Press_Release_2.10.11.pdf)).

<sup>13</sup> Financial Crisis Inquiry Commission, *Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States* (online at [http://fcic-static.law.stanford.edu/cdn\\_media/fcic-reports/fcic\\_final\\_report\\_commissioner\\_votes.pdf](http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_commissioner_votes.pdf)).

<sup>14</sup> Financial Crisis Inquiry Commission, *Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States – Dissenting Statement of Commissioner Keith Hennessey, Commissioner Douglas Holtz-Eakin, and Vice Chairman Bill Thomas* (Jan. 2011) (online at [http://fcic-static.law.stanford.edu/cdn\\_media/fcic-reports/fcic\\_final\\_report\\_hennessey\\_holtz-eakin\\_thomas\\_dissent.pdf](http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_hennessey_holtz-eakin_thomas_dissent.pdf)).

<sup>15</sup> Financial Crisis Inquiry Commission, *Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States – Dissenting Statement of Peter J. Wallison* (Jan. 2011) (online at [http://fcic-static.law.stanford.edu/cdn\\_media/fcic-reports/fcic\\_final\\_report\\_wallison\\_dissent.pdf](http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_wallison_dissent.pdf)).

<sup>16</sup> *Id.*

## I. WORK GUIDED BY POLITICS RATHER THAN FACT-FINDING

Although the purpose of the Commission was to conduct in-depth fact-finding to determine the causes of the economic crisis, internal Commission documents obtained by the Committee include e-mails from a Republican Commissioner urging his colleagues to use their positions on the Commission to help House Republicans in their efforts to repeal the Dodd-Frank Act.

In July 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protections Act in response to the 2008 economic crisis.<sup>17</sup> Based on testimony from former Federal Reserve Chairman Alan Greenspan and others that there had been inadequate and insufficient regulation of the financial markets leading up to the crisis, the Dodd-Frank Act included significant new protections for consumers of financial products.<sup>18</sup>

When the Dodd-Frank Act passed the House in 2010, House Republicans voted almost unanimously against it.<sup>19</sup> On the day it passed the Senate, then-House Minority Leader John Boehner stated: “I think it ought to be repealed.”<sup>20</sup>

Less than two weeks later, then-Ranking Member Issa announced an investigation into the activities of the Commission. In a letter to Chairman Angelides on July 27, 2010, Rep. Issa stated that, although he had hoped that the Commission would “be able to conduct a fair and effective investigation which would help Congress as it considered financial regulatory reform legislation,” he was launching his investigation in part because “the Administration and congressional Democrats have instead chosen to ram through a partisan financial regulation bill before the FCIC has completed its work.”<sup>21</sup>

On November 3, 2010, the day after the mid-term congressional elections in which Republicans took control of the House, Commissioner Wallison sent an e-mail to Republican Commissioner Douglas Holtz-Eakin. He wrote:

It’s very important, I think, that what we say in our separate statements not undermine the ability of the new House GOP to modify or repeal Dodd-Frank.<sup>22</sup>

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<sup>17</sup> P.L. 111-203.

<sup>18</sup> *The Dodd-Frank Wall Street Reform and Consumer Protection Act: Issues and Summary*, Congressional Research Service (July 29, 2010) (online at [www.llsdc.org/attachments/files/232/CRS-R41350.pdf](http://www.llsdc.org/attachments/files/232/CRS-R41350.pdf)).

<sup>19</sup> H.R. 4173, Dodd-Frank Wall Street Reform and Consumer Protection Act (June 30, 2010) (House vote on conference report) (online at [thomas.gov/cgi-bin/bdquery/z?d111:HR04173:@@R](http://thomas.gov/cgi-bin/bdquery/z?d111:HR04173:@@R)).

<sup>20</sup> *Senate Passes Wall Street Reform*, The Hill (July 15, 2010) (online at [thehill.com/homenews/senate/109053-senate-passes-wall-st-reform](http://thehill.com/homenews/senate/109053-senate-passes-wall-st-reform)).

<sup>21</sup> Letter from Darrell E. Issa to Phil Angelides (July 27, 2010).

<sup>22</sup> E-mail from Peter J. Wallison to Douglas Holtz-Eakin (Nov. 3, 2010).

The next day, on November 4, 2010, Commissioner Wallison sent an e-mail to Republican Vice Chairman Bill Thomas, again underscoring support for efforts to repeal the Dodd-Frank Act. Attaching an article entitled “GOP Pledges Major Changes to Dodd-Frank, Fannie and Freddie, CFPB,” Commissioner Wallison wrote:

Bill: In case this did not make the main media sources, I thought you should see this. Garrett [Rep. Scott Garrett] has also suggested in the past a complete repeal of Dodd-Frank. This effort should not be undermined. That law will suppress economic growth because it was based on the idea that more regulation was necessary. Boehner also said yesterday that changing this law was a priority.<sup>23</sup>

By December, Republican Commissioners had decided not to join the Commission’s report. On December 15, 2010, the four Republican commissioners, Bill Thomas, Peter Wallison, Keith Hennessey, and Douglas Holtz-Eakin, sent to the President and Congress a nine-page primer entitled “Financial Crisis Primer: Questions and Answers on the Cause of the Financial Crisis.”<sup>24</sup>

On January 3, 2011, an article in *Politico* reported that Rep. Issa planned an inquiry into the Commission’s activities as one of his first investigations. It stated:

Issa also wants to study why the financial crisis commission couldn’t reach consensus last year. He’d like to call commission Chairman Phil Angelides and former Rep. Bill Thomas (R-Calif.), vice chairman of the panel, to determine whether there was any agreement in relation to the cause of the meltdown.<sup>25</sup>

Two days later, on January 5, 2011, Chairman Issa joined seven other Members in introducing H.R. 87 to repeal the Dodd-Frank Act in its entirety.<sup>26</sup>

Although the Commission was scheduled to issue its report on January 27, 2011, Chairman Issa sent a letter to Chairman Angelides two days earlier, on January 25, 2011, to “renew the request for documents in the original letter.” He directed the production of all documents in less than a week, by January 31, 2011.<sup>27</sup>

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<sup>23</sup> E-mail from Peter Wallison to Bill Thomas (Nov. 4, 2010).

<sup>24</sup> Republican Commissioners on the Financial Crisis Inquiry Commission, *Financial Crisis Primer: Questions and Answers on the Causes of the Financial Crisis* (Dec. 15, 2010) (online at <http://keithhennessey.com/wp-content/uploads/2010/12/Financial-Crisis-Primer.pdf>).

<sup>25</sup> *Darrell Issa Reveals List of Investigations*, *Politico* (Jan. 3, 2011) (online at [www.politico.com/news/stories/0111/46952.html#ixzz1RS0PXlnR](http://www.politico.com/news/stories/0111/46952.html#ixzz1RS0PXlnR)).

<sup>26</sup> H.R. 87, To Repeal the Dodd-Frank Wall Street Reform and Consumer Protection Act (introduced Jan. 5, 2011) (online at <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR00087:@@P/>).

<sup>27</sup> Letter from Darrell E. Issa, *et al.*, to Phil Angelides (Jan. 25, 2011).

Two days later, when the Commission issued its final report, Commissioner Wallison's dissent stated that "the Dodd-Frank Act was legislative overreach and unnecessary." He concluded: "The appropriate policy choice was to reduce or eliminate the government's involvement in the residential mortgage markets, not to impose significant new regulation on the financial system."<sup>28</sup>

On May 23, 2011, Chairman Issa sent letters to former Chairman Angelides, former Commissioner Byron Georgiou, former General Counsel Gary Cohen, and former Executive Director Wendy Edelberg, requesting that they make themselves available for transcribed interviews with Committee staff.<sup>29</sup>

On July 1, 2011, Representatives Elijah Cummings and Mike Quigley, Ranking Members of the Oversight Committee and Subcommittee on TARP, Financial Services, and Bailouts of Public and Private Programs, sent a letter to Chairmen Issa and Patrick McHenry requesting that the Committee also conduct bipartisan staff interviews of former Vice Chairman Thomas and Commissioner Peter Wallison.<sup>30</sup> Chairman Issa declined to grant this request.

## **II. CAMPAIGN TO BLAME ECONOMIC CRISIS ON GOVERNMENT HOUSING POLICY**

Internal Commission documents obtained by the Committee indicate that Commissioner Peter J. Wallison used his position on the Commission to promote a theory supported by Rep. Issa and put forth by Edward Pinto, a Resident Fellow at the American Enterprise Institute (AEI), that was ultimately rejected as flawed by every other member of the Commission—namely, that government housing policy was the primary cause of the nation's economic crisis.

Peter Wallison joined AEI in 1999 and became the Arthur F. Burns Fellow in Financial Policy Studies in 2007.<sup>31</sup> In his previous positions as White House Counsel and General Counsel at the Treasury Department under President Reagan, "he had a significant role in the development of the Reagan administration's proposals for the deregulation of the financial

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<sup>28</sup> Financial Crisis Inquiry Commission, *Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States – Dissenting Statement of Commissioner Peter Wallison* (Jan. 2011) (online at [http://fcic-static.law.stanford.edu/cdn\\_media/fcic-reports/fcic\\_final\\_report\\_wallison\\_dissent.pdf](http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_wallison_dissent.pdf)).

<sup>29</sup> See, e.g., Letter from Darrell E. Issa to Phil Angelides (May 23, 2011).

<sup>30</sup> Letter from Elijah E. Cummings and Mike Quigley to Darrell E. Issa and Patrick McHenry (July 1, 2011).

<sup>31</sup> American Enterprise Institute, *Peter J. Wallison Appointed to the AEI's Arthur F. Burns Chair* (May 10, 2007) (online at [www.aei.org/press/26156](http://www.aei.org/press/26156)).

services industry.”<sup>32</sup> Mr. Wallison was appointed to the Commission by then-House Republican Leader John Boehner and Senate Republican Leader Mitch McConnell.<sup>33</sup>

Edward Pinto’s biography states that he was an “executive vice president and chief credit officer for Fannie Mae until the late 1980s,” and he focuses now “on the role of housing policies in the financial crisis and researching policy considerations and options for rebuilding our housing-finance sector.”<sup>34</sup> On August 14, 2010, Mr. Pinto published a paper arguing that government housing policy was to blame for the economic crisis.<sup>35</sup>

Then-Ranking Member Issa published reports and an article espousing the same position. A minority staff report originally issued on July 1, 2009, argued: “The housing bubble that burst in 2007 and led to a financial crisis can be traced back to federal government intervention in the U.S. housing market intended to help provide homeownership opportunities for more Americans.”<sup>36</sup> Similarly, in March 2010, then-Ranking Member Issa published an article in the Harvard Journal of Law and Public Policy arguing that the economic crisis “is directly tied to an over-inflated housing bubble” and that the loans that created the bubble “were given in record number to over-extended, under-qualified borrowers to satisfy an increasingly aggressive government drive for home ownership.”<sup>37</sup>

#### **A. Wallison Leaked Confidential Information**

Internal Commission documents obtained by the Committee indicate that Commissioner Wallison violated the Commission’s ethics provisions by leaking confidential information.

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<sup>32</sup> American Enterprise Institute, *Biography of Peter J. Wallison* (accessed July 8, 2011) (online at [www.aei.org/scholar/58](http://www.aei.org/scholar/58)).

<sup>33</sup> *California’s Angelides to Lead Financial Crisis Probe*, Bloomberg (July 15, 2009) (online at [www.bloomberg.com/apps/news?pid=newsarchive&sid=a7zD382h2EM8](http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a7zD382h2EM8)).

<sup>34</sup> American Enterprise Institute, *Biography of Edward Pinto* (accessed July 8, 2011) (online at [www.aei.org/scholar/100080](http://www.aei.org/scholar/100080)).

<sup>35</sup> *Government Housing Policies in the Lead-Up to the Financial Crisis: A Forensic Study*, (Aug. 14, 2010) (online at [www.aei.org/docLib/Pinto-Government-Housing-Policies-Crisis.pdf](http://www.aei.org/docLib/Pinto-Government-Housing-Policies-Crisis.pdf)).

<sup>36</sup> Minority Staff, House Committee on Oversight and Government Reform, *The Role of Government Affordable Housing Policy in Creating the Global Financial Crisis of 2008* (July 1, 2009; updated May 12, 2010) (online at <http://oversight.house.gov/images/stories/Reports/20100512affordablehousingpolicyandthefinancialcrisis.pdf>).

<sup>37</sup> Rep. Darrell E. Issa, *Unaffordable Housing and Political Kickbacks Rocked the American Economy*, Harvard Journal of Law & Public Policy (Mar. 22, 2010) (online at [www.harvard-jlpp.com/33-2/407.pdf](http://www.harvard-jlpp.com/33-2/407.pdf)).

On August 9, 2010, Commission staff prepared a memo to Commissioners entitled “Analysis of Housing Data and Comparison with Ed Pinto’s Analysis.”<sup>38</sup> This memo compared information provided by Mr. Pinto to the Commission on March 16, 2010, against confidential data provided by the Federal Reserve and not otherwise available to the public or AEI.

Several days later, on August 14, 2010, Commissioner Wallison sent an e-mail announcing to Commissioners and various staff that he had provided a copy of this confidential staff memo to Mr. Pinto.<sup>39</sup>

After receiving this information, Chairman Angelides forwarded the e-mail to Gary Cohen, the Commission’s General Counsel. Chairman Angelides wrote that he was “very concerned that the dissemination of this non-public staff report violates the FCIC’s ethics guidelines for commissioners as well as our agreement with the Federal Reserve.” He asked the General Counsel for his legal opinion on the matter.<sup>40</sup> In response, the General Counsel wrote:

The confidential Commission staff memorandum and the information obtained therein (part of which was obtained from the Federal Reserve under both written and oral confidentiality understanding), clearly constitute Commission Confidential Information and, as such, may not be disclosed by a Commissioner outside of the Commission without prior consent as above.

Sharing this information with Mr. Pinto was a violation of the Commission’s Ethics Guidelines, and our written confidentiality agreement with the Federal Reserve, and our staff’s understanding with staff members of the Federal Reserve.

Our agreement with the Fed provides for a Commission vote or approval of the Chair and Vice Chair, after prior consultation with the Fed, to release their information. That was not done here. ...

Disclosure of Commission Confidential information will gravely impair the Commission’s ability to conduct its business in the future by making it hard to secure the cooperation of other information providers in accessing their confidential information, and could expose the Commission to damage claims for the improper release thereof.<sup>41</sup>

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<sup>38</sup> *Analysis of Housing Data and Comparison with Ed Pinto’s Analysis*, Memorandum from Ron Borzekowski and Wendy Edelberg to Commissioners, Financial Crisis Inquiry Commission (Aug. 9, 2010) (online at [fcic-static.law.stanford.edu/cdn\\_media/fcic-docs/2010-08-09%20FCIC%20Staff%20Analysis%20of%20Housing%20Data%20and%20Comparison%20with%20Ed%20Pinto%20Analysis.pdf](http://fcic-static.law.stanford.edu/cdn_media/fcic-docs/2010-08-09%20FCIC%20Staff%20Analysis%20of%20Housing%20Data%20and%20Comparison%20with%20Ed%20Pinto%20Analysis.pdf)).

<sup>39</sup> E-mail from Peter J. Wallison to Wendy Edelberg, All Commissioners, et al. (Aug. 14, 2010 11:11 AM).

<sup>40</sup> E-mail from Phil Angelides to Gary Cohen (Aug. 14, 2010 1:25).

<sup>41</sup> E-mail from Gary Cohen to Phil Angelides (Aug. 14, 2010 7:13 PM).

On August 14, 2010, the General Counsel sent an e-mail to Mr. Pinto warning him about Commissioner Wallison's violation. He wrote:

I understand that Commissioner Wallison gave you a confidential staff memorandum for your review and comment. ... The memorandum and the information therein are Commission Confidential Information and must not be disseminated outside of the Commission in any manner. Please respect the Commission's rules and the confidentiality restrictions under which the Commission received that information by maintaining it in confidence in all respects.<sup>42</sup>

On August 17, 2010, the Commission held a telephone business meeting during which Commissioners Thompson, Georgiou, Born, and Murren all expressed concerns about Commissioner Wallison's unauthorized disclosure to Mr. Pinto.<sup>43</sup> Chairman Angelides reminded Commissioners that they must act in accordance with Commission procedures relating to the release of confidential information.<sup>44</sup>

Documents obtained by the Committee indicate that this was not the only occasion on which Commissioner Wallison released confidential information. For example, on January 26, 2011, the Commission's Deputy General Counsel sent an e-mail to Commissioner Wallison stating that "the American Enterprise Institute posted a copy of your 'Dissent from the Majority Report of the Financial Crisis Inquiry Commission' on its website" and that "its posting violates the Commission resolution which is attached to this email."<sup>45</sup>

In addition, in May 2010, Commissioner Wallison wrote an article published in the AEI Financial Services Outlook.<sup>46</sup> On May 24, 2010, Vice Chairman Thomas' special assistant sent an e-mail to Alex Brill, who works at Vice Chairman Thomas' law firm, Buchanan, Ingersoll, and Rooney. He wrote:

Peter crossed a line here that I wonder if he realizes he crossed. (I'm 75 percent sure he leaked confidential information—although it was information that nobody will dispute is true.)<sup>47</sup>

It is unclear from the documents obtained by the Committee whether this incident was reported to the Commission's General Counsel for further investigation.

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<sup>42</sup> E-mail from Gary Cohen to Edward Pinto (Aug. 14, 2010 2:43 PM).

<sup>43</sup> Approved Meeting Minutes of Telephonic Business Meeting of August 17, 2010, Financial Crisis Inquiry Commission (Aug. 17, 2010).

<sup>44</sup> *Id.*

<sup>45</sup> E-mail from Deputy General Counsel to Peter Wallison (Jan. 26, 2011).

<sup>46</sup> *Ideas Have Consequences: The Importance of a Narrative*, AEI Outlook Series, American Enterprise Institute (May 2010) (online at [www.aei.org/outlook/100960](http://www.aei.org/outlook/100960)).

<sup>47</sup> E-mail from Special Assistant to the Vice Chairman to Alex Brill (May 24, 2010).

**B. Other Republicans Called Wallison a “Parrot” for Pinto**

Internal Commission documents obtained by the Committee indicate that staff for Republican Vice Chairman Bill Thomas worried that Commissioner Wallison was unduly influenced by AEI Resident Fellow Edward Pinto’s discredited theory that the primary cause of the economic crisis related to government housing policy.

On March 31, 2010, Vice Chairman Thomas’ special assistant at the Commission sent an e-mail to Mr. Brill, who works at Vice Chairman Thomas’ law firm. In the e-mail, the Vice Chairman’s special assistant explained problems Commissioners and staff were having with Commissioner Wallison. He wrote:

Bill spoke to Phil [Angelides] and Wendy [Edelberg, Executive Director] and gave them his thoughts. Doug [Holtz-Eakin, Commissioner] was around the office today, so Bill looped him in and I explained to Doug what was going on. Doug said that he has some experience dealing with an intractable Peter before. Everyone agrees that there is simply no way to make Peter happy re: these staff reports. However, hopefully, we can keep him engaged enough so that when the time comes, we can sit down and have a reasonable conversation about the most effective way to describe the mortgage market. Wendy is going to reach out to Ed Pinto, and, hopefully, if we can get Ed to sign on, then Peter will really be sitting alone on this one.

My guess is that the best we are going to do is to get Peter to agree that he really can’t say anything until we get all of the data in front of us and that the data is coming. At that point, this debate over what kinds of mortgages are out there will be a little more public, since the FHFA is coming out with a report that discusses the loan performance of their loans in the next two weeks (apparently, they are trying to beat us to the punch). And, this conversation really doesn’t need to happen until September, so we can all cool off from these hysterics and worry about other things for a little while. Then, Peter is going to have to sit in a room and tell everyone why his way is the best way to describe the universe.<sup>48</sup>

In response, Mr. Brill wrote back:

Re: peter, it seems that if you get pinto on your side, peter can’t complain. But is peter thinking independently [sic] or is he just a parrot for pinto?<sup>49</sup>

The Vice Chairman’s special assistant responded:

I can’t tell re: who is the leader and who is the follower. If Peter is really a parrot for Pinto, he’s putting a lot of faith in the guy. Pinto called tonight, and Wendy scheduled a

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<sup>48</sup> E-mail from Special Assistant to the Vice Chairman to Alex Brill (Mar. 31, 2010 4:28 PM).

<sup>49</sup> E-mail from Alex Brill to Special Assistant to the Vice Chairman (Mar. 31, 2010 6:48 PM).

call with him for tomorrow morning. I am going to sit in on the call (quietly). I want to get a sense of whether this is a strategy that we really can use, or whether Pinto is just like Peter.<sup>50</sup>

Two days later, Mr. Brill followed up with another e-mail to the Vice Chairman's special assistant relaying a conversation in which Vice Chairman Thomas expressed concern that Mr. Pinto might be receiving outside funds for his efforts to influence the Commission. Mr. Brill wrote:

Maybe this email is reaching you too late but I think wmt [William M. Thomas] is going to push to find out if pinto is being paid by anyone.<sup>51</sup>

**C. Wallison Inaccurately Claimed Commission Ignored AEI Position**

Despite repeated claims by Commissioner Wallison that the Commission failed to consider AEI's position, as represented by Mr. Pinto, that the economic crisis was caused by government housing policies, internal documents obtained by the Committee demonstrate that the Commission went above and beyond in fully considering the flawed AEI position.

In testimony before the Committee on Financial Services on February 16, 2011, Commissioner Wallison stated that the Commission ignored Mr. Pinto's position:

Any objective investigation of the causes of the financial crisis would have looked carefully at this research, exposed it to the members of the Commission, taken Pinto's testimony, and tested the accuracy of Pinto's research. But the Commission took none of these steps. Pinto's research was never made available to the other members of the FCIC, or even to the commissioners who were members of the subcommittee charged with considering the role of housing policy in the financial crisis.

Accordingly, the Commission majority's report ignores hypotheses about the causes of the financial crisis that any objective investigation would have considered, while focusing solely on theories that confirm one political narrative about the financial crisis. This is not the way a serious and objective inquiry should have been carried out, but that is how the Commission used its resources and its mandate.<sup>52</sup>

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<sup>50</sup> E-mail from Special Assistant to the Vice Chairman to Alex Brill (Mar. 31, 2010 7:12 PM).

<sup>51</sup> E-mail from Alex Brill to Special Assistant to the Vice Chairman (Apr. 2, 2010).

<sup>52</sup> House Committee on Financial Services, Testimony of Peter J. Wallison, *The Final Report of the Financial Crisis Inquiry Commission* (Feb. 16, 2011) (online at [financialservices.house.gov/media/pdf/021611wallison.pdf](http://financialservices.house.gov/media/pdf/021611wallison.pdf)).

Commissioner Wallison made the identical complaint in his dissent to the Commission's final report.<sup>53</sup>

Internal Commission documents obtained by the Committee contradict this claim. Commission staff conducted a recorded interview of Mr. Pinto on July 19, 2010.<sup>54</sup> On August 9, 2010, the Commission's Executive Director, Wendy Edelberg, sent an e-mail to all Commissioners regarding Mr. Pinto's work. In addition to referencing previous materials that had been circulated to Commissioners, Ms. Edelberg attached a new memo prepared by Commission staff analyzing Mr. Pinto's work. She wrote:

Commissioners: Our July 7, 2010 memo to Commissioners with the subject "Analysis of housing data," provided a summary of the performance of various segments of the mortgage market during the crisis. Following up on this previous memo, the attached memo presents additional analysis that more directly compares our results to the analysis provided to the commission by Mr. Ed Pinto in his "Triggers" memo.<sup>55</sup>

Commission staff also prepared a summary of all of the work they conducted analyzing Mr. Pinto's work in response to Commissioner Wallison's requests. The summary states:

The Commission did look carefully at Ed Pinto's research, took Pinto's testimony and tested the accuracy of his research. On March 16, 2010 Commissioner Wallison emailed Ed Pinto's "Trigger" memos to all commissioners. FCIC staff spent a great deal of time looking at Ed Pinto's work. The FCIC allocated approximately 12 hours of staff interviews and meetings with Mr. Pinto, and spent approximately 20 hours reviewing Mr. Pinto's documents and data. Specifically Wendy Edelberg met with Ed Pinto once for several hours (in December 2009) and had at least 2 extensive phone calls with him (one in April and another in August). [Two Commission staff] met with Ed Pinto early on and reviewed all of his materials with him. This meeting was 3-4 hours (on 2/2/10). [A third staff member] spent 3.5-4 hours with Ed Pinto and [a fourth staff member] for review of Pinto's materials. [The third staff member] also participated in another meeting wherein Ed and Commissioner Wallison came to FCIC offices. And the staff formally interviewed him on July 19, 2010 for more than an hour. ...

[The first staff member] spent 20+ hours going through his document and came to the conclusion that Pinto's data didn't correctly add up. Aside from some arithmetic errors, it became apparent that the analysis was likely based on faulty premises. He then focused on two tasks. First, using tabulated data provided by the Federal Reserve (other sources

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<sup>53</sup> Financial Crisis Inquiry Commission, *Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States – Dissenting Statement of Commissioner Peter J. Wallison* (Jan. 2011) (online at [http://fcic-static.law.stanford.edu/cdn\\_media/fcic-reports/fcic\\_final\\_report\\_wallison\\_dissent.pdf](http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_wallison_dissent.pdf)).

<sup>54</sup> Financial Crisis Inquiry Commission, Staff Audiotape of Interview with Ed Pinto, Fannie Mae (July 19, 2010) (online at [fcic.law.stanford.edu/interviews/view/378](http://fcic.law.stanford.edu/interviews/view/378)).

<sup>55</sup> E-mail from Wendy Edelberg to All Commissioners and Personal Staff (Aug. 9, 2010).

were also pursued), he analyzed the relevant performance of the varied loans Pinto lumps together in his analysis. The results of this work are in the housing PSR, two memos to the Commission and in the book.

He then began creating and gathering an extensive set of loan-level data to further examine the question of how many high-risk loans there were before the crisis, as measured by ex-ante risk. He interviewed several prominent mortgage economists for advice regarding the best data and methodology to use and began discussions with FHFA, FHA, private data vendors and others in an effort to gather the data. Special computer resources were being built in-house when this latter effort was halted after being deemed infeasible, and after the determination was made that the initial analyzes were sufficient to analyze Pinto's main claim.<sup>56</sup>

**D. All Other Republican Commissioners Rejected AEI Position**

After praising Commission staff for fully considering the position put forth by Mr. Pinto, the three other Republican Commissioners rejected this position and refused to join Commissioner Wallison's dissent, which asserted that the primary cause of the economic crisis was government housing policies.

For example, on August 15, 2010, Republican Commissioner Holtz-Eakin sent an e-mail to Vice Chairman Thomas criticizing Commissioner Wallison and commending Commission staff for their work on this issue. He wrote:

I continue to think that Peter overplays the mortgage issue, but the staff memo did not dismiss it in any way.<sup>57</sup>

In their separate statement, Commissioners Thomas, Hennessey, and Holtz-Eakin rejected the idea that government housing policy—or any one factor—was the single largest contributor to the economic crisis. They wrote:

During the course of the Commission's hearings and investigations, we heard frequent arguments that there was a single cause of the crisis. For some it was international capital flows or monetary policy; for others, housing policy; and for still others, it was insufficient regulation of an ambiguously defined shadow banking sector, or unregulated over-the-counter derivatives, or the greed of those in the financial sector and the political influence they had in Washington.

In each case, these arguments, when used as single-cause explanations, are too simplistic because they are incomplete. While some of these factors were essential contributors to the crisis, each is insufficient as a standalone explanation.<sup>58</sup>

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<sup>56</sup> Memorandum, Commission Staff (Jan. 23, 2011).

<sup>57</sup> E-mail from Douglas Holtz-Eakin to Bill Thomas (Aug. 15, 2010).

<sup>58</sup> Financial Crisis Inquiry Commission, *Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States – Dissenting Statement of*

Instead, they described not one, but “ten causes, global and domestic ... essential to explaining the financial and economic crisis.” They were:

- (1) the credit bubble;
- (2) the housing bubble;
- (3) nontraditional mortgages;
- (4) credit ratings and securitizations;
- (5) financial institutions concentrated correlated risk;
- (6) leverage and liquidity risk;
- (7) risk of contagion;
- (8) common shock;
- (9) financial shock and panic; and
- (10) financial crisis causes economic crisis.<sup>59</sup>

In addition, the three Republican Commissioners commended the Commission staff for their professionalism. They wrote:

We wish to compliment the Commission staff for their investigative work. In many ways it helped shape our thinking and conclusions.<sup>60</sup>

Similarly, the other Commissioners also rejected Commissioner Wallison’s argument that the Commission did not fully evaluate the role of the Community Reinvestment Act (CRA) in the economic crisis. Commissioner Wallison’s dissent blamed the CRA for significantly driving the growth of non-traditional mortgages and the decline in underwriting standards.<sup>61</sup> After examining the CRA in detail, the Commission’s final report concluded that “CRA-related subprime loans appeared to perform better than other subprime loans” and “CRA-covered loans in the low- and moderate-income areas they serve were half as likely to default as similar loans by independent mortgage companies.”<sup>62</sup>

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*Commissioner Keith Hennessey, Commissioner Douglas Holtz-Eakin, and Vice Chairman Bill Thomas* (Jan. 2011) (online at [http://fcic-static.law.stanford.edu/cdn\\_media/fcic-reports/fcic\\_final\\_report\\_hennessey\\_holtz-eakin\\_thomas\\_dissent.pdf](http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_hennessey_holtz-eakin_thomas_dissent.pdf)).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Financial Crisis Inquiry Commission, *Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States – Dissenting Statement of Commissioner Peter J. Wallison* (Jan. 2011) (online at [http://fcic-static.law.stanford.edu/cdn\\_media/fcic-reports/fcic\\_final\\_report\\_wallison\\_dissent.pdf](http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_wallison_dissent.pdf)).

<sup>62</sup> Financial Crisis Inquiry Commission, *Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States* (Jan. 2011).

Commissioners Thomas, Hennessey, and Holtz-Eakin also rejected Commissioner Wallison's assertion that the CRA was a significant cause of the financial crisis. Their joint dissent stated:

Neither the Community Reinvestment Act nor removal of the Glass-Steagall firewall was a significant cause. The crisis can be explained without resorting to these factors.<sup>63</sup>

Despite the fact that the other Republican Commissioners were satisfied that Mr. Pinto's views were thoroughly considered, Commissioner Wallison repeatedly expressed anger that the AEI position was being rejected based on its faulty data and assumptions.

For example, on May 13, 2010, Chairman Angelides sent an e-mail to Commissioner Wallison explaining that the Commission staff had fully considered Mr. Pinto's position, but that it was fundamentally flawed. He wrote:

With respect to Mr. Pinto, the staff has indicated to me that they have conveyed to both Mr. Pinto and you their view that his approach is flawed. ... For what I have seen, the staff has spent more time responding to your questions and requests for information than any other Commissioner.<sup>64</sup>

Rather than accepting the conclusion that Mr. Pinto's data and assumptions were flawed, Commissioner Wallison continued to complain that Commission staff were ignoring him. On July 26, 2010, Commissioner Wallison and several other Commissioners held a working group conference call. After the call, Commissioner Wallison sent an e-mail to all Commissioners, the Commission's Executive Director and General Counsel, and other Commission staff. He wrote:

I don't like being told that I disagree with everything. I believe that I disagree with the things that are wrong and my point of view is valid and entitled to be heard. In this message, I'm going to explain why I raised the questions I did, and why I will continue to raise these questions. You should know that I have no compunction about filing a separate statement if I am not persuaded by data, by facts that have been tested and are not subject to dispute. Many of the statements I heard and read today are part of conventional wisdom; that in itself does not recommend them to me. I heard that we should accept the point of view of "experts" as evidence, as in a trial. As we all should know, in a trial each side can select its experts. All the experts I have ever suggested for

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<sup>63</sup> Financial Crisis Inquiry Commission, *Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States – Dissenting Statement of Commissioner Keith Hennessey, Commissioner Douglas Holtz-Eakin, and Vice Chairman Bill Thomas* (Jan. 2011) (online at [http://fcic-static.law.stanford.edu/cdn\\_media/fcic-reports/fcic\\_final\\_report\\_hennessey\\_holtz-eakin\\_thomas\\_dissent.pdf](http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_hennessey_holtz-eakin_thomas_dissent.pdf)).

<sup>64</sup> *Id.*

the Commission's hearings have been rejected or ignored. There is a price to pay for that.<sup>65</sup>

### **III. QUESTIONS ABOUT VICE CHAIRMAN THOMAS AND THE CEO OF A POLITICAL CONSULTING FIRM**

Internal Commission documents obtained by the Committee raise questions about the extent to which Vice Chairman Thomas and his Commission staff were providing information to, and receiving information from, a CEO of a political consulting firm who is also employed by the Vice Chairman's law firm.

Alex Brill is the CEO of Matrix Global Advisors, a firm that provides "economic and political consulting services for clients seeking to effect change in Washington." The firm advertises that it "works with clients spanning a variety of industries and has advised both small firms and large corporations," including a "Wall Street investment bank seeking insights into tax policy [and] financial services legislation."<sup>66</sup>

Mr. Brill is also an Economic Policy Advisor at the law firm of Buchanan, Ingersoll, and Rooney in Washington, DC. His biography states that he is "a consulting advisor to Buchanan Ingersoll & Rooney's Federal Government Relations Section," where Vice Chairman Thomas is a Senior Advisor. In this role, Mr. Brill "provides clients with economic and legislative insight" into matters including "financial markets and policies affecting capital investment." His biography does not disclose the firm's clients.<sup>67</sup>

Mr. Brill's biography states that he previously "served as senior advisor to former chairman of the House Ways and Means Committee Bill Thomas," and that he was "Congressman Thomas' top policy and political advisor." His biography states that he "is also a research fellow at the public policy think tank American Enterprise Institute."<sup>68</sup>

The law firm aggressively markets both Vice Chairman Thomas and Mr. Brill to obtain clients. Its website states:

Our team includes many professionals who have served in high-level government positions, including a former chair of the Committee on Ways and Means of the United States House of Representatives, the former chief economist and senior advisor to the former chair of the House Committee on Ways and Means.

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<sup>65</sup> E-mail from Peter Wallison to Wendy Edelberg, Derivatives Commissioners, et al. (July 26, 2010 8:33 PM).

<sup>66</sup> Matrix Global Advisors, *Our Clients* (accessed July 8, 2010) (online at [www.matrixglobaladvisors.com/our-clients/](http://www.matrixglobaladvisors.com/our-clients/)).

<sup>67</sup> Buchanan, Ingersoll, and Rooney, *Biography of Alex M. Brill* (accessed July 8, 2011) (online at [www.bipc.com/alex-m-brill/](http://www.bipc.com/alex-m-brill/)).

<sup>68</sup> *Id.*

The firm's website also states:

In 2010, *Influence Magazine* ranked us as the 15th largest law firm for lobbying revenue and 21st among all law firms and lobbying firms. **Our bi-partisan team of government affairs professionals has the attention—and the ear—of the federal government, and we use this influence to advance causes and cases for clients all over the nation.**<sup>69</sup>

The Ethics Guidelines for Commission Staff state that the internal workings of the Commission may not be disclosed to individuals outside the Commission. The Guidelines state:

All information concerning the internal non-public workings of the Commission, confidential information obtained by the Commission during the course of its investigations, and confidential non-public work product of the Commission, shall be maintained as "Commission Confidential Information," and shall be held in confidence and not disclosed outside of the Commission.<sup>70</sup>

In addition, Commission staff signed Confidentiality and Non-Disclosure Agreements establishing procedures to maintain the confidentiality of the deliberative processes and materials the Commission received.<sup>71</sup>

Committee staff have identified no record of Mr. Brill being an official employee, consultant, contractor, or adviser to the Commission. Although some Commissioners utilized non-Commission staff for scheduling, appointments, and other administrative functions, the documents obtained by the Committee indicate that, by virtue of his relationship with Vice Chairman Thomas, Mr. Brill received a significant amount of internal information about the Committee's work and provided substantive input.

For example, on August 17, 2010, Vice Chairman Thomas' special assistant at the Commission sent an e-mail to Mr. Brill with a draft outline of a preliminary investigative report prepared by Commission staff that addressed Wells Fargo's acquisition of Wachovia. Mr. Brill replied to the e-mail with comments on the outline. He wrote:

III. Wells Fargo Acquired Wachovia Without "Government Assistance" After Change in the Tax Code

that's humor, right? The "govt asst" IS the tax code change. And the word "code" refers to the statute—something that can only be changed by Congress, not Treasury. Maybe it is just staff shorthand but I hope III gets filled out a lot.<sup>72</sup>

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<sup>69</sup> Buchanan, Ingersoll, and Rooney, *Federal Government Relations* (accessed July 8, 2011) (online at [www.bipc.com/federalgovernmentrelations/](http://www.bipc.com/federalgovernmentrelations/)) (emphasis in original).

<sup>70</sup> Financial Crisis Inquiry Commission, Ethics Guidelines for Staff (online at [fcic.law.stanford.edu/about/policies/staff-ethics](http://fcic.law.stanford.edu/about/policies/staff-ethics))

<sup>71</sup> Financial Crisis Inquiry Commission, Confidentiality and Nondisclosure Agreement (online at <http://fcic.law.stanford.edu/about/policies/staff-confidentiality-agreement>)

Mr. Brill went on to suggest that Vice Chairman Thomas' special assistant monitor this issue:

I'd suggest you stay on top of this one still. I'm tired of tarp this, tarp that. I have [sic] no idea how to value this regulatory tax gift but it could be significant and somewhat off the radar. Its the only tax thing so it is the only thing where wmt [Vice Chairman Bill Thomas] can say he's got a value-add perspective. And, from the outline you shared, I wonder if this was done because Bair wasn't enthusiastic about doing something herself.<sup>73</sup>

During this e-mail exchange, the Vice Chairman's special assistant also described conversations among Commissioners and staff about deliberations regarding potential witnesses for an upcoming hearing. He wrote to Mr. Brill:

We also had a big conversation yesterday about witnesses. We left it at (big surprise) that the staff recommendations would be fine. Bill expressed a general interest in not having CEOs. But, all of the big-wigs (Kovacevich, Steel, Fuld, et. al.) are very much on the table. I think that our research director really wants Jamie Dimon there because he thinks that Dimon knows more about the markets than anyone else. But, Bill and Phil were in agreement that their preference was not to call Dimon for a second time.<sup>74</sup>

In another incident, on March 10, 2010, the Vice Chairman's special assistant forwarded to Mr. Brill a Commission media advisory about an upcoming hearing that had not yet been released publicly. He also forwarded an internal Commission e-mail discussing a *Wall Street Journal* article that exposed information about the upcoming hearing that was leaked.<sup>75</sup>

In response, Mr. Brill wrote:

What's your guess on the source of this info to wsj? The witnesses or the commissioners? Probably both. The release seems like a good idea as it defines the hearing more accurately than a story saying it is greenspan/citi/fannie when it actually has other regulators as well.<sup>76</sup>

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<sup>72</sup> E-mail from Alex Brill to Special Assistant to the Vice Chairman (Aug. 18, 2010 7:55 AM).

<sup>73</sup> E-mail from Alex Brill to Special Assistant to the Vice Chairman (Aug. 18, 2010 9:47 AM). *See also Wells Fargo Sweetened Wachovia Bid for Tax Gain, Bair Told FCIC*, Bloomberg (Jan. 26, 2011) (online at [www.businessweek.com/news/2011-01-26/wells-fargo-sweetened-wachovia-bid-for-tax-gain-bair-told-fcic.html](http://www.businessweek.com/news/2011-01-26/wells-fargo-sweetened-wachovia-bid-for-tax-gain-bair-told-fcic.html)).

<sup>74</sup> E-mail from Special Assistant to the Vice Chairman to Alex Brill (Aug. 18, 2010 8:16).

<sup>75</sup> Financial Crisis Inquiry Commission, *Media Advisory: Financial Crisis Inquiry Commission Announces Next Public Hearing* (Mar. 11, 2010) (online at [fcic-static.law.stanford.edu/cdn\\_media/fcic-news/2010-0311-Advisory.pdf](http://fcic-static.law.stanford.edu/cdn_media/fcic-news/2010-0311-Advisory.pdf)).

<sup>76</sup> E-mail from Alex Brill to Special Assistant to the Vice Chairman (Mar. 10, 2010 5:07 PM).

During this exchange, Mr. Brill sought information regarding the Commission's plans to investigate foreign banks. Mr. Brill wrote:

Also—you don't need to answer this if you don't want if its confidential but are you guys asking hard questions to foreign banks too? Are they a good control group maybe or perhaps they are just as responsible for being stupid as the domestic banks. I have no idea but I assume that DB, UBS, that weird french bank, bbva, etc are also worth studying. Did Iceland collapse completely in some manner? Would probably be popular with commissioners too. Just a suggestion.<sup>77</sup>

In response, the Vice Chairman's special assistant confirmed internal Commission plans to investigate foreign banks and listed several targets by name. He wrote:

We are going to be questioning foreign banks. I know that we have people from Deutche, UBS, BNP Paribas, RBS and Lazard Freres on our list for various purposes. However, we don't have the stick (subpoena power) with them. So, we can't push too hard.<sup>78</sup>

In another incident, on March 31, 2010, Mr. Brill sent an e-mail to the Vice Chairman's special assistant seeking internal Commission information about an upcoming hearing with Citigroup. He wrote:

Fyi, just heard from my friend who represents Citi. I guess Citi feels afraid that they will be painted as one of the worst offenders of subprime when really they think that they only dabbled in subprime. I don't know the truth in any of this but I guess the titles of the panels make this look like citi is the subprime devil while WMT was explaining to me that Citi is a great target to study because the did a bit of everything and that is more true for Citi than for anyone else. Any thoughts?<sup>79</sup>

The Vice Chairman's special assistant replied to Mr. Brill by providing an assessment of how the Commission would treat Citigroup at the hearing. He wrote:

They aren't going to be painted as a particularly bad offender of subprime origination, because they weren't a bad offender in that area. However, they ended up taking \$55B in losses associated with subprime and then got \$45B in TARP and a government guarantee on \$300B of assets. And their risk management re: their subprime exposure was, by any account, pretty awful. And, it is true that they are a good example because they did a little of everything, which means that we can discuss the entire subprime-universe during

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<sup>77</sup> E-mail from Alex Brill to Special Assistant to the Vice Chairman (Mar. 10, 2010 9:43 PM).

<sup>78</sup> E-mail from Alex Brill to Special Assistant to the Vice Chairman (Mar. 11, 2010 7:11 PM).

<sup>79</sup> E-mail from Alex Brill to Special Assistant to the Vice Chairman (Mar. 31, 2010 5:18 PM).

their hearing. So, while I don't think they will come across as the person who was ripping off the American public, I think they may come across as a pretty poorly managed company.<sup>80</sup>

The documents produced to the Committee do not indicate whether Mr. Brill conveyed this information to Citigroup officials. Similarly, the documents do not indicate whether any of Mr. Brill's business interests at his company or the law firm benefitted from any of the other internal Commission information he obtained.

#### **IV. UNSUBSTANTIATED ALLEGATIONS BY CHAIRMAN ISSA**

Internal Commission documents obtained by the Committee indicate that allegations made by Chairman Issa about problems within the Commission are largely unsubstantiated, overtly partisan, and unjustified by the record before the Committee.

##### **A. Financial Mismanagement**

In his July 27, 2010, letter, Chairman Issa alleged that "potential financial mismanagement" caused the Commission to seek a budget increase from \$8 million to \$9.8 million. Chairman Issa stated:

It is unclear how the FCIC has run out of money so quickly. ... [A]ccording to the FCIC's records, it had spent just \$1.4 million on staff salaries as of March 31, 2010, a fraction of its \$8 million budget. Furthermore, at least twelve FCIC staff members are on loan from other federal agencies, meaning their salaries are paid not by the FCIC but by their parent agencies. In light of these facts, the American people have a right to know how the FCIC has exhausted its \$8 million budget and why it deserves another \$1.8 million of taxpayer funds.<sup>81</sup>

Chairman Issa's allegations reflect a misunderstanding of the Commission's budget process. Internal Commission documents obtained by the Committee indicate that the Commission had not "run out of money" at this time, but had determined months earlier, based on investigative planning, and on a bipartisan basis, that the budget increase was necessary to enable it to fulfill its mission.

The Commission was established in May 2009 when Congress passed the Fraud Enforcement and Recovery Act.<sup>82</sup> The Act authorized "such sums as are necessary" for the

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<sup>80</sup> E-mail from Special Assistant to the Vice Chairman to Alex Brill (Mar. 31, 2010 4:28 PM).

<sup>81</sup> Letter from Member Darrell E. Issa to Phil Angelides (July 27, 2010).

<sup>82</sup> P.L. 111-21.

Commission's operations.<sup>83</sup> The Commission received an initial appropriation of \$8 million in the Supplemental Appropriations Act of 2009 enacted June 24, 2009.<sup>84</sup>

After the first few months of hiring and investigative planning, the Commission unanimously determined that the initial \$8 million appropriation would not be sufficient for its planned activities for the following year. On November 17, 2009, the Commission held a closed meeting during which the Commissioners determined on a bipartisan basis that additional funds would be necessary and charged Republican Vice Chairman Bill Thomas with making the request to Congress. The approved minutes from the closed session stated:

There was general consensus that the Commission's appropriation of \$8 million dollars would not suffice to accomplish the work of the Commission in the manner desired and that an additional allocation should be sought. Vice-Chairman Thomas will take the lead with Congress on this matter.<sup>85</sup>

To implement this plan, Chairman Angelides and Vice Chairman Thomas sent a joint letter the following month, on December 10, 2009, to Senators Kent Conrad and Johnny Isakson, requesting the additional funds. They wrote:

As Chairman and Vice Chairman of the Financial Crisis Inquiry Commission (the Commission), this letter will serve as a request that based upon our budget analysis, the Commission believes, to be reasonably successful in our statutory charge that the \$8 million initial funding level should be increased to \$11 million. This request is made in the full knowledge of the difficult budgetary conditions in which we find ourselves. We believe this request is sufficient to fulfill our duties. This letter will be the only request for additional funds during the existence of the Commission.<sup>86</sup>

The documents indicate that Vice Chairman Thomas was fully supportive of this request, based on the investigative planning that had occurred to date. On March 25, 2010, Vice Chairman Thomas' special assistant on the Commission sent an e-mail to Vice Chairman Thomas noting that the requested increase would actually be lower than the original estimate. He wrote:

Attached is the budget memorandum. ... Included is our estimated additional budget required. Note that we've requested \$2.66 million (down from \$3), because we don't

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<sup>83</sup> *Id.*

<sup>84</sup> P.L. 111-32.

<sup>85</sup> Approved Minutes of Closed Session Meeting of Tuesday, Nov. 17, 2009, Financial Crisis Inquiry Commission (Nov. 17, 2009).

<sup>86</sup> Letter from Phil Angelides and Bill Thomas to Senators Kent Conrad and Johnny Isakson (Dec. 10, 2009). *See also* Letter from Phil Angelides and Bill Thomas to House Appropriations Committee Chairman David Obey and Ranking Member Jerry Lewis (Dec. 11, 2009).

believe that we need the additional funding beyond what we have outlined in the memo. Can you take a look and approve for sending?<sup>87</sup>

In response, Vice Chairman Thomas replied, "It is ok by me."<sup>88</sup>

The final increase to the Commission's budget was less than the estimate in March. On July 29, 2010, Congress appropriated an additional \$1.8 million in the Supplemental Appropriations Act of 2010.<sup>89</sup> There is no indication that the request for additional funds was a result of mismanagement, as Chairman Issa alleged.

## **B. Conflicts of Interest and Partisan Staff**

In his July 27, 2010 letter, Chairman Issa alleged that various Democratic Commissioners and staff had conflicts of interest that compromised their ability to work on the Commission. He also alleged that staff who previously worked for Democrats would be incapable of working on the Commission in an objective way. He stated:

In addition to potential financial mismanagement, it appears that commissioners and staff of the FCIC may have conflicts of interest created by their previous roles in the public and private sectors which may interfere with the Commission's ability to conduct a thorough and even-handed investigation. ...

I am troubled by the extensive ties of some of the senior staff at a putatively bipartisan commission to partisan Democrat politics. ... [T]he FCIC's efforts will have been wasted if the American people come to believe that it has served as nothing more than a cheering section for the Administration and congressional Democrats in their efforts to defend a partisan and ineffective financial regulatory reform bill.<sup>90</sup>

Chairman Issa's letter focused its accusations on only one Commissioner, Democrat Byron Georgiou, who is currently running for U.S. Senate. In addition, Mr. Georgiou previously ran for the congressional seat in Chairman Issa's district. According to the *Las Vegas Sun*, Mr. Georgiou made multiple congressional "runs in California in the early 1990s, including one for the 49th District, the seat now held by Darrell Issa."<sup>91</sup>

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<sup>87</sup> E-mail from Special Assistant to the Vice Chairman to Bill Thomas (Mar. 25, 2010, 3:07 PM).

<sup>88</sup> E-mail from Bill Thomas to Special Assistant to the Vice Chairman (Mar. 25, 2010, 4:08 PM).

<sup>89</sup> P.L. 111-212.

<sup>90</sup> Letter from Darrell E. Issa to Phil Angedlides (July 27, 2011).

<sup>91</sup> *Who is Byron Georgiou and Why Should He Scare the Democratic Establishment?*, *Las Vegas Sun* (Mar. 28, 2011) (online at [www.lasvegassun.com/blogs/ralstons-flash/2011/mar/28/who-byron-georgiou-and-why-he-should-scare-democra/](http://www.lasvegassun.com/blogs/ralstons-flash/2011/mar/28/who-byron-georgiou-and-why-he-should-scare-democra/)).

With respect to the Commission staff targeted by Chairman Issa, internal Commission documents obtained by the Committee indicate that staffing decisions were made with the approval of both the Democratic Chairman, Phil Angelides, and the Republican Vice Chairman, Bill Thomas, and the staff was not separated by party lines. According to the Commission's Rules of Procedure, approved and ratified by the Commission on September 16, 2009:

All staff shall be appointed and terminated by the Chairman and Vice Chairman, acting jointly.<sup>92</sup>

The only exceptions to this policy were the special assistants to the Chairman and Vice Chairman.

During a transcribed interview with Committee staff, Executive Director Wendy Edelberg explained that the Commission had a unified staff. When asked whether staff were organized on a partisan basis, she replied: "Oh, no, there was no structuring along party lines. We were structured by tasks."<sup>93</sup>

In addition, the Commission implemented several policies on a bipartisan basis to prevent potential conflicts of interest. For example, the Commission adopted an ethics policy for Commissioners and staff that provided guidance regarding avoiding conflicts of interest.<sup>94</sup> The Commission also walled-off staff from investigations when there was an appearance of a conflict. The documents obtained by the Committee included instances of voluntary staff recusals, as well as instances in which the General Counsel, as Chief Ethics Officer, provided advice regarding ethical issues.

For example, the former Assistant Director and Deputy General Counsel for the Commission disclosed potential conflicts of interest and withdrew himself from certain Commission matters.<sup>95</sup>

Similarly, on March 23, 2010, Chairman Angelides sent an e-mail seeking an ethics opinion from the Commission's General Counsel concerning political contributions made to his campaign for Treasurer in 2002 by an officer of JPMorgan Chase. The General Counsel concluded that these actions "do not create a conflict or require that you take any action to recuse yourself from Commission deliberations concerning J.P. Morgan Chase."<sup>96</sup>

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<sup>92</sup> Financial Crisis Inquiry Commission, Rules of Procedure (Sept. 16, 2009).

<sup>93</sup> House Committee on Oversight and Government Reform, Transcribed Interview of Wendy Edelberg, at 117 (June 9, 2011).

<sup>94</sup> In addition to the ethics policy, the Commission had a records management policy, employee handbook, and a confidentiality and nondisclosure policy. All employees, detailees, and consultants were required to sign a Confidentiality and Nondisclosure Agreement.

<sup>95</sup> E-mail from Assistant Director and Deputy General Counsel to Gary Cohen (July 16, 2010).

<sup>96</sup> E-mail from Gary Cohen to Phil Angelides (Mar. 23, 2010).

In another example, the General Counsel provided ethics advice concerning Commissioners and staff staying at the MGM Grand in connection with a Commission field hearing in Las Vegas, Nevada, finding no conflict with the Commission being charged a government rate or with the Commissioners receiving fruit baskets upon their arrival.<sup>97</sup>

Chairman Issa's letter focused exclusively on Democratic Commissioners and staff, providing no analysis of the potential conflicts or partisanship among Republican Commissioners or staff. For example, Chairman Issa failed to mention that Vice Chairman Thomas works at the law firm of Buchanan, Ingersoll, and Rooney, which markets the Vice Chairman's ties to corporate clients and boasts that the firm's lobbyists "use this influence to advance causes and cases for clients all over the nation." Chairman Issa's letter also failed to provide any analysis of the potential influence of the conservative American Enterprise Institute among Republican Commissioners and staff. Vice Chairman Bill Thomas, Commissioner Peter Wallison, Commissioner Douglas Holtz-Eakin, and Vice Chairman Thomas' special assistant were all connected to AEI. (See Section II, above).

### **C. Decision to Delay Report**

On January 25, 2011, Chairman Issa sent a letter to Chairman Angelides alleging that the Commission's decision to issue its report on January 27, 2011, instead of December 15, 2010, was a result of "continued management problems." He wrote:

[O]n November 17, 2010, the FCIC voted to extend its mandatory reporting deadline of December 15, 2010. It is unclear on what legal authority this action was taken since the law states that the FCIC was to report to Congress no later than December 15 and does not provide for any procedure to grant an extension. The inability of the FCIC to report to Congress by its statutory deadline points to continued mismanagement problems.<sup>98</sup>

Chairman Issa's letter failed to note that short delays of this kind are typical and have occurred numerous times in the past on similar commissions, including those led by both Republicans and Democrats. For example, in 1999, then-Rep. Bill Thomas co-chaired the National Bipartisan Commission on the Future of Medicare. Although the Commission's report was due on March 1, 1999, it was not submitted until March 16, 1999.<sup>99</sup>

Other examples include the following:

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<sup>97</sup> E-mail from Gary Cohen to Phil Angelides (Sept. 7, 2010).

<sup>98</sup> Financial Crisis Inquiry Commission, *Financial Crisis Inquiry Commission Announces New Date for Final Report* (Nov. 17, 2010).

<sup>99</sup> Press Release, National Bipartisan Commission on the Future of Medicare, *National Medicare Commission to Continue Working to Make Recommendations; Panel Will Meet During the Week of March 8 in Washington, D.C.* (Feb. 26, 1999).

- A report by the Commission on Wartime Contracting in Iraq and Afghanistan was due on March 1, 2009, but was not submitted until June 10, 2009.<sup>100</sup>
- A report by the Congressional Commission on the Strategic Posture of the United States was due on December 1, 2008, but was not submitted until May 6, 2009.<sup>101</sup>
- A report by the Commission on the Prevention of Weapons of Mass Destruction Proliferation and Terrorism was due on November 12, 2008, but was not submitted until December 3, 2008.<sup>102</sup>
- A report by the Commission on Military Training and Gender-Related Issues was due on September 16, 1998, but was not submitted until July 30, 1999.<sup>103</sup>
- A report by the Commission on Affordable Housing and Health Facility Needs for Seniors in the 21st Century was due on December 31, 2001, but was not submitted until June 30, 2002.<sup>104</sup>
- A report by the Commission to Assess the Organization of the Federal Government to Combat the Proliferation of Weapons of Mass Destruction was due on April 11, 1998, but was not submitted until July 14, 1999.<sup>105</sup>

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<sup>100</sup> P.L. 110-181. *See* Commission on Wartime Contracting in Iraq and Afghanistan, *At What Cost? Contingency in Iraq and Afghanistan* (June 10, 2009) (online at [www.wartimecontracting.gov/index.php/reports](http://www.wartimecontracting.gov/index.php/reports)).

<sup>101</sup> P.L. 110-181. P.L. 110-417, section 1060. *See* Congressional Commission on the Strategic Posture of the United States, *America's Strategic Posture* (May 6, 2009) (online at [www.usip.org/programs/initiatives/congressional-commission-the-strategic-posture-the-united-states](http://www.usip.org/programs/initiatives/congressional-commission-the-strategic-posture-the-united-states)).

<sup>102</sup> Press Release, Commission on the Prevention of Weapons of Mass Destruction Proliferation and Terrorism, *WMD Commission to Report Findings on Preventing Nuclear and Biological Terrorism Threats* (Nov. 18, 2008).

<sup>103</sup> P.L. 105-85. *See* Congressional Commission on Military Training and Gender-Related Issues, *Final Report Findings and Recommendations* (July 30, 1999) (online at [www.dtic.mil/dtfs/doc\\_research/p18\\_16v1.pdf](http://www.dtic.mil/dtfs/doc_research/p18_16v1.pdf)).

<sup>104</sup> P.L. 106-74. *See* Commission on Affordable Housing and Health, *A Quiet Crisis in America* (June 30, 2001) (online at [govinfo.library.unt.edu/seniorscommission/pages/final\\_report/finalreport.pdf](http://govinfo.library.unt.edu/seniorscommission/pages/final_report/finalreport.pdf)).

<sup>105</sup> P.L. 104-293. *See* Commission to Assess the Organization of the Federal Government to Combat the Proliferation of Weapons of Mass Destruction, *Combating Proliferation of Weapons of Mass Destruction* (July 14, 1999) (online at [www.fas.org/spp/starwars/program/deutch/11910book.pdf](http://www.fas.org/spp/starwars/program/deutch/11910book.pdf)).

**D. Disclosure of Confidential Information**

On June 21, 2011, Chairmen Issa and McHenry sent a letter to the Office of the Comptroller of the Currency (OCC) expressing concern that the Commission may have improperly disclosed sensitive information that the Commission obtained from OCC. They wrote:

We are concerned that a significant amount of this information may have been made public in violation of a confidentiality agreement reached between the FCIC and the OCC. While we believe in maximizing transparency, we are concerned that the FCIC may have violated its agreement with the OCC and unduly aided the plaintiff's bar to launch lawsuits against financial firms.<sup>106</sup>

Chairmen Issa and McHenry requested a “summary of the OCC’s concerns related to the release of confidential OCC information by the FCIC” and a “description of any challenges the OCC has encountered in performing its regulatory responsibilities as a result.”<sup>107</sup>

On June 30, 2011, the OCC responded to the letter sent by Chairmen Issa and McHenry, confirming that “over OCC objection, the FCIC released Reports of Examination and Supervisory Letters for several large national banks” and “made public interviews with OCC officials regarding those institutions.”<sup>108</sup>

Although Chairmen Issa and McHenry asked the OCC to provide “a description of any challenges the OCC has encountered in performing regulatory responsibilities,” the OCC did not cite any specific challenges it had encountered.<sup>109</sup> Instead, the OCC asserted broadly that “release of this information is not only disruptive to the examination process, but could have a destabilizing effect on the banks involved, impact financial markets, trigger shareholder and other lawsuits, and set a dangerous precedent.”<sup>110</sup>

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<sup>106</sup> Letter from Congressman Darrell Issa, Chairman of the Committee on Oversight and Government Reform, and Congressman Patrick McHenry, Chairman of the Subcommittee on TARP, Financial Services, and Bailouts of Public and Private Programs, to Julie L. Williams, Chief Counsel, Office of the Comptroller of the Currency (June 21, 2011).

<sup>107</sup> *Id.*

<sup>108</sup> Letter from Daniel P. Stipano, Deputy Chief Counsel, Office of the Comptroller of the Currency, to Congressman Darrell Issa, Chairman, Committee on Oversight and Government Reform (June 30, 2011).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

### *Commission Approval of Review Process*

Internal Commission documents obtained by the Committee indicate that the release of information by the Commission was proper, did not violate the confidentiality agreement, and assisted Congress and the public by revealing the significant deficiencies at Citigroup.

The Commission voted unanimously on multiple occasions to implement a detailed process for determining when to make public sensitive documents it obtained from corporations and their regulators. On November 16, 2010, the Commission's General Counsel presented a memo to the Commissioners entitled, "Considerations with Respect to the Public Release of Confidential Documents and Materials in the Report, the E-Book and Website."<sup>111</sup> The memo proposed a process for determining how to handle sensitive documents. It stated:

[T]he Commission has received millions of pages of documents, conducted numerous surveys, interviewed hundreds of witnesses, held 19 days of hearings, compiled video records of testimony, and completed numerous reports. ... It is our intent to use in the Report and our e-book both public and nonpublic documents and to create on our website a resource of public and nonpublic documents relevant to the Commission's Report and inquiry, all with the purpose of meeting our statutory mandate to report to the President, Congress and the public on the causes of the financial and economic crisis.<sup>112</sup>

Regarding the release of sensitive materials, the General Counsel wrote:

The decision to release publicly confidential documents is one which should be made by the full Commission, either directly or through a process of delegation. ... It is unwieldy and impractical to expect that the full Commission will review all of the Web Elements and Report Elements, so a procedure for approval should be considered. ...I recommend that the Executive Director or General Counsel determine which documents should be recommended to the Commission for a determination in accordance with its processes for inclusion in Report Elements or Web Elements. This will primarily occur in situations where the staff has received objections to disclosure and the determination to override the objections must be made.<sup>113</sup>

The General Counsel explained that the Commission's authority to release documents publicly was the same as that of congressional committees, including the Oversight Committee. He wrote:

The Commission is formed under Congress, and is entitled to the benefit of Congress's authority and power to obtain information, including but not limited to proprietary

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<sup>111</sup> Memo to Commissioners of the FCIC on "Considerations with Respect to the Public Release of Confidential Documents and Materials in the Report, the E-Book and Website," Gary J. Cohen (Nov. 16, 2010).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

information. ... While there is no express provision of the Constitution or specific statute authorizing the conduct of congressional investigations, the Supreme Court has firmly established that such power is so essential to the legislative function as to be implied from the general vesting of legislative powers in Congress. ... As the Commission's enabling legislation manifests the clear congressional intent to establish an independent legislative branch entity with investigative powers, authorities and prerogatives equivalent to those of past and present standing and special investigatory committees, the decision to release confidential documents or materials as part of its statutory duty to report on the causes of the crisis rests in the Commission's discretionary determination that such public release will further fulfillment of its mandated statutory mission, a decision that cannot be limited by any court ruling or regulatory or statutory standard.<sup>114</sup>

The General Counsel also made clear that all of the confidentiality agreements between the Commission and outside entities allowed the Commission to disclose confidential information. He wrote:

The FCIC has entered into at least 69 confidentiality agreements of various forms pursuant to which it has committed to a process concerning the Commission's use of documents and other information submitted to it. ... [A]ll allow the FCIC to disclose the confidential information it determines appropriate in any interim or final report or in connection with public hearings upon the agreement of the Chairman and the Vice Chairman or upon a majority vote of the FCIC. .. Many of the agreements specifically reference, for example, certain bank regulatory reports confidentiality provisions, trade secrets and similar items protected from disclosure by statute or regulation as examples of the types of the documents entitled to confidential treatment in accordance with the letters. But that does not override the Commission's ability to release the documents if it so determines.<sup>115</sup>

After reviewing the General Counsel's memo, all nine Commissioners who participated in the meeting approved the proposed process. According to the minutes of the November 17, 2010, meeting:

Chairman Angelides and General Counsel Gary Cohen introduced Mr. Cohen's memo on suggested procedures for review and approval with respect to the public release of confidential documents and materials in the Report, the E-Book, and the Website. Discussion ensued among Commissioners on this matter. Mr. Cohen clarified that if there are unresolved matters concerning the release of confidential documents and materials that have been objected to by the submitting party and have not been resolved, these matters will come before the Commission for review and action prior to public release. It was further clarified that no confidential items can be publicly released except in accordance with Commission rules and, where there are confidentiality agreements, under the terms of those agreements. ...

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

MOTION: Born moved and Thompson seconded a motion to approve review and clearance process as outlined in Gary Cohen's memo (attached).

APPROVED: 9-0 (Commissioner Holtz-Eakin was absent.)<sup>116</sup>

*Commission Approval of Disclosure Process*

In preparing for the release of the Commission's report, the Commission held a meeting on January 24, 2011. During this meeting, the Commission reviewed a memo from the General Counsel entitled "Further Considerations with Respect to the Release of Confidential Documents and Materials in the Report, the E-Book, and Website."<sup>117</sup>

In that memo, the General Counsel wrote that "all documents referred to in the Report and the dissents have been cleared for use herein (clearance was confirmed by the Commissioners at their meeting of January 6, 2011), and on the date the Report is released the Commission's website will be populated by substantially all of the written documents referred to in the Report."<sup>118</sup>

The General Counsel also explained the process for "clearing and posting" additional documents, including "documents and follow-up answers to questions asked at public hearings," "audio tapes and transcripts of interviews to which objections have been raised after the objections are resolved or overruled," and "other materials relevant to our inquiry and the Report which were requested, received and reviewed or prepared by the staff during the course of our investigation."<sup>119</sup>

The General Counsel highlighted for Commissioners that this process "will likely result in posting a substantial number of documents ... to which objections have been raised by the document providers," including "[r]equests by various bank regulatory agencies such as the Fed, the OTS or OCC, the FDIC or the SEC that bank examination material not be released due to the chilling effect that such release would have on banks willingness to be candid in future examinations."<sup>120</sup> He added that, although "regulatory agencies have generally requested that bank examination reports not be released," "what these examinations revealed comprises a significant portion of the Commission's Report, and staff believes that disclosing these materials is merited."<sup>121</sup>

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<sup>116</sup> APPROVED Minutes of Telephonic Business Meeting of November 17, 2010 (Agenda Item 3 for FCIC Meeting of Dec. 15, 2010).

<sup>117</sup> Memo to Commissioners of the FCIC on Further Considerations with Respect to the Public Release of Confidential Documents and Materials in the Report, the E-Book and Website, Gary J. Cohen (Jan. 21, 2011).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

According to minutes of the January 24, 2011, meeting, the Commissioners unanimously approved the resolution. The minutes state:

RESOLVED, that the Commission delegates to the Executive Director, the General Counsel and Deputy General Counsel the power to review, resolve or override, on behalf of the Commission, objections made to the public release of confidential documents or interviews, on a case-by-case basis, after weighing the nature of the objections against the benefit to the report and the American public of such public release, and to approve the posting of such documents in the electronic presentations;

**RESOLVED, that if the Executive Director, the General Counsel and Deputy General Counsel determine necessary or appropriate, they may seek the advice of the Chairman and Vice Chairman regarding whether to override objections made to the public release of confidential documents or interviews;**

RESOLVED FURTHER, that the Commission adopts as the action of the Commission the recommendations of the Executive Director, General Counsel and Deputy General Counsel regarding the release and posting of such confidential documents, interviews or other materials, as well as public documents, for inclusion in the Commission's electronic presentations.<sup>122</sup>

#### *Information Disclosed Citigroup's Deficiencies*

The information disclosed to the public by the Commission fully supported the Commission's finding that Citigroup's management exercised deficient risk management and valuation functions.

In conjunction with its final report, the Commission released an OCC review of Citigroup's management and oversight originally issued on February 14, 2008. This review, Supervisory Letter 2008-5, presents "the results of reviews we conducted in light of the substantial financial losses realized in the third and fourth quarter of 2007" and covers two specific examinations of Citigroup, including "a review of director and management oversight and governance" and an "examination focused on the valuation and risk management practices against Citigroup Markets and Banking Group positions."<sup>123</sup> The review found that Citigroup's "[b]oard and senior management have not ensured an effective and independent risk management process is in place," that "management was more focused on short-term performance and profitability along with achieving top industry rankings across many major products rather than on risk or potential loss," and that "[o]ver-reliance was placed on credit

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<sup>122</sup> Minutes of FCIC Meeting of January 24, 2011 (Agenda Item 3 for FCIC Business Meeting of Feb. 9, 2011) (emphasis in original).

<sup>123</sup> Office of the Comptroller of the Currency, Supervisory Letter 2008-5 Issued to Citigroup Inc. (Feb. 14, 2008) (online at [http://fcic-static.law.stanford.edu/cdn\\_media/fcic-docs/2008-02-14\\_OCC\\_Letter\\_from\\_John\\_C\\_Lyons\\_to\\_Vikram\\_Pandit\\_Serious\\_Problems\\_at\\_Citibank.pdf](http://fcic-static.law.stanford.edu/cdn_media/fcic-docs/2008-02-14_OCC_Letter_from_John_C_Lyons_to_Vikram_Pandit_Serious_Problems_at_Citibank.pdf)).

rating agency ratings without considering the appropriateness of these ratings to specific products or the true risk of the underlying collateral.”<sup>124</sup>

In addition to releasing OCC’s Supervisory Letter, the Commission also released a 2007 annual inspection report of Citigroup issued by the Federal Reserve Bank of New York on April 15, 2008. This report “reflects a downgrade to fair or ‘3’ from satisfactory at the previous inspection.”<sup>125</sup> The report noted that a “fair” rating reflects “a combination of weaknesses in risk management and financial condition that range from fair to moderately severe.”<sup>126</sup> The report also noted that this downgrade “reflects serious deficiencies in Board & Senior Management oversight, policies/procedures/limits, monitoring & MIS, and internal controls.”<sup>127</sup> The report concluded:

Because of the nature and seriousness of the overall weaknesses, it is our intention to enter into an enforcement action with the firm, whereby both Citigroup and the Federal Reserve System agree on remedial action that must promptly be taken.<sup>128</sup>

According to the final Commission report, Citigroup’s former CEO downplayed the significance of these findings. He argued that this “was not a fundamental situation, it was not about the capital we had, not about the funding we had at that time, but with the stock price where it was ... perception becomes reality.”<sup>129</sup>

The Commission disagreed and detailed many problems with Citigroup’s management, including its risk management and valuation functions. The Commission report found that Citigroup was so highly leveraged in late 2008 that its “own calculations suggested that a drop in deposits of just 7.2% would wipe out its cash surplus.”<sup>130</sup>

Similarly, in their dissent, Commissioners Thomas, Hennessey, and Holtz-Eakin wrote that an “essential cause of the financial and economic crisis was appallingly bad risk management by the leaders of some of the largest financial institutions in the United States and

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<sup>124</sup> *Id.*

<sup>125</sup> Letter from John J. Ruocco, Assistant Vice President, Federal Reserve Bank of New York, to Board of Directors (c/o Vikram Pandit, CEO), Citigroup Inc. (Apr. 15, 2008) (online at [http://fcic-static.law.stanford.edu/cdn\\_media/fcic-docs/2008-04-15\\_FRBNY\\_Letter\\_from\\_John\\_J\\_Ruocco\\_from\\_Board\\_of\\_Directors\\_Re\\_annual\\_report\\_for\\_Citigroup\\_Inc\\_as\\_of\\_December\\_31\\_2007.pdf](http://fcic-static.law.stanford.edu/cdn_media/fcic-docs/2008-04-15_FRBNY_Letter_from_John_J_Ruocco_from_Board_of_Directors_Re_annual_report_for_Citigroup_Inc_as_of_December_31_2007.pdf)).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> Financial Crisis Inquiry Commission, *Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States* (Jan. 2011).

<sup>130</sup> *Id.*

Europe.”<sup>131</sup> They noted that, like other CEOs who appeared before the Commission, the former CEO of Citigroup was “willing to admit that he had poorly managed his firm’s liquidity risk, but unwilling to admit that his firm was insolvent or nearly so.”<sup>132</sup> Commissioners Thomas, Hennessey, and Holtz-Eakin noted that these “claims were highly unpersuasive.”<sup>133</sup>

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<sup>131</sup> Financial Crisis Inquiry Commission, *Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States – Dissenting Statement of Commissioner Keith Hennessey, Commissioner Douglas Holtz-Eakin, and Vice Chairman Bill Thomas* (Jan. 2011) (online at [http://fcic-static.law.stanford.edu/cdn\\_media/fcic-reports/fcic\\_final\\_report\\_hennessey\\_holtz-eakin\\_thomas\\_dissent.pdf](http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_hennessey_holtz-eakin_thomas_dissent.pdf)).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

# EXHIBIT 8

Peter J. Wallison  
1880 Lazy O Road  
Snowmass, Colorado 81654  
Pwallison@aol.com

March 13, 2012

The Honorable David S. Ferriero  
Archivist of the United States  
The National Archives and Records Administration  
8601 Adelphi Road  
College Park, MD 20740-6001  
[david.ferriero@nara.gov](mailto:david.ferriero@nara.gov)

Re: Request for Access to the Records of the Financial Crisis Inquiry Commission Pursuant to SF 258 Agreement to Transfer Records to the National Archives of the United States

Dear Mr. Ferriero:

As a member of the Financial Crisis Inquiry Commission (Commission), and in accordance with the terms and conditions under which Commission records were transferred to the National Archives and Records Administration (NARA or Archives) on or about February 11, 2011, I write to request access to Commission records that are currently stored at NARA.

Pursuant to a SF 258 Agreement, dated February 11, 2011, Commission records were transferred to the Archives under terms specified in that agreement and specified in a letter February 10, 2011, from Phil Angelides, the Chairman of the Commission. In the Angelides letter, he instructed the Archives to grant members of the Commission "access to Commission records," noting that "it is important that the ten Commissioners . . . have continuing access to the Commission's records once the records are transferred to NARA."

My request is based on more than the Angelides letter. On July 13, 2011, the minority staff of the Committee on Oversight and Government Reform, U.S. House of Representatives (the Oversight Committee), published a memorandum that made use Commission materials that had been turned over to the Oversight Committee by the Archives. A copy of this report can be found here:

<http://democrats.oversight.house.gov/images/stories/MINORITY/fcic%20report/FCIC%20Report%2007-13-11.pdf>

The memorandum contained a number of personal attacks on me, many of which were inaccurate and taken out of the context in which they were embedded. In order to respond to those attacks, I must have access to the same material that was furnished by the Archives to the Oversight Committee.

I understand that NARA has a policy of honoring the terms and conditions under which records are transferred to the Archives. Accordingly, consistent with the terms of the Angelides letter, and my right as a member of the Commission to have access to these materials, I am hereby requesting access to a portion of the Commission records currently stored at NARA. Specifically, I would like copies of the materials that were provided to the Oversight Committee in response to a request by Chairman Darrell Issa (R-CA). In an effort to facilitate production of these records in a timely, convenient, and expeditious manner, I prefer to receive the aforementioned Commission records in the same form that they were provided to the Oversight Committee.

Thank you in advance for your prompt cooperation. I look forward to timely receipt of the requested Commission records.

Sincerely,

Peter J. Wallison  
Commissioner  
Financial Crisis Inquiry Commission

cc: Gary M. Stern, General Counsel ([garym.stern@nara.gov](mailto:garym.stern@nara.gov))

# EXHIBIT 9

April 5, 2012

Gary Stern  
General Counsel  
National Archives and Records Administration  
8601 Adelphi Road  
College Park, MD 20740-6001

**RE: Phone Conversation on 3/29**

Dear Gary:

I was somewhat disappointed to hear in our telephone conversation last week that the Archives has a policy that would make it very difficult for me, or anyone else with permitted access to a commission's records, actually to make use of that right. As I mentioned in my initial letter, I was a victim of a tendentiously drafted memorandum by the minority staff of the House Committee on Oversight and Government Reform, based on material supplied to the Committee by the Archives. Yet, as you explained it in our telephone conversation, I personally could look at what you sent to the Committee, but no one working on my behalf could do so. Given the volume of material involved, and my limited time, that is essentially the same thing as telling me I have no right to view this material.

You indicated that NARA's policy is that any commissioner of any commission (including the Financial Crisis Inquiry Commission) has the right to review documents in case—among other things—the commissioner is called to testify in a legal or congressional proceeding. Furthermore, you explained that NARA has the originals of all documents, including the materials provided to the Hon. Darrel Issa, Chairman of the Committee. You stated that NARA will allow me to review these records on-site, but that I am not allowed to engage counsel for that purpose. That is surprising, given the nature of the exception. If I were called to testify, I could be accompanied by counsel, and my counsel would certainly be entitled to examine and draw from everything I might be entitled to see. In my case, I would like to have the assistance of counsel in reviewing the FCIC records in order to be properly advised about a response to the Oversight Committee's minority staff report, which was based on the FCIC materials supplied to the Committee by the Archives.

Is the policy you outlined an official policy of the Archives? Is it published somewhere? If so, I'd appreciate a reference to it so that I can examine it in context. If it is not published, I'd like to understand how it could be a policy of the Archives, rather than just an arbitrary limit that was added to the terms of the transfer of the documents from the FCIC.

Please contact me if any of the above is not an accurate record of our conversation or if you have questions regarding my request. I look forward to your reply.

Sincerely,

PETER WALLISON  
FORMER COMMISSIONER  
FINANCIAL CRISIS INQUIRY COMMISSION

# EXHIBIT 10

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

**CAUSE OF ACTION,** )  
 )  
 **Plaintiff,** )  
 ) **1:12-CV-1342 (JEB)**  
**v.** )  
 )  
 **NATIONAL ARCHIVES AND** )  
 **RECORDS ADMINISTRATION,** )  
 )  
 **Defendant.** )  
\_\_\_\_\_ )

**DECLARATION OF DANIEL Z. EPSTEIN**

**I, Daniel Z. Epstein, pursuant to 28 U.S.C. § 1746, do  
hereby declare and state:**

1. I am currently Executive Director and Founder of Cause of Action, formerly Freedom Through Justice Foundation. I have been in this position since August 15, 2011.
2. Cause of Action is a nonprofit, nonpartisan organization that uses investigative, legal, and communications tools

to educate the public on how government accountability and transparency protects taxpayer interests and economic opportunity..

3. For the period 02/02/2009 to 08/01/2011, inclusive, I served as Counsel to the House Committee on Oversight and Government Reform (“House Oversight Committee”).
4. I have personal knowledge of the facts set out herein, based upon my service as Counsel to the House Oversight Committee.
5. The Financial Crisis Inquiry Commission (“FCIC” or “Commission”) was created by Section 5 of the Fraud Enforcement and Recovery Act of 2009 (“FERA”), Pub. Law No. 111-21, § 5, 123 Stat. 1617, 1625-31 (2009), to report to Congress and the President its findings and conclusions on the causes of the U.S. financial and economic crisis.

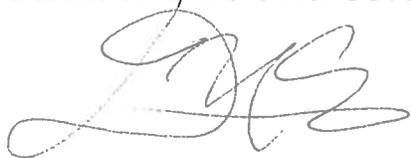
6. The House Oversight Committee requested FCIC records, including e-mails, from FCIC in late 2010 and early 2011.
7. NARA produced all of the records and materials requested by the House Oversight Committee in an electronic format on electronic disks.
8. NARA's production of FCIC records and materials to the House Oversight Committee was not done pursuant to a subpoena or any other form of legally-compelled disclosure.
9. NARA's production of FCIC records and materials the House Oversight Committee was done pursuant to a letter dated February 18, 2011 signed by The Honorable Darrell Issa, Chairman of the House Oversight Committee, the Honorable Spencer Bachus, Chairman of the House Financial Services Committee, The Honorable Patrick McHenry, Chairman of the Subcommittee on TARP, Financial Services, and Bailouts of Public and Private Programs, and The Honorable

Randy Neugebauer, Chairman of the Subcommittee on Oversight and Investigations.

10. After the House Oversight Committee's request on February 18, 2011, NARA informed the Committee that it would take time to format the documents into database (".db") files, and that the Committee's IT Technician, J.R. Deng, would have to place those files onto a server that could run Concordance, the document review software used by the Committee.

11. Based upon my observations while Counsel for the House Oversight Committee, at a minimum, NARA has created database files of the FCIC records.

**I declare under penalty of perjury that the foregoing Declaration is true and correct.**



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**DANIEL Z. EPSTEIN**

Executed this 18 day of December, 2012.

# EXHIBIT 11

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

<b>CAUSE OF ACTION,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	<b>1:12-cv-1342 (JEB)</b>
<b>v.</b>	)	
	)	
<b>NATIONAL ARCHIVES AND RECORDS ADMINISTRATION,</b>	)	
	)	
<b>Defendant.</b>	)	
<hr/>	)	

**DECLARATION OF PETER J. WALLISON**

**I, Peter J. Wallison, pursuant to 28 U.S.C. § 1746, do hereby declare and state:**

1. I was a Commissioner on the Financial Crisis Inquiry Commission (“FCIC” or “Commission”), which was created by Section 5 of the Fraud Enforcement and Recovery Act of 2009 (“FERA”), Pub. Law No. 111-21, § 5, 123 Stat. 1617, 1625-31 (2009).

2. I have personal knowledge of the facts set forth herein, based upon my service as an FCIC Commissioner, my communications with NARA, and my review of FCIC records at NARA on December 4, 2012.
3. The FCIC's purpose and mission was to investigate the causes of the U.S. financial crisis in 2008 through document and information review, witness interviews, public hearings, and internal discussion. The FCIC was instructed to report its findings to the Congress and to the President, and to advise the Attorney General of the United States of any person that may have violated federal law in connection with the financial crisis.
4. Recognizing the importance of restoring public trust in the U.S. financial markets, the FCIC was established to provide a full and public account of the causes of the financial crisis.
5. The FCIC's majority report and the accompanying dissents were submitted to Congress and the President on January 27, 2011.
6. On March 13, 2012, I wrote to the National Archives and Records Administration ("NARA") requesting access to FCIC records needed to respond to statements comprising personal attacks on me in a July 13, 2011 report by the minority staff of the Committee on Oversight and Government Reform ("House Oversight

Committee”), United States House of Representatives, that utilized FCIC materials from NARA.

7. The personal attacks referenced in ¶ 6 were inaccurate and taken out of the context in which they were embedded, and specifically involved use of FCIC materials that NARA formatted and turned over to the House Oversight Committee.
8. My purpose in seeking access to the Commission records, with counsel, was to collect information to respond to the defamatory allegations against me by minority staff of the House Oversight Committee.
9. I wrote the March 13, 2012 letter referenced in ¶ 6 to the Honorable David S. Ferriero, Archivist of the United States, based in part on a letter to Mr. Ferriero dated February 10, 2011 from Phil Angelides, Chairman of the Commission, indicating that access, without restriction, to the FCIC’s records should be granted to the FCIC’s Commissioners.
10. In a telephone conversation with NARA General Counsel Gary Stern on March 29, 2012, Mr. Stern stated to me that NARA’s policy is that any commissioner of any commission, including the FCIC, has the right to review documents in case, among other things, the commissioner is called to testify in a legal or congressional proceeding. Mr. Stern also stated that

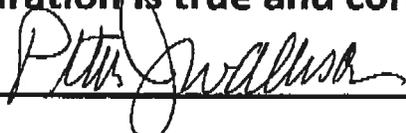
NARA would allow me to review the FCIC records on-site, but that I would not be allowed to engage counsel or third parties to review or otherwise access and examine the documents, on-site or otherwise.

11. Mr. Stern further stated, in the March 29, 2012 telephone conversation referenced in ¶ 10, that NARA then possessed the originals of all FCIC documents, including the materials provided to the Honorable Darrell Issa, Chairman of the House Oversight Committee.
12. On April 5, 2012, I wrote a letter to Mr. Stern in which I requested, among other things, NARA's policy on restricting access to former commissioners to on-site inspection of commission documents without the assistance of counsel.
13. On April 18, 2012, Mr. Stern responded to my April 5<sup>th</sup> letter referenced in ¶ 12 and wrote that requests, such as mine from former commissioners preparing for hearings or other queries regarding a commission's work, have only recently come about. He further wrote that "[t]here is no statutory or regulatory requirement that the Archivist grant this request," but that the Archivist has determined, as a matter of NARA "policy" that former commissioners "and their senior staff" have "continued access to the records of the Commission" for

the limited purpose of responding to queries or preparing for Congressional testimony.

14. Mr. Stern's April 18, 2012 letter, referenced in ¶ 13, did not correct or dispute my assertion, in my March 13, 2012 letter, that NARA had provided the FCIC documents to the House Oversight Committee, nor did Mr. Stern dispute that NARA refused to allow counsel to accompany me while I accessed Commission records.
15. On December 4, 2012, I was permitted by NARA to view the FCIC records at NARA's facility in Washington, DC. NARA's General Counsel, Gary Stern, placed the following restrictions on my viewing of the FCIC records: (1) I could not make copies of the documents; (2) I could not print the documents. The records I reviewed appeared to be exact copies of FCIC documents.
16. In all of NARA's communications with me regarding access to FCIC documents and materials, NARA never said that there was an official or statutory policy concerning a former commissioner's right to engage counsel for assistance in the review of records.

**I declare under penalty of perjury that the foregoing Declaration is true and correct.**

  
\_\_\_\_\_

**PETER J. WALLISON**

Executed this 18<sup>th</sup> day of December, 2012.

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

CAUSE OF ACTION, INC., )  
 )  
 Plaintiff, )  
 )  
 v. ) 1:12-cv-1342 (JEB)  
 )  
 NATIONAL ARCHIVES AND )  
 RECORDS ADMINISTRATION, )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

**ORDER**

Upon consideration of Plaintiff's Opposition to Defendant's Motion to Dismiss or in the Alternative for Summary Judgment, and Plaintiff's Cross-Motion for Summary Judgment, and in consideration of the entire Record hereunder, it appearing to the Court that no issues of material fact exist and that Plaintiff is entitled to judgment as a matter of law, it is hereby

**ORDERED**, that Defendant's Motion to Dismiss or in the Alternative for Summary Judgment be and the same is hereby **DENIED, AND IT IS FURTHER**

**ORDERED**, that Plaintiff's Cross-Motion for Summary Judgment be and the same is hereby **GRANTED**.

\_\_\_\_\_  
**JAMES E. BOASBERG**  
**UNITED STATES DISTRICT JUDGE**

Copies to: Karen M. Groen, Esq.  
Daniel Z. Epstein, Esq.  
Cause of Action, Inc.  
1919 Pennsylvania Avenue, NW  
Suite 650  
Washington, DC 20037  
*Counsel for Plaintiff*  
**VIA ECF**

Daniel S. Schwei  
Trial Attorney—United States Dept. of Justice  
Civil Division, Federal Programs Branch  
20 Massachusetts Avenue, NW  
Washington, DC 20530  
*Counsel for Defendant*  
**VIA ECF**

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

CAUSE OF ACTION, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	1:12-cv-1342 (JEB)
	)	
NATIONAL ARCHIVES AND	)	<b><u>HEARING REQUESTED</u></b>
RECORDS ADMINISTRATION,	)	
	)	
Defendant.	)	
_____	)	

**PLAINTIFF’S MOTION TO STRIKE THE DECLARATIONS OF ROBERT  
MATTHEW FULGHAM, JR. AND THOMAS E. MILLS OR IN THE  
ALTERNATIVE FOR LEAVE OF COURT TO TAKE LIMITED DISCOVERY**

Plaintiff, Cause of Action, Inc. (“CoA” or “Plaintiff”), pursuant to Local Rule 7 and Federal Rule of Civil Procedure 56, hereby respectfully moves this Honorable Court to Strike the Declarations of Defendant National Archives and Records Administration’s (“NARA” or “Defendant”) employees, Thomas E. Mills (“Mills Decl.”) and Robert Matthew Fulgham, Jr. (“Fulgham Decl.”), or in the alternative to take limited discovery in the form of a deposition of Mr. Fulgham which would be restricted to the four corners of his Declaration. Mr. Mills and Mr. Fulgham executed Declarations on behalf of Defendant in the above-referenced matter, in furtherance of Defendant’s Motion to Dismiss or in the Alternative for Summary Judgment (“Defs.’ Motion”). Both the Mills Decl. and the Fulgham Decl. contain inadmissible matter that is irrelevant, immaterial, without foundation, not based on personal knowledge, and conclusory both factually and legally. A Memorandum of Points and Authorities in Support Hereof, and a proposed Order, are attached.

**REQUEST FOR HEARING**

Plaintiff, Cause of Action, hereby respectfully requests, pursuant to Local Rule 7(f), a hearing on its Motion to Strike the Declarations of Thomas E. Mills and Robert Matthew Fulgham, Jr., or in the alternative to take Limited Discovery.

Dated: December 19, 2012

Respectfully submitted,

/s/ Karen M. Groen  
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/s/ Daniel Z. Epstein  
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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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RECORDS ADMINISTRATION,	)	
	)	
Defendant.	)	
_____	)	

**PLAINTIFF’S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS  
MOTION TO STRIKE THE DECLARATIONS OF THOMAS E. MILLS AND ROBERT  
MATTHEW FULGHAM, JR., OR IN THE ALTERNATIVE TO TAKE LIMITED  
DISCOVERY**

Plaintiff, Cause of Action, Inc., hereby files this Memorandum of Points and Authorities in Support of its Motion to Strike the Declarations of Thomas E. Mills (“Mr. Mills”) and Robert Matthew Fulgham, Jr. (“Mr. Fulgham”), or in the Alternative to Take Limited Discovery, stating as follows:

I. **STANDARD OF REVIEW**

Fed.R.Civ.P. 56(c) governs declarations submitted in support of motions for summary judgment. Simply put, such declarations “must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.” Fed.R.Civ.P. 56(c)(4); *see Hall v. CIA*, 538 F.Supp.2d 64, 66 (D.D.C. 2008) (discussing former Rule 56(e)).

## II. RELEVANCE AND MATERIALITY

It is well-settled that “[i]n considering a motion for summary judgment on a FOIA claim, a court may rely upon an agency’s affidavits so long as they ‘contain sufficient detail’ and ‘are not controverted by contrary evidence.’” *Walsh v. FBI*, No. 11-2214, 2012 U.S. Dist. LEXIS 166239, at \*6 (D.D.C. Nov. 21, 2012) (citations omitted). “Agency affidavits are afforded a ‘presumption of good faith’ and can be rebutted only with evidence that the agency did not act in good faith.” *Id.* (citing *Defenders of Wildlife v. Dep’t of the Interior*, 314 F.Supp.2d 1, 8 (D.D.C. 2004)).

Rule 401 of the Federal Rules of Evidence (“FRE”) states that evidence is relevant if “(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.” Under FRE 402, only relevant evidence is admissible.

Accordingly, Mr. Fulgham’s recitation of the nooks and crannies, as well as the definitional and administrative process, regarding NARA’s handling of congressional and legislative records is wholly irrelevant and immaterial to the central issue in this case: NARA’s possession and control of the Financial Crisis Inquiry Commission’s (“FCIC”) records at the time of Plaintiff’s Freedom of Information Act (“FOIA”) request on October 3, 2011, such that the FCIC records were agency records subject to the FOIA. *See* Fulgham Decl. at ¶¶ 7-29. This is so because NARA’s contention, without legal basis and belied by the actions of NARA in the handling of the FCIC records after it took possession of same, that the records maintained their legislative character is erroneous under the case law in the District of Columbia Circuit, and in this Court, as to whether records are “agency records” for purposes of the FOIA. *See* Plaintiff’s Memorandum of Points and Authorities in Support of its Opposition to Defendant’s Motion to Dismiss or in the Alternative for Summary Judgment; Plaintiff’s Memorandum of Points and Authorities in Support of Plaintiff’s Cross-Motion for Summary Judgment.

Mr. Mills' Declaration<sup>1</sup> is similarly defective in that a recitation of the background of the National Archives, Presidential records and other materials, and legislative records is completely irrelevant because NARA's possession of and control of the FCIC records, at the time of Plaintiff's FOIA request on October 3, 2011, made those records agency records and subject to FOIA. Mills Decl. ¶¶ 1-23, 25-33, 35.

### III. PERSONAL KNOWLEDGE

The Fulgham Declaration contains many statements that are not based upon personal knowledge. See § IV., *infra*. Of particular concern are ¶¶ 33-34. Mr. Fulgham does not, and cannot, express any opinion as to the "parties' intent" with specific regard to the language struck from the SF 258 by Ms. Sarah Zuckerman. Fulgham Decl. at ¶ 33; § IV., ¶ 2.

More alarmingly, Mr. Fulgham states as follows in paragraph 34: "**It is clear to me**—based on my personal involvement in the process, Chairman Angelides' letters, and the subsequent signing of the SF-258 between NARA and FCIC—that the FCIC **acted in signing the transfer documentation with the clear intent and desire to put controls on the future access to, and use and disclosure of, FCIC records.**" Fulgham Decl. ¶ 34 (emphasis supplied). Mr. Fulgham cannot possibly know the "clear intent and desire" of the FCIC.

### IV. NO FOUNDATION FOR DECLARANT'S CONCLUSORY STATEMENTS

The Fulgham Declaration contains a number of conclusory statements that have no foundation and, therefore, are inadmissible. See *Lujan v. Nat'l. Wildlife Fed'n*, 497 U.S. 871, 888 (1990) ("The object of [Rule 56(e)] is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit.") (citations omitted); *Gov't of the Republic of China v. Compass Communications Corp.*, 473 F.Supp. 1306, 1308 (D.D.C. 1979) (declarations containing "hearsay and generalized, conclusory and unsubstantiated statements" are insufficient

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<sup>1</sup> Knowledge based "on information and belief" is improper for a Rule 56(c)(4) declaration. See *Automatic Radio Mfg. Co. v. Hazeltine Research*, 339 U.S. 827, 831 (1950); *Hicks v. Baines*, 593 F.3d 159, 167 (2d Cir. 2010); Mills Decl. at ¶ 2.

and inadmissible, and “will not be considered by the court...” (citing *Citizens Envtl. Council v. Volpe*, 484 F.2d 870 (10<sup>th</sup> Cir. 1973), *cert. denied*, 416 U.S. 936 (1973)).

For example, Mr. Fulgham states that “[t]he SF 258 was also specifically hand-annotated (Terms of Agreement section at top) **to reflect the parties’ intent to negate any possibility that the [FOIA] would apply to these materials.**” Fulgham Decl. ¶ 33 (emphasis added). The Declaration makes no mention of the individual who signed the SF-258 on behalf of the FCIC, nor does it state whether either party had the authority to so alter the document, which Mr. Fulgham states is “a legal document.” Fulgham Decl. ¶ 33. There is no foundation for either statement. The Declaration is stating a legal conclusion for which Mr. Fulgham has neither the competency nor the personal knowledge because he is not in a position to speak of or testify to the “intent” of FCIC in altering the SF-258. **Moreover, if the argument advanced by the Defendant in this case—that the FCIC records are legislative and not subject to the FOIA—then why was it necessary for Ms. Zuckerman to alter the SF-258?** Based on the assertions of Mr. Fulgham, “the parties” should have the knowledge, and the competency, to realize that such an alternation was not necessary. Perhaps they do not.

Another conclusory statement is found at paragraph 35 of the Fulgham Declaration regarding the purported five-year restriction imposed on NARA by the FCIC. “[O]ne of the reasons the FCIC imposed a five-year restriction on public access to the records was to give the Center some advance time to begin processing and organizing the FCIC records.”<sup>2</sup> Mr. Fulgham provides no factual basis for this assertion and provides no explanation of how he might possibly know this. Moreover, the factual foundation for this statement appears nowhere in either the SF-258 or the Angelides letter. Compl. Exs. 1 and 2.

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<sup>2</sup> Defendant’s attempt to compare the FCIC records with the five-year period under the Presidential Records Act, 44 U.S.C. § 2204, is completely incongruous.

We find another blatantly obvious legal conclusion at paragraph 36 of the Fulgham Declaration: “This administrative scheme for FCIC records is exclusive, as the FCIC records are not subject to FOIA.” Mr. Fulgham backstops a legal conclusion—the legal status of the FCIC records when transferred into the custody and control of NARA—without any foundational factual basis in the Record. Stating that “the FCIC records are not subject to FOIA” is a legal conclusion—in fact, it is the question of law presented to this Court—and should be stricken from the Declaration by this Court. Mr. Fulgham goes on to speculate as to the potential “harms” that may be caused by granting CoA’s FOIA request: Fulgham Decl. at ¶ 41. “. . . Second, applying FOIA may also change the manner in which legislative commissions perform their duties, causing less documentation created as well as transferred to NARA for the purpose of preserving a historical record .” Fulgham Decl. ¶ 36 (emphasis supplied). Mr. Fulgham’s fears for the future of legislative commissions and the historical record are wholly speculative, as he himself admits in his Declaration by using speculative language and phraseology, as set forth *infra*.

The Fulgham Declaration is chock full of conclusory statements: “may also,” “might be,” and “could be.” “Second, applying FOIA to the FCIC records **may result** in the improper release of sensitive information.” Fulgham Decl. ¶ 40 (emphasis added). “My experience in dealing with legislative commissions generally is that they **might be** less likely to document their activities if legislative staff operated under the belief that records transferred to NARA would be immediately subject to public scrutiny.” Fulgham Decl. ¶ 41 (emphasis added). The Declarant goes on in the rest of ¶ 41 to state what “**could be**.” That is, what “could be” as between agencies and private parties that interact with legislative commissions as well as future commissions. Mr. Fulgham even goes so far as to speculate as to the “chilling to future commissions” if Plaintiff prevails here. Of course, it is only what “**could be**.” These are not admissible facts. These inadmissible conclusory statements comprise wholesale speculation, for which Mr. Fulgham provides neither competence nor foundation.

The Mills Declaration contains a conclusion of law similar to the legal conclusion in paragraph 36 of the Fulgham Declaration: “NARA has treated these records as legislative records and has controlled access as specified in the letter from the agency head.” Mills Decl. at ¶ 24. This is the legal issue to be decided by this Court, namely, whether the FCIC records were legislative or agency records at the time of CoA’s FOIA request on October 3, 2011. Moreover, Mr. Mills’ statement creates a factual dispute, namely, whether NARA’s treatment of the FCIC records after transfer—by virtue of control and possession—rendered those records agency records subject to FOIA.

Mr. Mills creates another factual dispute in ¶ 24. Mr. Mills states that NARA has “controlled access as specified in the letter from the agency head.” However, he does not address the decisions of NARA to make FCIC records available to the House Oversight and Financial Services Committees and to former Commissioner Peter J. Wallison. First, the “letter from the agency head” did not proscribe disclosure to the Committees. Second, the “letter from the agency head” requested that each Commissioner have access to the records; it did not, however, proscribe any restrictions on their access. *See* Compl. Ex. 1; Declaration of Daniel Z. Epstein, Exhibit 10 to Plaintiff’s Statement of Material Facts Not in Dispute at ¶¶ 3-11; Declaration of Peter J. Wallison, Exhibit 11 to Plaintiff’s Statement of Material Facts Not in Dispute at ¶¶ 10-16. The wish is the father of the thought in this regard.

Mr. Mills again makes a conclusory statement regarding the FCIC Chairman:<sup>3</sup> “The [FCIC] Chairman, serving as head of the Federal agency under the Federal Records Act, wrote to the Archivist specifying the restrictions **he believed to be necessary or desirable in the public interest.** These restrictions were accepted by NARA in the SF 258.” Mills Decl. at ¶ 34 (emphasis

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<sup>3</sup> Mr. Mills and Mr. Fulgham appear to possess this same clairvoyance when it comes to the intent of the FCIC when transferring its records to NARA. Mr. Angelides’ intent, however, is not Congressional intent and is not the controlling factor here. *See* Plaintiff’s Memorandum of Points and Authorities in Support of its Cross-Motion for Summary Judgment at 29-31.

added). Mr. Mills has no way of knowing with certitude what the FCIC Chairman intended, nor what he believed to be “desirable in the public interest.” This is at once a legal conclusion and a statement made without personal knowledge. Therefore it is inadmissible.

V. **ALTERNATIVE MOTION FOR LIMITED DISCOVERY**

Plaintiff also moves the Court, in the alternative, for limited discovery in the form of a deposition of Robert Matthew Fulgham, Jr., restricted to an examination of the four corners of his Declaration. This is necessary because of the many evidentiary irregularities present in the Declaration on its face. *See* §§ I. through IV., *supra*. Moreover, there is no other method by which Plaintiff may ascertain the foundation and credibility of Mr. Fulgham’s statements.

“Depositions are the most efficient means of discovery for the plaintiffs in the context of the instant case.” *American Broadcasting Cos., Inc. v. U.S. Info. Agency*, 599 F.Supp. 765, 769 (D.D.C. 1984) (discussion of deposition in the Rule 56(d) context). ““Where an agency head possesses particular information necessary to the development or maintenance of the party’s case, which cannot be reasonably obtained by another discovery mechanism; the deposition should be allowed to proceed.’ *See Sykes v. Brown*, 90 F.R.D. 77, 78 (E.D.Pa. 1981).” *Id.*

Accordingly, Plaintiff requests leave of Court to take a limited deposition of Mr. Fulgham specifically restricted to the four corners of his Declaration.

Dated: December 19, 2012

Respectfully submitted,

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RECORDS ADMINISTRATION,	)	
	)	
Defendant.	)	
_____	)	

**ORDER**

Upon consideration of Plaintiff’s Motion to Strike the Declarations of Thomas E. Mills and Robert Matthew Fulgham, Jr., or in the Alternative for Leave of Court to Take Limited Discovery, and in consideration of the entire Record hereunder, it appearing to the Court that good cause exists for Plaintiff’s Motion, it is hereby

**ORDERED**, that Plaintiff’s Motion to Strike the Declarations of Thomas E. Mills and Robert Matthew Fulgham, Jr. be and the same is hereby **GRANTED, AND IT IS FURTHER**

**ORDERED**, that Plaintiff’s Motion in the Alternative for Leave of Court to Take Limited Discovery be and the same is hereby **GRANTED**, with deponent Robert Matthew Fulgham, Jr. to appear for deposition on \_\_\_\_\_ at \_\_\_\_\_, for the limited purpose of examination regarding his Declaration submitted in support of Defendant’s Motion to Dismiss or in the Alternative for Summary Judgment.

\_\_\_\_\_  
**JAMES E. BOASBERG**  
**UNITED STATES DISTRICT JUDGE**

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