ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 13 – 5127

Cause of Action,
Plaintiff-Appellant,

v.

National Archives and Records Administration,
***Defendant-Appellee*.**

On Appeal from the United States District Court for the District of Columbia
Civil Action No. 12-1342 (Hon. James E. Boasberg)

Opening Brief of Appellant-Petitioner Cause of Action

PATRICK J. MASSARI
DANIEL EPSTEIN
CAUSE OF ACTION
1919 Pennsylvania Ave., N.W., Suite 650
Washington, D.C. 20006
(202) 499-4232

REED D. RUBINSTEIN
DINSMORE & SHOHL, L.L.P.
801 Pennsylvania Ave., N.W., Suite 610
Washington, D.C. 20004
(202) 372-9120

Counsel for Cause of Action

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici.

The parties before the district court were Cause of Action and the National Archives and Records Administration. There were no intervenors or amici.

The parties in this court are Cause of Action and the National Archives and Record Administration. There are no intervenors or amici.

B. Rulings Under Review.

The ruling under review is *Cause of Action v. National Archives and Records Administration*, 12-cv-1342-JEB (D.D.C. Mar. 1, 2013) (ECF 21) (Hon. James E. Boasberg). It may be found in Appellant's Appendix at A389. The official citation is 926 F. Supp. 2d 182 (D.D.C. 2013).

C. Related Cases.

There are none.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Cause of Action is a nonprofit corporation. It has no parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

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GLOSSARY

FCIC	Financial Crisis Inquiry Commission
FERA	Fraud Enforcement and Recovery Act of 2009
FOIA	Freedom of Information Act
NARA	National Archives and Records Administration
SF-115	NARA's Standard Form 115
SF-258	NARA's Standard Form 258

JURISDICTIONAL STATEMENT

Cause of Action seeks review of the district court's Memorandum Opinion and Order granting NARA's Motion to Dismiss. *Cause of Action v. NARA*, 12-cv-1342 (JEB) (ECF Nos. 20 & 21) (Mar. 1, 2013). Final judgment was also entered on March 1, 2013.

Cause of Action properly exhausted its administrative remedies before filing suit in the district court. *Oglesby v. Dep't of Army*, 920 F.2d 57, 61 (D.C. Cir. 1990). The district court had subject matter jurisdiction under 28 U.S.C. § 1331(federal question), 28 U.S.C. § 2201, *et seq.* (declaratory judgment), and 5 U.S.C. § 552(a)(4)(B) (Freedom of Information Act).

This Court has jurisdiction under 28 U.S.C. § 1291. Cause of Action timely filed its Notice of Appeal on April 30, 2013. *See* Fed. R. App. P. 4(a).

STATEMENT OF THE ISSUE

I. Did the district court err in holding that the FCIC records were not agency records subject to the Freedom of Information Act?

STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the Addendum.

STATEMENT OF THE CASE

On October 3, 2011, Cause of Action submitted a Freedom of Information Act ("FOIA") to the National Archives and Records Administration ("NARA") seeking certain Financial Crisis Inquiry Commission ("FCIC") records. NARA denied this request on December 1, 2011, stating the FCIC records were legislative in character and beyond FOIA's reach.

Cause of Action appealed NARA's denial on January 5, 2012. NARA denied this appeal on February 6, 2012, citing an Agreement to Transfer Records to NARA, Standard Form 258 ("Standard Agreement")—a document that an FCIC staff member altered by striking out mandatory FOIA-disclosure language. However, on February 7, 2011, the FCIC's Deputy General Counsel executed a Standard Form 115 ("SF-115") to request that NARA permanently retain the FCIC records. A188–A190. The FCIC's General Counsel placed no restrictions on the FCIC records, and upon executing the form, Archivist David Ferriero accepted and confirmed this request on April 13, 2011. Cause of Action's App. at A188–A190 (hereinafter "A__").

NARA's denial of Cause of Action's appeal exhausted Cause of Action's administrative remedies. On August 14, 2012, Cause of Action filed a Complaint in the United States District Court for the District of Columbia seeking FOIA disclosure. A014. In response, NARA filed a motion to dismiss or in the

alternative for summary judgment on October 31, 2012. A039. Cause of Action filed an opposition, a cross-motion for summary judgment, and a motion to strike NARA's affidavits, or in the alternative, to take limited discovery, on December 19, 2012. A194; A217; A302. NARA replied on January 11, 2013. A325. The district court issued a Memorandum Opinion and Order denying Cause of Action's FOIA request on March 1, 2013. A388; A389.

The district court committed reversible error in ruling that the requested records were not subject to FOIA, and Cause of Action filed a Notice of Appeal on April 29, 2013. A401. From the outset, the district court also mischaracterized the scope of Cause of Action's request. At page one of its opinion, the district court states that Cause of Action seeks "copies of the FCIC's records." A389. This is erroneous. Cause of Action's FOIA request was narrowly limited to the subset of FCIC documents that NARA sent "to the Committee on Oversight and Government Reform at the U.S. House of Representatives." A015.

Consistent with the controlling authorities, Cause of Action seeks a narrow ruling that if NARA lawfully exercises "control" over the records of a temporary commission, as with FCIC, then those records are subject to FOIA. *Tax Analysts v. U.S. Dep't of Justice*, 845 F.2d 1060 (D.C. Cir. 1988). Not all records deposited with NARA are subject to FOIA merely by virtue of their transfer. Instead, NARA must lawfully exercise control over such records. Consequently, congressional and

judicial records, exempt from FOIA because the Archivist does not have the legal authority to exercise control over such records, would remain so even if Cause of Action is granted the relief that it seeks. *See* 44 U.S.C. § 2108(a).

STATEMENT OF THE FACTS

I. The Creation of the Financial Crisis Inquiry Commission.

Congress created the Financial Crisis Inquiry Commission ("FCIC") when it enacted the 2009 Fraud Enforcement and Recovery Act ("FERA"). Pub. L. No. 111-21, § 5, 123 Stat. 1617, 1625 (2009). FCIC was formed to investigate the causes of the 2008 financial crisis, report its findings to Congress and the President, and if appropriate, refer any potential legal violations to the U.S. Attorney General—all by December 15, 2010. *Id.* §§ 5(c), 5(h), 123 Stat. at 1626–27, 1630.

FERA automatically terminated FCIC on February 13, 2011. *Id.* No successor agency or entity was authorized. *Id.*

FERA did not address FCIC records preservation or dissemination at termination. *Id.* 123 Stat. at 1617–30. No other federal statute provides or suggests that Congress intended to restrict public access to FCIC records under FOIA.

II. The FCIC Deposited Its Records with NARA.

On February 7, 2011, the FCIC's Deputy General Counsel executed and certified Standard Form 115 ("SF-115") requesting that NARA be given disposition authority to receive the FCIC records. A188. The SF-115 placed no restrictions on the FCIC records. A188–A190. NARA received this form on February 8, 2011, and the Archivist David Ferriero accepted the FCIC's request to permanently retain their records without restrictions of any kind because they had "high research value". A188, A190.

On February 8, 2011, NARA Assistant Director Matthew Fulgham signed the Standard Agreement. A36. The Standard Agreement, used by non-congressional entities to deposit records with NARA, states that agencies using the Standard Agreement subject their records to FOIA: "[t]he transferring agency [here, the FCIC] certifies that any restrictions on the use of these records are in conformance with the requirements of 5 U.S.C. 552" [FOIA]. A36, A246. The Standard Agreement also provides that "[i]f the records are exempt from release pursuant to the FOIA . . . , this must be fully justified." A247.

On February 10, 2011, Mr. Phil Angelides, former FCIC chairman, wrote to NARA explaining that the FCIC would soon terminate, and the FCIC would deposit its records with NARA. A033. Mr. Angelides unilaterally recommended that NARA impose a five-year categorical ban on public access to any FCIC

records that the FCIC had not made publically available before its termination. *Id.* Mr. Angelides also unilaterally suggested, and the Archivist accepted on April 13, 2011, that the FCIC records should never be subject to FOIA, even after the five-year ban lifts restrictions on certain records. *Id.* Finally, Mr. Angelides suggested that former FCIC Commissioners and certain staff have immediate and continuing access to the records. *Id.*

Thereafter, on February 11, 2011, FCIC employee Sarah Zuckerman signed the Standard Agreement, striking the mandatory FOIA language from the form. A008, A036, A213. On February 11, 2011, NARA employee Thomas Eisinger also signed the Standard Agreement, which transferred the records into NARA's physical and legal custody. *Id.*

III. Prior to Its Expiration, the FCIC Deposited and Made Publicly Available Certain of Its Records to Stanford University.

While FERA is silent on the FCIC's preservation or dissemination of its records, a few days before the FCIC terminated on February 13, 2011, the FCIC elected to share certain records—other than those Cause of Action requested—with Stanford University for public online access. A248.

IV. NARA Voluntarily Transferred FCIC Records to Congress.

In July 2010, Darrell Issa, then-Ranking Member of the House Oversight and Government Reform Committee ("House Oversight Committee"), wrote to Mr. Angelides, FCIC chairman, requesting that the FCIC produce certain

documents. A009 at ¶24. Mr. Angelides refused. *Id.* On January 25, 2011, as Chairman of the House Oversight Committee, Mr. Issa again requested the documents. *Id.* Mr. Angelides again refused citing that his Commission was too busy to respond. *Id.*

Within days of the FCIC's termination, Chairman Issa and Chairman Spencer Bachus of the House Financial Services Committee requested the FCIC records from NARA. A250. NARA released the requested records to the Committees without requiring them to issue a subpoena. A009 at ¶26.

V. NARA Unilaterally Denied and Then Restricted Former FCIC Commissioner Peter Wallison's Access to the FCIC Records.

When Mr. Angelides attempted to restrict access to the FCIC records by letter dated February 10, 2011, he also suggested that the Commissioners and certain staff continue to have unrestricted access to the FCIC records even after the FCIC's expiration. A034. To that end, on March 13, 2012, former FCIC Commissioner Peter Wallison requested access. A289. In his communications with NARA, Mr. Wallison wrote a letter to NARA General Counsel Gary Stern memorializing their March 29, 2012 telephone conversation. A291. Specifically, Mr. Wallison memorialized NARA's General Counsel as having represented that NARA had possession and control over the FCIC's documents: "NARA has the originals of all documents, including the materials provided to the Hon. Darrel[l] Issa." *Id.* NARA's General Counsel limited Mr. Wallison to "look[ing] at what

[NARA] sent to the [Oversight] Committee, but no one working on [Wallison's] behalf could do so." *Id.* NARA would only allow Mr. Wallison to "review these records on-site," and Mr. Wallison was "not allowed to engage[] counsel for that purpose." *Id.* NARA's General Counsel affirmed that Mr. Wallison's access would be restricted, and that Mr. Wallison could not bring counsel with him to review the documents. *Id.* Importantly, NARA's General Counsel did not dispute that the Archives had voluntarily provided FCIC documents to Congress. *Id.*

VI. Cause of Action's FOIA Request.

Cause of Action sought to independently evaluate the FCIC's investigation of the 2008 financial crisis. Cause of Action submitted a FOIA request to NARA requesting only those documents NARA had given to the House Oversight Committee. A014. Cause of Action did not seek all of the FCIC records. *C.f.* A390. However, NARA denied the request on December 1, 2011 claiming that because the FCIC records originated from a legislative commission, they were not subject to FOIA. A021–A022, A027–A036. On January 5, 2012, Cause of Action appealed, A023–A026, and NARA denied this appeal on February 6, 2012, A027–A036. On July 31, 2012, Cause of Action submitted a comprehensive letter to the Archivist requesting reconsideration by setting forth the facts and arguments herein. NARA never responded to that letter.

SUMMARY OF THE ARGUMENT

Congress established the FCIC, a temporary investigative body, to examine the causes of the 2008 financial crisis. Shortly before its statutorily mandated expiration, the FCIC transferred its records to NARA. NARA now exercises complete possession and control over the FCIC records. Consequently, according to the Federal Records Act, FOIA, and binding case law of the Supreme Court and this Circuit, [1] these records are subject to FOIA.

On October 3, 2011, Cause of Action submitted a FOIA request to NARA, requesting the exact FCIC records that NARA had previously provided to Congress. A014. Notwithstanding NARA's undisputed possession and absolute control over the requested records, it denied Cause of Action's request, improperly asserting that the records were excluded from FOIA by the statutory provision reserved exclusively for records originating from Congress. A021–A022, A027–A036; *see* 5 U.S.C. § 551(1)(A).

Cause of Action submitted a proper FOIA request, and the FCIC records fall squarely within FOIA's purview. Notwithstanding, NARA has unlawfully denied Cause of Action's request for nearly two years. Despite pleading facts that show that the FCIC records are subject to FOIA, the district court committed reversible

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[1] 5 U.S.C. § 552 (2012); 44 U.S.C. § 2108 (2012); *U.S. Dep't Justice v. Tax Analysts*, 492 U.S. 136 (1989); *Tax Analysts v. U.S. Dep't of Justice*, 845 F.2d 1060, 1067 (D.C. Cir. 1988); *Burka v. Dep't of Health & Hum. Servs.*, 87 F.3d 508 (D.C. Cir. 1996).

error by failing to examine the Complaint in a light most favorable to Cause of Action.

STANDARD OF REVIEW

FOIA cases receive the "same standard of appellate review applicable generally to summary judgments," *Petroleum Info. Corp. v. U.S. Dep't. of Interior*, 976 F.2d 1429, 1433 (D.C. Cir. 1992), and NARA carries the burden of proving that Cause of Action's documents are not subject to FOIA. *See* 5 U.S.C. § 552(a)(4)(B); *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 n.3 (1989) ("The burden is on the agency to demonstrate, not the requestor to disprove, that the materials sought are not agency records or have not been improperly withheld.") (internal quotes omitted). Under FOIA, a district court has jurisdiction "'to order the production of any *agency records* improperly withheld from the complainant.' *Id*. § 552(a)(4)(B) (emphasis added). The question at issue on this appeal is whether [FCIC] records are 'agency records.'" *Judicial Watch v. U.S. Secret Serv.*, No. 11-5282, 2013 U.S. App. LEXIS 18119, at *13 (Aug. 30, 2013).

Review in this case is *de novo*. *Dixon v. District of Columbia*, 666 F.3d 1337, 1341 (D.C. Cir. 2011). This Court must accept as true all factual allegations in the complaint and all reasonable inferences from the facts alleged. *Am. Nat'l Ins. Co. v. FDIC*, 642 F.3d 1137, 1139 (D.C. Cir. 2011).

The long-standing fundamentals of notice pleading remain intact in this Circuit, so the Court must deny a motion to dismiss when the complaint contains "a short and plain statement of the claim showing that the pleader is entitled to relief." *Aktieselskabet AF 21 November 2001 v. Fame Jeans, Inc.*, 525 F.3d 8, 15, 17 (D.C. Cir. 2008) (quoting Fed. R. Civ. P. 8(a)(2)) (rejecting that *Twombly* created a heightened pleading standard because "*Twombly* was concerned with the plausibility of an inference of conspiracy, not with the plausibility of a claim."); *Sharma v. District of Columbia*, 881 F.Supp.2d 138, 141 (D.D.C. 2012) (denying that *Iqbal* created a new pleading standard).

When a district court considers and/or relies on evidence outside the pleadings in ruling on a motion to dismiss, it is converted into a motion for summary judgment. *Gordon v. Nat'l Youth Work Alliance*, 675 F.2d 356, 361 (D.C. Cir. 1982); *Ctr. for Auto Safety & Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 805 (D.C. Cir. 2006). Upon such a conversion, a lower court must inform the parties that the motion has been converted and allow them to submit arguments and evidence supporting their summary judgment positions. *Kim v. United States*, 632 F.3d 713, 719 (D.C. Cir. 2011). The lower court evaluates a converted motion for summary judgment in the same manner as any other motion for summary judgment. *See Ctr. for Auto Safety*, 452 F.3d at 805.

This Court reviews *de novo* motions for summary judgment. *Public Citizen v. U.S. Dist. Ct.*, 486 F.3d 1342, 1345 (D.C. Cir. 2007). On summary judgment, this Court must view the evidence in the light most favorable to the nonmoving party, and the Court may grant summary judgment only if there is no genuine issue of material fact and judgment is required as a matter of law. Fed. R. Civ. P. 56; *Ctr. for Auto Safety*, 452 F.3d at 805.

ARGUMENT

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Cause of Action legitimately requested the subject documents, and the documents fall squarely within FOIA's purview. Notwithstanding, NARA has unlawfully denied Cause of Action's request for nearly two years. Despite pleading facts that demonstrated that the documents are subject to FOIA, the

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[2] 5 U.S.C. § 552 (2012); 44 U.S.C. § 2108 (2012); *U.S. Dep't Justice v. Tax Analysts*, 492 U.S. 136 (1989); *Tax Analysts v. U.S. Dep't of Justice*, 845 F.2d 1060, 1067 (D.C. Cir. 1988); *Burka v. Dep't of Health & Hum. Servs.*, 87 F.3d 508 (D.C. Cir. 1996).

district court committed reversible error by failing to examine the Complaint in a light most favorable to Cause of Action.

I. The Federal Records Act Gives NARA Broad Authority and Discretion and It Does Not Supplant FOIA's Disclosure Regime.

a. The Federal Records Act Requires NARA to Store and Manage Federal Records and Gives It Discretion to Make Record Publicly Available.

The Federal Records Act, enacted by Congress in 1950 "to ensure that agencies adequately document their policies and decisions, and that their records management programs strike a balance 'between developing efficient and effective records management, and the substantive need for Federal records.'" *Tax Analysts v. IRS*, No. 97-0260, 1997 U.S. Dist. LEXIS 12845, at *6 (D.D.C. 1997) (internal citations omitted). The Federal Records Act establishes the basic records management responsibilities for federal agencies. Executive agencies and legislative establishments, other than the Senate and the House, are 'agencies' under the Federal Records Act. 44 U.S.C. § 2901(14). [3] The FCIC as a temporary legislative commission is therefore subject to the Federal Records Act.

[3] For purposes of the Federal Records Act, the term "federal agency" includes any "executive agency or any establishment in the legislative or judicial branch of the Government (except the Supreme Court, the Senate, the House of Representatives, and the Architect of the Capitol and any activities under the direction of the Architect of the Capitol)." 44 U.S.C. § 2901(14).

The Federal Records Act also designates NARA[4] as the agency to oversee all federal records management. 44 U.S.C. § 2103. NARA must "provide guidance and assistance to federal agencies with respect to records creation, records maintenance and use, and records disposition." 44 U.S.C. § 2904 (1950). NARA must also "promulgate standards, procedures, and guidelines with respect to records management," *id.* § 2904(2), and may "inspect records or records management practices" of any federal agency. *Am. Friends Serv. Comm. v. Webster*, 720 F.2d 29, 37 (D.C. Cir. 1983) (citing 44 U.S.C. § 2906(a)(1)). NARA recently ordered a "major overhaul in the way federal departments and agencies manage and preserve their records."[5] These facts show that NARA is more than merely a repository.

NARA is also responsible for managing records once they are deposited with NARA. 44 U.S.C. § 2103 (2012). Since the enactment of the Federal Records Act, Congress has increased NARA's records management responsibilities and its authority over the preservation and disclosure of agency

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[4] The General Services Administration, NARA's predecessor, first conducted the government's archival and records management functions. Congress later transferred these responsibilities to the Archives. Pub. L. No. 98-497, 98 Stat. 2280, 2285-86 (1984).

[5] Cause of Action respectfully requests that this Court take judicial notice of NARA's press release, Overhaul of Federal Record-Keeping Ordered by NARA, Office of Management and Budget, (Aug. 24, 2012), *available at* http://www.archives.gov/press/press-releases/2012/nr12-145.html. Fed. R. Evid. 201(b)(2) & 201(c)(2).

records. *Armstrong v. Bush*, 924 F.2d 282, 284 n.1 (D.C. Cir. 1991). NARA's predecessor initially had little authority over the records it received. In 1968, Congress's amendments to the Federal Records Act gave NARA's predecessor little authority to alter a depository statement of agencies with no successors: "[w]hen the head of an agency states in writing restrictions that appear to him to be necessary or desirable in the public interest . . . [NARA's predecessor] shall impose the restrictions . . . and may not remove or relax the restrictions without the concurrence in writing of the head of the agency from which the material was transferred, or his successor in function, if any." Pub. L. No. 90-620, 82 Stat. 1238, 1288 (1968).

Congress has continued to increase NARA's authority and discretion. In the Presidential Recordings and Materials Preservation Act (the "Materials Act"), which was passed following the Watergate scandal, Congress amended the Federal Records Act. In the Materials Act, Congress refused to abrogate the public's right to access records through FOIA and conferred to NARA's predecessor "complete possession and control" over the subject records of the Materials Act. Materials Act § 104(d) ("the provisions of [Materials Act] shall not in any way affect the rights, limitations or exemptions applicable under the Freedom of Information Act"); *id.* §§ 101(a), 101(b)(1); *Reporters Comm. for Freedom of the Press v. Sampson*, 591 F.2d 944, 950 (D.C. Cir. 1978) (finding that the "availability of

records under both the FOIA and the Materials Act cannot negate the clear intent of Congress to preserve rights of access under FOIA."); *Ricchio v. Kline*, 773 F.2d 1389, 1395 (D.C. Cir. 1985) (confirming that the Materials Act does not supersede FOIA). In 1978, Congress amended the Federal Records Act to confer upon the Archivist wide discretion in granting public access to records of agencies that terminated without a successor, like the FCIC. "In the event that a Federal agency is terminated and there is no successor in function, [NARA's predecessor] is authorized to relax, remove, or impose restrictions on such agency's records when he determines that such action is in the public interest." Pub. L. No. 95-416, 92 Stat. 915 (1978). Congress amended the Federal Records Act again that same year with the Presidential Records Act of 1978, 44 U.S.C. §§ 2201–2207, an act that governs the management of the official presidential and vice-presidential records. *Id.* All of these Federal Records Act amendments promote openness, transparency, disclosure, and access: "The Archivist shall have an affirmative duty to make such records available to the public as rapidly and completely as possible consistent with the provisions of this Act." Pub. L. No. 95-591, 92 Stat. 2523, 2525 § 2203(f)(1) (1978); *see also* Pub. L. No. 98-497, 98 Stat. 2280, 2285–86 (1984).

Today, the Archivist has broad discretion to make publicly available the records of a depositing entity that is terminated without a successor. If the depositing entity wants restrictions placed on the records, it must invoke specific

legal justifications for those restrictions through 5 U.S.C. § 552 or another relevant law. 36 C.F.R. § 1235.20. Even so, the Archivist may remove these restrictions to serve the public interest, when the depositing entity is terminated without a successor. 44 U.S.C. § 2108(a). Once NARA receives the records it must "preserve them and make them available to the citizenry." *Am. Friends*, 720 F.2d at 37.

FOIA promotes the same open access principles as the Federal Records Act. Congress enacted FOIA to enhance transparency and establish the public's legally enforceable right to access federal agency records, like those possessed and controlled by NARA. 5 U.S.C. § 552.

b. NARA and FCIC's Deputy General Counsel Certified That the FCIC Records Were Transferred to NARA Without Any Restrictions.

Agencies depositing records with NARA consummate the transfer process with two NARA forms: (1) SF-115 to obtain authority from NARA to deposit its records, and (2) the Standard Agreement, an agreement to transfer records to NARA. 36 C.F.R. §§ 1220.18, 1225.18. An authorized representative of the depositing agency must complete SF-115, describing the records it will deposit and proposing whether NARA should accept the records permanently or temporarily. 36 C.F.R. § 1225.14. The depositing entity must also explain any "restrictions on access under the FOIA if records are proposed for immediate transfer." 36 C.F.R.

§ 1225.14(b)(2)(v). NARA staff then appraises the records and recommends a particular disposition method to the Archivist. 36 C.F.R. § 1225.14. The Archivist accepts or rejects his staff's recommendation. *See id*; 36 C.F.R. § 1225.12(j).

On February 7, 2011, FCIC Deputy General Counsel Cassidy Waskowicz executed a SF-115 for the FCIC records. A188. In describing these FCIC records, she attested that they have "high research value" and that they "document the actions of federal officials because of the breadth of records obtained by the FCIC". She further attested they had value because of the FCIC's "in depth analysis reported to the Congress, the Administration, and the public." A190. The FCIC's Deputy General Counsel placed no restrictions on these records in the SF-115. *Id.* NARA's regulations required the FCIC, whose records were proposed for immediate transfer, to identify and justify any intended restrictions on access in the SF-115. 36 C.F.R. § 1225.14(b)(2)(v).

NARA received the SF-115 request on February 8, 2011. A188. On April 13, 2011, and with his staff's affirmative appraisal, the Archivist executed the SF-115 and accepted the FCIC records for permanent retention without restrictions of any kind. A188–A190.

c. The FCIC Violated Legal Requirements When Depositing Records with NARA.

NARA's Standard Agreement—Standard Form 258—applies FOIA to records deposited under the agreement, unless the depositor follows explicit procedures to justify FOIA's inapplicability. A246. (citing FOIA and NARA's public access regulations). Agencies executing the Standard Agreement must obey the law incorporated into the agreement. *Id*. NARA's regulations also require that any depositor who wants restrictions placed on his records to "attach a written justification" that "must cite the statute or [FOIA] exemption" authorizing FOIA's inapplicability. 36 C.F.R. § 1235.20. Every Standard Agreement depositor must certify that "any restrictions on the use of these records are in conformance with the requirements of 5 U.S.C. § 552 [FOIA]." A246. Finally, when the depositor is an agency without a successor, the Archivist may eliminate any restrictions placed on the records. 44 U.S.C. § 2108(a); 36 C.F.R. § 1235.32.

Mr. Angelides and his proxy Ms. Zuckerman failed to comply with the law in the Standard Agreement when depositing the FCIC records with NARA. Rather than enumerate a specific FOIA exemption or other legal basis for his desire to restrict public access to the FCIC records, Mr. Angelides, by proxy, crossed out by hand the mandatory FOIA language from the Standard Agreement, and authored an aspirational letter that carries no legal effect. A033. Specifically, his letter "*recommended*" that NARA restrict access to the records, and "*encouraged*" the

Archivist to carry out these recommendations. *Id.* (emphasis added). Despite Mr. Angelides's best laid hopes, he cited no legal authority for restricting access, as required by the Standard Agreement and 36 C.F.R. § 1235.20. Any restrictions placed on the records are invalid because any Mr. Angelides and Ms. Zuckerman failed to follow the requisite procedures and justify FOIA's inapplicability. Finally, and importantly, because the FCIC was a temporary legislative commission with no successor, even if Mr. Angelides placed legitimate restrictions on access, it was within the Archivist's discretion to eliminate his purported restrictions. *See* 44 U.S.C. § 2108(a).

d. The Certified SF-115 Supersedes Mr. Angelides's Letter and the Standard Agreement; the District Court Committed Reversible Error by Not Considering These Facts.

The certified SF-115 supersedes Mr. Angelides's February 10, 2011 letter and its purported restrictions, as well as the Standard Agreement executed February 11, 2011. First, FCIC's Deputy General Counsel executed and certified the SF-115 without restrictions on February 7, 2011 before Mr. Angelides authored his February 10, 2011 letter that aimed to restrict public access to the FCIC records. Second, the FCIC, by and through its Deputy General Counsel, specifically requested that NARA permanently accept the records without restrictions. By executing the SF-115 and confirming that the records have a "high research value" without placing any restrictions on the records, the FCIC's Deputy

General Counsel made a binding election that expressed the intent of the FCIC. A188–A190. The Archivist's authority to approve the SF-115 is absolute, 44 U.S.C. § 3314; 36 C.F.R. § 1225.12(j), and he accepted the FCIC records for permanent retention without restrictions. 44 U.S.C. § 2108(a). The district court committed reversible error by not considering the SF-115 and by not ruling that the SF-115 superseded Mr. Angelides's letter and the altered Standard Agreement. The district court committed further reversible error in failing to consider the manner in which Mr. Angelides attempted to restrict access to the records, which should have triggered a mandatory FOIA analysis by virtue of three distinct, yet closely interrelated, directives: (1) the Standard Agreement's Terms of Agreement requiring a FOIA analysis and certified justification for any restrictions; (2) the public interest edicts of 44 U.S.C. § 2108(a), which the FCIC's Deputy General Counsel set forth as an admission in describing the FCIC records in the SF-115, A190; and, (3) the vivid course of transparency and accountability by which all agencies are to handle records under both the Federal Records Act and FOIA. *See* 44 U.S.C. § 2108(a); 5 U.S.C. § 552.

II. The FCIC's Records Are Agency Records Subject to FOIA Because NARA Possesses and Controls Them.

a. Two-Part Legal Test: Possession and Control.

NARA's argument that the FCIC records are not subject to FOIA is based on the flawed premise that the records, even after being transferred to NARA, permanently remain legislative records and therefore exempt from FOIA. This is not the case. Whether records are subject to FOIA depends on a two-part test. First, an agency subject to FOIA, like NARA, must possess the subject documents. *See* 5 U.S.C. § 552(f)(2). NARA's possession of the FCIC's documents is undisputed. A393.

Second, once possession is established, the agency must control the documents as outlined in the four-part analysis below. *Tax Analysts v. U.S. Dep't of Justice*, 845 F.2d 1060, 1067–69 (D.C. Cir. 1988) ("information originating in a FOIA-exempt entity may only become an 'agency record' if the agency's eventual dominion over it includes the discretion to disclose it" (emphasis added)), *aff'd on other grounds*, *U.S. Dep't Justice v. Tax Analysts*, 492 U.S. 136, 155 (1989).

b. Once the Threshold Issue of Possession Is Established, the Court Considers Four Factors to Evaluate Control.

This Court has enumerated four factors in evaluating whether an agency exercises sufficient control to make the subject documents 'agency records' under FOIA. *Tax Analysts*, 845 F.2d at 1067–69. First, the Court must evaluate the

"intent of the document's creator to retain or relinquish control over the records." *Id.*[6] Second, the Court evaluates the ability of the agency possessing the documents "to use and dispose of the records as it sees fit." *Id.* Third, the Court evaluates the extent to which the personnel of the agency possessing the documents "read or relied upon the document." *Id.* Fourth, the Court evaluates the "degree to which the document was integrated into the [FOIA] agency's record system or files." *Id.*; *see Judicial Watch v. Fed. Hous. Fin. Agency*, 646 F.3d 924, 926–27 (D.C. Cir. 2011); *United We Stand Am., Inc. v. IRS*, 359 F.3d 595, 599 (D.C. Cir. 2004); *Burka v. Dep't of Health & Hum. Servs.*, 87 F.3d 508, 515 (D.C. Cir. 1996). NARA's possession and control over the FCIC documents belies its argument that the FCIC records are not subject to FOIA.

The four-factor test outlined above is a totality of the circumstances test, balancing the intent of the documents' creator against the other three factors, i.e., the agency's ability to freely use the records, whether it has read and relied upon them, and whether the records are integrated in the agency's files. *See Consumer Fed'n of Am. v. Dep't of Agric.*, 455 F.3d 283, 287 (D.C. Cir. 2006).[7] Here, all

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[6] This Court's Opinion in *Tax Analysts* was informed by an Eleventh Circuit decision which "conveniently distilled the essence of Supreme Court and D.C. Circuit rulings into four relevant considerations for deciding whether an agency has sufficient 'control' over a document to make it an 'agency record.'" *Tax Analysts*, 845 F.2d at 1068.

[7] The D.C. Circuit recently declined to apply the four-factor test determining that White House records held by the Secret Service were not subject to

four factors favor Cause of Action's position. Congress has neither expressed its intent to restrict access to the FCIC records, nor has Congress authorized anyone—and certainly not Mr. Angelides or Ms. Zuckerman—to restrict public access to the FCIC records. Further, NARA has unlimited discretion to use the records, has read and relied upon them, and it has integrated them into its system. 44 U.S.C. § 3314; 36 C.F.R. § 1225.12(j).

c. NARA Possesses the FCIC Records.

As set forth above, the threshold matter for consideration is the agency's possession of the requested records. NARA possesses the FCIC records. As the Court stated in its Opinion, "[t]here is no dispute that NARA obtained the materials, which were directly transferred to it from the FCIC." A396. On February 11, 2011, the FCIC deposited its records with NARA via the Standard Agreement transfer. A036. At that time, NARA integrated the FCIC records into its system. A399. The FCIC records were assembled in a searchable format and

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FOIA. *See Judicial Watch v. U.S Secret Serv.*, No. 11-5282, 2013 U.S. App. LEXIS 18119, at *23 n. 11 (Aug. 30, 2013). The D.C. Circuit held the four-factor analysis does not apply to Congress or to the President. First, because neither entity is subject to FOIA; second, because neither Congress nor the President clearly expressed intent to keep the documents outside the public reach; and finally, because special policy considerations warranted the court honoring the particular intent of Congress and the President, namely secrecy, oversight, and security. *Judicial Watch v. Secret Service* is distinguishable from the present case because the FCIC is not Congress, and the special policy considerations that apply to Congress and the President do not apply to the FCIC.

submitted, in part, to the House Committee for Oversight and Government Reform and to the House Committee for Financial Services pursuant to Congress's request. A009 ¶¶ 27–29.

d. NARA Controls the FCIC Records Under *Tax Analysts* and *Burka*.

The second element necessary to establish whether records qualify as agency records subject to FOIA is that the agency subject to FOIA must control the requested records. *Burka*, 87 F.3d at 515. The Supreme Court has explained that the term "control" means "that the materials have come into the agency's possession in the legitimate conduct of its official duties." *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 145 (1989); *see Judicial Watch*, 646 F.3d at 926–27 (understanding the *Tax Analysts* definition of "control" in light of the four *Tax Analysts* factors).

i. Intent: Neither Congress Nor the FCIC Intended the Records to Be Subject to Any Public Access Restrictions.

The functions and powers of the FCIC are enumerated by FERA §§ 5(c) and 5(d). Nowhere in that statute does Congress authorize restricting access to the FCIC records. Neither does any other relevant statute contemplate restricting access to the FCIC records. Additionally, under NARA's own regulations, a depositor must identify any exemptions it wants placed on the records in its SF-115. As discussed above, the FCIC's Deputy General Counsel placed no

restrictions on the FCIC records. A188-A190. Further, records deposited via the Standard Agreement are subject to FOIA, unless the depositor cites a FOIA exemption or another legal authority for restricting access. 36 C.F.R. §§ 1235.18, 1235.20. Mr. Angelides and Ms. Zuckerman, as purported representatives of the FCIC, transferred the FCIC records to NARA using the Standard Agreement. A036. Mr. Angelides submitted a letter to NARA in which he claimed that the FCIC records were beyond FOIA's reach. A033–A034. He cited no FOIA exemption, nor did he provide any factual or legal justification for his suggestion that the records were beyond FOIA's reach. *Id.* Because the records were deposited under a NARA regulation that presumes FOIA applies, and because Mr. Angelides did not cite any legal or other authority for restricting access to the FCIC records, both Mr. Angelides and Ms. Zuckerman lacked authority to restrict the use, release, or disposition of the FCIC records. Mr. Angelides's mere aspirations cannot bind NARA. *See* A033–A034. He "recommended" NARA restrict access to the records and "encouraged" the Archivist to carry out these recommendations without citing legal authority. A033. Mr. Angelides's hortatory language acknowledges the Archivist's liberty to disregard all of his recommendations, and this acknowledgement tracks the Archivists' broad discretion under the Federal Records Act. *See* 44 U.S.C. § 2108(a).

ii. Use and Disposal: NARA Has Complete Discretion to Use and Dispose of the FCIC Records.

Absent Congress's clear intent to control the FCIC records, and absent Congress authorizing Mr. Angelides or Ms. Zuckerman to restrict access to the FCIC records, the Archivist's ability to use the FCIC records as he sees fit is the controlling factor in determining whether the FCIC records are subject to FOIA. *Tax Analysts*, 845 F.2d at 1068; *Judicial Watch v. Fed. Hous. Fin. Agency*, 744 F. Supp. 2d 228, 234 (D.D.C. 2010), *aff'd*, 646 F.3d 924 (D.C. Cir. 2011) (an agency can use and dispose of records when no legal restriction exists regarding the agency's records' disposal). The Federal Records Act governs the Archivist's discretion to use the FCIC records. 44 U.S.C. § 2108(a). The Federal Records Act provides in relevant part:

> [W]hen the head of a Federal agency states, in writing, restrictions that appear to him to be necessary or desirable in the public interest with respect to the use or examination of records being considered for transfer from his custody to the Archivist, the Archivist shall, if he concurs,[,] impose such restrictions on the records so transferred, and may not relax or remove such restrictions without the written concurrence of the head of the agency from which the material was transferred. . . . In the event that a Federal agency is terminated and there is no successor in function, the Archivist is authorized to relax, remove, or impose restrictions on such agency's records when he determines that such action is in the public interest.

44 U.S.C. § 2108(a) (emphasis added). Since the FCIC terminated and had no successor in function, and since the FCIC was an agency under the Federal Records Act, 44 U.S.C. § 2108(a), the Federal Records Act gives NARA complete discretion to determine what, if any, access restrictions should be placed on the FCIC records without regard to the Mr. Angelides's urgings. *Id.*

iii. Read and Rely: NARA Has Read and Relied upon the FCIC Records.

An agency reads and relies upon a record when its employee(s) consults the document in the "legitimate conduct of its official duties." *Tax Analysts*, 492 U.S. at 145. NARA personnel have had direct contact with the FCIC records, reading and relying upon the records line-by-line to describe them for preservation, A134 ¶ 35, and determining which records should be "exempt from public release." A136–A137 ¶ 39; A359–A360 ¶ 6 (citing Fulgham Decl. ¶¶ 38–39).

These facts are distinct from *Judicial Watch. v. Fed. Hous. Fin. Agency*, 646 F.3d 924, 928 (D.C. Cir. 2011), upon which NARA relied below, A347, where the records were not subject to FOIA because no one in the agency had read or relied upon the records. *See id.* at 924. Unlike *Judicial Watch*, NARA personnel have had extensive contact with the FCIC records, reading and relying upon them as they (1) began preserving and preparing to provide access to the FCIC records, A62; (2) created database files for certain of the FCIC records to be transferred to the House Committees, A009 at ¶ 27; (3) released the records to the House

Oversight and House Financial Services Committees without a subpoena or other legally-compelled disclosure, A006 at ¶ 5; and (4) restricted former FCIC Commissioner Peter Wallison's access to the records (and denied access to his legal counsel), A011 at ¶¶ 39, 41. For these reasons, the read and reliance factor of *Tax Analysts* favors Cause of Action.

iv. Integration: NARA Has Integrated the FCIC Records Into Its System, As Confirmed by the District Court.

Documents are integrated into an agency's records if they are incorporated into an agency's computer system, *Judicial Watch 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.C. Cir. 2006). On February 13, 2012, NARA received the FCIC records, integrated them into its system and made them searchable by assembling, organizing, or cataloging the records. A009 at ¶ 27. The district court concurred with this assessment. A399.

III. The District Court Committed Reversible Error by Failing to Examine the Complaint's Allegations in a Light *Most* Favorable to Cause of Action and by Relying upon Evidence Outside the Pleadings Without Converting a Motion to Dismiss into One for Summary Judgment.

Cause of Action presented facts in its Complaint that not only presented a substantive claim, but that also would have prevailed if they had been properly weighed. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The district court failed to consider these facts in the light most favorable to Cause of Action. Instead, the district court disposed of facts favorable to Cause of Action without explanation or citation to legal authority. Moreover, the district court ignored several critical facts that Cause of Action pled, and it relied upon facts outside the pleadings to rule on a motion to dismiss without converting it into one for summary judgment. For instance, the district court relied on the government's characterization, in affidavits, that NARA is "merely a repository" as the basis for finding against Cause of Action in the *Tax Analysts* control analysis. A398. The district court also ignored the discretion that the Archivist has under 44 U.S.C. § 2108, and it ignored facts in the Complaint that call into question Mr. Angelides's authority to restrict access to the FCIC records. In sum, the district court committed reversible error in its review and analysis. Consequently, the district court's opinion should be reversed and this Court should remand and direct the district court to enter

summary judgment in Cause of Action's favor. Cause of Action also respectfully requests oral argument.

a. The District Court Failed to Examine the Complaint in a Light Most Favorable to Plaintiff-Appellant.

The district court ignored facts that, if properly weighed in a light most favorable to Cause of Action, would have tipped the scales in Cause of Action's favor for all four factors of *Tax Analysts*'s control test: intent, use, read and reliance, and integration. When applying the *Tax Analysts* factors, the district court in large part failed to provide an explanation for its decision or cite legal authority.

i. The District Court Ignored Critical Law and Facts in the Complaint that Tip the Intent Factor in Cause of Action's Favor.

The district court ignored critical case law that supports Cause of Action prevailing on *Tax Analysts*'s intent factor. Under the *Tax Analysts* test for agency control, the court will consider the intent of the record's creator to retain control over the records, but in balancing the factors, use of the records trumps the intent of the creator. *Judicial Watch v. U.S. Secret Serv.*, 803 F. Supp. 2d 51, 60 (D.D.C. 2011); *see also U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 147 (1989). This framework is distinguished by a line of cases in which Congress itself has manifested intent control over certain records in an agency's possession. *See, e.g.*, *Paisley v. CIA*, 712 F.2d 686, 693 (D.C. Cir. 1983). In this context, "congressional

records" exempt from FOIA may include records created, marked "secret," and transmitted to an agency by an official committee of Congress, *Goland v. CIA*, 607 F.2d 339 (D.C. Cir. 1978), or records generated by an agency in response to a confidential inquiry by an official committee of Congress. *United We Stand Am. v. IRS*, 359 F.3d 595, 604 (D.C. Cir. 2004); *Holy Spirit Ass'n v. CIA*, 636 F.2d 838, 842-43 (D.C. Cir. 1980). Only in this context is the intent of the creator determinative. In the present case, the records were created by a temporary legislative branch commission, comprised of unelected officials, which then relinquished the records into the possession and control of NARA. The district court failed to consider this legal analysis.

The district court also ignored critical, undisputed facts that support Cause of Action prevailing on *Tax Analysts*'s intent factor. Cause of Action pled that FERA did not exempt the FCIC from FOIA, that no member of Congress served on the FCIC, that the FCIC selectively released records to Stanford University, that the FCIC did not execute a transfer agreement under the statute used for Congressional Records, 44 U.S.C. § 2118, and that NARA voluntarily released FCIC records to the House Oversight Committee without legal compulsion. A006–A009 at ¶¶ 7–10, 12, 20–28. The FCIC's offices were located in Washington DC at 1717 Pennsylvania Avenue, NW, which is not a part of the Congressional complex. A033. Additionally, Congress has expressed a preference

for transparency and disclosure with respect to the FCIC.[8] These facts show that the FCIC was not an arm of Congress, that Congress neither created the records nor offered its express intent to retain control over them, and that NARA controlled the FCIC records. Further, these facts weigh against NARA's assertion that Mr. Angelides's suggestions to exclude the records from FOIA were legally justified. A006, A009 at ¶¶ 7, 23, 24; A204. For these reasons, the intent factor does not "clearly tip[] in favor" of NARA as the district court held. A398. The district court ignored these salient facts and erroneously concluded that Mr. Angelides had the same authority as a staff member of a permanent congressional committee, namely the Joint Committee on Taxation. A398, A390 at n.10 (citing *United We Stand Am. v. IRS*, 359 F.3d 595, 604 (D.C. Cir. 2004)). The district court failed to explain how a Congressional staff member who reports directly to an elected public official has the same ability to express the will of Congress as Mr. Angelides, a temporary, unelected commissioner.

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[8] Cause of Action respectfully requests that this Court take judicial notice of a congressional press release, 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/ ("Learning from these mistakes of the past through a transparent process is an important part of America's road to full financial recovery. . . The American people deserve nothing less than a full explanation. . ."). Fed. R. Evid. 201(b)(2) & 201(c)(2).

ii. The District Court Ignored Facts in the Complaint That Tip the Use, Reading and Reliance, and Integration Factors in Cause of Action's Favor.

When addressing these final three *Tax Analysts* factors: use, reading and reliance, and integration, the district court cited no law and few facts to support its conclusions. The district court ignored that NARA voluntarily transferred the FCIC records to the House Oversight Committee, a fact that strongly supports the use and integration factors. After the FCIC ceased to exist, the House Oversight Committee requested the FCIC records from NARA without issuing a subpoena. A009 at ¶¶ 25, 26. NARA promptly turned over electronic copies of these records. *Id*. NARA produced the records in an organized, searchable format. *Id.* at ¶¶ 27–29. The district court addressed none of these facts; instead, the district court summarily concluded that "NARA is merely a repository, and its personnel do not act in reliance on these types of documents . . ." A398–A399. Again, had the district court applied the law which considered the facts in the light most favorable to Cause of Action, then Cause of Action would have prevailed on the use, reading and reliance factors of *Tax Analysts*.

iii. The District Court Improperly Identified the Scope of the Records Cause of Action Sought.

The district court also erred by improperly classifying the records requested by Cause of Action, thereby discounting evidence that favored Cause of Action in three factors: use, read and reliance, and integration. The district court at page one

of its Memorandum Opinion states that Cause of Action "copies of the FCIC's records" and later writes that Cause of Action seeks "*all* FCIC records" (emphasis added). A390; A389. That is erroneous. Cause of Action requested *only* those FCIC records that NARA had provided to the Oversight Committee, A009–A010 at ¶¶ 31, 24–28[9]; *see also* A201 ("[Cause of Action] merely seeks the same records provided to the Oversight Committee."); A015 (Cause of Action's FOIA request letter sought "all documents, including email communications, memoranda, draft reports, and other relevant information and/or data contained in the records transfer of [FCIC] documents stored at NARA to the Committee on Oversight and Government Reform at the U.S. House of Representatives" (emphasis added)).

b. The District Court Improperly Relied on Evidence Outside the Pleadings Without Converting the Motion to Dismiss into one for Summary Judgment.

i. The District Court Improperly Gave Controlling Weight to NARA's Assertion that Mr. Angelides's Letter Precludes NARA's Control Over the FCIC Records.

The district court afforded controlling weight to NARA's assertion that the "contemporaneous and specific instructions" provided by Mr. Angelides precluded NARA's control over the FCIC records. A397–A398. The court concluded that

[9] In its October 3, 2011 FOIA Request, Cause of Action asked that NARA produce "all documents, including e-mail communications, memoranda, draft reports, and other relevant information and/or data contained in the records transfer of Financial Crisis Inquiry Commission documents stored at NARA to the Committee on Oversight and Government Reform at the U.S. House of Representatives." A015.

the Standard Agreement and Mr. Angelides's letter was determinative, A398, while ignoring the facts asserted by Cause of Action that directly contradicted this conclusion. For instance, the court ignored that Congress has granted the Archivist discretion to modify and control access to the records pursuant to 44 U.S.C. § 2108. A007–A009, ¶¶ 14, 20–23; A229 ("because Congress did not state otherwise when creating the FCIC, section 2108 of the Federal Records Act governs the deposit of the FCIC records"). This statute supersedes the alleged intent of Mr. Angelides, as addressed above. The court also ignored facts that call into question whether Mr. Angelides had authority to bind the FCIC. A006–A007 at ¶¶ 7, 15–20; A221 n.8 (with regard to *ultra vires*: "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."); 36 C.F.R. § 1235.20 (agency must indicate the lawful restriction and cite statute or FOIA exemption). These facts are especially relevant given that the Standard Agreement was signed by Matthew Fulgham of NARA on February 8, 2011—two days prior to the date of the Angelides letter and three days prior to the signature of the Standard Agreement by Sarah Zuckerman. A033–A036.

ii. The District Court Improperly Concluded that NARA is "Merely a Repository".

The district court improperly and extensively relied on the government's characterization of NARA as "merely a repository." A398. The government argued in its affidavits—outside the pleadings—that NARA's unique role is to serve as a "repository for federal records," A340 (citing Mills Decl.); *see also* A053 (citing Mills Decl.); A348 (citing Mills Decl.). In addition to serving as a storage facility, NARA regulates access to federal records. In its Complaint, Cause of Action pled facts to this effect, showing that NARA has discretion to regulate access, A008–A009 at ¶¶ 20, 22, and that NARA exercised this authority in transferring the FCIC records to the House Oversight Committee, A009 at ¶¶ 23–29, and by denying Mr. Wallison's counsel access to the records. A011 at ¶¶ 37–41. Rather than accepting the facts Cause of Action pled as true, the district court ignored them and instead relied upon the government's mischaracterization—outside the pleadings—that "NARA's exclusive function is to store and maintain records." A396. The government's mischaracterization led the district court to ultimately find that "[a]s the repository for federal records of all kinds . . . NARA does not 'possess' documents in the same manner as other executive agencies." A395; *see also* A399.

Furthermore, by relying on the government's mischaracterization, the district court assumed that NARA cannot exercise control over documents in its

possession. A395. In so doing, the district court implicitly rejected the *Tax Analysts* framework as applied to NARA. By shielding NARA from FOIA, the district court gives the agency unfettered control over the documents it possesses. The district court thereby contravenes the purpose and scope of FOIA by allowing NARA's actions to go unchecked. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) ("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."). In sum, NARA is not "merely a repository," and this clearly erroneous presumption should not have been used to reject Cause of Action's factual claims.

iii. The District Court Improperly Denied Cause of Action's Motion for Summary Judgment as Moot.

In weighing the four *Tax Analysts* factors of agency control, the district court's relied upon the government's affidavits to conclude that the "intent of the document's creator to retain control clearly weighs in favor of NARA." A397. The government argued that "NARA itself views the FCIC as having intended to control future access to FCIC records," A069 (citing Fulgham Decl. ¶ 34), because the Standard Agreement was "specifically hand-annotated . . . to reflect the parties' intent to negate any possibility that [FOIA] would apply to these materials." A068–A069 (citing Fulgham Decl. ¶ 33). The district court went beyond the pleadings and adopted this language, concluding that Mr. Angelides's letter

manifested FCIC intent and the Standard Agreement "includes additional indicia of the FCIC's intent to control future access to its records." A397–A398.

The district court relied upon this same extraneous evidence to conclude that the second *Tax Analysts* factor "benefits NARA largely for the reasons just articulated." A398. The government asserted that "NARA is unique within the Federal government as its mission includes the preservation of records originating from all three branches of the government of the United States," A053 (citing Mills Decl. ¶ 7), and as such NARA serves unique role within federal government as a "repository for records." A340 (citing Mills Decl. ¶ 7). Similarly, the district court adopted this language from outside the pleadings to conclude that "as the repository for federal records of all kinds . . . NARA does not 'possess' documents in the same manner as other executive agencies." A395; *see also* A396, A399

In light of these conclusions, the district court did not merely test the legal sufficiency of Cause of Action's Complaint under Fed. R. Civ. P. 12(b)(6). Rather than treating Cause of Action's factual allegations as true, the district court relied on evidence outside the pleadings to rule in favor of NARA and to conclude that Cause of Action had failed to state a claim upon which relief can be granted. By relying on evidence outside the pleadings, the district court effectively, albeit erroneously, granted NARA's motion for summary judgment.

Despite the district court's decision in favor of NARA, the evidence in the Record favors Cause of Action.

CONCLUSION

This Court should reverse the district court's opinion and remand the case with directions to enter summary judgment for Cause of Action. Cause of Action pled facts that established that the FCIC records are subject to FOIA. Rather than construing the facts alleged in the Complaint in a light most favorable to Cause of Action, the district court relied upon allegations in NARA's affidavits to grant NARA's motion to dismiss and deny as moot the parties' cross-motions for summary judgment. The district court failed to properly convert NARA's motion to dismiss into one for summary judgment.

The parties fully briefed these issues below and there remains no genuine issue of material fact. *Ctr. for Auto Safety*, 452 F.3d at 805. In the interest of judicial expediency, the Court should conclude as a matter of law that NARA failed to disclose the records requested by Cause of Action in violation of FOIA, and it should remand and direct the district court to enter summary judgment for Cause of Action.

Dated: October 1, 2013

Respectfully submitted,

/s/ Patrick J. Massari
PATRICK J. MASSARI
DANIEL EPSTEIN
CAUSE OF ACTION
1919 Pennsylvania Ave., N.W., Suite 650
Washington, D.C. 20006
(202) 499-4232

REED D. RUBINSTEIN
DINSMORE & SHOHL, L.L.P.
801 Pennsylvania Ave., NW, Suite 610
Washington, D.C. 20004
(202) 372-9120

Counsel for Cause of Action

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that this brief complies with the type-volume limitation in Rule 32(a)(7)(B). Prepared in Microsoft Word 2010, the foregoing brief used proportionally spaced type in 14-point Times New Roman font. The brief, excluding the parts exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), contains 11,166 as counted by Microsoft Word 2010.

Dated: October 1, 2013

/s/ Patrick J. Massari
PATRICK J. MASSARI
DANIEL EPSTEIN
CAUSE OF ACTION
1919 Pennsylvania Ave., N.W., Suite 650
Washington, D.C. 20006
(202) 499-4232

REED D. RUBINSTEIN
DINSMORE & SHOHL, L.L.P.
801 Pennsylvania Ave., NW, Suite 610
Washington, D.C. 20004
(202) 372-9120

Counsel for Cause of Action

CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I also hereby certify that I will have eight copies hand-delivered or sent via Federal Express overnight delivery to the Court within two business days, pursuant to Circuit Rule 31(b).

/s/ Patrick J. Massari
PATRICK J. MASSARI
DANIEL EPSTEIN
CAUSE OF ACTION
1919 Pennsylvania Ave., N.W., Suite 650
Washington, D.C. 20006
(202) 499-4232

REED D. RUBINSTEIN
DINSMORE & SHOHL, L.L.P.
801 Pennsylvania Ave., NW, Suite 610
Washington, D.C. 20004
(202) 372-9120

Counsel for Cause of Action

STATUTORY & REGULATORY ADDENDUM

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STATUTES

REGULATIONS

Public Law 111–21
111th Congress

An Act

To improve 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 frauds, and for other purposes.

May 20, 2009
[S. 386]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Fraud Enforcement and Recovery Act of 2009.
18 USC 1 note.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Fraud Enforcement and Recovery Act of 2009" or "FERA".

SEC. 2. AMENDMENTS TO IMPROVE MORTGAGE, SECURITIES, COMMODITIES, AND FINANCIAL FRAUD RECOVERY AND ENFORCEMENT.

(a) DEFINITION OF FINANCIAL INSTITUTION AMENDED TO INCLUDE MORTGAGE LENDING BUSINESS.—Section 20 of title 18, United States Code, is amended—

(1) in paragraph (8), by striking "or" after the semicolon;

(2) in paragraph (9), by striking the period and inserting "; or"; and

(3) by inserting at the end the following:

"(10) a mortgage lending business (as defined in section 27 of this title) or any person or entity that makes in whole or in part a federally related mortgage loan as defined in section 3 of the Real Estate Settlement Procedures Act of 1974.".

(b) MORTGAGE LENDING BUSINESS DEFINED.—

(1) IN GENERAL.—Chapter 1 of title 18, United States Code, is amended by inserting after section 26 the following:

"§ 27. Mortgage lending business defined

"In this title, the term 'mortgage lending business' means an organization which finances or refinances any debt secured by an interest in real estate, including private mortgage companies and any subsidiaries of such organizations, and whose activities affect interstate or foreign commerce.".

(2) CHAPTER ANALYSIS.—The chapter analysis for chapter 1 of title 18, United States Code, is amended by adding at the end the following:

"27. Mortgage lending business defined.".

(c) FALSE STATEMENTS IN MORTGAGE APPLICATIONS AMENDED TO INCLUDE FALSE STATEMENTS BY MORTGAGE BROKERS AND AGENTS OF MORTGAGE LENDING BUSINESSES.—Section 1014 of title 18, United States Code, is amended by—

(1) striking "or" after "the International Banking Act of 1978),"; and

(2) inserting after "section 25(a) of the Federal Reserve Act" the following: ", or a mortgage lending business, or any person or entity that makes in whole or in part a federally related mortgage loan as defined in section 3 of the Real Estate Settlement Procedures Act of 1974".

(d) MAJOR FRAUD AGAINST THE GOVERNMENT AMENDED TO INCLUDE ECONOMIC RELIEF AND TROUBLED ASSET RELIEF PROGRAM FUNDS.—Section 1031(a) of title 18, United States Code, is amended by—

(1) inserting after "or promises, in" the following: "any grant, contract, subcontract, subsidy, loan, guarantee, insurance, or other form of Federal assistance, including through the Troubled Asset Relief Program, an economic stimulus, recovery or rescue plan provided by the Government, or the Government's purchase of any troubled asset as defined in the Emergency Economic Stabilization Act of 2008, or in";

(2) striking "the contract, subcontract" and inserting "such grant, contract, subcontract, subsidy, loan, guarantee, insurance, or other form of Federal assistance"; and

(3) striking "for such property or services".

(e) SECURITIES FRAUD AMENDED TO INCLUDE FRAUD INVOLVING OPTIONS AND FUTURES IN COMMODITIES.—

(1) IN GENERAL.—Section 1348 of title 18, United States Code, is amended—

(A) in the caption, by inserting "**and commodities**" after "**Securities**";

(B) in paragraph (1), by inserting "any commodity for future delivery, or any option on a commodity for future delivery, or" after "any person in connection with"; and

(C) in paragraph (2), by inserting "any commodity for future delivery, or any option on a commodity for future delivery, or" after "in connection with the purchase or sale of".

(2) CHAPTER ANALYSIS.—The item for section 1348 in the chapter analysis for chapter 63 of title 18, United States Code, is amended by inserting "and commodities" after "Securities".

(f) MONEY LAUNDERING AMENDED TO DEFINE PROCEEDS OF SPECIFIED UNLAWFUL ACTIVITY.—

(1) MONEY LAUNDERING.—Section 1956(c) of title 18, United States Code, is amended—

(A) in paragraph (8), by striking the period and inserting "; and"; and

(B) by inserting at the end the following:

"(9) the term 'proceeds' means any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity.".

(2) MONETARY TRANSACTIONS.—Section 1957(f) of title 18, United States Code, is amended by striking paragraph (3) and inserting the following:

"(3) the terms 'specified unlawful activity' and 'proceeds' shall have the meaning given those terms in section 1956 of this title.".

(g) SENSE OF THE CONGRESS AND REPORT CONCERNING REQUIRED APPROVAL FOR MERGER CASES.—

(1) SENSE OF CONGRESS.—It is the sense of the Congress that no prosecution of an offense under section 1956 or 1957 of title 18, United States Code, should be undertaken in combination with the prosecution of any other offense, without prior approval of the Attorney General, the Deputy Attorney General, the Assistant Attorney General in charge of the Criminal Division, a Deputy Assistant Attorney General in the Criminal Division, or the relevant United States Attorney, if the conduct to be charged as "specified unlawful activity" in connection with the offense under section 1956 or 1957 is so closely connected with the conduct to be charged as the other offense that there is no clear delineation between the two offenses.

(2) REPORT.—One year after the date of the enactment of this Act, and at the end of each of the four succeeding one-year periods, the Attorney General shall report to the House and Senate Committees on the Judiciary on efforts undertaken by the Department of Justice to ensure that the review and approval described in paragraph (1) takes place in all appropriate cases. The report shall include the following:

(A) The number of prosecutions described in paragraph (1) that were undertaken during the previous one-year period after prior approval by an official described in paragraph (1), classified by type of offense and by the approving official.

(B) The number of prosecutions described in paragraph (1) that were undertaken during the previous one-year period without such prior approval, classified by type of offense, and the reasons why such prior approval was not obtained.

(C) The number of times during the previous year in which an approval described in paragraph (1) was denied.

SEC. 3. AUTHORIZATION OF ADDITIONAL FUNDING TO COMBAT MORTGAGE FRAUD, SECURITIES AND COMMODITIES FRAUD, AND OTHER FRAUDS INVOLVING FEDERAL ECONOMIC ASSISTANCE.

(a) AUTHORIZATION OF ADDITIONAL APPROPRIATIONS FOR THE DEPARTMENT OF JUSTICE.—

(1) IN GENERAL.—There is authorized to be appropriated to the Attorney General, $165,000,000 for each of the fiscal years 2010 and 2011, for the purposes of investigations and prosecutions and civil and administrative proceedings involving Federal assistance programs and financial institutions, including financial institutions to which this Act and amendments made by this Act apply.

(2) ALLOCATIONS.—With respect to fiscal years 2010 and 2011, the amounts authorized to be appropriated under paragraph (1) shall be allocated as follows:

(A) Federal Bureau of Investigation: $75,000,000 for fiscal year 2010 and $65,000,000 for fiscal year 2011, an appropriate percentage of which amounts shall be used to investigate mortgage fraud.

(B) The offices of the United States Attorneys: $50,000,000 for each fiscal year.

(C) The criminal division of the Department of Justice: $20,000,000 for each fiscal year.

(D) The civil division of the Department of Justice: $15,000,000 for each fiscal year.

(E) The tax division of the Department of Justice: $5,000,000 for each fiscal year.

(b) AUTHORIZATION OF ADDITIONAL APPROPRIATIONS FOR THE POSTAL INSPECTION SERVICE.—There is authorized to be appropriated to the Postal Inspection Service of the United States Postal Service, $30,000,000 for each of the fiscal years 2010 and 2011 for investigations involving Federal assistance programs and financial institutions, including financial institutions to which this Act and amendments made by this Act apply.

(c) AUTHORIZATION OF ADDITIONAL APPROPRIATIONS FOR THE INSPECTOR GENERAL FOR THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT.—There is authorized to be appropriated to the Inspector General of the Department of Housing and Urban Development, $30,000,000 for each of the fiscal years 2010 and 2011 for investigations involving Federal assistance programs and financial institutions, including financial institutions to which this Act and amendments made by this Act apply.

(d) AUTHORIZATION OF ADDITIONAL APPROPRIATIONS FOR THE UNITED STATES SECRET SERVICE.—There is authorized to be appropriated to the United States Secret Service of the Department of Homeland Security, $20,000,000 for each of the fiscal years 2010 and 2011 for investigations involving Federal assistance programs and financial institutions, including financial institutions to which this Act and amendments made by this Act apply.

(e) AUTHORIZATION OF ADDITIONAL APPROPRIATIONS FOR THE SECURITIES AND EXCHANGE COMMISSION.—

(1) IN GENERAL.—There is authorized to be appropriated to the Securities and Exchange Commission, $20,000,000 for each of the fiscal years 2010 and 2011 for investigations and enforcement proceedings involving financial institutions, including financial institutions to which this Act and amendments made by this Act apply.

(2) INSPECTOR GENERAL.—There is authorized to be appropriated to the Securities and Exchange Commission, $1,000,000 for each of the fiscal years 2010 and 2011 for the salaries and expenses of the Office of the Inspector General of the Securities and Exchange Commission.

(f) USE OF FUNDS.—

(1) IN GENERAL.—The funds appropriated pursuant to authorization under this section shall be limited to covering the costs of each listed agency or department for investigating possible criminal, civil, or administrative violations and for criminal, civil, or administrative proceedings involving financial crimes and crimes against Federal assistance programs, including mortgage fraud, securities and commodities fraud, financial institution fraud, and other frauds related to Federal assistance and relief programs.

(2) FUNDS FOR TRAINING AND RESEARCH.—Funds authorized to be appropriated under this section may be used and expended for programs for improving the detection, investigation, and prosecution of economic crime including financial fraud and mortgage fraud. Funds allocated under this section may be allocated to programs which assist State and local criminal

justice agencies to develop, establish, and maintain intelligence-focused policing strategies and related information sharing; provide training and investigative support services to State and local criminal justice agencies to provide such agencies with skills and resources needed to investigate and prosecute such criminal activities and related criminal activities; provide research support, establish partnerships, and provide other resources to aid State and local criminal justice agencies to prevent, investigate, and prosecute such criminal activities and related problems; provide information and research to the general public to facilitate the prevention of such criminal activities; and any other programs specified by the Attorney General as furthering the purposes of this Act.

(g) ADDITIONAL NATURE OF AUTHORIZATIONS; AVAILABILITY.—The amounts authorized under this section are in addition to amounts otherwise authorized in other Acts and shall remain available until expended.

(h) REPORT TO CONGRESS.—Following the final expenditure of all funds appropriated pursuant to authorization under this section, the Attorney General, in consultation with the United States Postal Inspection Service, the Inspector General for the Department of Housing and Urban Development, the Secretary of Homeland Security, and the Commissioner of the Securities and Exchange Commission, shall submit a report to Congress identifying—

(1) the amounts expended under each of subsections (a), (b), (c), (d), and (e) and a certification of compliance with the requirements listed in subsection (f); and

(2) the amounts recovered as a result of criminal or civil restitution, fines, penalties, and other monetary recoveries resulting from criminal, civil, or administrative proceedings and settlements undertaken with funds authorized by this Act.

SEC. 4. CLARIFICATIONS TO THE FALSE CLAIMS ACT TO REFLECT THE ORIGINAL INTENT OF THE LAW.

(a) CLARIFICATION OF THE FALSE CLAIMS ACT.—Section 3729 of title 31, United States Code, is amended—

(1) by striking subsection (a) and inserting the following:

"(a) LIABILITY FOR CERTAIN ACTS.—

"(1) IN GENERAL.—Subject to paragraph (2), any person who—

"(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

"(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

"(C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);

"(D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;

"(E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

"(F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or

"(G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104–410), plus 3 times the amount of damages which the Government sustains because of the act of that person.

"(2) REDUCED DAMAGES.—If the court finds that—

"(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

"(B) such person fully cooperated with any Government investigation of such violation; and

"(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation,

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of that person.

"(3) COSTS OF CIVIL ACTIONS.—A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.";

(2) by striking subsections (b) and (c) and inserting the following:

"(b) DEFINITIONS.—For purposes of this section—

"(1) the terms 'knowing' and 'knowingly'—

"(A) mean that a person, with respect to information—

"(i) has actual knowledge of the information;

"(ii) acts in deliberate ignorance of the truth or falsity of the information; or

"(iii) acts in reckless disregard of the truth or falsity of the information; and

"(B) require no proof of specific intent to defraud;

"(2) the term 'claim'—

"(A) means any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that—

"(i) is presented to an officer, employee, or agent of the United States; or

"(ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest, and if the United States Government—

"(I) provides or has provided any portion of the money or property requested or demanded; or

"(II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded; and

"(B) does not include requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as an income subsidy with no restrictions on that individual's use of the money or property;

"(3) the term 'obligation' means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment; and

"(4) the term 'material' means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.";

(3) by redesignating subsections (d) and (e) as subsections (c) and (d), respectively; and

(4) in subsection (c), as redesignated, by striking "subparagraphs (A) through (C) of subsection (a)" and inserting "subsection (a)(2)".

(b) INTERVENTION BY THE GOVERNMENT.—Section 3731(b) of title 31, United States Code, is amended—

(1) by redesignating subsection (c) as subsection (d);

(2) by redesignating subsection (d) as subsection (e); and

(3) by inserting the new subsection (c):

"(c) If the Government elects to intervene and proceed with an action brought under 3730(b), the Government may file its own complaint or amend the complaint of a person who has brought an action under section 3730(b) to clarify or add detail to the claims in which the Government is intervening and to add any additional claims with respect to which the Government contends it is entitled to relief. For statute of limitations purposes, any such Government pleading shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person.".

(c) CIVIL INVESTIGATIVE DEMANDS.—Section 3733 of title 31, United States Code, is amended—

(1) in subsection (a)—

(A) in paragraph (1)—

(i) in the matter preceding subparagraph (A)—

(I) by inserting ", or a designee (for purposes of this section)," after "Whenever the Attorney General"; and

(II) by striking "the Attorney General may, before commencing a civil proceeding under section 3730 or other false claims law," and inserting "the

Attorney General, or a designee, may, before commencing a civil proceeding under section 3730(a) or other false claims law, or making an election under section 3730(b),"; and

(ii) in the matter following subparagraph (D)—

(I) by striking "may not delegate" and inserting "may delegate"; and

(II) by adding at the end the following: "Any information obtained by the Attorney General or a designee of the Attorney General under this section may be shared with any qui tam relator if the Attorney General or designee determine it is necessary as part of any false claims act investigation."; and

(B) in paragraph (2)(G), by striking the second sentence;

(2) in subsection (i)(2)—

(A) in subparagraph (B), by striking ", who is authorized for such use under regulations which the Attorney General shall issue"; and

(B) in subparagraph (C), by striking "Disclosure of information to any such other agency shall be allowed only upon application, made by the Attorney General to a United States district court, showing substantial need for the use of the information by such agency in furtherance of its statutory responsibilities."; and

(3) in subsection (l)—

(A) in paragraph (6), by striking "and" after the semicolon;

(B) in paragraph (7), by striking the period and inserting "; and"; and

(C) by adding at the end the following:

Definition.

"(8) the term 'official use' means any use that is consistent with the law, and the regulations and policies of the Department of Justice, including use in connection with internal Department of Justice memoranda and reports; communications between the Department of Justice and a Federal, State, or local government agency, or a contractor of a Federal, State, or local government agency, undertaken in furtherance of a Department of Justice investigation or prosecution of a case; interviews of any qui tam relator or other witness; oral examinations; depositions; preparation for and response to civil discovery requests; introduction into the record of a case or proceeding; applications, motions, memoranda and briefs submitted to a court or other tribunal; and communications with Government investigators, auditors, consultants and experts, the counsel of other parties, arbitrators and mediators, concerning an investigation, case or proceeding.".

(d) RELIEF FROM RETALIATORY ACTIONS.—Section 3730(h) of title 31, United States Code, is amended to read as follows:

"(h) RELIEF FROM RETALIATORY ACTIONS.—

"(1) IN GENERAL.—Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the

employee, contractor, or agent on behalf of the employee, contractor, or agent or associated others in furtherance of other efforts to stop 1 or more violations of this subchapter.

"(2) RELIEF.—Relief under paragraph (1) shall include reinstatement with the same seniority status that employee, contractor, or agent would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An action under this subsection may be brought in the appropriate district court of the United States for the relief provided in this subsection.".

(e) FALSE CLAIMS JURISDICTION.—Section 3732 of title 31, United States Code, is amended by adding at the end the following new subsection:

"(c) SERVICE ON STATE OR LOCAL AUTHORITIES.—With respect to any State or local government that is named as a co-plaintiff with the United States in an action brought under subsection (b), a seal on the action ordered by the court under section 3730(b) shall not preclude the Government or the person bringing the action from serving the complaint, any other pleadings, or the written disclosure of substantially all material evidence and information possessed by the person bringing the action on the law enforcement authorities that are authorized under the law of that State or local government to investigate and prosecute such actions on behalf of such governments, except that such seal applies to the law enforcement authorities so served to the same extent as the seal applies to other parties in the action.". Applicability.

(f) EFFECTIVE DATE AND APPLICATION.—The amendments made by this section shall take effect on the date of enactment of this Act and shall apply to conduct on or after the date of enactment, except that— 31 USC 3729 note.

(1) subparagraph (B) of section 3729(a)(1) of title 31, United States Code, as added by subsection (a)(1), shall take effect as if enacted on June 7, 2008, and apply to all claims under the False Claims Act (31 U.S.C. 3729 et seq.) that are pending on or after that date; and

(2) section 3731(b) of title 31, as amended by subsection (b); section 3733, of title 31, as amended by subsection (c); and section 3732 of title 31, as amended by subsection (e); shall apply to cases pending on the date of enactment.

SEC. 5. FINANCIAL CRISIS INQUIRY COMMISSION.

(a) ESTABLISHMENT OF COMMISSION.—There is established in the legislative branch the Financial Crisis Inquiry Commission (in this section referred to as the "Commission") to examine the causes, domestic and global, of the current financial and economic crisis in the United States.

(b) COMPOSITION OF THE COMMISSION.—

(1) MEMBERS.—The Commission shall be composed of 10 members, of whom—

(A) 3 members shall be appointed by the majority leader of the Senate, in consultation with relevant Committees;

(B) 3 members shall be appointed by the Speaker of the House of Representatives, in consultation with relevant Committees;

(C) 2 members shall be appointed by the minority leader of the Senate, in consultation with relevant Committees; and

(D) 2 members shall be appointed by the minority leader of the House of Representatives, in consultation with relevant Committees.

(2) QUALIFICATIONS; LIMITATION.—

(A) IN GENERAL.—It is the sense of the Congress that individuals appointed to the Commission should be prominent United States citizens with national recognition and significant depth of experience in such fields as banking, regulation of markets, taxation, finance, economics, consumer protection, and housing.

(B) LIMITATION.—No person who is a member of Congress or an officer or employee of the Federal Government or any State or local government may serve as a member of the Commission.

(3) CHAIRPERSON; VICE CHAIRPERSON.—

(A) IN GENERAL.—Subject to the requirements of subparagraph (B), the Chairperson of the Commission shall be selected jointly by the Majority Leader of the Senate and the Speaker of the House of Representatives, and the Vice Chairperson shall be selected jointly by the Minority Leader of the Senate and the Minority Leader of the House of Representatives.

(B) POLITICAL PARTY AFFILIATION.—The Chairperson and Vice Chairperson of the Commission may not be from the same political party.

(4) MEETINGS, QUORUM; VACANCIES.—

(A) MEETINGS.—

(i) INITIAL MEETING.—The initial meeting of the Commission shall be as soon as possible after a quorum of members have been appointed.

(ii) SUBSEQUENT MEETINGS.—After the initial meeting of the Commission, the Commission shall meet upon the call of the Chairperson or a majority of its members.

(B) QUORUM.—6 members of the Commission shall constitute a quorum.

(C) VACANCIES.—Any vacancy on the Commission shall—

(i) not affect the powers of the Commission; and

(ii) be filled in the same manner in which the original appointment was made.

(c) FUNCTIONS OF THE COMMISSION.—The functions of the Commission are—

(1) to examine the causes of the current financial and economic crisis in the United States, specifically the role of—

(A) fraud and abuse in the financial sector, including fraud and abuse towards consumers in the mortgage sector;

(B) Federal and State financial regulators, including the extent to which they enforced, or failed to enforce statutory, regulatory, or supervisory requirements;

(C) the global imbalance of savings, international capital flows, and fiscal imbalances of various governments;

(D) monetary policy and the availability and terms of credit;

(E) accounting practices, including, mark-to-market and fair value rules, and treatment of off-balance sheet vehicles;

(F) tax treatment of financial products and investments;

(G) capital requirements and regulations on leverage and liquidity, including the capital structures of regulated and non-regulated financial entities;

(H) credit rating agencies in the financial system, including, reliance on credit ratings by financial institutions and Federal financial regulators, the use of credit ratings in financial regulation, and the use of credit ratings in the securitization markets;

(I) lending practices and securitization, including the originate-to-distribute model for extending credit and transferring risk;

(J) affiliations between insured depository institutions and securities, insurance, and other types of nonbanking companies;

(K) the concept that certain institutions are "too-big-to-fail" and its impact on market expectations;

(L) corporate governance, including the impact of company conversions from partnerships to corporations;

(M) compensation structures;

(N) changes in compensation for employees of financial companies, as compared to compensation for others with similar skill sets in the labor market;

(O) the legal and regulatory structure of the United States housing market;

(P) derivatives and unregulated financial products and practices, including credit default swaps;

(Q) short-selling;

(R) financial institution reliance on numerical models, including risk models and credit ratings;

(S) the legal and regulatory structure governing financial institutions, including the extent to which the structure creates the opportunity for financial institutions to engage in regulatory arbitrage;

(T) the legal and regulatory structure governing investor and mortgagor protection;

(U) financial institutions and government-sponsored enterprises; and

(V) the quality of due diligence undertaken by financial institutions;

(2) to examine the causes of the collapse of each major financial institution that failed (including institutions that were acquired to prevent their failure) or was likely to have failed if not for the receipt of exceptional Government assistance from the Secretary of the Treasury during the period beginning in August 2007 through April 2009;

(3) to submit a report under subsection (h);

(4) to refer to the Attorney General of the United States and any appropriate State attorney general any person that the Commission finds may have violated the laws of the United States in relation to such crisis; and

(5) to build upon the work of other entities, and avoid unnecessary duplication, by reviewing the record of the Committee on Banking, Housing, and Urban Affairs of the Senate, the Committee on Financial Services of the House of Representatives, other congressional committees, the Government Accountability Office, other legislative panels, and any other department, agency, bureau, board, commission, office, independent establishment, or instrumentality of the United States (to the fullest extent permitted by law) with respect to the current financial and economic crisis.

(d) POWERS OF THE COMMISSION.—

(1) HEARINGS AND EVIDENCE.—The Commission may, for purposes of carrying out this section—

(A) hold hearings, sit and act at times and places, take testimony, receive evidence, and administer oaths; and

(B) require, by subpoena or otherwise, the attendance and testimony of witnesses and the production of books, records, correspondence, memoranda, papers, and documents.

(2) SUBPOENAS.—

(A) SERVICE.—Subpoenas issued under paragraph (1)(B) may be served by any person designated by the Commission.

(B) ENFORCEMENT.—

(i) IN GENERAL.—In the case of contumacy or failure to obey a subpoena issued under paragraph (1)(B), the United States district court for the judicial district in which the subpoenaed person resides, is served, or may be found, or where the subpoena is returnable, may issue an order requiring such person to appear at any designated place to testify or to produce documentary or other evidence. Any failure to obey the order of the court may be punished by the court as a contempt of that court.

Applicability.

(ii) ADDITIONAL ENFORCEMENT.—Sections 102 through 104 of the Revised Statutes of the United States (2 U.S.C. 192 through 194) shall apply in the case of any failure of any witness to comply with any subpoena or to testify when summoned under the authority of this section.

(iii) ISSUANCE.—A subpoena may be issued under this subsection only—

(I) by the agreement of the Chairperson and the Vice Chairperson; or

(II) by the affirmative vote of a majority of the Commission, including an affirmative vote of at least one member appointed under subparagraph (C) or (D) of subsection (b)(1), a majority being present.

(3) CONTRACTING.—The Commission may enter into contracts to enable the Commission to discharge its duties under this section.

(4) INFORMATION FROM FEDERAL AGENCIES AND OTHER ENTITIES.—

(A) IN GENERAL.—The Commission may secure directly from any department, agency, bureau, board, commission,

office, independent establishment, or instrumentality of the United States any information related to any inquiry of the Commission conducted under this section, including information of a confidential nature (which the Commission shall maintain in a secure manner). Each such department, agency, bureau, board, commission, office, independent establishment, or instrumentality shall furnish such information directly to the Commission upon request.

(B) OTHER ENTITIES.—It is the sense of the Congress that the Commission should seek testimony or information from principals and other representatives of government agencies and private entities that were significant participants in the United States and global financial and housing markets during the time period examined by the Commission.

(5) ADMINISTRATIVE SUPPORT SERVICES.—Upon the request of the Commission—

(A) the Administrator of General Services shall provide to the Commission, on a reimbursable basis, the administrative support services necessary for the Commission to carry out its responsibilities under this Act; and

(B) other Federal departments and agencies may provide to the Commission any administrative support services as may be determined by the head of such department or agency to be advisable and authorized by law.

(6) DONATIONS OF GOODS AND SERVICES.—The Commission may accept, use, and dispose of gifts or donations of services or property.

(7) POSTAL SERVICES.—The Commission may use the United States mails in the same manner and under the same conditions as departments and agencies of the United States.

(8) POWERS OF SUBCOMMITTEES, MEMBERS, AND AGENTS.—Any subcommittee, member, or agent of the Commission may, if authorized by the Commission, take any action which the Commission is authorized to take by this section.

(e) STAFF OF THE COMMISSION.—

(1) DIRECTOR.—The Commission shall have a Director who shall be appointed by the Chairperson and the Vice Chairperson, acting jointly.

(2) STAFF.—The Chairperson and the Vice Chairperson may jointly appoint additional personnel, as may be necessary, to enable the Commission to carry out its functions.

(3) APPLICABILITY OF CERTAIN CIVIL SERVICE LAWS.—The Director and staff of the Commission may be appointed without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and may be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, except that no rate of pay fixed under this paragraph may exceed the equivalent of that payable for a position at level V of the Executive Schedule under section 5316 of title 5, United States Code. Any individual appointed under paragraph (1) or (2) shall be treated as an employee for purposes of chapters 63, 81, 83, 84, 85, 87, 89, 89A, 89B, and 90 of that title.

(4) DETAILEES.—Any Federal Government employee may be detailed to the Commission without reimbursement from

the Commission, and such detailee shall retain the rights, status, and privileges of his or her regular employment without interruption.

(5) CONSULTANT SERVICES.—The Commission is authorized to procure the services of experts and consultants in accordance with section 3109 of title 5, United States Code, but at rates not to exceed the daily rate paid a person occupying a position at level IV of the Executive Schedule under section 5315 of title 5, United States Code.

(f) COMPENSATION AND TRAVEL EXPENSES.—

(1) COMPENSATION.—Each member of the Commission may be compensated at a rate not to exceed the daily equivalent of the annual rate of basic pay in effect for a position at level IV of the Executive Schedule under section 5315 of title 5, United States Code, for each day during which that member is engaged in the actual performance of the duties of the Commission.

(2) TRAVEL EXPENSES.—While away from their homes or regular places of business in the performance of services for the Commission, members of the Commission shall be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the Government service are allowed expenses under section 5703(b) of title 5, United States Code.

(g) NONAPPLICABILITY OF FEDERAL ADVISORY COMMITTEE ACT.—The Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to the Commission.

(h) REPORT OF THE COMMISSION; APPEARANCE BEFORE AND CONSULTATIONS WITH CONGRESS.—

(1) REPORT.—On December 15, 2010, the Commission shall 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.

(2) INSTITUTION-SPECIFIC REPORTS AUTHORIZED.—At the discretion of the chairperson of the Commission, the report under paragraph (1) may include reports or specific findings on any financial institution examined by the Commission under subsection (c)(2).

Deadline.

(3) APPEARANCE BEFORE THE CONGRESS.—The chairperson of the Commission shall, not later than 120 days after the date of submission of the final reports under paragraph (1), appear before the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives regarding such reports and the findings of the Commission.

(4) CONSULTATIONS WITH THE CONGRESS.—The Commission shall consult with the Committee on Banking, Housing, and Urban Affairs of the Senate, the Committee on Financial Services of the House of Representatives, and other relevant committees of the Congress, for purposes of informing the Congress on the work of the Commission.

(i) TERMINATION OF COMMISSION.—

(1) IN GENERAL.—The Commission, and all the authorities of this section, shall terminate 60 days after the date on which the final report is submitted under subsection (h).

(2) ADMINISTRATIVE ACTIVITIES BEFORE TERMINATION.—The Commission may use the 60-day period referred to in paragraph

(1) for the purpose of concluding the activities of the Commission, including providing testimony to committees of the Congress concerning reports of the Commission and disseminating the final report submitted under subsection (h).

(j) AUTHORIZATION OF APPROPRIATION.—There is authorized to be appropriated to the Secretary of the Treasury such sums as are necessary to cover the costs of the Commission.

Approved May 20, 2009.

LEGISLATIVE HISTORY—S. 386:

SENATE REPORTS: No. 111–10 (Comm. on the Judiciary).
CONGRESSIONAL RECORD, Vol. 155 (2009):
Apr. 22, 23, 27, 28, considered and passed Senate.
May 6, considered and passed House, amended.
May 14, Senate concurred in House amendments with an amendment.
May 19, House concurred in Senate amendment.
DAILY COMPILATION OF PRESIDENTIAL DOCUMENTS (2009):
May 20, Presidential remarks and statement.

○

*** Current through PL 113-36, approved 9/18/13 ***

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I. THE AGENCIES GENERALLY
CHAPTER 5. ADMINISTRATIVE PROCEDURE
SUBCHAPTER II. ADMINISTRATIVE PROCEDURE

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5 USCS § 552

THE CASE NOTES SEGMENT OF THIS DOCUMENT HAS BEEN SPLIT INTO 4 DOCUMENTS.
THIS IS PART 2.
USE THE BROWSE FEATURE TO REVIEW THE OTHER PART(S).

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public--

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying--

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

(C) administrative staff manuals and instructions to staff that affect a member of the public;

(D) copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and

(E) a general index of the records referred to under subparagraph (D);

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

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) (A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

(D) For purposes of this paragraph, the term "search" means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.

(E) An agency, or part of an agency, that is an element of the intelligence community (as that term is defined in section 3(4) of the National Security Act of 1947 (*50 U.S.C. 401a(4)*)) shall not make any record available under this paragraph to--

(i) any government entity, other than a State, territory, commonwealth, or district of the United States, or any subdivision thereof; or

(ii) a representative of a government entity described in clause (i).

(4)

(A) (i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

(ii) Such agency regulations shall provide that--

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when

records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

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

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

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

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

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

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

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

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

(viii) An agency shall not assess search fees (or in the case of a requester described under clause (ii)(II), duplication fees) under this subparagraph if the agency fails to comply with any time limit under paragraph (6), if no unusual or exceptional circumstances (as those terms are defined for purposes of paragraphs (6)(B) and (C), respectively) apply to the processing of the request.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and

subsection (b) and reproducibility under paragraph (3)(B).

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) [Repealed]

(E) (i) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(ii) For purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either--

(I) a judicial order, or an enforceable written agreement or consent decree; or

(II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.

(F) (i) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(ii) The Attorney General shall--

(I) notify the Special Counsel of each civil action described under the first sentence of clause (i); and

(II) annually submit a report to Congress on the number of such civil actions in the preceding year.

(iii) The Special Counsel shall annually submit a report to Congress on the actions taken by the Special Counsel under clause (i).

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6) (A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall--

(i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

The 20-day period under clause (i) shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency's regulations under this section to receive requests under this section. The 20-day period shall not be tolled by the agency except--

(I) that the agency may make one request to the requester for information and toll the 20-day period while it is awaiting such information that it has reasonably requested from the requester under this section; or

(II) if necessary to clarify with the requester issues regarding fee assessment. In either case, the agency's receipt of the requester's response to the agency's request for information or clarification ends the tolling period.

(B)

(i) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such

notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.

(ii) With respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A), the agency shall notify the person making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. To aid the requester, each agency shall make available its FOIA Public Liaison, who shall assist in the resolution of any disputes between the requester and the agency. Refusal by the person to reasonably modify the request or arrange such an alternative time frame shall be considered as a factor in determining whether exceptional circumstances exist for purposes of subparagraph (C).

(iii) As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular requests--

(I) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(iv) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for the aggregation of certain requests by the same requestor, or by a group of requestors acting in concert, if the agency reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances specified in this subparagraph, and the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated.

(C)

(i) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(ii) For purposes of this subparagraph, the term "exceptional circumstances" does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.

(iii) Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing a request (or a modified request) under clause (ii) after being given an opportunity to do so by the agency to whom the person made the request shall be considered as a factor in determining whether exceptional circumstances exist for purposes of this subparagraph.

(D) (i) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for multitrack processing of requests for records based on the amount of work or time (or both) involved in processing requests.

(ii) Regulations under this subparagraph may provide a person making a request that does not qualify for the fastest multitrack processing an opportunity to limit the scope of the request in order to qualify for faster processing.

(iii) This subparagraph shall not be considered to affect the requirement under subparagraph (C) to exercise due diligence.

(E) (i) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records--

(I) in cases in which the person requesting the records demonstrates a compelling need; and

(II) in other cases determined by the agency.

(ii) Notwithstanding clause (i), regulations under this subparagraph must ensure--

(I) that a determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 days after the date of the request; and

(II) expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing.

(iii) An agency shall process as soon as practicable any request for records to which the agency has granted expedited processing under this subparagraph. Agency action to deny or affirm denial of a request for expedited processing pursuant to this subparagraph, and failure by an agency to respond in a timely manner to such a request shall be subject to judicial review under paragraph (4), except that the judicial review shall be based on the record before the agency at the time of the determination.

(iv) A district court of the United States shall not have jurisdiction to review an agency denial of expedited processing of a request for records after the agency has provided a complete response to the request.

(v) For purposes of this subparagraph, the term "compelling need" means--

(I) that a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.

(vi) A demonstration of a compelling need by a person making a request for expedited processing shall be made by a statement certified by such person to be true and correct to the best of such person's knowledge and belief.

(F) In denying a request for records, in whole or in part, an agency shall make a reasonable effort to estimate the volume of any requested matter the provision of which is denied, and shall provide any such estimate to the person making the request, unless providing such estimate would harm an interest protected by the exemption in subsection (b) pursuant to which the denial is made.

(7) Each agency shall--

(A) establish a system to assign an individualized tracking number for each request received that will take longer than ten days to process and provide to each person making a request the tracking number assigned to the request; and

(B) establish a telephone line or Internet service that provides information about the status of a request to the person making the request using the assigned tracking number, including--

(i) the date on which the agency originally received the request; and

(ii) an estimated date on which the agency will complete action on the request.

(b) This section does not apply to matters that are--

(1)

(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this *title [5 USCS § 552b*]), if that statute--

(A) (i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009 [enacted Oct. 28, 2009], specifically cites to this paragraph.

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such

law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological or geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

(c)

(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and--

(A) the investigation or proceeding involves a possible violation of criminal law; and

(B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings,

the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

(2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.

(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

(d) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(e) (1) On or before February 1 of each year, each agency shall submit to the Attorney General of the United States a report which shall cover the preceding fiscal year and which shall include--

(A) the number of determinations made by the agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(B)

(i) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information; and

(ii) a complete list of all statutes that the agency relies upon to authorize the agency to withhold information under subsection (b)(3), the number of occasions on which each statute was relied upon, a description of whether a court has upheld the decision of the agency to withhold information under each such statute, and a concise description of the

scope of any information withheld;

(C) the number of requests for records pending before the agency as of September 30 of the preceding year, and the median and average number of days that such requests had been pending before the agency as of that date;

(D) the number of requests for records received by the agency and the number of requests which the agency processed;

(E) the median number of days taken by the agency to process different types of requests, based on the date on which the requests were received by the agency;

(F) the average number of days for the agency to respond to a request beginning on the date on which the request was received by the agency, the median number of days for the agency to respond to such requests, and the range in number of days for the agency to respond to such requests;

(G) based on the number of business days that have elapsed since each request was originally received by the agency--

(i) the number of requests for records to which the agency has responded with a determination within a period up to and including 20 days, and in 20-day increments up to and including 200 days;

(ii) the number of requests for records to which the agency has responded with a determination within a period greater than 200 days and less than 301 days;

(iii) the number of requests for records to which the agency has responded with a determination within a period greater than 300 days and less than 401 days; and

(iv) the number of requests for records to which the agency has responded with a determination within a period greater than 400 days;

(H) the average number of days for the agency to provide the granted information beginning on the date on which the request was originally filed, the median number of days for the agency to provide the granted information, and the range in number of days for the agency to provide the granted information;

(I) the median and average number of days for the agency to respond to administrative appeals based on the date on which the appeals originally were received by the agency, the highest number of business days taken by the agency to respond to an administrative appeal, and the lowest number of business days taken by the agency to respond to an administrative appeal;

(J) data on the 10 active requests with the earliest filing dates pending at each agency, including the amount of time that has elapsed since each request was originally received by the agency;

(K) data on the 10 active administrative appeals with the earliest filing dates pending before the agency as of September 30 of the preceding year, including the number of business days that have elapsed since the requests were originally received by the agency;

(L) the number of expedited review requests that are granted and denied, the average and median number of days for adjudicating expedited review requests, and the number adjudicated within the required 10 days;

(M) the number of fee waiver requests that are granted and denied, and the average and median number of days for adjudicating fee waiver determinations;

(N) the total amount of fees collected by the agency for processing requests; and

(O) the number of full-time staff of the agency devoted to processing requests for records under this section, and the total amount expended by the agency for processing such requests.

(2) Information in each report submitted under paragraph (1) shall be expressed in terms of each principal component of the agency and for the agency overall.

(3) Each agency shall make each such report available to the public including by computer telecommunications, or if computer telecommunications means have not been established by the agency, by other electronic means. In addition, each agency shall make the raw statistical data used in its reports available electronically to the public upon request.

(4) The Attorney General of the United States shall make each report which has been made available by electronic means available at a single electronic access point. The Attorney General of the United States shall notify the Chairman and ranking minority member of the Committee on Government Reform and Oversight of the House of Representatives and the Chairman and ranking minority member of the Committees on Governmental Affairs and the Judiciary of the Senate, no later than April 1 of the year in which each such report is issued, that such reports are available by electronic means.

(5) The Attorney General of the United States, in consultation with the Director of the Office of Management and Budget, shall develop reporting and performance guidelines in connection with reports required by this subsection by October 1, 1997, and may establish additional requirements for such reports as the Attorney General determines may be useful.

(6) The Attorney General of the United States shall submit an annual report on or before April 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subparagraphs (E), (F), and (G) of subsection (a)(4). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(f) For purposes of this section, the term--

(1) "agency" as defined in section 551(1) of this *title [5 USCS § 551(1)]* includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency; and

(2) "record" and any other term used in this section in reference to information includes--

(A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and

(B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.

(g) The head of each agency shall prepare and make publicly available upon request, reference material or a guide for requesting records or information from the agency, subject to the exemptions in subsection (b), including--

(1) an index of all major information systems of the agency;

(2) a description of major information and record locator systems maintained by the agency; and

(3) a handbook for obtaining various types and categories of public information from the agency pursuant to chapter 35 of title 44 [*44 USCS §§ 3501* et seq.], and under this section.

(h) (1) There is established the Office of Government Information Services within the National Archives and Records Administration.

(2) The Office of Government Information Services shall--

(A) review policies and procedures of administrative agencies under this section;

(B) review compliance with this section by administrative agencies; and

(C) recommend policy changes to Congress and the President to improve the administration of this section.

(3) The Office of Government Information Services shall offer mediation services to resolve disputes between persons making requests under this section and administrative agencies as a non-exclusive alternative to litigation and, at the discretion of the Office, may issue advisory opinions if mediation has not resolved the dispute.

(i) The Government Accountability Office shall conduct audits of administrative agencies on the implementation of this section and issue reports detailing the results of such audits.

(j) Each agency shall designate a Chief FOIA Officer who shall be a senior official of such agency (at the Assistant Secretary or equivalent level).

(k) The Chief FOIA Officer of each agency shall, subject to the authority of the head of the agency--

(1) have agency-wide responsibility for efficient and appropriate compliance with this section;

(2) monitor implementation of this section throughout the agency and keep the head of the agency, the chief legal officer of the agency, and the Attorney General appropriately informed of the agency's performance in implementing this section;

(3) recommend to the head of the agency such adjustments to agency practices, policies, personnel, and funding as may be necessary to improve its implementation of this section;

(4) review and report to the Attorney General, through the head of the agency, at such times and in such formats as the Attorney General may direct, on the agency's performance in implementing this section;

(5) facilitate public understanding of the purposes of the statutory exemptions of this section by including concise descriptions of the exemptions in both the agency's handbook issued under subsection (g), and the agency's annual report on this section, and by providing an overview, where appropriate, of certain general categories of agency records to which those exemptions apply; and

(6) designate one or more FOIA Public Liaisons.

(l) FOIA Public Liaisons shall report to the agency Chief FOIA Officer and shall serve as supervisory officials to whom a requester under this section can raise concerns about the service the requester has received from the FOIA Requester Center, following an initial response from the FOIA Requester Center Staff. FOIA Public Liaisons shall be responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.

TITLE 44. PUBLIC PRINTING AND DOCUMENTS
CHAPTER 21. NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

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44 USCS § 2107

§ 2107. Acceptance of records for historical preservation

When it appears to the Archivist to be in the public interest, he may--

(1) accept for deposit with the National Archives of the United States the records of a Federal agency, the Congress, the Architect of the Capitol, or the Supreme Court determined by the Archivist of the United States to have sufficient historical or other value to warrant their continued preservation by the United States Government;

(2) direct and effect the transfer to the National Archives of the United States of records of a Federal agency that have been in existence for more than thirty years and determined by the Archivist of the United States to have sufficient historical or other value to warrant their continued preservation by the United States Government, unless the head of the agency which has custody of them certifies in writing to the Archivist that they must be retained in his custody for use in the conduct of the regular current business of the agency;

(3) direct and effect, with the approval of the head of the originating agency, or if the existence of the agency has been terminated, then with the approval of his successor in function, if any, the transfer of records deposited or approved for deposit with the National Archives of the United States to public or educational institutions or associations; title to the records to remain vested in the United States unless otherwise authorized by Congress; and

(4) transfer materials from private sources authorized to be received by the Archivist by section 2111 of this *title [44 USCS § 2111*].

*** Current through PL 113-36, approved 9/18/13 ***

TITLE 44. PUBLIC PRINTING AND DOCUMENTS
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44 USCS § 2108

§ 2108. Responsibility for custody, use, and withdrawal of records

(a) The Archivist shall be responsible for the custody, use, and withdrawal of records transferred to him. When records, the use of which is subject to statutory limitations and restrictions, are so transferred, permissive and restrictive statutory provisions with respect to the examination and use of records applicable to the head of the agency from which the records were transferred or to employees of that agency are applicable to the Archivist and to the employees of the National Archives and Records Administration, respectively. Except as provided in subsection (b) of this section, when the head of a Federal agency states, in writing, restrictions that appear to him to be necessary or desirable in the public interest with respect to the use or examination of records being considered for transfer from his custody to the Archivist, the Archivist shall, if he concurs,[,] impose such restrictions on the records so transferred, and may not relax or remove such restrictions without the written concurrence of the head of the agency from which the material was transferred, or of his successor in function, if any. In the event that a Federal agency is terminated and there is no successor in function, the Archivist is authorized to relax, remove, or impose restrictions on such agency's records when he determines that such action is in the public interest. Statutory and other restrictions referred to in this subsection shall remain in force until the records have been in existence for thirty years unless the Archivist by order, having consulted with the head of the transferring Federal agency or his successor in function, determines, with respect to specific bodies of records, that for reasons consistent with standards established in relevant statutory law, such restrictions shall remain in force for a longer period. Restriction on the use or examination of records deposited with the National Archives of the United States imposed by section 3 of the National Archives Act, approved June 19, 1934, shall continue in force regardless of the expiration of the tenure of office of the official who imposed them but may be removed or relaxed by the Archivist with the concurrence in writing of the head of the agency from which material was transferred or of his successor in function, if any.

(b) With regard to the census and survey records of the Bureau of the Census containing data identifying individuals enumerated in population censuses, any release pursuant to this section of such identifying information contained in such records shall be made by the Archivist pursuant to the specifications and agreements set forth in the exchange of correspondence on or about the date of October 10, 1952, between the Director of the Bureau of the Census and the Archivist of the United States, together with all amendments thereto, now or hereafter entered into between the director of the Bureau of the Census and the Archivist of the United States. Such amendments, if any, shall be published in the Register.

*** This section is current through the September 19, 2013 ***
*** issue of the Federal Register ***

TITLE 36 -- PARKS, FORESTS, AND PUBLIC PROPERTY
CHAPTER XII -- NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
SUBCHAPTER B -- RECORDS MANAGEMENT
PART 1220 -- FEDERAL RECORDS; GENERAL
SUBPART A -- GENERAL PROVISIONS OF SUBCHAPTER B

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36 CFR 1220.18

§ 1220.18 What definitions apply to the regulations in Subchapter B?

As used in subchapter B--

Adequate and proper documentation means a record of the conduct of Government business that is complete and accurate to the extent required to document the organization, functions, policies, decisions, procedures, and essential transactions of the agency and that is designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities.

Agency (see Executive agency and Federal agency).

Appraisal is the process by which the NARA determines the value and the final disposition of Federal records, designating them either temporary or permanent.

Commercial records storage facility is a private sector commercial facility that offers records storage, retrieval, and disposition services.

Comprehensive schedule is an agency manual or directive containing descriptions of and disposition instructions for documentary materials in all physical forms, record and nonrecord, created by a Federal agency or major component of an Executive department. Unless taken from General Records Schedules (GRS) issued by NARA, the disposition instructions for records must be approved by NARA on one or more Standard Form(s) 115, Request for Records Disposition Authority, prior to issuance by the agency. The disposition instructions for nonrecord materials are established by the agency and do not require NARA approval. See also records schedule.

Contingent records are records whose final disposition is dependent on an action or event, such as sale of property or destruction of a facility, which will take place at some unspecified time in the future.

Disposition means those actions taken regarding records no longer needed for the conduct of the regular current business of the agency.

Disposition authority means the legal authorization for the retention and disposal of records. For Federal records it

is found on SF 115s, Request for Records Disposition Authority, which have been approved by the Archivist of the United States. For nonrecord materials, the disposition is established by the creating or custodial agency. See also records schedule.

Documentary materials is a collective term that refers to recorded information, regardless of the medium or the method or circumstances of recording.

Electronic record means any information that is recorded in a form that only a computer can process and that satisfies the definition of a Federal record under the Federal Records Act. The term includes both record content and associated metadata that the agency determines is required to meet agency business needs.

Evaluation means the selective or comprehensive inspection, audit, or review of one or more Federal agency records management programs for effectiveness and for compliance with applicable laws and regulations. It includes recommendations for correcting or improving records management policies and procedures, and follow-up activities, including reporting on and implementing the recommendations.

Executive agency means any executive department or independent establishment in the Executive branch of the U.S. Government, including any wholly owned Government corporation.

Federal agency means any executive agency or any establishment in the Legislative or Judicial branches of the Government (except the Supreme Court, Senate, the House of Representatives, and the Architect of the Capitol and any activities under his direction). *(44 U.S.C. 2901*(14)).

Federal records (see records).

File means an arrangement of records. The term denotes papers, photographs, maps, electronic information, or other recorded information regardless of physical form or characteristics, accumulated or maintained in filing equipment, boxes, on electronic media, or on shelves, and occupying office or storage space.

Information system means the organized collection, processing, transmission, and dissemination of information in accordance with defined procedures, whether automated or manual.

Metadata consists of preserved contextual information describing the history, tracking, and/or management of an electronic document.

National Archives of the United States is the collection of all records selected by the Archivist of the United States because they have sufficient historical or other value to warrant their continued preservation by the Federal Government and that have been transferred to the legal custody of the Archivist of the United States, currently through execution of a Standard Form (SF) 258 (Agreement to Transfer Records to the National Archives of the United States). See also permanent record.

Nonrecord materials are those Federally owned informational materials that do not meet the statutory definition of records *(44 U.S.C. 3301)* or that have been excluded from coverage by the definition. Excluded materials are extra copies of documents kept only for reference, stocks of publications and processed documents, and library or museum materials intended solely for reference or exhibit.

Permanent record means any Federal record that has been determined by NARA to have sufficient value to warrant its preservation in the National Archives of the United States, even while it remains in agency custody. Permanent records are those for which the disposition is permanent on SF 115, Request for Records Disposition Authority, approved by NARA on or after May 14, 1973. The term also includes all records accessioned by NARA into the National Archives of the United States.

Personal files (also called personal papers) are documentary materials belonging to an individual that are not used to conduct agency business. Personal files are excluded from the definition of Federal records and are not owned by the Government.

Recordkeeping requirements means all statements in statutes, regulations, and agency directives or other authoritative issuances, that provide general or specific requirements for Federal agency personnel on particular records to be created and maintained by the agency.

Recordkeeping system is a manual or electronic system that captures, organizes, and categorizes records to facilitate their preservation, retrieval, use, and disposition.

Records or Federal records is defined in *44 U.S.C. 3301* as including "all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the Government or because of the informational value of the data in them *(44 U.S.C. 3301).*" (See also § 1222.10 of this part for an explanation of this definition).

Records center is defined in *44 U.S.C. 2901*(6) as an establishment maintained and operated by the Archivist (NARA Federal Records Center) or by another Federal agency primarily for the storage, servicing, security, and processing of records which need to be preserved for varying periods of time and need not be retained in office equipment or space. See also records storage facility.

Records management, as used in subchapter B, means the planning, controlling, directing, organizing, training, promoting, and other managerial activities involved with respect to records creation, records maintenance and use, and records disposition in order to achieve adequate and proper documentation of the policies and transactions of the Federal Government and effective and economical management of agency operations.

Records schedule or schedule means any of the following:

(1) A Standard Form 115, Request for Records Disposition Authority that has been approved by NARA to authorize the disposition of Federal records;

(2) A General Records Schedule (GRS) issued by NARA; or

(3) A published agency manual or directive containing the records descriptions and disposition instructions approved by NARA on one or more SF 115s or issued by NARA in the GRS. See also comprehensive schedule.

Records storage facility is a records center or a commercial records storage facility, as defined in this section, i.e., a facility used by a Federal agency to store Federal records, whether that facility is operated and maintained by the agency, by NARA, by another Federal agency, or by a private commercial entity.

Retention period is the length of time that records must be kept.

Series means file units or documents arranged according to a filing or classification system or kept together because they relate to a particular subject or function, result from the same activity, document a specific kind of transaction, take a particular physical form, or have some other relationship arising out of their creation, receipt, or use, such as restrictions on access and use. Also called a records series.

Temporary record means any Federal record that has been determined by the Archivist of the United States to have insufficient value (on the basis of current standards) to warrant its preservation by the National Archives and Records

Administration. This determination may take the form of:

(1) Records designated as disposable in an agency records disposition schedule approved by NARA (SF 115, Request for Records Disposition Authority); or

(2) Records designated as disposable in a General Records Schedule.

Unscheduled records are Federal records whose final disposition has not been approved by NARA on a SF 115, Request for Records Disposition Authority. Such records must be treated as permanent until a final disposition is approved.

HISTORY: *[50 FR 26930,* June 28, 1985; *64 FR 67662, 67664,* Dec. 2, 1999; *74 FR 51004, 51014,* Oct. 2, 2009]

AUTHORITY: AUTHORITY NOTE APPLICABLE TO ENTIRE PART:
44 U.S.C. Chapters 21, 29, 31, and 33.

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TITLE 36 -- PARKS, FORESTS, AND PUBLIC PROPERTY
CHAPTER XII -- NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
SUBCHAPTER B -- RECORDS MANAGEMENT
PART 1225--SCHEDULING RECORDS

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36 CFR 1225.12

§ 1225.12 How are records schedules developed?

The principal steps in developing agency records schedules are listed below. Additional details that may be helpful are provided in the NARA records management handbook, Disposition of Federal Records at http://www.archives.gov/records-mgmt/publications/disposition-o f-federal-records/index.html.

(a) Conduct a functional or work process analysis to identify the functions or activities performed by each organization or unit. Identify the recordkeeping requirements for each.

(b) Prepare an inventory for each function or activity to identify records series, systems, and nonrecord materials.

(c) Determine the appropriate scope of the records schedule items, e.g., individual series/system component, work process, group of related work processes, or broad program area.

(d) Evaluate the period of time the agency needs each records series or system based on use, value to agency operations and oversight agencies, and legal obligations. Determine whether a fixed or flexible retention period is more appropriate. For records proposed as temporary, specify a retention period that meets agency business needs and legal requirements. For records proposed as permanent records, identify how long the records are needed by the agency before they are transferred to NARA.

(e) Determine whether the proposed disposition should be limited to records in a specific medium. Records schedules submitted to NARA for approval on or after December 17, 2007, are media neutral, i.e., the disposition instructions apply to the described records in any medium, unless the schedule identifies a specific medium for a specific series.

(f) Compile a schedule for records, including descriptions and disposition instructions for each item, using an SF 115.

(g) Obtain internal clearances, as appropriate, from program offices and other stakeholders such as the legal counsel, chief information officer, electronic systems manager, and agency historian, as appropriate.

(h) Obtain approval from the Government Accountability Office (GAO), when required (see § 1225.20(a) for the

categories that require GAO approval).

(i) Submit an SF 115 covering only new or revised record items to NARA for approval (see § 1225.18(d)).

(j) The disposition instructions on SF 115s approved by the Archivist of the United States are mandatory *(44 U.S.C. 3314).*

AUTHORITY: AUTHORITY NOTE APPLICABLE TO ENTIRE PART:
44 U.S.C. 2111, 2904, 2905, 3102, and Chapter 33.

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36 CFR 1225.14

§ 1225.14 How do agencies schedule permanent records?

(a) Identification. Identify potentially permanent records. Useful guidelines in the identification of permanent Federal records may be found in the NARA records management handbook, Disposition of Federal Records (see § 1225.12 for the Web site address of this publication).

(b) Requirements. Each item proposed for permanent retention on an SF 115 must include the following:

(1) Descriptive title of the records series, component of an information system, or appropriate aggregation of series and/or information system components. The descriptive title must be meaningful to agency personnel;

(2) Complete description of the records including:

(i) Agency function;

(ii) Physical type, if appropriate;

(iii) Inclusive dates;

(iv) Statement of how records are arranged;

(v) Statement of restrictions on access under the FOIA if the records are proposed for immediate transfer;

(3) Disposition instructions developed using the following guidelines:

(i) If the records series or system is current and continuing, the SF 115 must specify the period of time after which

the records will be transferred to the National Archives of the United States, and if appropriate, the time period for returning inactive records to an approved records storage facility.

(ii) If the records series or system is nonrecurring, i.e., no additional records will be created or acquired, the agency must propose either that the records be transferred to the National Archives of the United States immediately or set transfer for a fixed date in the future.

(c) Determination. NARA will appraise the records to determine if they have sufficient value to warrant archival permanent preservation. If NARA determines either that records are not permanent or that the transfer instructions are not appropriate:

(1) NARA will notify the agency and negotiate an appropriate disposition. The disposition instruction on the SF 115 will be modified prior to NARA approval; or

(2) If NARA and the agency cannot agree on the disposition instruction for an item(s), the items(s) will be withdrawn. In these cases, the agency must submit an SF 115 with a revised proposal for disposition; unscheduled records must be treated as permanent until a new schedule is approved.

HISTORY: *[74 FR 51004, 51014,* Oct. 2, 2009]

AUTHORITY: AUTHORITY NOTE APPLICABLE TO ENTIRE PART:
44 U.S.C. 2111, 2904, 2905, 3102, and Chapter 33.

NOTES: [EFFECTIVE DATE NOTE: *74 FR 51004, 51014,* Oct. 2, 2009, revised Subchapter B, effective Nov. 2, 2009.]

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36 CFR 1225.18

§ 1225.18 How do agencies request records disposition authority?

(a) Federal agencies submit an SF 115 to NARA to request authority to schedule (establish the disposition for) permanent and temporary records, either on a recurring or one-time basis.

(b) SF 115s include only records not covered by the General Records Schedules (GRS) (see part 1227 of this subchapter), deviations from the GRS (see § 1227.12 of this subchapter), or previously scheduled records requiring changes in retention periods or substantive changes in description.

(c) SF 115s do not include nonrecord material. The disposition of nonrecord materials is determined by agencies and does not require NARA approval.

(d) The following elements are required on a SF 115:

(1) Title and description of the records covered by each item.

(2) Disposition instructions that can be readily applied. Records schedules must provide for:

(i) The destruction of records that no longer have sufficient value to justify further retention (see § 1224.10(b) of this subchapter); and

(ii) The identification of potentially permanent records and provisions for their transfer to the legal custody of NARA.

(3) Certification that the records proposed for disposition are not now needed for the business of the agency or will not be needed after the specified retention periods. The signature of the authorized agency representative on the SF 115 provides certification.

(e) NARA will return SF 115s that are improperly prepared. The agency must make the necessary corrections and resubmit the form to NARA.

HISTORY: *[74 FR 51004, 51014,* Oct. 2, 2009]

AUTHORITY: AUTHORITY NOTE APPLICABLE TO ENTIRE PART:
44 U.S.C. 2111, 2904, 2905, 3102, and Chapter 33.

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PART 1235--TRANSFER OF RECORDS TO THE NATIONAL ARCHIVES OF THE UNITED STATES
SUBPART A--GENERAL TRANSFER REQUIREMENTS

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36 CFR 1235.20

§ 1235.20 How do agencies indicate that transferred records contain information that is restricted from public access?

When completing an SF 258, agencies must indicate restrictions on the use and examination of records and attach a written justification. The justification must cite the statute or Freedom of Information Act (FOIA) exemption *(5 U.S.C. 552*(b) as amended), that authorizes the restrictions.

HISTORY: *[74 FR 51004, 51014,* Oct. 2, 2009]

AUTHORITY: AUTHORITY NOTE APPLICABLE TO ENTIRE PART:
44 U.S.C. 2107 and 2108.

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TITLE 36 -- PARKS, FORESTS, AND PUBLIC PROPERTY
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SUBPART B--ADMINISTRATION OF TRANSFERRED RECORDS

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36 CFR 1235.32

§ 1235.32 How does NARA handle restrictions on transferred records?

(a) For records less than 30 years old. Unless required by law, NARA will remove or relax restrictions on transferred records less than 30 years old only with the written concurrence of the transferring agency or, if applicable, its successor agency. If the transferring agency no longer exists, and there is no successor, the Archivist may relax, remove, or impose restrictions to serve the public interest.

(b) For records more than 30 years old.

(1) After records are more than 30 years old, most statutory and other restrictions on transferred records expire. NARA, however, after consulting with the transferring agency, may keep the restrictions in force for a longer period.

(2) See part 1256 of this chapter for restrictions on specific categories of records, including national security classified information and information that would invade the privacy of an individual that NARA restricts beyond 30 years.

HISTORY: *[74 FR 51004, 51014,* Oct. 2, 2009]

AUTHORITY: AUTHORITY NOTE APPLICABLE TO ENTIRE PART:
44 U.S.C. 2107 and 2108.

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