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

No. 13 – 5127

**Cause of Action,
*Plaintiff-Appellant,***

v.

**National Archives 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)

APPENDIX

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October 1, 2013

TABLE OF CONTENTS

District Court Docket, <i>Cause of Action v. Nat’l Archives & Records Admin.</i> , No. 12-1342 (D.D.C.)	A1
Complaint [Doc. 1]	A5
Cause of Action’s FOIA Request [Doc. 1-8]	A14
NARA’s Denial [Doc. 1-9]	A21
Cause of Action’s Appeal [Doc. 1-10]	A23
NARA’s Denial of Cause of Action’s Appeal [Doc. 1-12]	A27
Angelides’ February 10, 2011 Letter to the Archivist [Doc. 1-12]	A32
FCIC’s Executed Agreement to Transfer Records to the National Archives of the United States (SF-258) [Doc. 1-12]	A35
Archivist’s April 18, 2012 Letter to Wallison [Doc. 1-13]	A37
NARA’s Motion to Dismiss or in the Alternative for Summary Judgment [Doc. 8]	A39
NARA’s Memorandum Supporting its Motion to Dismiss or in the Alternative for Summary Judgment [Doc. 8-1]	A42
Mills Declaration for NARA [Doc. 8-3]	A71
Archives’ Vision Statement [Doc. 8-3]	A83
Types of Presidential Materials [Doc. 8-3]	A84
NARA 101, <i>NARA Organization and Delegations, Legislative Archives, Presidential Libraries, and Museum Services</i> [Doc. 8-3]	A86
Center for Legislative Archives, <i>Congressional Records</i> [Doc 8-3]	A94
Society of American Archivists, <i>Glossary of Archival and Records Terminology: Original Order</i> [Doc. 8-3]	A95
Maygene F. Daniels, <i>Introduction to Archival Terminology</i> [Doc. 8-3]	A96
Society of American Archivists, <i>Glossary of Archival and Records Terminology: Provenance</i> [Doc. 8-3]	A103
Oliver W. Holmes, <i>Archival Arrangement</i> [Doc. 8-3]	A104
Wayne C. Grover, <i>The Archivist Code</i> [Doc. 8-3]	A116
Society of American Archivists, <i>SAA Core Values Statement and Code of Ethics of Archivists</i> [Doc. 8-3]	A118

Fulgham Declaration for NARA [Doc. 8-4]	A122
9/11 Commission Co-Chairs' August 20, 2004 Letter to NARA.....	A140
NARA's Progress in Processing 9/11 Commission's Records.....	A142
NARA's 9/11 Commission Memoranda for the Records [Doc. 8-3]	A145
NARA's <i>Guidance Defining Exemption Categories for 9/11 Commission Records</i> [Doc. 8-3].....	A182
NARA's <i>Guidelines for Appealing Denials of Withheld Records of the 9/11 Commission</i> [Doc. 8-3]	A186
FCIC's Request for Records Disposition with NARA (NARA Standard Form 115) [Doc. 8-3]	A189
FAQ on the 9/11 Commission Records [Doc. 8-3].....	A191
Cause of Action's Memorandum Opposing NARA's Dispositive Motions [Doc. 11]	A194
Cause of Action's Statement of Material Facts Not in Dispute [Doc. 11]	A211
Cause of Action's Memorandum Supporting its Cross-Motion for Summary Judgment [Doc. 11].....	A217
Holder's March 19, 2009 Open Government Memorandum [Doc. 11-1]	A242
FCIC's January 20, 2011 Press Release [Doc. 11-3].....	A244
Blank SF 258 with Instructions [Doc. 11-4].....	A246
Stanford Law School's Website [Doc. 11-5].....	A248
House Oversight Committee's February 18, 2011 Letter to NARA [Doc. 11-6]	A250
Minority Staff of House Oversight Committee's July 13, 2011 Report, <i>An Examination of Attacks Against the Financial Crisis Inquiry Commission</i> [Doc. 11-7]	A252
Wallison's March 13, 2012 Letter to Archivist [Doc. 11-8].....	A289
Wallison's April 5, 2012 Letter to Archivist [Doc. 11-9].....	A291
Epstein Declaration [Doc. 11-10]	A293
Wallison Declaration [Doc. 11-11].....	A297

Cause of Action’s Motion to Strike NARA’s Affidavits, or for Leave to Take Limited Discovery, and Cause of Action’s Memorandum in Support Thereof [Doc. 14]	A302
NARA’s Opposition to Cause of Action’s Motion to Strike [Doc. 15].....	A312
NARA’s Opposition to Cause of Action’s Cross-Motion, and NARA’s Reply Supporting Its Motion to Dismiss or in the Alternative for Summary Judgment [Doc. 16]	A325
NARA’s Statement of Material Facts Not in Dispute [Doc. 16-1].....	A353
Fulgham Supplemental Declaration [Doc. 16-2]	A358
Cause of Action’s Reply Supporting its Motion to Strike [Doc. 18].....	A361
Cause of Action’s Reply Supporting its Cross-Motion for Summary Judgment [Doc. 19] ..	A371
District Court Order [Doc. 20].....	A388
Memorandum Opinion [Doc. 21]	A389
Notice of Appeal [Doc. 22].....	A401

U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:12-cv-01342-JEB

CAUSE OF ACTION v. NATIONAL ARCHIVES AND
RECORDS ADMINISTRATION

Assigned to: Judge James E. Boasberg

Case in other court: 13-05127

Cause: 05:552 Freedom of Information Act

Date Filed: 08/14/2012

Date Terminated: 03/01/2013

Jury Demand: None

Nature of Suit: 895 Freedom of Information
Act

Jurisdiction: Federal Question

Plaintiff

CAUSE OF ACTION

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V.

Defendant

**NATIONAL ARCHIVES AND
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Date Filed	#	Docket Text
08/14/2012	1	COMPLAINT against NATIONAL ARCHIVES AND RECORDS ADMINISTRATION (Filing fee \$ 350 receipt number 0090-3036720) filed by CAUSE OF ACTION. (Attachments: # 1 Civil Cover Sheet, # 2 Supplement Corporate Disclosure Certification, # 3 Summons, # 4 Summons, # 5 Summons, # 6 Exhibit, # 7 Exhibit, # 8 Exhibit, # 9 Exhibit, # 10 Exhibit, # 11 Exhibit, # 12 Exhibit, # 13 Exhibit) (Groen, Karen) (Entered: 08/14/2012)
08/14/2012		Case Assigned to Judge James E. Boasberg. (sth,) (Entered: 08/15/2012)
08/15/2012	2	ELECTRONIC SUMMONS (3) Issued as to NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, U.S. Attorney and U.S. Attorney General (Attachments: # 1 Summons, # 2 Summons, # 3 Summons)(sth,) (Entered: 08/15/2012)
08/24/2012	3	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed as to the United States Attorney. Date of Service Upon United States Attorney on 8/20/2012. Answer due for ALL FEDERAL DEFENDANTS by 9/19/2012. (Groen, Karen) (Entered: 08/24/2012)
08/24/2012	4	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed on United States Attorney General. Date of Service Upon United States Attorney General 8/20/2012. (Groen, Karen) (Entered: 08/24/2012)
08/24/2012	5	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed. NATIONAL ARCHIVES AND RECORDS ADMINISTRATION served on 8/20/2012 (Groen, Karen) (Entered: 08/24/2012)
09/17/2012	6	NOTICE of Appearance by Daniel Schwei on behalf of NATIONAL ARCHIVES AND RECORDS ADMINISTRATION (Schwei, Daniel) (Entered: 09/17/2012)
09/18/2012	7	Consent MOTION for Extension of Time to <i>Respond to Complaint</i> by NATIONAL ARCHIVES AND RECORDS ADMINISTRATION (Attachments: # 1 Text of Proposed Order)(Schwei, Daniel) (Entered: 09/18/2012)
09/18/2012		MINUTE ORDER granting 7 Consent Motion for Extension of Time to Respond to Complaint. Defendants shall Answer or otherwise respond to the Complaint on or before October 31, 2012. Signed by Judge James E. Boasberg on 9/18/2012. (lcjeb3) Modified event title on 9/20/2012 (znmw,). (Entered: 09/18/2012)
09/19/2012		Set/Reset Deadlines: Defendants shall Answer or otherwise respond to the Complaint on or before 10/31/2012. (ad) (Entered: 09/19/2012)

10/31/2012	8	MOTION to Dismiss <i>or in the Alternative for Summary Judgment</i> by NATIONAL ARCHIVES AND RECORDS ADMINISTRATION (Attachments: # 1 Memorandum in Support, # 2 Text of Proposed Order, # 3 Declaration of Thomas E. Mills, # 4 Declaration of Robert Matthew Fulgham, Jr.)(Schwei, Daniel). Added MOTION for Summary Judgment on 11/1/2012 (td,). (Entered: 10/31/2012)
11/01/2012	9	NOTICE of Change of Address by Karen Marie Groen (Groen, Karen) (Entered: 11/01/2012)
11/15/2012	10	Unopposed MOTION for Extension of Time to <i>Amend Briefing Schedule</i> by CAUSE OF ACTION (Attachments: # 1 Text of Proposed Order)(Groen, Karen) (Entered: 11/15/2012)
11/15/2012		MINUTE ORDER granting 10 Motion to Modify Briefing Schedule. Plaintiff's Opposition will now be due December 19, 2012, with Defendant's reply due January 11, 2013. Signed by Judge James E. Boasberg on 11/15/12. (lcjeb3) (Entered: 11/15/2012)
11/16/2012		Set/Reset Deadlines: Plaintiff's Opposition will now be due 12/19/2012, with Defendant's reply due 1/11/2013. (ad) (Entered: 11/16/2012)
12/19/2012	11	Memorandum in opposition to re 8 MOTION to Dismiss <i>or in the Alternative for Summary Judgment</i> MOTION for Summary Judgment filed by CAUSE OF ACTION. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8, # 9 Exhibit 9, # 10 Exhibit 10_Epstein Declaration, # 11 Exhibit 11_Wallison Declaration, # 12 Text of Proposed Order)(Groen, Karen) (Entered: 12/19/2012)
12/19/2012	12	MOTION to Strike 8 MOTION to Dismiss <i>or in the Alternative for Summary Judgment</i> MOTION for Summary Judgment by CAUSE OF ACTION (Attachments: # 1 Text of Proposed Order)(Groen, Karen) (Entered: 12/19/2012)
12/19/2012	13	MOTION for Summary Judgment by CAUSE OF ACTION; (See docket entry no. 11 to view document) (td,) (Entered: 12/20/2012)
12/20/2012		MINUTE ORDER: The Court hereby ORDERS that Plaintiff's Motion to Strike is DENIED WITHOUT PREJUDICE for failure to comply with LCvR 7(m). Signed by Judge James E. Boasberg on 12/20/2012. (lcjeb3) (Entered: 12/20/2012)
12/20/2012	14	MOTION to Strike 8 MOTION to Dismiss <i>or in the Alternative for Summary Judgment</i> MOTION for Summary Judgment (<i>Corrected</i>) by CAUSE OF ACTION (Attachments: # 1 Text of Proposed Order)(Groen, Karen) (Entered: 12/20/2012)
01/07/2013	15	Memorandum in opposition to re 14 MOTION to Strike 8 MOTION to Dismiss <i>or in the Alternative for Summary Judgment</i> MOTION for Summary Judgment (<i>Corrected</i>) filed by NATIONAL ARCHIVES AND RECORDS ADMINISTRATION. (Schwei, Daniel) (Entered: 01/07/2013)
01/11/2013	16	REPLY to opposition to motion re 8 MOTION to Dismiss <i>or in the Alternative for Summary Judgment</i> MOTION for Summary Judgment filed by NATIONAL

		ARCHIVES AND RECORDS ADMINISTRATION. (Attachments: # 1 Statement of Facts, # 2 Supplement to Fulgham Declaration)(Schwei, Daniel) (Entered: 01/11/2013)
01/11/2013	17	Memorandum in opposition to re 13 MOTION for Summary Judgment filed by NATIONAL ARCHIVES AND RECORDS ADMINISTRATION. (Attachments: # 1 Statement of Facts, # 2 Supplement to Fulgham Declaration)(Schwei, Daniel) (Entered: 01/11/2013)
01/14/2013	18	REPLY to opposition to motion re 14 MOTION to Strike 8 MOTION to Dismiss <i>or in the Alternative for Summary Judgment</i> MOTION for Summary Judgment (<i>Corrected</i>) filed by CAUSE OF ACTION. (Groen, Karen) (Entered: 01/14/2013)
01/22/2013	19	REPLY to opposition to motion re 13 MOTION for Summary Judgment filed by CAUSE OF ACTION. (Epstein, Daniel) (Entered: 01/22/2013)
03/01/2013	20	ORDER: Defendant's 8 Motion to Dismiss is GRANTED; Plaintiff's 13 Cross-Motion for Summary Judgment is DENIED; Plaintiff's 14 Motion to Strike is DENIED AS MOOT; and the case is DISMISSED WITH PREJUDICE. Signed by Judge James E. Boasberg on 3/1/13. (lcjeb4) (Entered: 03/01/2013)
03/01/2013	21	MEMORANDUM OPINION to 20 Order. Signed by Judge James E. Boasberg on 3/1/13. (lcjeb4) (Entered: 03/01/2013)
04/29/2013	22	NOTICE OF APPEAL TO DC CIRCUIT COURT as to 20 Order on Motion to Dismiss, Order on Motion for Summary Judgment,, Order on Motion to Strike,,, by CAUSE OF ACTION. Filing fee \$ 455, receipt number 0090-3299753. Fee Status: Fee Paid. Parties have been notified. (Epstein, Daniel) (Entered: 04/29/2013)
04/30/2013	23	Transmission of the Notice of Appeal, Order Appealed, and Docket Sheet to US Court of Appeals. re 22 Notice of Appeal to DC Circuit Court,. (td,) (Entered: 04/30/2013)
05/01/2013		USCA Case Number 13-5127 for 22 Notice of Appeal to DC Circuit Court, filed by CAUSE OF ACTION. (td,) (Entered: 05/01/2013)

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Washington, D.C. 20037, is a non-partisan, non-profit organization that uses public advocacy and legal reform strategies to ensure greater transparency in government and protect taxpayer interests and economic freedom. Plaintiff, who requested certain documents under FOIA, intends to disseminate the requested documents to its supporters and benefactors, government officials, appropriate news media, and to the American public at large. The documents Plaintiff seeks are likely to contribute significantly to the public's understanding of the operations and activities of the Financial Crisis Inquiry Commission ("FCIC") and National Archives and Records Administration ("NARA"). Plaintiff is empowered to undertake educational and other programs to promote and protect the public interest in connection with this and other matters.

4. Defendant, National Archives and Records Administration ("NARA"), is a 5 U.S.C. § 552(f)(1) "agency" and an instrumentality of the United States. NARA has possession, custody, and control of the records that are the subject of this Complaint, but has illegally denied CoA access to same.

FACTS

5. Section 5 of the Fraud Enforcement and Recovery Act of 2009 ("FERA"), Pub. Law No. 111-21, § 5, 123 Stat. 1617, 1625-31 (2009) created the Financial Crisis Inquiry Commission ("FCIC") to report to Congress and the President its findings and conclusions on the causes of the U.S. financial and economic crisis.
6. FCIC was directed to advise the Attorney General of the United States of any person that may have violated federal law in connection with the financial crisis.
7. FERA did not exempt FCIC, or other agencies in possession or control of FCIC records, from compliance with the Freedom of Information Act, 5 U.S.C. § 552 *et seq.* ("FOIA").

8. As authorized by 5 U.S.C. App. II § 4(b) of the Federal Advisory Committee Act (FACA), Section 5(g) of the FERA specifically exempts the FCIC from the disclosure requirements that the FACA—which only applies to bodies that, *inter alia*, advise the Executive branch per 5 U.S.C. App. II § 3(2)—would otherwise impose.
9. Section 5(b)(2)(B) of the FERA explicitly prohibited members of Congress and their employees from serving as members of the FCIC.
10. No members of Congress or their employees served on the FCIC.
11. FCIC’s investigation included nineteen (19) days of public hearings and more than seven hundred (700) witness interviews.
12. On or around February 13, 2011, without any express Congressional authorization, the FCIC, on its own initiative, selectively released records including, e-mails, audio recordings and transcripts of interviews, and reports and fact sheets developed by FCIC staff— to Stanford Law School ostensibly for public distribution.
13. Although Section 5(h) of the FERA provided that the FCIC’s report on the financial crisis was due on December 10, 2010, the FCIC did not deliver its statutorily mandated report to the President, Congress, and the public at large until January 27, 2011.
14. Pursuant to FERA, the FCIC terminated on February 13, 2011, without a successor in function.
15. On February 10, 2011, Phil Angelides, FCIC Chairman, sent a letter to Archivist of the United States, David Ferriero (“Letter”), stating his position that, with the sole exception of FCIC records that the Commission had previously selected to release to the public on its own initiative, NARA should impose a five-year categorical bar on public access to FCIC records, claiming that FCIC records are not subject to FOIA. (Exhibit 1).

16. Chairman Angelides's letter regarding the release of FCIC records did not reflect the views of one or more of the Commissioners on the FCIC; for example, Commissioner Peter Wallison believed that the public should have access to all FCIC documents except those records provided to the FCIC on condition of confidentiality. Wallison was not even aware of this Letter, which expresses a position materially inconsistent with his own views.
17. FCIC did not have either a legal obligation to transfer, or a regular, established practice of transferring its records to NARA. However, on or about February 11, 2011, FCIC entered into a Standard Form Agreement (using Standard Form 258) to Transfer Records to the National Archives of the United States (the "Agreement"), thereby transferring legal custody of FCIC records to Defendant from the FCIC. (Exhibit 2).
18. On information and belief, Sarah Zuckerman, whose signature appears on the "Agency Approval" portion of the Agreement and purportedly was authorized to execute the Agreement on behalf of the FCIC, was a low-level staff member on the FCIC on or about February 11, 2011.
19. In the Agreement, the certification by the "transferring agency" (FCIC) that "any constrictions on the use of these records are in conformance with the requirements of 5 U.S.C. § 552 [i.e. FOIA]," was crossed out by a hand-drawn line.
20. The Terms of Agreement section of the Agreement also provides that the transfer of FCIC records is in accordance with 44 U.S.C. § 2108.
21. The Terms of Agreement did not provide that the FCIC documents and communications were transferred to Defendant pursuant to 44 U.S.C. § 2118, which pertains to transfer of records from Congress and its committees.

22. The Terms of Agreement section of the Agreement provided that the transfer of FCIC records is in accordance with 44 U.S.C. § 2107(1), which, *inter alia*, authorizes Defendant to accept for deposit “the records of a Federal Agency,” so long as the Archivist of the United States believes it “to be in the public interest.”
23. On information and belief, Congress did not through letter, resolution, or any other expression of intent, provide instructions regarding NARA’s use and/or disclosure of the requested FCIC records.
24. On information and belief, the House Committee on Oversight and Government Reform (“Oversight Committee”) requested FCIC records, including e-mails, from FCIC in late 2010 and early 2011.
25. On information and belief, NARA produced many or all of the records requested by the Oversight Committee in an electronic format on electronic discs.
26. On information and belief, NARA’s production was not pursuant to a subpoena or any other form of legally-compelled disclosure.
27. On information and belief, the FCIC records produced to the Oversight Committee by NARA had been concatenated or otherwise assembled, organized, cataloged, or combined in a searchable format prior thereto.
28. On information and belief, certain of the FCIC records produced to the Oversight Committee by NARA were received in the form of database files, which were subsequently uploaded into Concordance, a form of discovery management software, by the Oversight Committee.
29. On information and belief, NARA has, at minimum, created database files of the FCIC records.

30. The FCIC website, as it existed on March 10, 2011, “is a federal record managed on behalf of” NARA that is publicly available at <http://cybercemetery.unt.edu/archive/fcic/20110310172443/http://fcic.gov/> (last visited March 5, 2012) that contains FCIC records under NARA’s custody and control.
31. On October 3, 2011, CoA, as Freedom Through Justice Foundation, sent a FOIA request to NARA for all FCIC records transferred to the Oversight Committee. CoA also asked for waiver of search and duplication fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 5 U.S.C. § 552(a)(4)(A)(iii). (Exhibit 3.)
32. By letter dated December 1, 2011, NARA designated Plaintiff’s October 3, 2011 FOIA request LL-12-143 and then denied it on grounds that FCIC records are not “agency records” that must be disclosed pursuant to FOIA’s disclosure provisions and that the FCIC established a five-year restriction on public access to FCIC records which it had chosen not to release. (Exhibit 4.)
33. By letter dated January 5, 2012, CoA timely appealed. (Exhibit 5.)
34. On or about January 13, 2012, NARA acknowledged receipt of CoA’s appeal. (Exhibit 6.) Final agency action denying the appeal occurred on or about February 6, 2012. (Exhibit 7.) NARA never addressed CoA’s request for waiver of search and duplication fees.
35. Both NARA’s December 1, 2011 FOIA denial letter and its February 6, 2012 appeal denial letter were silent as to Plaintiff’s request for a fee waiver.
36. On information and belief, many of the FCIC records transferred to Defendant on or about February 11, 2011, were not created by the FCIC but by Executive branch agencies and others.

37. On or about March 13, 2012, former FCIC Commissioner Peter Wallison wrote to NARA requesting access to FCIC records needed by him to respond to statements in a July 13, 2011 report by the minority staff of the Committee on Oversight and Government Reform, U.S. House of Representatives, that made use of FCIC materials from NARA.
38. On information and belief, NARA General Counsel Gary Stern told Wallison that “NARA’s policy is that any commissioner of any commission (including the Financial Crisis Inquiry Commission) has the right to review documents in case—among other things—the commissioner is called to testify in a legal or congressional proceeding.”
39. On information and belief, on or around March 29, 2012 Mr. Stern told Commissioner Wallison NARA would not allow Mr. Wallison to seek assistance from third parties (including counsel) to access FCIC records.
40. On information and belief, Mr. Stern also told Commissioner Wallison that NARA has the originals of all FCIC records, including records provided to the Oversight Committee.
41. By letter dated April 18, 2012, Mr. Stern responded to an April 5, 2012 email from Peter Wallison and stated:
- Only in the past few years have members of commissions requested that the Archivist of the United States allow for continued access by former commissioners and their senior staff. The request was premised on the limited need to prepare for possible subsequent congressional hearings or queries on the work of the commission. There is no statutory or regulatory requirement that the Archivist grant this request. However, the Archivist has determined that it is reasonable to grant former Commissioners and their senior staff continued access to the records of the Commission for the limited purpose described above. This discretionary access is limited to the persons named in the request letter from the former Chairman of the Commission, and thus does not extend to other persons, including representatives of the named persons.
42. On information and belief, Defendant has integrated the FCIC records into its files and record system in the legitimate conduct and course of its official duties.

COUNT 1

FOR VIOLATION OF FOIA

43. CoA repeats paragraphs 1 - 42.
44. CoA has exhausted applicable administrative remedies.
45. NARA's failure to disclose the documents requested by CoA violates FOIA, 5 U.S.C. § 552.
46. CoA is entitled to injunctive relief compelling the release and disclosure of the requested records.

COUNT II

FOR A FEE WAIVER

47. CoA repeats paragraphs 1-42.
48. CoA has exhausted applicable administrative remedies.
49. NARA's failure to grant CoA's request for a search and duplication fee waiver violates FOIA, 5 U.S.C. § 552.

REQUESTED RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court grant the following relief:

- I. Enter an order:
 - a. Declaring that NARA has wrongfully withheld the requested FCIC records;
 - b. directing NARA to search for all records responsive to CoA's request and then demonstrate that it employed appropriate search methods;
 - c. directing NARA to produce by a date certain all non-exempt records and a Vaughn index of all records withheld under claim of exemption; and

- d. declaring that Plaintiff is entitled to a waiver of both search and duplication fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(I) and 5 U.S.C. § 552(a)(4)(A)(iii).
- II. Issue a permanent injunction directing NARA to disclose and release to CoA all wrongfully withheld records.
- III. Maintain jurisdiction over this action until NARA complies with the FOIA and all orders of this Court.
- IV. Award CoA's attorneys' fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E).
- V. Grant such additional and further relief to which CoA may be entitled.

Respectfully submitted,

s/ Karen M. Groen
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VIA E-MAIL AND FIRST CLASS MAIL

Mr. Gary M. Stern
General Counsel
National Archives and Records Administration
8601 Adelphi Road, Room 3110
College Park, MD 20740
garym.stern@nara.gov

Re: Freedom of Information Act Request

Dear Mr. Stern:

We write on behalf of the Freedom Through Justice Foundation, a 501(c)(3) nonprofit, nonpartisan public interest firm that uses public policy and legal reform strategies to ensure greater transparency in government, protect taxpayer interests, and promote social and economic freedoms.

The Financial Crisis Inquiry Commission ("FCIC") was created by an act of Congress in May of 2009, and was tasked with investigating and completing a report that detailed the causes of the economic failures in 2008. Despite the FCIC's nonpartisan purpose, both the FCIC and its subsequent report have been the subject of recent political controversy.

Prior to the release of the Commission's report, U.S. House Committee on Oversight and Government Reform Chairman Darrell Issa (R-CA) raised questions concerning the potential conflicts of interest that existed between Commission staff and several outside entities involved in suing banks targeted by the FCIC.¹ Oversight Committee Ranking Member Elijah Cummings (D-MD) recently released a report finding that several of the decisions of the FCIC may have been politically motivated.²

Because of the risk of potential conflicts of interest and politicization involved at the FCIC, the public has an interest in an independent assessment of the FCIC record.

¹ LETTER, DARRELL ISSA, CHRMN., H. COMM. ON OVERSIGHT & GOV'T REF. TO PHIL ANGELIDES, CHRMN., FCIC (July 27, 2010), *available at* http://oversight.house.gov/images/stories/Letters/7-27-10_Issa_Letter_to_Angelides_-_FCIC_Budget.pdf.

² STAFF OF H. COMM. ON OVERSIGHT AND GOV'T REF., 111TH CONG., AN EXAMINATION OF ATTACKS AGAINST THE FINANCIAL CRISIS INQUIRY COMMISSION 3 (Comm. Print 2011) *available at* <http://democrats.oversight.house.gov/images/stories/MINORITY/fcic%20report/FCIC%20Report%2007-13-11.pdf>.

Mr. Gary M. Stern
October 3, 2011
Page 2 of 4

FCIC records were deposited at the National Archives (“NARA,”)³ which subsequently shared those documents with the Oversight and Government Committee for the purpose of the Committee’s investigation. Freedom Through Justice Foundation is entitled to receive the aforementioned records stored with NARA and shared with the Oversight Committee. NARA is a federal agency and records under its control are subject to disclosure under FOIA.

This request seeks no privileged information from NARA. These records are not exempt from disclosure due to privilege because they were relied upon extensively in the creation of the House Oversight and Government Reform Committee’s publicly released report. And even if these records were privileged under FOIA exemption 5, which protects inter-agency or intra agency memoranda, documents lose their protection if a final decision maker chooses “expressly to adopt or incorporate” the documents by reference.⁴

Other privileges or exemptions that might prevent disclosure are not applicable here. Congress does not enjoy the same protections as a federal agency under FOIA, and documents conveyed to Congress do not fall under the inter-agency protections.⁵ Moreover, the documents were requested by the Chairman of the House Oversight and Government Reform Committee via his subpoena powers, so the privileges that normally apply to materials requested by individual members of Congress should not apply.⁶ The Oversight Committee’s public report has revealed the contents of the FCIC documents to the public, and it is in the public’s best interests to have access to the entire record. Additionally, any deliberative-process or informational-privilege claims against this request can only be raised by the FCIC, which has expressed its intent that this information eventually be made public through NARA.⁷

Pursuant to the provisions of FOIA and 5 CFR § 2502, the Freedom Through Justice Foundation hereby requests that NARA produce within twenty (20) business days for the date range of May 20, 2009 to the present: 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.

³ Interview by FTJ Staff with Gary Stern, General Counsel, FCIC (Sept. 23, 2011).

⁴ See NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 161 (1975) see also Niemeier v. Watergate Special Protection Force, 565 F.2d 967, 973 (7th Cir. 1977) (ordering disclosure of underlying memorandum that was expressly relied upon in final agency dispositional document).

⁵ See Dow Jones & Co. v. DOJ, 917 F.2d 571 (D.C. Cir. 1990).

⁶ Cf. Murphy v. Department of Army, 613 F.2d 1151 (D.C. Cir. 1979).

⁷ FINANCIAL CRISIS INQUIRY COMMISSION, THE FINANCIAL CRISIS INQUIRY REPORT, XII, (2011), available at <http://www.gpoaccess.gov/fcic/fcic.pdf> (The report is not a sole repository of what the panel found . . . more materials that cannot be released yet for various reasons will eventually be made public through the National Archives and Records Administration).

Mr. Gary M. Stern
October 3, 2011
Page 3 of 4

Freedom Through Justice Qualifies Under the Non-Commercial Fee Category

The Freedom Through Justice Foundation requests a waiver of both search and duplication fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 5 U.S.C. § 552(a)(4)(A)(iii). The Freedom Through Justice Foundation is a 501(c)(3), not-for-profit, representative of the news media and has no commercial purpose in requesting information. Freedom Through Justice has no commercial, trade or profit interests and is organized and operated to publish or broadcast news to the general public. Freedom Through Justice will use its editorial skills to turn raw materials into a distinct work.

Freedom Through Justice Is Entitled to a Complete Waiver of Fees

Freedom Through Justice requests a waiver of fees as a representative of the news media under 5 U.S.C. § 552(a)(4)(A)(ii)(II). The disclosure of the requested information is likely to contribute significantly to public understanding of the operations and activities of the government and is not primarily in the commercial interest of the requester pursuant to 5 U.S.C. § 552(a)(4)(A)(iii).⁸

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

Production of Documents and Contact Information

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

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA. . . . The presumption of disclosure should be applied to all decisions involving FOIA.⁹

If any responsive record or portion thereof is claimed to be exempt from production under FOIA, please provide sufficient identifying information with respect to each allegedly exempt record or portion thereof to allow us to assess the propriety of the

⁸ See, e.g., *Carney v. U.S. Dep’t of Justice*, 19 F.3d 807, 814 n.3 (2d Cir. 1994); *Prison Legal News v. Lappin*, 436 F. Supp. 2d 17, 27 n.5 (D.D.C. 2006).

⁹ PRESIDENT BARACK OBAMA, MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES, SUBJECT: FREEDOM OF INFORMATION ACT, Jan. 21, 2009, available at <http://www.whitehouse.gov/the-press-office/freedom-information-act>.

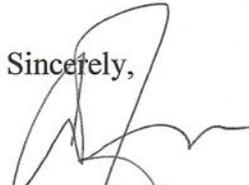
Mr. Gary M. Stern
October 3, 2011
Page 4 of 4

claimed exemption.¹⁰ In addition, any reasonably segregable portion of a responsive record must be provided, after redaction of any allegedly exempt material.¹¹

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

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

Sincerely,



AMBER D. TAYLOR
SENIOR ATTORNEY

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

¹⁰ Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

¹¹ 5 U.S.C. § 552(b).

Responding to Document Requests

1. In complying with this request, you should produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Freedom Through Justice Foundation.
2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.
3. The Freedom Through Justice Foundation's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.
4. When you produce documents, you should identify the paragraph in the Freedom Through Justice Foundation's request to which the documents respond.
5. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.
6. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Freedom Through Justice Foundation staff to determine the appropriate format in which to produce the information.
7. If compliance with the request cannot be made in full, compliance shall be made to the extent possible and shall include an explanation of why full compliance is not possible.
8. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.
9. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.

10. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.
11. The time period covered by this request is included in the attached request. To the extent a time period is not specified, produce relevant documents from January 1, 2009 to the present.
12. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.
13. All documents shall be Bates-stamped sequentially and produced sequentially.

Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmation, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email, regular mail, telexes, releases, or otherwise.

3. The terms “and” and “or” shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.
4. The terms “person” or “persons” mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.
5. The term “identify,” when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.
6. The term “referring or relating,” with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.



National Archives and Records Administration

700 Pennsylvania Avenue, NW
Washington, DC 20408-0001

December 1, 2011

Amber D. Taylor
Senior Counsel
Freedom Through Justice Foundation
2111 Wilson Blvd, #700
Arlington, VA 22201

Dear Ms. Taylor:

This is in response to your letter of October 3, 2011, to NARA General Counsel Gary M. Stern, which requests the records of the Financial Crisis Inquiry Commission (FCIC) that were transferred by the National Archives and Records Administration (NARA) to the House Committee on Oversight and Government Reform. Mr. Stern referred your request to the Center for Legislative Archives, as we are the archival custodian of the FCIC records. We apologize for the delay in responding to your request.

As you may be aware, the FCIC was a commission that was established within the legislative branch. As such, its records are not subject to the Freedom of Information Act (FOIA), which only applies to executive branch agencies. While NARA is an executive branch agency, we serve as the National Archives for all three branches of the Government in accordance with the Federal Records Act (FRA), 44 U.S.C. Chapters 21, 29, 31, and 33. When federal agencies from the legislative and judicial branches accession their permanent federal records into the National Archives of the United States, those records do not become "agency records" subject to the FOIA. However, they will become available for public access requests under the FRA.

The FCIC records were transferred to NARA on February 11, 2011, and, in accordance with 44 U.S.C. § 2108(a), the Commission established a five-year restriction on public access to its non-public records. Accordingly, NARA will not accept requests for public access until February 11, 2016. Your letter notes that NARA has provided some of the FCIC records to the House Committee on Oversight and Government Reform. NARA did so in response to a formal request from the Committee as part of its ongoing business. It is well established that the provision of records to the Congress does not constitute a public release of that information (see, e.g., *Murphy v. Dep't of Army*, 613 F.2d 1151, 1155 (D.C. Cir. 1979)). The fact that Congress may have subsequently released some of these records to the public does not alter the non-public status of these records at NARA.

Accordingly, we are denying your request because these records are not subject to the FOIA. If you are not satisfied with our action on this request, you have the right to file an administrative appeal. Address your appeal to:

Deputy Archivist (ND)
National Archives and Records Administration
College Park, Maryland 20740

Your appeal should be received within 35 calendar days of the date of this letter and it should explain why you think this response does not meet the requirements of the FOIA. All correspondence should reference the tracking number LL-12-143.

Sincerely,



MATT FULGHAM
Assistant Director
Center for Legislative Archives



Advocates for Government Accountability

A 501(c)(3) NONPROFIT CORPORATION

TELEPHONE: (703) 875.8625
WEB SITE: CAUSEOFACTION.ORG
2100 M STREET
SUITE 170-247
WASHINGTON, D.C. 20037

January 5, 2012

VIA E-MAIL AND FIRST CLASS MAIL

ATTN: Debra Steidel Wall
Deputy Archivist of the United States
FOIA Appeal Staff, Room 4200
National Archives and Records Administration
8601 Adelphi Road
College Park, Maryland 20740-6001

RE: FREEDOM OF INFORMATION ACT APPEAL (FOIA APPEAL LL-12-143)

Dear Mr. Fulgram:

We write in response to your December 1, 2011 letter denying our Freedom of Information Act (“FOIA”) request for records created, relied on, or otherwise used by the Financial Crisis Inquiry Commission (hereinafter “FCIC”) pursuant to Section 5 of the Fraud Enforcement and Recovery Act of 2009 (hereinafter “FERA”) and subsequently obtained and controlled by the National Archives and Records Administration (hereinafter “NARA”). Specifically, you denied our request on the following grounds: (1) the FCIC is not subject to FOIA because FOIA “only applies to executive branch agencies”; and (2) “in accordance with 44 U.S.C. § 2108(a), the Commission established a five-year restriction on public access to its non-public records.”¹ For the following reasons, we urge you to reevaluate your position.

A. FCIC records obtained and controlled by NARA are subject to FOIA and must be produced, unless a narrowly construed statutory exemption applies.

NARA has acknowledged it is an executive branch agency, which is generally subject to FOIA. The Supreme Court has made clear that “[a]n agency ordinarily may refuse to make

¹ Letter from Matt Fulgham, Assistant Director, Center for Legislative Archives, to Amber Taylor, Cause of Action (Dec. 1, 2011).

Mr. Matt Fulgrum

January 5, 2012

Page 2

available documents in its control only if it proves that the documents fall within one of the nine disclosure exemptions set forth in § 552(b).”²

As you are aware, FOIA does not define the term “agency records.” But the Court has established a two-pronged test for determining whether material constitutes an “agency record.”³ The first prong of the test is disjunctive: a federal agency must “*either create or obtain*” the materials at issue.⁴ Under this requirement, the agency must have possession of the material at the time of the request in order for the material to qualify as an “agency record.” Second, the agency “must be in control of the requested materials at the time the FOIA request is made[,]. . .mean[ing] that the materials have come into the agency’s possession in the legitimate conduct of its official duties.”⁵ In *Department of Justice v. Tax Analysts*, the Court applied this test and squarely held that federal district court tax opinions in the possession of the Tax Division of the Department of Justice are not *court* records, which are outside of the ambit of FOIA, but rather “agency records,” which *are* subject to FOIA.⁶

The Court has given its imprimatur to a broad definition of “agency records”: “agency records include 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. . . .”⁷

Your agency, which is subject to FOIA, has possession and control of FCIC documents that are agency records under well-established law. The mere fact that those agency records were produced by a Commission formed pursuant to a federal statute that directed that Commission to report *both* to the President and Attorney General and the Congress does not somehow *ipse dixit* transform FCIC documents into part of the Congressional Record.⁸ Rather, the FCIC documents in your possession constitute “agency records” that your federal agency has obtained and currently has in its control. Those agency records must be produced in response to a FOIA request, unless one of FOIA’s nine exemptions applies. And as the case cited by you in your

² *Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 141 (1989).

³ *See id.* at 138, 155.

⁴ *Id.* at 144 (citations omitted and emphasis added).

⁵ *Id.* at 145.

⁶ *See id.*

⁷ *Id.* (internal quotations and citation omitted).

⁸ *Cf. United We Stand Am., Inc. v. IRS*, 360 U.S. App. D.C. 243, 251 (D.C. Cir. 2004) (“Under these circumstances, absent ‘clear’ (Goland’s word) expression of congressional intent to control the entire response, neither the IRS’s own expectations nor its handling of the document can turn the entire agency-created record into a congressional document. Otherwise, documents that agencies create in response to congressional requests could become congressional documents even if Congress expressed no intent to keep them secret, for it can be said of most such materials that they would not have been created but for the congressional request, that the agency relies on them for no other purpose, and that they are kept in separate files, i.e., in the agency’s office of congressional affairs. Such a result would ‘exempt from FOIA’s purview a broad array of materials otherwise clearly categorizable as agency records, thereby undermining the spirit of broad disclosure that animates the Act.’ ” (citations omitted)). *See generally* Fraud Enforcement and Recovery Act of 2009, Pub. Law 111-21, 123 Stat. 1617, Sec. 5 (creating Financial Crisis Inquiry Commission).

Mr. Matt Fulgrum

January 5, 2012

Page 3

letter makes clear: “as a matter of public policy, the FOIA exemptions are to be narrowly construed....”⁹

B. The Commission is not authorized under 44 U.S.C. § 2108(a) to establish a five-year restriction on public access to FCIC records.

5 U.S.C. § 552(b)(3) provides in relevant part that FOIA does not apply to agency records that are

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.¹⁰

Conspicuously absent from Section 5 of FERA, which created the FCIC, is any blanket statement to the effect that the Commission’s work product and the documents it generated and relied on should, as a general matter, be withheld from the public in such a manner as to leave no discretion on the issue, and the statute does not outline any criteria for withholding information. Indeed, FERA contains no provisions that implicitly or explicitly indicate a congressional intent to exempt the FCIC from FOIA.

To be sure, Section 5(g) of the Act, entitled “Nonapplicability of Federal Advisory Committee Act,” specifically states that “[t]he Federal Advisor Committee Act (5 U.S.C. App.) shall not apply to the Commission.”¹¹ But application of the well-accepted principle of statutory construction *inclusio unius exclusio alterius*, the inclusion of one thing suggests the exclusion of another, militates toward the conclusion that Congress did not intend to exempt the Commission’s work from disclosure under FOIA. Moreover, the Commission held public hearings and generated a public report. The notion that Congress intended to either exempt FCIC from FOIA or implicitly delegate to the Commission the authority to restrict access to the documents it relied on and generated is without any statutory support.

You invoke 44 U.S.C. § 2108(a) to support your assertion that there is a “five-year restriction on public access to [FCIC’s] non-public records.” That provision provides in relevant part:

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

⁹ *Murphy v. Dep’t. of Army*, 613 F.2d 1151, 1157-1158 (D.C. Cir. 1979).

¹⁰ 5 U.S.C. § 552(b)(3).

¹¹ Pub. Law 111-21, 123 Stat. 1617, Sec. 5(g).

Mr. Matt Fulgrum
January 5, 2012
Page 4

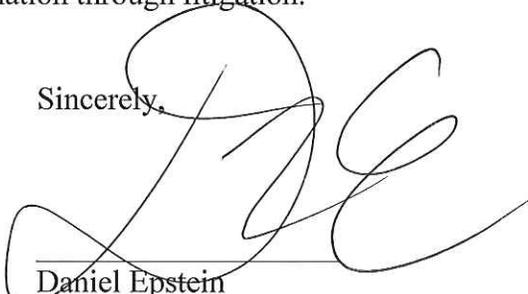
examination of records being considered for transfer from his custody to the Archivist, the Archivist shall, if he concurs,[,] impose such restrictions on the records so transferred, and may not relax or remove such restrictions without the written concurrence of the head of the agency from which the material was transferred, or of his successor in function, if any.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.¹²

That provision gives neither NARA nor the Commission the authority to impose a five-year restriction on FOIA access. First, as you noted, the FCIC is not a federal agency; thus, it cannot have a “head.” Second, 5 U.S.C. § 552(b)(3), by its terms, only applies to statutes—not regulations promulgated by agencies or agency orders. Thus, NARA and other agencies may not insulate themselves from FOIA simply by promulgating regulations. Therefore, 44 U.S.C. § 2108(a) is inapposite to the question whether the FCIC records are subject to FOIA.

Simply put, the documents we requested in our initial FOIA request are agency records that are *subject to* FOIA. Unless you can point to a specific provision in the FOIA statute that exempts individual records, you must provide them in response to our FOIA request.

We specifically reserve the right to supplement this appeal as necessary and as allowed by applicable law. We sincerely hope that you will reconsider your agency’s denial of our FOIA request in light of this additional information. If you do not, we will have no choice but to vindicate our right of access to this information through litigation.

Sincerely,



Daniel Epstein
Executive Director

¹² 44 U.S.C. § 2108(a).



February 6, 2012

Daniel Epstein
Executive Director
Cause of Action
2100 M Street Suite 170-247
Washington, D.C. 20037

Re: Freedom of Information Act Appeal NGC12-012A

Dear Mr. Epstein:

This is in response to your Freedom of Information Act (FOIA) appeal of January 5, 2012. In the original request received from Amber Taylor, dated October 3, 2011, you asked for access to the records of the Financial Crisis Inquiry Commission (FCIC or Commission) that were transferred to the National Archives and Records Administration (NARA) from the House Committee on Oversight and Government Reform. In our initial response of December 1, 2011, you were advised that in our view the records of the FCIC do not qualify as “agency records” for purposes of the Freedom of Information Act, as they were transferred into NARA’s custody from the Legislative branch of government. You were further informed that the Commission established a five-year restriction on public access to its non-public records, and that NARA will not accept requests for public access until February 11, 2016.

In your appeal, you argue that NARA has possession and control of the documents within the meaning of FOIA law, and therefore that FCIC’s records now enjoy “agency record” status, citing to *Department of Justice v. Tax Analysts*, 492 U.S. 136 (1989), and related case law. Your appeal makes a secondary argument taking issue with NARA’s invocation of 44 U.S.C. 2108(a) in support of applying access restrictions. In your view, section 2108 of the Federal Records Act, constitutes insufficient authority for FCIC to invoke restrictions or for NARA to accept restrictions on access placed by the FCIC. We understand this portion of your appeal to be alleging that NARA is holding out section 2108(a) as a “(b)(3)” withholding statute, as in your view section 2108(a) fails to meet the relevant FOIA test.

For the reasons stated below, I affirm NARA’s original denial of your FOIA request for FCIC records on the grounds that these are legislative branch records that are not subject to the FOIA.

Letter to Daniel Epstein, Page 2 of 5

A proper analysis of the legal issues raised by your FOIA appeal must begin with the factual circumstances regarding transfer of FCIC records into NARA's custody.

First, on February 10, 2011, contemporaneous with the imminent termination of the FCIC, the Chairman of the FCIC, Phil Angelides, wrote to the Archivist of the United States, David Ferriero, providing detailed instructions to "set forth the Commission's continued interest in government and public access to information created or gathered during its investigation," in which the Chairman "establishe[d] criteria under which these records should be made available." (See attached at Tab A.) As set out in the Chairman's letter, NARA is to make the FCIC's records available to the public "to the greatest extent possible consistent with the terms of this letter," beginning on February 13, 2016 (five years after the termination of the FCIC by statute). The letter also went on to detail specific instructions as to which records should not be disclosed after February 13, 2016, if they contain (a) personal privacy information; (b) confidential financial supervisory or regulatory information; (c) proprietary business information which remains confidential or contains trade secrets; or (d) information otherwise barred from disclosure as determined by the Archivist. The letter further states that "[b]ecause the Commission was established in the legislative branch, its records have not been subject to the Freedom of Information Act (FOIA), and we understand that the FOIA will not apply to Commission records even after they are transferred to NARA."

Second, accompanying the Chairman's letter was a signed Standard Form 258, "Agreement to Transfer Records to the National Archives of the United States," Accession No. NN3-148-11-001, signed and countersigned by representatives of the FCIC and NARA (attached at Tab B). The Agreement contains as Box 12 under "Records Information," in which in answer to the question "Are records fully available for public use," the corresponding box is checked "No." The Agreement also contains language striking out a reference to 5 U.S.C. 552 under "Terms of Agreement." Those terms go on to specify that the records are now the responsibility of the Archivist of the United States pursuant to 44 U.S.C. 2108 to continue to maintain, in fulfillment of the Archivist's obligations under the Federal Records Act.

As a matter of law, there is no question that the FCIC's records were exempt from the FOIA at the time of their creation. The FCIC was established by the Fraud Enforcement and Recovery Act of 2009 (FERA), Pub. L. 111-21, under the auspices of the Legislative branch. As such, the Commission's records were properly deemed "legislative branch records," excluded from FOIA, while in the possession of the FCIC during the entirety of the Commission's existence. See *United We Stand Am, Inc. v. IRS*, 359 F.3d 595, 597 (D.C. Cir. 2004).

Letter to Daniel Epstein, Page 3 of 5

You cite to *Tax Analysts* for the proposition that material constituting an “agency record” must be in the possession and control of an executive branch agency that is subject to FOIA. However, under longstanding D.C. Circuit precedent, the matter of “control” is determined by analyzing the legislative branch’s intent contemporaneous with transfer of possession. In particular, under a line of authority starting with *Goland v. CIA*, 607 F.2d 339 (D.C. Cir. 1978), *vacated in part on other grounds*, 607 F.2d 367 (D.C. Cir. 1979), *cert. denied*, 445 U.S. 927 (1980), courts have seen fit to find that congressional-originated documents retain their status and are *not* considered to be “agency records” subject to FOIA, where the “conditions under which [the documents] were transferred to the agency” indicate that “Congress established ‘*contemporaneous* and *specific* instructions’ to the agency limiting either the use or disclosure of the documents.” *Center for National Security Studies v. CIA*, 577 F. Supp. 584, 588 (D.D.C. 1983) (quoting *Paisley v. CIA*, 712 F.2d 686, 692, 694 (D.C. Cir. 1983)), *vacated in part on other grounds*, 742 F.2d 201 (D.C. Cir. 1984) (emphasis in *Paisley*).

Here, based on the FCIC Chairman’s letter stating explicitly “that the FOIA will not apply to Commission records even after they are transferred to NARA,” NARA is on notice that the transfer evidenced legislative intent to maintain legislative control over the document’s confidentiality. *Accord, Goland*, 607 F.2d at 347 (court finding “Congressional intent to maintain Congressional control over the document[s] confidentiality”). As such, NARA does not consider that control has passed from the legislative branch sufficiently to establish that NARA has “free disposition,” *id.* at 348, to treat these legislative branch records as being subject to FOIA. *Id.* at 348.

In our view, the fact that the records in question have been transferred to NARA’s legal custody under the Federal Records Act is not otherwise dispositive of the FOIA access question. First, the D.C. Circuit has rejected the notion that “the treatment of documents for disposal and retention purposes under the various federal records management statutes determines their status under FOIA.” *Consumer Federation of America v. Dep’t of Agriculture*, 455 F.3d 283, 289 (D.C. Cir. 2006), *citing Bureau of Nat’l Affairs v. Dep’t of Justice*, 742 F.2d 1484, 1493 (D.C. Cir. 1984).

Second, courts have long recognized that there are types of archival records in NARA’s legal custody where access restrictions are controlled by the terms of other statutes or by donor intent. *See, e.g., Ricchio v. Kline*, 773 F.2d 1389 (D.C. Cir. 1985) (holding that access to Nixon materials in NARA’s custody were controlled by the Presidential Materials and Preservation Act (PRMPA), 44 U.S.C. 2111 note, and not by FOIA). For example, NARA’s older Presidential Libraries hold vast collections of Presidential materials created prior to the Presidential Records Act, 44 U.S.C. 2201, and to the PRMPA, that were owned originally by

Letter to Daniel Epstein, Page 4 of 5

the former Presidents and then donated to NARA under a deed of gift. There has never been a challenge that these presidential materials, transferred under donor agreements, are to be considered “agency records” subject to FOIA, and the mere fact that NARA is in possession of such records does not convert their status wholesale to such “agency records.”

With respect to your secondary argument on appeal, we believe NARA’s organic statute at 44 U.S.C. 2108(a) does, in fact, buttress our position that the Archivist of the United States has the authority to uphold and respect FCIC’s instructions with regard to imposing restrictions on future access to what were legislative branch records in FCIC’s custody.

[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 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.

Contrary to what you assert in your appeal letter, the FCIC is a “Federal agency” within the meaning of the Federal Records Act, 44 U.S.C. 2901(14) (the term includes establishments in the executive, legislative and judicial branches, with exceptions). This definition in the FRA of “Federal agency” differs significantly from the FOIA definition of “agency,” 5 U.S.C. 552(F)(1), which is limited only to executive branch entities. Thus, the Archivist may act pursuant to section 2108 to uphold restrictions placed by a federal agency from the legislative branch. While in our view the FCIC could have imposed a stricter nondisclosure regime on its legislative branch records that were transferred to NARA under the FRA, section 2108 provides a statutory mechanism for the Archivist to accept *lesser* restrictions on access, such as FCIC’s stated intent that its non-public records be disclosed in five years subject to conditions that would appear to be consistent with the FOIA. Your further references to section 2108 not meeting the requirements of an Exemption 3 statute under the FOIA, 5 U.S.C. 552(b)(3), are inapposite, as Exemption 3 comes into play only where “agency records” are at issue, which is not the case here.

Letter to Daniel Epstein, Page 5 of 5

This exhausts your administrative remedies. Judicial review is available to you in the United States District Court for the judicial district in which you reside, in the District of Columbia, which is where the records reside.

Sincerely,



DEBRA STEIDEL WALL
Deputy Archivist of the United States

Enclosures

Tab A

February 10, 2011



The Honorable David Ferriero
 Archivist of the United States
 National Archives and Records Administration
 8601 Adelphi Road
 College Park, MD 20740

Dear Mr. Ferriero:

Phil Angelides
Chairman

Hon. Bill Thomas
Vice Chairman

When the Financial Crisis Inquiry Commission (the "Commission") terminates, by statute, on February 13, 2011, the records of the Commission will be transferred to the National Archives and Records Administration (NARA) for preservation and public access. This letter sets forth the Commission's continued interest in government and public access to information created or gathered during its investigation and establishes criteria under which these records should be made available.

Brooksley Born
Commissioner

Byron S. Georgiou
Commissioner

Senator Bob Graham
Commissioner

Keith Hennessey
Commissioner

Douglas Holtz-Eakin
Commissioner

Heather H. Murren, CFA
Commissioner

The Commission has established a policy of making available to the public as much information as possible, while safeguarding personal privacy, law enforcement, private commercial, financial regulatory, and other sensitive information. The Commission's final report is highly detailed and discloses a significant amount of previously unavailable material. In addition, the Commission has released through its website many supplemental documents, including staff memoranda, documentary evidence, e-mails, witness statements, interviews, transcripts and summaries, audio and video files, and press releases. All of the records and information that the Commission has made available to the public should continue to be made publicly available by NARA. This includes the records that are accessible on the Commission's website, which NARA will maintain after February 13, 2011, and on the Commission's parallel website which the Commission will establish at Stanford University. Because the Commission was established in the legislative branch, its records have not been subject to the Freedom of Information Act (FOIA), and we understand that the FOIA will not apply to Commission records even after they are transferred to NARA.

John W. Thompson
Commissioner

Peter Wallison
Commissioner

The Commission recommends to NARA that records not already publicly available should be made available to the public, to the greatest extent possible consistent with the terms of this letter, beginning on February 13, 2016. The Commission encourages NARA to conduct a systematic review of the records that are not currently available to the public with the goal of releasing to the public as much information as is allowable by law and regulation on February 13, 2016, or as soon thereafter as possible. Records should not be disclosed immediately after February 13, 2016, if they contain (a) personal privacy information that the Commission agreed to protect from public disclosure for longer than 5 years; (b) confidential financial supervisory or regulatory information which remains sensitive at the time of release; (c) proprietary business information which remains confidential or contains trade secrets at the time of release, including any such information that the Commission has agreed will remain confidential for a longer period of time; or (d) information which is otherwise barred from public disclosure by law, as determined by the Archivist.

Wendy Edelberg
Executive Director

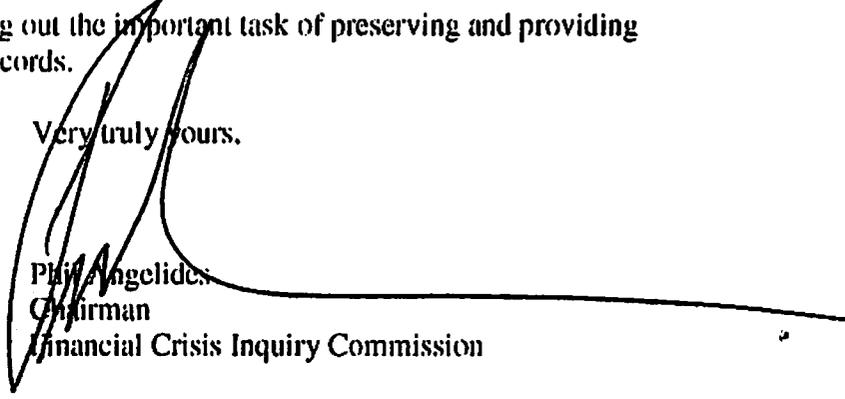
1717 Pennsylvania Avenue, NW, Suite 800 • Washington, DC 20006-4614
 202.292.2799 • 202.632.1604 Fax

A033

We understand that there will be an initial period of at least several months during which NARA's staff will be organizing and processing the Commission's records. During this period, access to the records should be provided to the ten members of the Commission (Phil Angelides, the Honorable Bill Thomas, Brooksley Born, Byron S. Georgiou, Senator Bob Graham, Keith Hennessey, Douglas Holtz-Eakin, Heather H. Murren, John W. Thompson and Peter J. Wallison) and the following members of the Commission staff and advisors: Wendy Edelberg, Peter Kadzik, Esq., Gretchen Newsom, Scott Ganz, Gary Cohen, Greg Feldberg, Chris Seefer, Maryann Haggerty, and Cassidy Waskowicz. In addition, certain administrative staff of the Commission may have access as part of their duties to transfer the records to NARA. During the period when the FCIC transfers records to NARA and after February 13, 2011, it is important that the ten Commissioners and the designated members of the Commission staff and advisors have continuing access to the Commission's records once the records are transferred to NARA.

Thank you for your cooperation in carrying out the important task of preserving and providing access to the Commission's voluminous records.

Very truly yours,

A large, stylized handwritten signature in black ink, which appears to be 'Phil Angelides', is written over the typed name and extends across the right side of the page.

Phil Angelides
Chairman
Financial Crisis Inquiry Commission

Cc: Members, Financial Crisis Inquiry Commission
Gary M. Stern, NARA
Wendy Edelberg, Executive Director
Cassidy Waskowicz, Deputy General Counsel

Tab B

AGREEMENT TO TRANSFER RECORDS TO THE NATIONAL ARCHIVES OF THE UNITED STATES

1. INTERIM CONTROL NO. (NARA Use Only)

JRC

TERMS OF AGREEMENT

The records described below and on the attached pages are deposited in the National Archives of the United States in accordance with 44 U.S.C. 2107. The transferring agency certifies that any restrictions on the use of these records are in conformance with the requirements of 5 U.S.C. 552.

restrictions on the use of those records will be imposed other than the general and specific restrictions on the use of records in the National Archives of the United States that have been published in 36 CFR Part 1256 or in the Guide to the National Archives of the United States. The Archivist may destroy, donate, or otherwise dispose of any containers, duplicate copies, unused forms, blank stationery, nonarchival printed or processed material, or other non-record material in any manner authorized by law or regulation. Without further consent, the Archivist may destroy deteriorating or damaged documents after they have copied in a form that retains all of the information in the original document. The Archivist will use the General Records Schedule and any applicable records disposition schedule (SF 115) of the transferring agency to dispose of nonarchival materials contained in this deposit.

In accordance with 44 U.S.C. 2108, custody of those records becomes the responsibility of the Archivist of the United States at the time of transfer of the records. It is agreed that these records will be administered in accordance with the provisions of 44 U.S.C. Chapter 21, 36 CFR XII, 36 CFR Part 1256, and such other rules and regulations as may be prescribed by the Archivist of the United States (The Archivist). Unless specified and justified below, no restrictions of the use of these records will be imposed other than the general and specific

2A. AGENCY APPROVAL
 Signature [Signature] Date 2/11/11

3A. NARA APPROVAL
 Signature [Signature] Date 2/18/2011

2B. NAME, TITLE, MAILING ADDRESS
 Sarah Zuckerman
 Financial Crisis Inquiry Commission
 1717 Pennsylvania Ave, NW
 Washington, DC 20006

3B. NAME, TITLE, MAILING ADDRESS
 Matt Fulgham
 Assistant Director, Center for Legislative Archives (NARA)
 700 Pennsylvania Ave, NW
 Washington, DC 20408

RECORDS INFORMATION

4A. RECORDS SERIES TITLE Records of the Financial Crisis Inquiry Commission

4B. DATE SPAN OF SERIES 2009-2011 (Attach any additional description)

5A. AGENCY OR ESTABLISHMENT
Legislative branch commission

5B. AGENCY MAJOR SUBDIVISION

5C. AGENCY MINOR SUBDIVISION

5D. UNIT THAT CREATED RECORDS

5E. AGENCY PERSON WITH WHOM TO CONFER ABOUT THE RECORDS
 Name: Sarah Zuckerman
 Telephone Number: 202-292-1388

6. DISPOSITION AUTHORITY
pending records schedule (NN1-148-)

7. IS SECURITY CLASSIFIED INFORMATION PRESENT? X NO YES
 LEVEL: Confidential Secret Top Secret
 SPECIAL MARKINGS: (R) (U) SCI NATO
 INFORMATION STATUS: Other Segregated Declassified

8. CURRENT LOCATION OF RECORDS
X Agency (Complete 8A only)
 Federal Records Center (Complete 8B only)

8A. ADDRESS:
 1717 Pennsylvania Ave, NW
 Washington, DC 20006

9. PHYSICAL FORMS
 Paper Documents Posters
 Paper Publications Maps and Charts
 Microfilm/Microfiche Archiving Drawings
 Electronic Records Motion/Sound/Video
 Photographs Other (specify):

10. VOLUME CONTAINERS:
 Cu. Ft.: 293 Number: 293 Type: FRC

11. DATE RECORDS ELIGIBLE FOR TRANSFER TO THE ARCHIVES
Feb. 2011

12. ARE RECORDS FULLY AVAILABLE FOR PUBLIC USE?
 YES X NO (If no, attach limits on use and justification)

13. ARE RECORDS SUBJECT TO THE PRIVACY ACT?
 YES X NO (If yes, cite Agency System Number and Federal Register volume and page number of most recent notice and attach a copy of this notice.)

14. ATTACHMENTS
 Agency Manual Except Listing of Records Transferred
 Additional Description NA Form 14097 or Equivalent
 Privacy Act Notice Microform Inspection Report
 Other (specify): Access letter SF-(s) 135

8B. FRC ACCESSION NUMBER CONTAINER NUMBERS FRC LOCATION

NARA PROVIDES

5. SHIPPING INSTRUCTIONS TO AGENCIES/REMARKS REGARDING DISPOSITION RG 148

6. RECORDS ACCEPTED INTO THE NATIONAL ARCHIVES OF THE UNITED STATES
 Signature [Signature] Date 2/11/11

17. NATIONAL ARCHIVES ACCESSION NO.
NW3-148-11-001



NATIONAL
ARCHIVES

April 18, 2012

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

By Email

Dear Mr. Wallison:

In your letter of April 5, 2012, you have asked for NARA's policy on providing access to former government officials, such as yourself, to the records of the Financial Crisis Inquiry Commission on which you served that are now permanently preserved in the National Archives.

As we discussed on the phone, non-governmental officials presumptively have no right of access to non-public information that is maintained by the National Archives (or any other government agency). Access to records in the National Archives is controlled by applicable statutory requirements found in such statutes as the Freedom of Information Act, the Privacy Act, the Federal Records Act, and the Presidential Records. Our policies on access can be found in our corresponding regulations, at 36 C.F.R. Part 1202 (Privacy Act); Part 1250 (FOIA); Part 1256 (Federal Records); Part 1270 (Presidential Records); Part 1275 (Nixon Presidential Materials).

Only in the past few years have members of commissions requested that the Archivist of the United States allow for continued access by former commissioners and their senior staff. The request was premised on the limited need to prepare for possible subsequent congressional hearings or queries on the work of the commission. There is no statutory or regulatory requirement that the Archivist grant this request. However, the Archivist has determined that it is reasonable to grant former Commissioners and their senior staff continued access to the records of the Commission for the limited purpose described above. This discretionary access is limited to the persons named in the request letter from the former Chairman of the Commission, and thus does not extend to other persons, including representatives of the named persons.

We are making arrangements to facilitate your access to the commission records that you have requested, if you would still like to come. The records will be available on a computer in a

NATIONAL ARCHIVES *and*
RECORDS ADMINISTRATION

8601 ADELPHI ROAD
COLLEGE PARK MD 20740-6001
www.archives.gov

GARY M. STERN
GENERAL COUNSEL
SUITE 3110
T 301 837 3026

garym.stern@nara.gov **A037**

secure research room at our Main Archives Building 700 Pennsylvania Avenue, NW, in Washington, DC, during regular business hours.

Sincerely,

A handwritten signature in black ink, appearing to read "Gary M. Stern", with a long, sweeping flourish extending to the right.

GARY M. STERN
General Counsel

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

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

**DEFENDANT’S MOTION TO DISMISS,
OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT**

Pursuant to Federal Rule of Civil Procedure 12(b)(6), defendant National Archives and Records Administration (“NARA”) hereby moves to dismiss Plaintiff’s complaint for failure to state a claim upon which relief can be granted, and in the alternative moves for summary judgment pursuant to Federal Rule of Civil Procedure 56(a). The reasons supporting NARA’s motion are set forth in the accompanying memorandum of law.

Dated: October 31, 2012

Respectfully Submitted,

STUART F. DELERY
Acting Assistant Attorney General

RONALD C. MACHEN JR.
United States Attorney

ELIZABETH J. SHAPIRO
Deputy Branch Director

/s/ Daniel Schwei

Daniel Schwei
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W.
Washington, D.C. 20530

Tel: 202-305-8693
Fax: 202-616-8470
daniel.s.schwei@usdoj.gov

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2012, a copy of the foregoing Motion to Dismiss, Or in the Alternative for Summary Judgment, was filed electronically. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

/s/ Daniel Schwei

_____ Daniel Schwei

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

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

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT’S MOTION TO
DISMISS, OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT**

TABLE OF CONTENTS

INTRODUCTION1

BACKGROUND2

 I. Statutory Background.2

 II. Factual and Procedural Background.5

STANDARD OF REVIEW8

ARGUMENT9

 I. This FOIA Lawsuit Must Be Dismissed, Because Legislative Records Are Not Subject to FOIA.9

 A. The FCIC Was a Legislative Agency, and Therefore Its Records Are Not Subject to FOIA.10

 B. Practical Considerations Also Confirm that FOIA Does Not Apply to Legislative Records Transferred to NARA’s Custody.16

 1. Interference with NARA’s Administrative Scheme for Orderly Processing Legislative Records.16

 2. Improper Release of Sensitive Information.18

 II. Even Assuming NARA’s Control of the Records Affects the Analysis, the Records Here Are Still Legislative Records Not Subject to FOIA.21

 A. The Cases Considering Control as a Relevant Factor in Determining The Status of Records Do Not Apply in These Factual Circumstances.21

 B. Even Were Control a Relevant Factor, the FCIC Records Would Still Be Legislative Records Outside of FOIA.24

CONCLUSION.....26

INTRODUCTION

Plaintiff Cause of Action, Inc. filed this lawsuit under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, seeking access to records of the Financial Crisis Inquiry Commission (“FCIC”)—a temporary commission established within the legislative branch. Cause of Action’s lawsuit fails as a matter of law, however, because well-established precedent holds that FOIA does not apply to records of the legislative branch. *See id.* § 551(1)(A) (exempting “the Congress” from FOIA’s definition of agency).

Although the FCIC records have now been transferred into the possession and custody of the defendant agency here—the National Archives and Records Administration (“NARA”)—that fact is irrelevant to whether the FCIC records are legislative in nature. The mere deposit of records at NARA does not alter the records’ original status. Indeed, all three branches of the federal government—the courts, Congress, and the executive—have confirmed that NARA’s custody of records does not automatically make those records subject to FOIA. These binding precedents are conclusive. And even apart from this wealth of legal precedent, practical considerations also confirm that legislative records within NARA’s custody are not subject to FOIA. Thus, the requested records here retain their original status as legislative records outside the reach of FOIA; NARA’s control over the records is irrelevant.

Even if NARA’s control of the records were a relevant factor, moreover, the records at issue here would still be considered legislative. When the FCIC transferred its records to NARA, the FCIC clearly intended to limit future access and disclosure of those records, and issued contemporaneous and specific instructions to that effect. Even under a control-based framework, therefore, the FCIC’s records are outside the reach of FOIA. Cause of Action’s lawsuit thus fails as a matter of law.

BACKGROUND

I. STATUTORY BACKGROUND.

Pursuant to the Federal Records Act, the National Archives and Records Administration (“NARA”) accepts for deposit “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.” 44 U.S.C. § 2107(a). Thus, NARA accepts and preserves records from all three branches of the United States Government.

Particularly relevant to this case is NARA’s acceptance of records from the legislative branch. Although the substantive provisions of the Federal Records Act (“FRA”), 44 U.S.C. §§ 2101-18, 2901-09, 3101-07, 3301-24, do not generally apply to the House, the Senate, or their official Committees, NARA nonetheless accepts those entities’ noncurrent records for preservation. *See id.* § 2118 (directing the transfer of such records “to the National Archives and Records Administration for preservation, subject to the orders of the Senate or the House of Representatives, respectively”). These records (hereinafter referred to as “Congressional records”), are deposited with NARA, but remain the property of the House and the Senate. *See Fulgham Decl.* at ¶¶ 7-9.

In addition to Congressional records, NARA also accepts records from other government entities established within the legislative branch (hereinafter referred to as “legislative records”). Some of these legislative-branch entities are long-standing in nature—such as the Congressional Budget Office, the Library of Congress, the Government Accountability Office, and the Government Printing Office—whereas other entities are temporary in nature, such as commissions or panels that terminate as of a fixed date. *See generally Fulgham Decl.* at ¶¶ 6-12.

Unlike the House and Senate, these legislative agencies *are* subject to the FRA's substantive provisions. Specifically, the FRA applies to any "Federal agency," which, for FRA purposes, is defined as "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) (emphasis added). Thus, although the substantive provisions of the FRA do not apply to the House and Senate, they do apply to other legislative agencies.

Under the FRA, each agency head is given certain duties pertaining to the creation, management, and disposal of federal records. For instance, agency heads are required to "make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency[.]" 44 U.S.C. § 3101. Agency heads must also ensure the proper disposition of all federal records. The FRA requires that the disposal of all federal records be approved by the Archivist of the United States (the head of NARA). *Id.* § 3303; *see also* 36 CFR § 1225.10. In order to efficiently manage the disposition process, agencies may create records schedules—negotiated with and approved by NARA—that govern recurring types of records. 44 U.S.C. § 3303(3); 36 C.F.R. §§ 1225.10-1225.26. Those records schedules classify records as either permanent records of the United States (which are transferred to NARA and permanently preserved), or as temporary records (in which case the records are subject to destruction after a term of years). *See* 36 CFR §§ 1225.14, 1225.16.

For legislative agencies that are temporary in nature, those agencies will first negotiate a records schedule with NARA, and then shortly before their termination will transfer their records to NARA for further preservation. This transfer of legal custody occurs via a Standard Form 258

(“SF-258”), entitled “Agreement to Transfer Records to the National Archives of the United States.” Once this form is signed by both the transferring agency and NARA, the records are within the legal custody of NARA. *See* 44 U.S.C. §§ 2107, 2108.

As part of this transfer process, an agency head, with NARA’s concurrence, may impose restrictions on future access to the records. *See id.* § 2108(a). If restrictions are placed on records, and the transferring agency is later terminated without a successor (as is usually the case with temporary legislative commissions), then “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.” *Id.*

All legislative records transferred to NARA are administered by its Center for Legislative Archives (“the Center”), which is “responsible for processing, preserving and making accessible legislative branch records.” Fulgham Decl. at ¶ 1. The Center for Legislative Archives has created a general administrative scheme for the processing, request, and release of legislative records. *See* Fulgham Decl. at ¶¶ 19-24. That general administrative process can be, and has been, tailored to the specific needs of individual records collections. *Id.* at ¶¶ 25-29.

This administrative scheme for releasing records is necessary because, unlike most executive agencies’ records, these legislative records are not subject to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 *et seq.* Normally FOIA would require an executive agency to make its records available to anyone who properly requests them, unless the requested records (or portions of them) fall within particular exceptions. *See* 5 U.S.C. § 552(a)(3), (b). But FOIA does not apply to legislative records, because FOIA’s definition of “agency” expressly exempts Congress and the courts. *See id.* § 551(1)(A), (B). Thus, the legislative records housed

in NARA's Center for Legislative Archives are not accessible through FOIA. *See also* 36 C.F.R. § 1250.6; Fulgham Decl. at ¶ 17.

II. FACTUAL AND PROCEDURAL BACKGROUND.

The Financial Crisis Inquiry Commission ("FCIC") was created as part of the Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617 (2009), and was a temporary commission expressly established within the legislative branch. *Id.* § 5(a). The FCIC was created in order to "examine the causes, domestic and global, of the current financial and economic crisis in the United States." *Id.* To fulfill that mission, the FCIC was granted certain investigatory powers, *id.* § 5(d), and was tasked with submitting a report to the President and Congress "containing the findings and conclusions of the Commission on the causes of the current financial and economic crisis in the United States." *Id.* § 5(h)(1). The FCIC submitted its report on January 27, 2011, and pursuant to statute the FCIC terminated on February 13, 2011. *See* Compl. at ¶¶ 13-14.

Prior to its termination, the FCIC negotiated a NARA-approved records schedule classifying certain FCIC records as permanent. *See* Fulgham Decl. at ¶ 30. Several days before the FCIC's scheduled termination, FCIC Chairman Phil Angelides wrote to Archivist of the United States David Ferriero to inform NARA that the FCIC intended to restrict future access to some of its records. *See* Compl. (ECF No. 1), Exh. 1. Chairman Angelides made clear that the FCIC has embraced "a policy of making available to the public as much information as possible, while safeguarding personal privacy, law enforcement, private commercial, financial regulatory, and other sensitive information." *Id.* at 1. Thus, Chairman Angelides stated that "[a]ll of the records and information that the Commission has made available to the public should continue to be made publicly available by NARA." *Id.*

For information that had not already been made public, however, the FCIC recommended that the records “should be made available to the public, to the greatest extent possible consistent with the terms of this letter, beginning on February 13, 2016.” *Id.* Thus, the FCIC recommended at least a five-year restriction on all non-public information. Additionally, for certain categories of information, the FCIC imposed restrictions lasting beyond five years:

Records should not be disclosed immediately after February 13, 2016, if they contain (a) personal privacy information that the Commission agreed to protect from public disclosure for longer than 5 years; (b) confidential financial supervisory or regulatory information which remains sensitive at the time of release; (c) proprietary business information which remains confidential or contains trade secrets at the time of release, including any such information that the Commission has agreed will remain confidential for a longer period of time; or (d) information which is otherwise barred from public disclosure by law, as determined by the Archivist.

Id. Chairman Angelides’ letter also made clear that these restrictions were imposed “[b]ecause the Commission was established in the legislative branch,” and therefore “FOIA will not apply to Commission records even after they are transferred to NARA.” *Id.*

One day after Chairman Angelides’ letter, NARA and the FCIC signed an SF-258 transferring the FCIC’s records into NARA’s legal custody. *See* Compl., Exh. 2. The SF-258 expressly attached Chairman Angelides’ access letter, and stated that the records are not fully available for public use. *Id.* Additionally, the FCIC and NARA struck out language on the SF-258 referencing FOIA. *Id.* The signing of this SF-258 represented the transfer of the FCIC records into NARA’s legal custody, along with NARA’s concurrence in the restrictions set forth in Chairman Angelides’ letter.

As alleged in the Complaint, at some point the FCIC came under scrutiny from the House Committee on Oversight and Government Reform (“the Oversight Committee”), and the

Oversight Committee requested various FCIC records. *See* Compl. at ¶ 24. NARA provided many or all of the requested FCIC records to the Oversight Committee. *See id.* at ¶ 25.

On October 3, 2011, plaintiff Cause of Action, Inc., submitted a FOIA request to NARA seeking copies of all FCIC records that NARA had transmitted to the Oversight Committee. *See* Compl., Exh. 3. On December 1, 2011, NARA denied this FOIA request by letter stating that “the FCIC was a commission that was established within the legislative branch” and therefore “its records are not subject to the Freedom of Information Act[.]” Compl., Exh. 4 at 1. NARA stated that although the FCIC records will eventually become available through public access requests under the FRA, NARA would not accept such requests until February 11, 2016, based on the FCIC’s five-year restriction of its records. *Id.*

Cause of Action timely appealed this denial on January 5, 2012. *See* Compl., Exh. 5. Cause of Action asserted that NARA had possession and custody of the FCIC records, and therefore the records were subject to FOIA. *Id.* at 2. Cause of Action also asserted that 44 U.S.C. § 2108, the statutory basis for restrictions on access to the FCIC records, was not a valid withholding statute under FOIA’s Exemption 3. *Id.* at 3-4; *see* 5 U.S.C. § 552(b)(3).

NARA thereafter denied Cause of Action’s appeal, again stating that the FCIC records were legislative records not subject to FOIA. *See* Compl., Exh. 7. The mere transfer of records to NARA’s custody does not subject the records to FOIA, NARA said, because “courts have long recognized that there are types of archival records in NARA’s legal custody where access restrictions are controlled by the terms of other statutes or by donor intent.” *Id.* at 3. Additionally, NARA stated that it was irrelevant whether § 2108 met the requirements of an Exemption 3 withholding statute under FOIA, because the records at issue here are not subject to FOIA in the first instance. *Id.* at 4.

Cause of Action then filed this lawsuit against NARA on August 14, 2012. The Complaint alleges two counts: (i) that NARA violated FOIA by failing to disclose the requested FCIC records; and (ii) that NARA violated FOIA by failing to grant Cause of Action a fee waiver for its FOIA request. *See* Compl. at ¶¶ 43-49.

STANDARD OF REVIEW

NARA moves to dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion, a plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level[.]" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Although a court must accept all factual allegations as true, the court is "not bound to accept as true a legal conclusion couched as a factual allegation[.]" *Id.* (internal quotation marks omitted).

When evaluating the sufficiency of the Complaint, the Court may consider "the facts alleged in the complaint, any documents either attached to or incorporated in the complaint and matters of which [the court] may take judicial notice." *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997). Additionally, for purposes of a Rule 12(b)(6) motion, "documents that are referenced in, or are an integral part of, the complaint are deemed not 'outside the pleadings.'" *Norris v. Salazar*, ___ F. Supp. 2d ___, 2012 WL 3541710 at *3 n.9 (D.D.C. Aug. 17, 2012) (internal quotation marks omitted).

To the extent that the Court believes the attached declarations present information not properly considered on a Rule 12(b)(6) motion and that such information is necessary to the resolution of this motion, NARA also moves in the alternative for summary judgment pursuant to Federal Rule of Civil Procedure 56(a). Under that rule, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

ARGUMENT

I. THIS FOIA LAWSUIT MUST BE DISMISSED, BECAUSE LEGISLATIVE RECORDS ARE NOT SUBJECT TO FOIA.

FOIA expressly exempts “the Congress” from its definition of agency. 5 U.S.C. § 551(1)(A). Both the Supreme Court and the D.C. Circuit have made clear that this reference to “the Congress” includes all entities within the legislative branch. *See Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 145 (1980) (noting that the Library of Congress, a legislative agency, is not an agency under FOIA); *Wash. Legal Found. v. United States Sentencing Comm’n*, 17 F.3d 1446, 1449 (D.C. Cir. 1994) (interpreting the APA’s definition of agency, which is the exact same statutory provision incorporated into FOIA, and stating “we have interpreted the APA exemption for ‘the Congress’ to mean the entire *legislative* branch”).

Because Congress created the FCIC and housed it within the legislative branch, its records are therefore legislative records that are exempt from FOIA. The fact that NARA, an executive agency, currently has legal custody of the FCIC’s records is irrelevant to the status of those records. For decades, all three branches of government—the courts, Congress, and the Executive—have agreed that the transition of records to NARA does not alter the records’ original status. Indeed, this principle is a fundamental tenet of the archival profession. These precedents from all three branches of government are binding on this Court, and conclusively resolve the present lawsuit.

Even aside from these binding precedents, moreover, practical considerations also confirm that FOIA does not apply to legislative records. Subjecting legislative records in NARA’s possession to FOIA would significantly disrupt NARA’s existing administrative scheme for processing and releasing the legislative records. Additionally, granting FOIA access to the

records would fail to protect all of the relevant sensitivities, thereby releasing improper information and harming future legislative commissions.

A. The FCIC Was a Legislative Agency, and Therefore Its Records Are Not Subject to FOIA.

It cannot be seriously disputed that the FCIC was a legislative agency. *See* Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617, § 5(a) (2009) (“There is established *in the legislative branch* the Financial Crisis Inquiry Commission . . . to examine the causes, domestic and global, of the current financial and economic crisis in the United States.” (emphasis added)). The only question, then, is whether the FCIC’s transfer of its records to NARA resulted in the records losing their legislative status.

It did not: NARA’s possession and custody of the FCIC records does not affect their status as legislative records. Although NARA itself is an executive agency subject to FOIA, NARA also possesses and maintains custody over numerous collections of records that are not subject to FOIA. “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.” Mills Decl. at ¶ 7. Many of those collections are not subject to FOIA as executive records, notwithstanding NARA’s custody of the records. For instance, NARA has legal custody over presidential records (both publicly owned and donated), judicial records, legislative records, and other donated materials. *See* Mills Decl. at ¶¶ 13-24. None of these records are governed by FOIA. *Id.* at ¶ 11. NARA’s possession of these records is irrelevant: “Under prevailing law and practice, access to records in NARA’s legal custody always has depended on the source of the records and the method by which they were obtained.” *Id.*

Indeed, all three branches of government—the courts, Congress, and the Executive—have confirmed that NARA’s legal custody of records does not alter their original status. First,

binding D.C. Circuit precedent holds that NARA's legal custody of records does not make those records subject to FOIA. In *Ricchio v. Kline*, 773 F.2d 1389 (D.C. Cir. 1985), the D.C. Circuit addressed whether FOIA could be used to access certain materials from President Nixon's time in office. NARA had full legal custody of those materials pursuant to the Presidential Recordings and Materials Preservation Act ("PRMPA"), 44 U.S.C. § 2111 note § 101; *see also* Mills Decl. at ¶ 16. Notwithstanding NARA's complete control of the records, the D.C. Circuit held that FOIA could not be used to obtain the records because they were covered solely by the PRMPA. *See Ricchio*, 773 F.2d at 1395 ("We conclude that the proper method by which the appellant Ricchio may seek disclosure of the Watergate Force transcripts of the Nixon tapes is by proceeding under the [PRMPA] and that she cannot proceed under the [Freedom of] Information Act."). Thus, binding D.C. Circuit precedent has already rejected the theory underlying Cause of Action's lawsuit—that all records within NARA's custody and control are subject to FOIA.

Moreover, Congress has likewise rejected this theory. When passing the Presidential Records Act of 1978 ("PRA"), 44 U.S.C. § 2201 *et seq.*, Congress confirmed that records transferred to NARA's legal custody do not automatically become subject to FOIA. Under the PRA, at the conclusion of each presidential administration (beginning with President Reagan), the administration's presidential records are transferred into NARA's legal custody and control. *See* 44 U.S.C. §§ 2202, 2203(f); *see also* Mills Decl. at ¶ 14. The presidential records are generally unavailable to the public for a period of five years, with some categories of records potentially unavailable for up to twelve years. *See* 44 U.S.C. § 2204(a), (b). Subject to those restrictions, the presidential records then become available for public access pursuant to a modified version of FOIA that prohibits invoking exemption (b)(5) to withhold information:

Subject to the limitations on access imposed pursuant to subsections (a) and (b), Presidential records shall be administered in accordance with section 552 of

title 5, United States Code, except that paragraph (b)(5) of that section shall not be available for purposes of withholding any Presidential record, and for the purposes of such section such records shall be deemed to be records of the National Archives and Records Administration.

44 U.S.C. § 2204(c)(1).

Critically, the last clause of this provision would have been wholly unnecessary if presidential records became subject to FOIA as a result of NARA's custody and control over them. Had NARA's custody and control been sufficient to render presidential records subject to FOIA, there would have been no need for Congress to expressly state that "for the purposes of [FOIA] such [presidential] records shall be deemed to be records of the National Archives and Records Administration." *Id.* And because it is a "cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant," *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal quotation marks omitted), Congress clearly understood that NARA's custody and control of the records was *not* sufficient to render them subject to FOIA.

The legislative history underlying this statutory provision further confirms Congress's understanding that presidential records would not have been otherwise subject to FOIA:

While Presidential records are not currently covered by the Freedom of Information Act, they *effectively* become agency records for the purposes of this provision in applying FOIA requirements to them. As discussed above, however, *since Presidential records as defined by this Act are not actually agency records under the FOIA*, they may not be withheld from public release by the Archivist under the fifth exemption of the Freedom of Information Act, dealing with inter- and intra-agency records.

H.R. REP. NO. 95-1487, pt. 1, at 16 (1978) (emphasis added), *reprinted in* 1978 U.S.C.C.A.N. 5732, 5747 (hereinafter "PRA House Report"); *see also id.* at 11 (discussing how FOIA does not apply to presidential records, and stating that § 2204(c) of the PRA would "specially apply the FOIA to these non-agency records after a President leaves office"). Based on the statutory text

of § 2204(c)(1), as well as the legislative history underlying that provision, Congress clearly understood that presidential records were not subject to FOIA simply because NARA obtained custody and control over the records. Rather, Congress had to include a statutory provision specially applying FOIA to those records. Just as with the D.C. Circuit, therefore, Congress has rejected the notion that NARA’s custody and control over records automatically subjects those records to FOIA.

Finally, the Executive Branch has also rejected this principle. Binding NARA regulations confirm that not all records located at NARA are subject to FOIA. *See* 36 C.F.R. § 1250.6 (stating that FOIA does not cover all of the records at NARA because “FOIA applies only to the records of the executive branch of the Federal government and certain Presidential records”). That regulation includes a chart listing the various types of records stored at NARA, and how to obtain access to those records:

If you want access to ...	Then access is governed by . . .
(a) Records of executive branch agencies	This part and parts 1254 through 1260 of this chapter. FOIA applies to these records.
(b) Records of the Federal courts	Parts 1254 through 1260 of this chapter. FOIA does not apply to these records.
(c) Records of Congress	Parts 1254 through 1260 of this chapter. FOIA does not apply to these records.
(d) Presidential records (created by Presidents holding office since 1981).	This part and parts 1254 through 1270 of this chapter. FOIA applies to these records 5 years after the President leaves office. However a President may invoke exemptions under the Presidential Records Act which would extend this up to 12 years after the President leaves office.
(e) Documents created by Presidents holding office before 1981 and housed in a NARA Presidential library.	The deed of gift under which they were given to NARA. These documents are not Federal records and FOIA does not apply to these materials.
(f) Nixon Presidential materials	Part 1275 of this chapter. FOIA does not apply to these materials.

Id.; *see also* 36 C.F.R. § 1250.2(e) (“FOIA request means a written request for access to *records of the executive branch of the Federal Government held by NARA*, including NARA operational records, or to Presidential records in the custody of NARA that were created after January 19, 1981, that cites the Freedom of Information Act.” (emphasis added)).

When promulgating these regulations, NARA considered the very argument advanced by Cause of Action here—that all of the records in NARA’s custody should be subject to FOIA. After NARA published a Notice of Proposed Rulemaking for the above regulations, an advocacy group known as Public Citizen submitted a comment arguing that “all records in the custody of the Archivist should be governed by FOIA,” believing that “all archival records received under 44 U.S.C. 2107, including the records of Congress and judicial branch records that have been deposited with NARA for preservation[,] are subject to the FOIA.” *See* 66 Fed. Reg. 16374, 16374 (March 23, 2001). NARA rejected this argument, however, stating:

We believe that 44 U.S.C. 2107 allows the Archivist to accept for deposit Congressional and court records of historical value and that accepting these records does not make them records of the executive branch for purposes of FOIA. In addition, the courts have carved out court and Congressional records from the FOIA statute coverage. (*See United States v. Spain, No.82-60-N, slip op. at 1 (E.D. Va. June 19, 1998) and Smith v. United States Congress, No. 95-5281, 1996 WL 523800, at *1(D.C.Cir. August 28, 1996)*)[.]

Id. Accordingly, this principle—that records transferred to NARA’s custody retain their original character and do not become subject to FOIA—is codified in a final regulation, which is entitled to deference from this Court. NARA is the agency responsible for administering the Federal Records Act, of which chapter 21 of title 44 of the U.S. Code is a part, and is authorized to do so by promulgating regulations. *See* 44 U.S.C. § 2104(a). Thus, this principle is entitled to deference. *See generally Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

Moreover, this principle’s codification in NARA’s regulations is not surprising, given that the principle is based on “fundamental” tenets of the archival profession. Mills Decl. at ¶ 25. Specifically, the tenets of original order and provenance require that records retain their original status even after they are transferred to an archives. *Id.* The tenet of original order is defined as

“the principle that records should be maintained in the order in which they were placed by the organization, individual, or family that created them.” *Id.* at ¶ 27 (internal quotation marks omitted). This principle “preserve[s] the existing relationships and evidential significance” of the transferred records, and allows researchers to use the “record creator’s mechanisms to access the records.” *Id.* at ¶ 26 (internal quotation marks omitted). NARA respects this principle by not intermixing its various types of records. *Id.* at ¶ 28. Even after the transfer of legislative records to NARA, therefore, those records are still maintained separately as legislative records.

Similarly, the archival tenet of provenance “requires that records of different origins (provenance) be kept separate to preserve their context.” *Id.* at ¶ 29. Again, NARA respects this tenet by maintaining each record group (and record sub-group) separately and not intermixing records of one origin with records that originated elsewhere. *Id.* at ¶ 30. NARA’s practices, therefore, likewise confirm that legislative records retain their status as such, even after they have been transferred into NARA’s custody.

At bottom, Cause of Action’s FOIA lawsuit rests on a single premise—that legislative records transferred into NARA’s legal custody become agency records subject to FOIA. But all three branches of the Federal Government have expressly rejected that premise. Here, Congress created the FCIC within the legislative branch, meaning that the FCIC created legislative records outside the reach of FOIA. As the precedents discussed above establish, the fact that those records have now been transferred into NARA’s custody for permanent preservation does not change the records’ original status. The above legal precedents are binding on this Court, and conclusively demonstrate that the FCIC records requested here are not subject to FOIA. Cause of Action’s lawsuit should be dismissed on this basis alone.

B. Practical Considerations Also Confirm that FOIA Does Not Apply to Legislative Records Transferred to NARA's Custody.

Even apart from the legal precedents discussed above, practical considerations also demonstrate why Cause of Action's lawsuit must fail as a matter of law. Subjecting legislative records to FOIA would not only disrupt NARA's administrative scheme for processing and releasing such records, but would also harm future legislative commissions by causing the improper release of sensitive information.

These types of practical considerations have previously motivated the D.C. Circuit to hold that particular records are outside of FOIA. *See, e.g., Ricchio*, 773 F.2d at 1394 (holding that permitting disclosure of the Nixon materials under FOIA, as opposed to NARA's existing administrative scheme, "might frustrate the achievement of the legislative goals of orderly processing and protection of the rights of all affected persons" (quoting *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 606 (1978))). Similarly here, permitting FOIA access to legislative records would frustrate those same two goals.

1. Interference with NARA's Administrative Scheme for Orderly Processing Legislative Records.

First, permitting immediate FOIA access would significantly interfere with NARA's orderly processing of the FCIC records. NARA has established a detailed administrative scheme for processing and releasing legislative records, which will be implemented with respect to the FCIC records at issue here. *See Fulgham Decl.* at ¶¶ 19-24, 29-30. The first step in this scheme is for the Center for Legislative Archives, after it receives records from a legislative agency, to begin preliminary processing of the records. *Id.* at ¶ 20. Processing priorities are determined based on anticipated researcher and public interest in the records. *See Fulgham Decl.* at ¶ 20. This preliminary processing involves the Center creating lists of folder titles and directories, which are known as "finding aids" and are designed to "act as an aid to researchers in finding

pertinent material to their research[.]” *Id.* The Center “also prepare[s] narrative descriptions of particular groupings of records, for eventual online posting and public use.” *Id.* These finding aids are “very valuable for allowing the researcher and archivist to locate and identify the records of interest.” *Id.* at ¶ 22.

Applying FOIA to legislative records would significantly disrupt this administrative scheme. The critical difference is that under FOIA the legislative records would be immediately available, whereas under the present scheme there is a five-year restricted period. This five-year restricted period is critical for allowing NARA “to begin at least preliminary organizing and processing of records before access requests are submitted.” *Id.* at ¶ 38. Indeed, this five-year period was modeled on the PRA’s five-year restricted period, which was also designed, at least in part, to allow NARA sufficient time to begin orderly processing the records. *See* 44 U.S.C. § 2204(b)(2) (establishing the five-year restricted period on access to presidential records); PRA House Report at 16 (describing this provision as a “grace period provided for archival processing of unrestricted records”). Just as with presidential records, this five-year period is necessary given the volume of recently created records that are transferred into NARA’s custody at one time. *See* Fulgham Decl. at ¶ 37. Subjecting legislative records to immediate FOIA access “would interfere with the Center’s ability to orderly process the records and make them available to researchers in an organized fashion” because the Center would be “unable to undertake systematic organization, indexing, or finding aid development[.]” *Id.* at ¶ 38.*

* This interference is increased by the “particularly burdensome” nature of processing legislative records. Fulgham Decl. at ¶ 39. The FCIC records here were very recently created, meaning that they contain far more sensitivities than most other records collections within NARA. “Most agencies do not transfer their records to NARA until they are 20 to 30 years old, during which time many of the sensitivities diminish significantly.” *Id.*; *see generally* 44 U.S.C. § 2107(2) (stating that the Archivist may direct the transfer to NARA of “records of a Federal agency that have been in existence for more than thirty years”).

Additionally, applying FOIA would interfere with the Center's ability to process the records according to broad public interest. Instead, the Center would be catering to the interests of whichever individual was at the top of the FOIA queue. *See id.* at ¶ 37. Applying FOIA to legislative records would thus "decrease the Center's ability to make the most widely requested records publicly available at the earliest possible date." *Id.*

Finally, these increased burdens placed on the Center would interfere with the Center's ability to fulfill other aspects of its overall mission, such as responding to requests from Congress. *See id.* at ¶ 38. The processing and release of records is extremely time-consuming and burdensome for the Center's staff, and "those burdens would only be increased if the records were subject to FOIA instead of NARA's current administrative scheme." *Id.* at ¶ 39. Applying FOIA to legislative records would thus interfere with the "comprehensive, carefully tailored and detailed procedure" that NARA has already created for the processing and release of legislative records. *Ricchio*, 773 F.2d at 1395.

2. Improper Release of Sensitive Information.

In addition to the significant disruption of NARA's administrative scheme, applying FOIA to legislative records could also cause the improper release of sensitive information. This would be both harmful in its own right, and could also harm the effectiveness of future legislative commissions.

If legislative records were subjected to FOIA, the only information that could be withheld from a requester would have to be justified under one of the nine FOIA exemptions. *See* 5 U.S.C. § 552(b). Although most of the restricted information within legislative records could likely be withheld under one of these exemptions, there is still a very real subset of information that is currently restricted but may not be justified under a FOIA exemption. In effect, then,

applying FOIA could nullify restrictions that both the legislative agency head and the Archivist thought were “necessary or desirable in the public interest[.]” 44 U.S.C. § 2108(a).

For example, legislative commissions frequently obtain “highly sensitive information” based on “promises of confidentiality to individuals and organizations (from both the private and public sectors)[.]” Fulgham Decl. at ¶ 40. Under NARA’s present administrative scheme, a legislative commission is easily able to restrict this information from public release. *See, e.g.*, Compl., Exh. 1 (Chairman Angelides’ Letter restricting the disclosure of “personal privacy information that the Commission agreed to protect from public disclosure for longer than 5 years” and “proprietary business information . . . that the Commission has agreed will remain confidential for a longer period of time”). Under FOIA, however, there may be no applicable exemption that protects information solely on the basis of a confidentiality agreement.

One illustrative example is from records of the 9/11 Commission. There, the 9/11 Commission interviewed New York City first responders, and in order to facilitate those interviews “entered into an agreement with New York City to keep the interviews confidential for a period of at least 25 years[.]” Fulgham Decl. at ¶ 40. That restriction was approved by the 9/11 Commission and NARA when the records were transferred to NARA’s custody, and NARA “intends to honor that agreement[.]” *Id.* Under FOIA, however, it is doubtful that any of the nine exemptions would justify withholding in full the entirety of those interviews. Under the FOIA framework, then, at least some of the interviews might have to be disclosed, at least in part—notwithstanding the 9/11 Commission’s promise to keep the interviews confidential for at least 25 years.

The improper disclosure of this information would be harmful in its own right, and would also harm future legislative commissions. Needless to say, the individuals or entities that

provided sensitive information under a guarantee of confidentiality would likely be harmed by the disclosure of that information (that is presumably why they sought a confidentiality agreement in the first place). *See id.* at ¶ 40 (acknowledging potential “harm to those who provided the information under guarantees of confidentiality by releasing their sensitive information”).

Additionally, this improper disclosure would harm future legislative commissions. For one thing, legislative commissions themselves may be “less likely to document their activities” if they believed their records were immediately available under FOIA. Fulgham Decl. at ¶ 41. Moreover, “agencies and private parties that work with legislative commissions . . . could be less willing to share documentation in the future” if the records were immediately subject to public scrutiny. Fulgham Decl. at ¶ 41. This prospect “could be especially chilling to future commissions trying to access non-government records, because those commissions could no longer offer a firm promise of confidentiality that will withstand a court challenge.” *Id.*; *cf. Baez v. Dep’t of Justice*, 647 F.2d 1328, 1336 (D.C. Cir. 1980) (“A failure to honor the agreements to maintain the confidentiality of this information . . . could be expected to dissuade foreign agencies from entrusting additional information, to the [government].”).

These results only confirm that NARA’s legislative records are not subject to FOIA. Subjecting legislative records to FOIA would harm individuals, as well as future commissions’ transparency and effectiveness. When Congress chose to establish the FCIC within the legislative branch, Congress implicitly adopted NARA’s administrative scheme as the best framework for “orderly processing and protection of the rights of all affected persons.” *Ricchio*, 773 F.2d at 1395 (internal quotation marks omitted). Applying FOIA to legislative records would conflict with this judgment by Congress. Even apart from the binding legal precedents

discussed in Section I.A, therefore, practical considerations also confirm that FOIA does not apply to legislative records in NARA's custody.

II. EVEN ASSUMING NARA'S CONTROL OF THE RECORDS AFFECTS THE ANALYSIS, THE RECORDS HERE ARE STILL LEGISLATIVE RECORDS NOT SUBJECT TO FOIA.

For the foregoing reasons, NARA's legal custody and control of the FCIC records is irrelevant to the question whether those records are subject to FOIA. All three branches of the Federal Government have adopted that principle, and therefore binding precedent has established that NARA's control is irrelevant to the analysis. Cause of Action's lawsuit should be dismissed on this basis alone.

To be sure, there is a line of D.C. Circuit cases considering control as a relevant factor in assessing whether records are legislative. But those cases arise in a very different context—*i.e.*, an ongoing oversight relationship between Congress and an executive agency—and thus are inapplicable to the factual circumstances here. Moreover, even if NARA's control of the records was a relevant factor, the FCIC records here would still be legislative records outside the reach of FOIA. The FCIC, at the time of its transfer of records to NARA, clearly *did* intend to establish controls to restrict future access to its records. Even under a control-based framework, therefore, Cause of Action's lawsuit must still be dismissed.

A. The Cases Considering Control as a Relevant Factor in Determining The Status of Records Do Not Apply in These Factual Circumstances.

The cases considering control as a relevant factor arise in the unique context of Congress's ongoing interaction with executive agencies, including Congress's exercise of its oversight functions. In those situations, a control-based framework is needed to allow Congress to keep secret its own records sent to agencies, as well as records agencies create in response to

confidential Congressional inquiries. That framework is inapplicable to this case, where a legislative agency is simply depositing its records with NARA for permanent preservation.

The first D.C. Circuit case to consider control as a relevant factor in determining whether a record is legislative or executive was *Goland v. CIA*, 607 F.2d 339 (D.C. Cir. 1978), *vacated in part on other grounds*, 607 F.2d 367 (D.C. Cir. 1979). In *Goland*, a FOIA requester sought access to a congressional hearing transcript that the CIA possessed, but which Congress had marked “Secret” and was transcribed from a committee hearing closed to the public. *Id.* at 347. The FOIA requester argued that the CIA’s possession of the transcript was, by itself, sufficient to subject the transcript to FOIA. But such a holding, the *Goland* Court said, would unnecessarily interfere with Congress’s oversight role:

Congress has undoubted authority to keep its records secret, authority rooted in the Constitution, longstanding practice, and current congressional rules. Yet Congress exercises oversight authority over the various federal agencies, and thus has an undoubted interest in exchanging documents with those agencies to facilitate their proper functioning in accordance with Congress’ originating intent. If plaintiffs’ argument were accepted, Congress would be forced either to surrender its constitutional prerogative of maintaining secrecy, or to suffer an impairment of its oversight role.

Id. at 346. Thus, the Court adopted a control-based framework, holding that documents within an agency’s possession were nonetheless legislative in character if Congress intended to retain control over them. *See id.* at 347.

A later decision applied this same framework to the converse situation—a FOIA request for agency-created documents that were sent to Congress, in response to a congressional inquiry. In *United We Stand America, Inc. v. IRS*, 359 F.3d 595 (D.C. Cir. 2004), the D.C. Circuit held that Congress intended to retain control over its confidential request for information, and therefore all parts of the agency-created response that would reveal Congress’s request were outside FOIA. *See id.* at 600 (“[U]nder all of the circumstances surrounding the IRS’s creation

and possession of the documents, we find sufficient indicia of congressional intent to control, but only with respect to the Joint Committee’s April 28 request and those portions of the IRS response that would reveal that request.”). Thus, the D.C. Circuit expressly adopted the control-based framework to protect “the ‘exchang[e]’ of documents” between Congress and executive agencies. *Id.* at 599 (quoting *Goland*, 607 F.2d at 646, modification in original).

The concern underlying these cases—protecting Congress’s ability to keep its records secret, while also allowing Congress to perform oversight over executive agencies—is inapplicable to the factual circumstances here. A control-based framework makes sense in the usual course, where “[m]any agencies . . . must work frequently and closely with congressional committees on matters of budget and policy or on individual cases.” *Paisley v. CIA*, 712 F.2d 686, 696 (D.C. Cir. 1983), *vacated in part on other grounds*, 724 F.2d 201 (D.C. Cir. 1984). In order to protect the exchange of documents in that context, there must be some way to distinguish between congressional records possessed by agencies, and actual agency records subject to FOIA. But here, the FCIC did not send its records to NARA as part of an ongoing, supervisory relationship requiring the exchange of documents. Rather, the FCIC deposited its records with NARA for permanent preservation, as it was required to do under the FRA. When a temporary legislative agency is about to expire and is simply depositing its records for preservation, as it is required to do by statute, there is no need to distinguish between different classes of records: *all* of the agency’s records retain their original character.

At bottom, the above D.C. Circuit cases are inapplicable due to NARA’s “uniqueness as an Executive branch agency that holds legal and physical custody of widely disparate collections of records not strictly governed under the FOIA.” *Mills Decl.* at ¶ 13. No other agency routinely accepts for deposit records from all three branches of government, as NARA does. *See* 44

U.S.C. § 2107(a); Mills Decl. at ¶¶ 7, 14-22. Although control may be a relevant factor when evaluating a traditional executive agency's possession of a legislative document, that factor is inapplicable to NARA's collection of legislative records: the formal deposit of records with NARA does not alter their original character. For all of the reasons set forth above, therefore, control is not a relevant factor in assessing whether NARA's legislative records are subject to FOIA.

B. Even Were Control a Relevant Factor, the FCIC Records Would Still Be Legislative Records Outside of FOIA.

Even under a control-based framework, the FCIC records here would still be legislative records. When the FCIC transferred its records to NARA, the FCIC clearly intended to establish controls to restrict future access to those records. This intent is evident from FCIC Chairman Angelides' letter, as well as the SF-258 officially transferring the records to NARA. Even were control a relevant factor, therefore, the FCIC records would still not be subject to FOIA.

Under the control-based framework, the legislative entity must "manifest[] its own intent to retain control" of the records for the records to retain their legislative character. *Paisley*, 712 F.2d at 693. The focus is on legislative intent to control, rather than actual agency control. *See United We Stand*, 359 F.3d at 603 (interpreting *Paisley* as "chang[ing] the focus from agency control to congressional intent"). Accordingly, legislative intent to control is typically embodied in "contemporaneous and specific instructions . . . limiting either the use or disclosure of the documents." *Paisley*, 712 F.2d at 694.

Here, at the time of transfer, the FCIC clearly intended to exercise control over the future use and disclosure of its documents. For one thing, FCIC Chairman Angelides' letter expressly stated "that the FOIA will not apply to Commission records even after they are transferred to NARA," thus providing clear evidence that the FCIC intended to control the disclosure of its

records. Compl., Exh. 1 at 1. Chairman Angelides' letter then went on to provide "contemporaneous and specific instructions" regarding "disclosure of the documents." *Paisley*, 712 F.2d at 694. Specifically, Chairman Angelides recommended that "records not already publicly available should be made available to the public, to the greatest extent possible consistent with the terms of this letter, beginning on February 13, 2016." Compl., Exh. 1 at 1. Thus, the FCIC imposed a five-year restriction on all of its non-public records. The FCIC also imposed four specific restrictions lasting beyond the five-year period:

Records should not be disclosed immediately after February 13, 2016, if they contain (a) personal privacy information that the Commission agreed to protect from public disclosure for longer than 5 years; (b) confidential financial supervisory or regulatory information which remains sensitive at the time of release; (c) proprietary business information which remains confidential or contains trade secrets at the time of release, including any such information that the Commission has agreed will remain confidential for a longer period of time; or (d) information which is otherwise barred from public disclosure by law, as determined by the Archivist.

Id. These restrictions were accepted by NARA, pursuant to the signing of the SF-258 between the FCIC and NARA. *See* Compl., Exh. 2. Clearly, then, Chairman Angelides' letter—expressly incorporated into the SF-258—represents contemporaneous and specific instructions from the FCIC regarding the use and disclosure of its records.

Even apart from the SF-258's express incorporation of Chairman Angelides' letter, that form contains two additional indicia of the FCIC's intent to control future access to its records. First, in the "Terms of Agreement" section, the FCIC and NARA struck out the reference to restrictions on use of the records complying with FOIA. *Id.*; *see also* Fulgham Decl. at ¶ 33 ("The SF-258 was also specifically hand-annotated . . . to reflect the parties' intent to negate any possibility that the Freedom of Information Act, 5 U.S.C. § 552, would apply to these

materials.”). Second, box 12 of the form asks whether the “records [are] fully available for public use?”, and the parties answered “No” to that question. *See* Compl., Exh. 2.

Taken together, the SF-258 and Chairman Angelides’ letter clearly establish the FCIC’s intent to establish controls over the future disclosure of its documents. Indeed, NARA itself views the FCIC as having intended to control future access to FCIC records. *See* Fulgham Decl. at ¶ 34 (“It is clear to me—based on my personal involvement in this process, Chairman Angelides’ letter, and the subsequent signing of the SF-258 between NARA and FCIC—that the FCIC acted in signing the transfer documentation with the clear intent and desire to put controls on the future access to, and use and disclosure of, FCIC records.”). Even if control is a relevant factor in the analysis, therefore, the FCIC records are still legislative in character. And because the requested FCIC records are legislative, Cause of Action cannot obtain access to them through FOIA. Thus, Cause of Action’s lawsuit—predicated entirely on violations of FOIA—fails as a matter of law and should be dismissed.

CONCLUSION

For the foregoing reasons, NARA’s motion to dismiss for failure to state a claim, or in the alternative for summary judgment, should be granted.

Dated: October 31, 2012

Respectfully Submitted,

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Acting Assistant Attorney General

RONALD C. MACHEN JR.
United States Attorney

ELIZABETH J. SHAPIRO
Deputy Branch Director

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Attorneys for Defendant

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

CAUSE OF ACTION,)
Plaintiff,)
)
v.) Civil Action No. 12-1342 (JEB)
)
NATIONAL ARCHIVES AND)
RECORDS ADMINISTRATION,)
)
Defendant.)

DECLARATION OF THOMAS E. MILLS

I, Thomas E. Mills, pursuant to 28 U.S.C. § 1746, do hereby declare and state:

1. I am the Chief Operating Officer (“COO”) for the National Archives and Records Administration (“NARA” or the “National Archives”). I have served in this position since March 27, 2011. My duties as COO include oversight of NARA’s six major program and support offices. As relevant to this case, those offices include: Legislative Archives, Presidential Libraries, and Museum Services, which includes the Center for Legislative Archives, and is responsible for processing and preserving Congressional records, among other duties; and Research Services, which is responsible for processing and preserving Federal records and making them accessible.
2. I have personal knowledge of the facts set out herein, based on my twelve years of service with NARA, save that where the knowledge is based on information or belief, I have so stated.
3. I have worked at the National Archives since 2000. Prior to being named Chief Operating Officer, I was the Assistant Archivist for Regional Records Services. In this position, I oversaw archives, records management, and records center programs in

NARA's nine regions and the National Personnel Records Center in St. Louis. I was in that position for ten years, from 2001 to 2011. Prior to serving as the Assistant Archivist for Regional Records Services, I worked at NARA as a Regional Administrator for NARA's Mid-Atlantic region, headquartered in Philadelphia. In this position, I provided leadership and direction for archives, records management, and records center operations in NARA's Mid-Atlantic region. I was in that position for one year, from 2000 to 2001.

4. Prior to my work at NARA, I worked for the New York State Archives for twenty-one years. I was the Director of Operations of the New York State Archives, from 1997-2000. In this position, I provided strategic leadership and direction for records storage, preservation and research services operations; records management advisory services to state and local government agencies; and archival grant programs for local government and historical organizations.
5. I earned a Bachelor's degree in History as well as a Master's degree in History from the State University of New York at Albany. I have taken graduate courses at the SUNY School of Public Administration, attended the Pittsburgh Advanced Institute for Government Archivists, and participated as a Bentley Historical Library Fellow at the University of Michigan.

BACKGROUND ON THE NATIONAL ARCHIVES

6. The Archivist of the United States is responsible for the use and custody of all records transferred to NARA, and by statute is required to maintain adequate facilities for the housing of those records. 44 U.S.C. §§ 2108(a), 2110, and 2203(f)(2). NARA is the depository of the permanently valuable historical records and documents of the Federal

Government of the United States of America. The National Archives was created by Congress in 1934.

7. 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. Pursuant to the Federal Records Act, the National Archives of the United States accepts for deposit “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.” 44 U.S.C. § 2107(1).
8. In addition to these records, the Archivist, when he considers it to be in the public interest, may accept for deposit “the papers and other historical materials of a President or former President of the United States, or other official or former official of the Government, and other papers relating to and contemporary with a President or former President of the United States, subject to restrictions agreeable to the Archivist as to their use” and documents “from private sources that are appropriate for preservation by the Government as evidence of its organization, functions, policies, decisions, procedures, and transactions.” 44 U.S.C. § 2111. See also ¶ 14, *infra* (discussing records covered under the Presidential Records Act).
9. As stated above, NARA accepts records from all “Federal agencies.” The Federal Records Act defines the term “Federal agency” to mean “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).

10. NARA's mission is to "serv[e] American democracy by safeguarding and preserving the records of our Government, ensuring that the people can discover, use, and learn from this documentary heritage." National Archives and Records Administration, *About the National Archives*, <http://www.archives.gov/about/info/mission.html> (Tab A). It is crucial to NARA's mission to "ensure continuing access to the essential documentation of the rights of American citizens and the actions of their government." *Id.*
11. Under prevailing law and practice, access to records in NARA's legal custody always has depended on the source of the records and the method by which they were obtained. Access considerations (including any restrictions on access) may be governed by the Freedom of Information Act ("FOIA"), the Federal Records Act, the Presidential Records Act, the Presidential Recordings and Materials Preservation Act, the President John F. Kennedy Assassination Records Collection Act, as well as other specific statutes, deeds, or written letters. NARA ensures that access to the records complies with the applicable restrictions on each set of records.
12. Access restrictions are identified on the signed and approved Standard Form 258, *Agreement to Transfer Records to the National Archives of the United States*, at the time records are transferred to the National Archives, if they are transferred by a "Federal agency."¹
13. Out of NARA's vast collections of permanent archives, it is estimated that NARA holds over 900,000 cubic feet of textual records in its legal and physical custody that are either not considered subject to FOIA at all, or in the case of presidential records, are subject to

¹ More recent transfers may be governed by a Transfer Request made in the Electronic Records Archives. The process for this transfer is discussed in the Electronic Records Archives Agency User Manual, available online at <http://www.archives.gov/records-mgmt/era/agency-user-manual.pdf>. This Transfer Request replaces the SF 258 when it is used.

an alternate access regime that partially incorporates aspects of the FOIA. *See* National Archives and Records Administration, Statistical Summary of Holdings, <http://www.archives.gov/research/guide-fed-records/index-numeric/>; *see also* 36 C.F.R. § 1250.6. These holdings include presidential records, other forms of presidential materials, judicial records, donated records, and legislative records. These collections are all held in custody in one of NARA's many facilities, either in the Washington D.C. area, or in regional archives or presidential libraries located across the country. In further illustration of NARA's uniqueness as an Executive branch agency that holds legal and physical custody of widely disparate collections of records not strictly governed under the FOIA, I wish to speak to several examples of such holdings in more depth.

Presidential Records and Other Materials

14. The Presidential Records Act of 1978 changed the legal status of Presidential and Vice Presidential records from being the personal property of the President to comprising official records of the United States. *See* 44 U.S.C. § 2201 *et seq.* As a result of this determination, the records of Presidents Ronald Reagan, George H.W. Bush, William J. Clinton, and George W. Bush were transferred into the legal and physical custody of the Archivist immediately upon the end of each Administration; however, FOIA access, as incorporated into the provisions of the PRA, begins as a general rule only after a period of five years from the time the president leaves office, with certain categories of records exempt from FOIA up to twelve years. 44 U.S.C. § 2204; National Archives and Records Administration, *Types of Presidential Materials*, available at <http://www.archives.gov/presidential-libraries/research/types.html#pra> (Tab B).

15. Prior to the passage of the Presidential Records Act of 1978, the records of the president were viewed as the personal property of the president, who could dispose of the records as he wished. Presidents Herbert Hoover, Franklin D. Roosevelt, Harry S. Truman, Dwight D. Eisenhower, John F. Kennedy, Lyndon B. Johnson, Gerald Ford, and Jimmy Carter all chose to donate their presidential records to NARA. Access to these documents and materials is governed by the restrictions that were set by the donors, and agreed to by the Archivist at the time the records were accepted. National Archives and Records Administration, *Types of Presidential Materials*, available at <http://www.archives.gov/presidential-libraries/research/types.html#pra>, *supra* & Tab B. On information and belief, NARA holds approximately 160,000 cubic feet of presidential textual papers from these Presidents, along with other forms of electronic records.
16. The Presidential Recordings and Materials Preservation Act applied only to the records of the Nixon Administration. 44 U.S.C. § 2111, note, Presidential Recordings and Materials Preservation Act. Access to these records is controlled under terms of the Act, not by FOIA. See NARA, *Types of Presidential Materials*, *supra* & Tab B. On information and belief, NARA holds approximately 33,000 cubic feet of presidential textual papers from President Nixon, along with tape recordings and other materials.

Judicial Records

17. NARA accepts the records of the judicial branch, including the records of the Supreme Court, the Circuit Courts, the District Courts, the Administrative Office of the U.S. Courts, the Court of Claims, the U.S. Commerce Court, the U.S. Courts of Appeals, the U.S. Tax Court, the U.S. Court of International Trade, the Federal Judicial Center, the U.S. Court of Veterans' Appeals, the Bankruptcy Courts, and judicial agencies, such as

the U.S. Sentencing Commission. As records of the judicial branch, these records are not subject to FOIA, and are instead governed by the access restrictions noted by the court at the time of transfer. These restrictions are typically noted on the SF-258 transfer form (see ¶ 12, *supra*).

18. NARA holds just under an estimated 500,000 cubic feet of records from the judicial branch. See National Archives and Records Administration, Statistical Summary of Holdings, <http://www.archives.gov/research/guide-fed-records/index-numeric/>. These records are held at the National Archives facilities in the Washington D.C. area, as well as in facilities around the country, such as in Waltham, Massachusetts; New York, New York; Philadelphia, Pennsylvania; Atlanta, Georgia; Chicago, Illinois; Kansas City, Missouri; Fort Worth, Texas; Denver, Colorado; Riverside, California; San Bruno, California; Anchorage, Alaska; and Seattle, Washington.

Donated Records

19. As I stated above, the Archivist has the authority to accept documents from private sources that are appropriate for preservation by the Government. When the Archivist determines such records are appropriate for acceptance, access to these donated records is controlled by the deed of gift that the Archivist agrees to upon acceptance of the records.
20. NARA holds over 8,000 cubic feet of donated records. See Donated Materials Holdings of the National Archives, http://www.archives.gov/research/guide-fed-records/index-numeric/statistics_donated_materials.html. These records are held at the National Archives facilities in the Washington D.C. area, as well as in its regional archives across the country.

Legislative Records

21. Noncurrent records of the Congress are transferred to NARA for preservation. 44 U.S.C. § 2118. The records of Congress remain the property of Congress, but are preserved and made available by the Center for Legislative Archives in NARA. The official Committee records of the House and Senate also remain in the legal custody of Congress, but are made available through the Center for Legislative Archives.
22. NARA also accepts the records of agencies, committees, and commissions established within the legislative branch. As records created in the legislative branch and not subject to FOIA, access to the records of the agencies, committees, and commissions are governed by the controls placed by the agency head at the time of transfer (with NARA's concurrence). 44 U.S.C. § 2108(a).
23. The Director of NARA's Center for Legislative Archives is given responsibility to "[c]onsul[t] with legislative branch agencies and commissions to establish access provisions for their records as they are not subject to the Freedom of Information Act." NARA 101, NARA Organization and Delegations, Part 8: Legislative Archives, Presidential Libraries, and Museum Services, § 2(c)(11) (Tab C). The Center for Legislative Archives holds more than 190,000 cubic feet of records that are not subject to FOIA. Center for Legislative Archives, *Congressional Records*, available at <http://www.archives.gov/legislative/research/> (Tab D).
24. The records of the Financial Crisis Inquiry Commission were accepted for deposit by the Center for Legislative Archives as a commission established within the legislative branch. The SF 258 transferring the records to NARA's custody was signed by the Center for Legislative Archives. The SF 258 incorporated access instructions specified in the

agency head's letter to the Archivist. SF 258, NN3-14-8-11-001 (Tab E). NARA has treated these records as legislative records and has controlled access as specified in the letter from the agency head.

THE IMPORTANCE OF MAINTAINING RECORD COLLECTIONS IN ACCORDANCE WITH ARCHIVAL PRINCIPLES

25. I am familiar with the archival principles of original order and provenance and how they are followed at NARA. Original order and the provenance of records are fundamental principles of the archival profession and are practiced at NARA.
26. According to the Society of American Archivists, "original order" is "a fundamental principle of archives." Society of American Archivists, "Glossary of Archival and Records Terminology: Original Order," <http://www2.archivists.org/glossary/terms/o/original-order> (Tab F). The purpose of maintaining records in their original order is to preserve the "existing relationships and evidential significance" and to use the "record creator's mechanisms to access the records." *Id.*
27. NARA defines "original order" as the "principle that records should be maintained in the order in which they were placed by the organization, individual, or family that created them." Maygene F. Daniels, "Introduction to Archival Terminology," <http://www.archives.gov/research/alic/reference/archives-resources/terminology.html> (Tab G).
28. NARA maintains the original order of the records to provide evidence of the business operations and systems of the creating agency. In rare cases where original order has been disturbed through neglect or an unforeseen event, NARA staff work to restore original order as accurately as possible, and retain a description or an audit trail of the

restoration activities. Original order is maintained by ensuring that when documents are pulled for and used by researchers they are returned to the same order and location that they were in previously. *See* 36 C.F.R. § 1254.38 (requiring that researchers keep documents in the order they are received). The records are not otherwise intermixed or incorporated into other files maintained by NARA.

29. Provenance is also a “fundamental principle of archives, referring to the individual, family, or organization that created or received the items in a collection.” Society of American Archivists, “Glossary of Archival and Records Terminology: Provenance,” (Tab H). The principle of provenance, which can also be called *respect des fonds*, requires that “records of different origins (provenance) be kept separate to preserve their context.” *Id.* At NARA, “provenance” requires that “records created or received by one recordskeeping unit should not be intermixed with those of any other,” and defines “respect des fonds” by referring to provenance. Maygene F. Daniels, “Introduction to Archival Terminology,” *supra* & Tab G.
30. NARA maintains provenance by retaining records together in a single fonds or record group, depending on the size of the collection. *See* Oliver W. Holmes, “Archival Arrangement” (1964), available at <http://www.archives.gov/research/alic/reference/archives-resources/archival-arrangement.html> (Tab I). In the case of the records of the FCIC, this translates into the designation RG148 (Records of Commissions of the Legislative Branch), with a subgroup specifically for the FCIC records.
31. The Archivist Code, which was created by former Archivist of the United States Wayne Grover, served as the primary guidance for the archival profession for many years. The

Archivist Code states that the archivist should “endeavor to promote access to records, ... but he should carefully observe any proper restrictions on the use of records.” Wayne C. Grover, “The Archivist Code,”

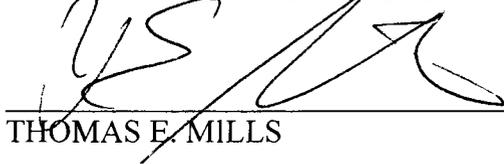
<http://www.archives.gov/preservation/professionals/archivist-code.html> (Tab J).

32. The Society of American Archivists recognizes archivists’ role to work with “donors and originating agencies to ensure that any restrictions are appropriate, well-documented, and equitably enforced.” Society of American Archivists, “SAA Core Values Statement and Code of Ethics of Archivists,” <http://www2.archivists.org/statements/saa-core-values-statement-and-code-of-ethics> (Tab K). One of the core values of archivists, as identified by the Society of American Archivists, is the “widest possible accessibility of materials, consistent with any mandatory access restrictions.” *Id.*
33. The head of a Federal agency may state in writing the restrictions that the agency head believes “to be necessary or desirable in the public interest with respect to the use or examination of records” of that agency. 44 U.S.C. § 2108(a). If the Archivist concurs with the restrictions, the Archivist will impose the specified restrictions and “may not relax or remove such restrictions” without the consent of the head of the agency. *Id.* For a terminated agency with no successor in function, the Archivist has the authority to remove the restrictions if the Archivist determines it is in the public interest to remove such restrictions. *Id.* The restrictions, unless otherwise removed, “shall remain in force until the records have been in existence for thirty years.” *Id.*
34. The Financial Crisis Inquiry Commission Chairman, serving as head of the Federal agency under the Federal Records Act, wrote to the Archivist specifying the restrictions

he believed to be necessary or desirable in the public interest. These restrictions were accepted by NARA in the SF 258.

35. To the best of my knowledge, I know of no instance in the history of the National Archives since its inception in 1934 where the Archivist of the United States or his staff intentionally overrode or contravened the expressed intent of a donor of records with respect to the imposition of restrictions on access. Moreover, I am unaware of any instance in which records that have been accepted, pursuant to 44 U.S.C. § 2107, into the legal custody of NARA from a component of government not covered by the FOIA have been subsequently deemed to be within the scope of the FOIA. By creating an administrative process outside of FOIA that provides for public access to legislative records, the Center for Legislative Archives is conscientiously fulfilling NARA's dual missions of promoting maximum public access to records while also respecting the provenance of records (and any restrictions that the originating entity imposed on those records).

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



THOMAS E. MILLS

Executed this 31st day of October, 2012.



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As the nation's record keeper, it is our vision that all Americans will understand the vital role records play in a democracy, and their own personal stake in the National Archives. Our holdings and diverse programs will be available to more people than ever before through modern technology and dynamic partnerships. The stories of our nation and our people are told in the records and artifacts cared for in NARA facilities around the country. We want all Americans to be inspired to explore the records of their country.

Our Mission Statement

The National Archives and Records Administration serves American democracy by safeguarding and preserving the records of our Government, ensuring that the people can discover, use, and learn from this documentary heritage. We ensure continuing access to the essential documentation of the rights of American citizens and the actions of their government. We support democracy, promote civic education, and facilitate historical understanding of our national experience.

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Types of Presidential Materials

There are three types of Presidential Materials. The law that applies to the materials depends on:

- how the materials are defined.
- the year it was created.

Donated Historical Materials

Until the Reagan administration, materials created during the presidency, with the exception of Nixon, were considered the personal property of the President or his associates, and came to NARA as donated historical materials.

- The Presidential collections from Hoover through Carter, excluding Nixon, are maintained by the Presidential libraries and governed by individual donor deeds of gift.
- The acceptance of these collections is covered by the [Presidential Libraries Act of 1955](#), and NARA observes any restrictions on access to these materials that have been set by the donors, and agreed to by the Archivist of the United States.
- As a result, some of the Presidential materials in the custody of the Presidential libraries may not currently be available for research.
- Staff at the individual Presidential libraries can advise researchers on the availability of particular collections.

Presidential Records

In 1978, Congress passed the [Presidential Records Act \(PRA\)](#), which changed the legal status of Presidential and Vice Presidential materials. Under the PRA, the official records of the President and his staff are owned by the United States, not by the President.

- The Archivist is required to take custody of these records when the President leaves office, and to maintain them in a Federal depository.
- These records are eligible for access under the [Freedom of Information Act \(FOIA\)](#) five years after the President leaves office.
- The President may restrict access to specific kinds of information for up to 12 years after he leaves office, but after that point the records are reviewed for FOIA exemptions only.
- This legislation took effect on January 20, 1981, and the records of the Reagan administration were the first to be administered under this law.
- Staff at the Reagan Library, the George H. W. Bush Library, the William J. Clinton Library, and the George W. Bush Library can provide additional information regarding access to Presidential records in their collections.

Types of Presidential Materials

- [Donated Historical Materials](#)
- [Presidential Records](#)
- [Presidential Historical Materials](#)

See Also:

- [Types of Documents](#)
- [Laws & Regulations](#)

Presidential Historical Materials

Only the Nixon Presidential Historical Materials are governed by the [Presidential Recordings and Materials Preservation Act \(PRMPA\) of 1974](#).

- This only applies to the Nixon Presidential Historical Materials and none of the other libraries.
- The Nixon Presidential Materials Staff at the National Archives at College Park, MD is responsible for preserving these materials and preparing them for public access under the law.
- For information regarding the availability of these materials, researchers should contact the [Nixon Staff](#) directly.

Presidential Libraries >

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July 31, 2011

[Organization chart](#) **ORGANIZATION**

1. [Executive for Legislative Archives, Presidential Libraries, and Museum Services](#)
2. [Director, Center for Legislative Archives](#)
3. [Director, Presidential Libraries](#)
4. [Director, Presidential Materials Division](#)
5. [Presidential Libraries](#)
6. [Richard Nixon Library](#)
7. [Existing Presidential Libraries and museums](#)
8. [Presidential Libraries' Director's Council](#)
9. [Education and Public Programs](#)
10. [Exhibits](#)

DELEGATION of AUTHORITIES**Authorities Delegated to Legislative Archives, Presidential Libraries and Museum Services by the Archivist**

11. [Accession and Transfers/Accept Records and Donated Historical Materials](#)
12. [Appraisal](#)
13. [Access to Records and Donated Historical Materials](#)
14. [Servicing Records and Donated Historical Materials](#)
15. [Implementation of Presidential Records and Materials Preservation Act](#)
16. [Other](#)
17. [General Administration](#)

ORGANIZATION**1. Executive for Legislative Archives, Presidential Libraries, and Museum Services**

a. Ensures office coordination and direction by consulting and collaborating with staff, managers, and colleague executives across NARA, as well as the COO, the Deputy Archivist, and the Archivist. Evaluates feedback from key subordinates and considers evaluation reports from GAO, NARA's IG, OMB, and other relevant bodies.

b. Provides executive leadership ensuring coordination among programs within the scope of this Service, achieving "one NARA" and "one-voice" presentation to various audiences, with responsibility for ensuring coordination among NARA's museum and outreach programs; ensures "open NARA" principle of seeking input and participation from staff, stakeholders and customers is actively pursued.

c. In cooperation with the Director for Presidential Libraries, serves as principal consultant and adviser to the Archivist of the United States and Deputy Archivist on matters involving the Presidential Libraries, participating in policy development, implementation, or interpretation; planning proposed libraries for present and future Presidents in close coordination with the White House and other interested parties; assessing the business model of the Presidential Library system, conducting negotiations with key figures in American political life regarding deposit of personal papers in libraries; and initiating contacts with educational institutions, historical societies and other professional associations to foster awareness of NARA.

d. In cooperation with the Center for Legislative Archives Director, serves as principal consultant and adviser to the Archivist of the United States and Deputy Archivist on matters involving the Center for Legislative Archives, participating in policy development, implementation, or interpretation; planning programs and outreach to members of Congress and their staffs; and initiating contacts with educational institutions, historical societies and other professional associations to foster awareness of NARA.

e. In cooperation with the Director of the Presidential Materials Division, serves as a principal consultant and adviser to the Archivist of the United States and Deputy Archivist on courtesy storage for incumbent Presidential and Vice Presidential records and artifacts, White House records management and transition issues, declassification and classification management of Presidential Library records and materials, and access issues dealing with Presidential records.

f. In cooperation with the Education and Public Programs Director serves as principal consultant and advisor to the Archivist of the United States and the Deputy Archivist on matters relating to the educational use of NARA's records, participating in policy and strategy development and conducting negotiations with key partners in the development and delivery of educational services and public programs.

g. In cooperation with the Exhibits Director serves as principal consultant and advisor to the Archivist of the United States

USCA Case #13-5127 and the Deputy Archivist on matters relating to the development of new exhibits and services for visitors as well as the loan of materials for exhibit outside the agency, participating in policy and strategy development and conducting negotiations with key partners in the development of exhibits.

- h. Provides executive direction supporting front-line teams and their management, encouraging them to propose process improvement and services development/delivery for better customer service. Ensures customer-driven focus in the development of new processes and services.
- i. Analyzes content and character of operating programs in terms of legal compliance and financial viability, responsiveness to customers, quality of relations with stakeholders, program cost-effectiveness, and other similar objective criteria. Assesses program strategies, objectives, and plans for short- and long-term effectiveness. Evaluates operations for resource utilization and stewardship, and for financial due diligence and impacts upon NARA. Proactively seeks data and input about the effectiveness of functions performed within the office's scope, and proactively seeks to rectify issues. Determines the priorities, objectives and policies of NARA's Legislative Archives, Presidential Libraries, and Museum Services office by consulting with team of directors, managers, and staff and executive colleagues.
- j. Enables gathering of the Presidential Library Directors' Council, ensuring creation of meeting agendas, schedules, and minutes. The Council consists of the Archivist, the Executive, the Director for Presidential Libraries, all Library Directors, and the Director of the Presidential Materials Division, gathered to discuss opportunities and concerns, and to participate in creating and implementing library strategies and initiatives.
- k. Collaborates with staff and managers in Research Services in shared support of archival access, exhibit, education, and public and outreach programs, especially in the preservation and loan of records for public outreach purposes.
- l. Collaborates with the Chief Strategy and Communications Officer to discuss NARA messaging and communications strategy related to the work of Legislative Archives, Presidential Libraries, and Museum Services.
- m. Collaborates with staff and managers across NARA on common practice and support for records management and archival issues including the declassification of records and access and use issues.
- n. Collaborates with Business Support Services to obtain services and to coordinate NARA property, facility, security, IT, finances, and purchasing matters.
- o. Collaborates with the Chief Financial Officer and the Chief Human Capital Officer in evaluation of budgetary data and information relating to planned utilization of personnel; analyzes plans and recommends changes, considering personnel impact of new or emerging mandates or trends.
- p. Provides executive direction to staff through management teams. Sets performance standards and appraises performance of key subordinates; approves promotions, reassignments, awards, training and other personnel actions; makes selections for key positions; hears and resolves formal complaints and grievances; makes final decisions on disciplinary and performance based actions; develops the organization's budget and monitors the expenditure of resources; and approves purchases.
- q. Participates in NARA executive teams, shaping NARA's strategic direction and producing practical and creative high-level approaches to address related matters such as: agency-wide aligned outcomes/goals and priorities, customer- and stakeholder-focused needs and expectations, internal change management, employee satisfaction, outreach and relationship-building, "one-voice" communication, and problem resolution.
- r. Collaborates with Regional Liaisons, who report to the COO, to explore and coordinate approaches regarding shared goals and outcomes.

2. Director, Center for Legislative Archives

- a. Serves as the repository for the official records of the U.S. House of Representatives and the U.S. Senate, which remain in the permanent legal custody of the House of Representatives and Senate, respectively. House and Senate records are exempt from the Federal Records Act and, reflecting their status as records of independent institutions in a separate branch of government, are governed solely by House and Senate rules, respectively. Also holds records of legislative branch agencies and commissions.
- b. Reports to and implements the mandates, recommendations, and guidelines established by the Advisory Committee on the Records of Congress, which was established under the authority of Public Law 101-509 (November 5, 1990) to advise Congress and the Archivist of the United States on the management and preservation of the records of Congress.
 - (1) Center serves as the administrative secretariat for the committee, providing administrative services and travel arrangements.
 - (2) Center reports twice a year to the committee at its biannual meetings, providing formal mid-year and annual reports on Center resources, programs, activities, accomplishments, and challenges.
 - (3) Center assists in the drafting of the committee's published reports (issued on a six-year cycle), reporting Center performance and results on the committee's mandates and recommendations.
- c. Center's Archival Programs
 - (1) At the request of the House and Senate Archivists, Center staff assists in the appraisal of textual and electronic records of the House and Senate. Staff also assists NARA Agency Services staff in the appraisal of legislative branch agency and commission records.
 - (2) At the request of the House and Senate Archivists, Center staff plans, coordinates, and tracks the transfer of textual and electronic records from the House and Senate to the Center.
 - (3) Establishes safe, secure, and protected control of House and Senate records; access is restricted to Center staff only.
 - (4) Identifies, locates, and delivers closed, sensitive House and Senate records to the appropriately designated committee staff in a timely manner to support the current business of the U.S. Congress.
 - (5) Performs holdings maintenance and preservation activities on the textual and electronic records of the House and Senate; all major preservation treatments must be approved by the Clerk of the House of Representatives or Secretary of the Senate, as appropriate.

(6) Administers restrictions on access to House committee records following the provisions of House Rule VII. Complex requests and access issues are referred to the Clerk of the House of Representatives for final determination.

(7) Administers restrictions on access to Senate committee records following the provision of Senate Resolution 474 (96th Congress). Complex requests and access issues are referred to Senate committee chairs for final determination.

(8) Procures, administers, and operates the local version of the Congressional Records Instance of the Electronic Records Archive (CRI-ERA) to transfer, ingest, verify, and process the electronic records of the House and Senate. Maintains compatibility, common functionalities, and communication linkages with the remotely stored version of CRI-ERA.

(9) Provides public reference service on the open records of the House, Senate, and legislative branch agencies and commissions to researchers.

(10) Coordinates the declassification of Congressional committee records and legislative branch agency records with the National Declassification Center.

(11) Consults with legislative branch agencies and commissions to establish access provisions for their records as they are not subject to the Freedom of Information Act.

(12) Creates, prepares, and presents finding aid information and records description to reflect the unique institutional characteristics of the House of Representative and the Senate and their records holdings.

d. Center's Exhibition Program

(1) Center staff serves on the exhibition content team for the Capitol Visitor Center. The team is chaired by Capitol Visitor Center staff in the Architect of the Capitol's Office, and includes staff from the Senate Historian's Office, House Historian's Office, and the Library of Congress. The team identifies thematic emphases for CVC exhibits, selects documents for display, and drafts content. All exhibit content must be approved by the Capitol Preservation Commission, which is an 18 member bipartisan and bicameral commission composed of the top leaders in the House and Senate. All loans of House and Senate records for exhibition purposes must be approved by the Clerk of the House of Representatives or the Secretary of the Senate, as appropriate.

(2) On NARA exhibit projects with a major focus on Congress, Center staff collaborates with staff in Exhibits and Presidential Libraries.

e. Center's Educational and Public Programs

(1) Center staff performs outreach activities and services to disseminate House and Senate records that document the history of Congress and representative government, through the presentation of educational workshops, public lectures, and web and print publications for the general public, members of Congress, educators and educational institutions, students, and scholars. The Center partners with the House and Senate Historical Offices, fellow members of the Association of Centers for the Study of Congress, other congressionally-oriented groups and associations, and educational institutions on public programs and educational projects consistent with its mission to expand public understanding of Congress and the history of representative government.

(2) On NARA public programs and educational projects with a major focus on Congress, Center staff collaborates with staff in Education and Public Programs and Presidential Libraries.

3. Director, Presidential Libraries

a. Plans, directs, and coordinates comprehensive programs for the acquisition, storage, preservation, and servicing, and disposal of Presidential records, Federal records, and donated historical materials (including artifacts) in Presidential libraries and Presidential materials projects.

b. Plans and coordinates in conjunction with Director of Presidential Materials Division a comprehensive program for the review and disposal of Presidential papers, materials and records.

c. Develops policies and procedures for the management and operation of Presidential libraries and Presidential materials projects.

d. Develops, coordinates, and monitors overall plans, programs, and resource allocations for the Presidential Libraries.

e. Develops and coordinates plans for the establishment of new Presidential Libraries.

f. Coordinates system-wide education, museum, and public programs to advance the Presidential Libraries' ability to use its holdings for the support of civic education. Coordinates multi-library exhibit and conference programming in support of the Presidential Libraries.

g. Represents the Presidential Libraries on agency-wide initiatives involving archives, museum, education, and public programming. Coordinates these efforts with other program offices.

h. Serves as a representative of NARA and Presidential Libraries in the larger museum and education community and facilitates the National Archives' Presidential libraries' cooperative efforts with these institutions.

i. Ensures collaboration with Research Services staff and Center for Legislative Archives staff to identify records useful in responding to customers' requests.

j. Collaborates with Regional Liaisons, who report to the COO, to explore and coordinate approaches regarding shared goals and outcomes.

4. Director, Presidential Materials Division

a. Plans, directs and coordinates a comprehensive program for courtesy storage of Presidential records and other historical materials and artifacts, including those created or received by the incumbent Presidential administration pending their transfer to a Presidential Library or other authorized NARA facility.

b. Provides assistance to White House Staff and officials on records creation, management, and disposition and conducts training to improve records management practices.

c. Directs a program of providing access policy guidance and support to the Presidential Libraries working in conjunction with the Executive, the Deputy of Presidential Libraries and NARA's General Counsel.

- d. Directs an access staff team responsible for processing special access requests for Presidential records. Works directly with NARA's General Counsel, White House Counsel, the representatives of the former Presidents and Vice Presidents, and the Directors of the Presidential Record Act Libraries regarding access to Presidential and Vice Presidential records. Implements the required notification requirements of the Presidential Records Act (PRA) and EO 13489, and NARA's applicable regulations.
- e. In coordination with the Executive, the Director of Presidential Libraries, Presidential Library Directors and the National Declassification Center, plans and coordinates a comprehensive program to manage, review and declassify security classified materials in the Presidential Libraries.
- f. Directs the storage, preservation, servicing, access to, and processing of records and artifacts in the custodial control of the Presidential Materials Division.
- g. Coordinates with the White House on the movement of all Presidential records and artifacts at the end of the Administration. Directs the move staff assigned for this purpose including serving as the liaison with the military staff assigned for this function.
- h. Serves on special task forces or represents NARA or Presidential libraries dealing with archival issues of declassification, access, processing Presidential records.
- i. Plans and coordinates with the Director for Presidential Libraries on the training of new archival hires for the Presidential Libraries.

5. Presidential Libraries

Perform the following functions for the libraries listed in [para. 7](#):

- a. In accordance with applicable laws and regulations, appraises Presidential and Federal records in their custody to determine whether they have or will continue to have sufficient value to warrant preservation by the U.S. Government and recommends appropriate disposition action for approval by the Archivist.
- b. Solicits, negotiates, and reviews offers to donate documents or other historical materials, determines whether it is in the public interest to accept them for deposit, and recommends appropriate action for approval by the Archivist.
- c. Accepts for deposit, or affects the transfer of, records and other historical materials that have been determined by the Archivist to have sufficient value to warrant continued preservation.
- d. Disposes of records and other historical materials in accordance with applicable laws and regulations, and the terms of deeds of gift.
- e. Reviews Presidential records, Federal records, and donated historical materials for national security, statutory, and when applicable, donor's deeds of gift restrictions on access.
- f. Services records and other historical materials by furnishing the records or materials, or information from them, or copies of them, to U.S. Government agencies and the public.
- g. Operates research rooms for public or U.S. Government agency use of records and other historical materials or copies thereof.
- h. Reviews and responds to Freedom of Information Act (FOIA) requests, mandatory review requests and appeals, and appeals for access to records and other historical materials restricted by donor's deeds of gift.
- i. Establishes physical and management control over the records, including the storage, arrangement, and security of records and other historical materials and the space housing them.
- j. Inspects records and other historical materials to determine the state of their preservation; identifies those requiring preservation and repair or reproduction; determines the appropriate treatment; and carries out appropriate measures on site or arranges for appropriate treatment by another NARA unit, or by contract.
- k. Analyzes records and other historical materials to understand the origins, filing systems, content, technical and legal problems, and uses; prepares descriptive guides, lists, inventories, and other finding aids; and performs research in the administrative history of Presidential administrations.
- l. Plans and conducts programs for the documentary publication of records and other historical materials.
- m. Plans and conducts oral history projects relating to the holdings of the library.
- n. Exhibits records and other historical materials and assists other elements of NARA in the preparation of exhibits by recommending and providing records and other historical materials from the holdings.
- o. Develops joint exhibit projects internally and externally to NARA, partnering with organizations to advance the mission of the Presidential Library and Museum. Develops traveling exhibits.
- p. Serves as a representative of NARA in the larger museum community and facilitates NARA's cooperative efforts with these institutions.
- q. Loans materials to other NARA units and to institutions external to NARA that meet NARA standards for display.
- r. Develops, provides, and promotes public and educational programs that provide for greater understanding and use of NARA's cultural services and educational resources and services by educational and research institutions and the general public.
- s. Develops education programs with a local, regional, national, and international impact. Supports online educational and outreach tools and initiatives, including the use of social media.
- t. Recruits and trains volunteers for in-service and outreach programs.
- u. Operates a museum, a museum shop, and sells publications and historical mementos.
- v. Manages deposits to and expenditures from the library's National Archives Trust Fund account.
- w. Administers the day-to-day facilities management program of the library in coordination with Presidential Libraries, and

major renovation and restoration projects in coordination with Presidential Libraries and Business Support Services

- x. Develops and administers the local program for the efficient operation of the library in an emergency, including the self-protection program for civil defense, fire prevention, and building safety.
- y. Collaborates with staff and managers across NARA on common practice and support for records management and archival issues including the declassification of records and access and use issues. Collaborates with Regional Liaisons, who report to the COO, to explore and coordinate approaches regarding shared goals and outcomes.
- z. Serves as lead on maintaining relationship with respective Presidential Foundation, Institute or Association. Collaborates with Foundation on joint programming and initiatives to advance the Presidential Library and Museum.
- aa. Serves as a representative of the Presidential Library and NARA to community groups, as well as national and international audiences. Representation spans scope of Presidential Library to include archives and research, museum, education, and public programming.

6. Richard Nixon Library

In addition to the functions listed under [para. 5](#), Presidential libraries, the Richard Nixon Library with support by the Richard Nixon Library - College Park, in accordance with Pub. L. 93-526, 88 Stat. 1695, as affected by existing court orders and as implemented by regulations issued by the Archivist:

- a. Inspects Nixon Presidential materials to determine the state of their preservation; identifies those requiring preservation and repair or reproduction; determines the appropriate treatment; and carries out appropriate measures on site or arranges for appropriate treatment by another NARA unit, or by contract.
- b. In accordance with the Presidential Recordings and Materials Preservation Act regulations governing Nixon materials and legal settlement, reviews for national security and statutory restrictions on access and materials to be returned to the Nixon estate.
- c. Disposes of Nixon Presidential materials in accordance with applicable laws and regulations.

7. Existing Presidential Libraries and museums

- a. Herbert Hoover Presidential Library and Museum
- b. Franklin D. Roosevelt Presidential Library and Museum
- c. Harry S. Truman Presidential Library and Museum
- d. Dwight D. Eisenhower Presidential Library and Museum
- e. John F. Kennedy Presidential Library and Museum
- f. Lyndon Baines Johnson Presidential Library and Museum
- g. Richard Nixon Presidential Library and Museum
- h. Gerald R. Ford Presidential Library and Gerald R. Ford Presidential Museum
- i. Jimmy Carter Presidential Library and Museum
- j. Ronald Reagan Presidential Library and Museum
- k. George Bush Presidential Library and Museum
- l. William J. Clinton Presidential Library and Museum
- m. George W. Bush Presidential Library and Museum

8. Presidential Libraries' Director's Council

Chaired by the Archivist, consists of the Executive for Legislative Archives, Presidential Libraries and Museum Services, the Director for Presidential Libraries, all Library Directors, and the Director of the Presidential Materials. This council is a forum for the directors to discuss opportunities and concerns, and to participate in creating and implementing library strategies and initiatives.

9. Education and Public Programs

- a. Leads a defined, coordinated, and unified national education program for NARA, fostering K-12 and post-secondary educational programming as well as educational experiences for the general public.
- b. Supports initiative and management of educational services and products produced by the Education and Public Programs staff in Washington DC and at field locations, excluding Presidential Libraries.
- c. Collaborates and coordinates with the Director of Presidential Libraries and Library Directors and their education staff in the Presidential Libraries, the Center for Legislative Archives, and the education directors of the Regional Archives to achieve NARA's education program goals. Collaborates and coordinates with Research Services staff in shared support of outreach and education programs and archival access.
- d. Collaborates with Research Services staff to identify records useful in outreach programming and to conduct educational programming of interest to educators, students, and the general public.
- e. Develops and manages the programs of the William G. McGowan Theater, including the scheduling of film and author-lecture programs and special events. Develops and maintains the Guggenheim Center for the Documentary Film that uses NARA's film holdings as well as contemporary documentaries related to NARA's holdings for purposes of educational outreach.
- f. Manages the Boeing Learning Center including the ReSource Room and the Learning Lab as well as workshops and training for teachers at sites across the country.
- g. Develops and manages the development of online tools for teachers and students as well as videoconferences and other remote training opportunities.

h. Manages the Modern Archives Institute.

- i. Manages NARA's volunteer program in the Washington, DC area, which provides extensive resources in support of NARA's archival work, customer service, and public programs, through local program coordinators.
- j. Promotes and publicizes NARA and its educational and cultural services to educational and research institutions and similar organizations through a variety of means including public lectures, scholarly conferences and symposia, open houses and tours, film festivals, presentations at historical archival and genealogical organization meetings, social media, special events and education workshops. Collaborates with Regional Liaisons, who report to the COO, for assistance, expertise, contacts, and resources supporting nationwide coordination of these services.
- k. Serves as a representative of NARA in the larger education community and facilitates NARA's collaborations with similar institutions.

10. Exhibits

- a. Leads a defined, coordinated, and unified national exhibit program for NARA.
- b. Initiates and manages exhibits (including traveling exhibits), museum visitor services, and related web products produced by exhibits staff in Washington, DC, Kansas City's Exhibit Specialist, and the National Museum Exhibit Coordinator.
- c. Collaborates and coordinates with the Director of Presidential Libraries and Library Directors and their staffs, and the Center for Legislative Archives to achieve NARA's exhibits program goals.
- d. Collaborates and coordinates with Research Services staff in shared support of exhibit programs and archival access and with Preservation Programs staff within Research Services for expert advice and assistance on the care and control of artifacts.
- e. Develops and maintains the National Archives Experience in Washington, DC. Manages the signage program in the public lobbies; ensures the continuing intellectual and physical integrity of the exhibits in the Rotunda for the Charters of Freedom and the Public Vaults; prepares or rents exhibits for the Lawrence F. O'Brien gallery; assists other NARA units in the preparation of exhibits.
- f. Manages the exhibit loan registration program (except for the Presidential Libraries) including loans to other NARA units and outside organizations; coordinates review and approval of exhibit loan requests; documents exhibit history of federal and legislative records, ensures that NARA standards are upheld in the exhibition of original records, and develops traveling exhibits available to other NARA units and to outside organizations. Loans to originating agencies are the responsibility of custodial units, unless loans are for exhibit purposes.
- g. Establishes service standards for the National Archives Experience, and works closely with Business Support Services to effectively maintain a secure, clean and safe environment for visitors. Coordinates planning and scheduling of public space and equipment use, and for building services with both the Strategy and Communications Office and Business Support Services.
- h. Collaborates with the Strategy and Communications Office to assist in NARA's oversight of interests in exhibit contracts underwritten by the Foundation for the National Archives.
- i. Serves as a representative of NARA in the larger exhibits community and facilitates NARA's collaborations with similar institutions.

DELEGATION OF AUTHORITIES

Authorities Delegated to Legislative Archives, Presidential Libraries and Museum Services by the Archivist

11. Accession and Transfers/Accept Records and Donated Historical Materials

- a. Solicit, negotiate terms of transfer, assume custody, and transfer personal papers and other historical materials of any President of the United States, any Vice President of the United States and of any official or former official of the U.S. Government and other contemporary papers relating to the President or former President of the United States, and from other private sources, and administer any restrictions agreed to upon transfer or accession of such papers and materials (44 U.S.C. 2111; and 2111 note 2203(f)(1); 2204). This authority may be redelegated to Presidential Libraries, Project and Staff Directors, and the Presidential Materials Director. The Archivist's approval is also required in cases of special terms of access or custody, or in high profile cases.
- b. Assume custody and control of Presidential and Vice-Presidential records at the conclusion of an incumbent's last consecutive term of office, transfer the records to an appropriate archival depository, provide for their preservation and archival processing, and establish means for public access thereto (44 U.S.C. 2203(f); 2204; 2207). The authority to preserve, process, and establish means for public access is delegated to Presidential Libraries, the Presidential Materials Director, and Project and Staff Directors. The authority to assume custody and control and to transfer records is retained by the Archivist of the United States and may be delegated to the Executive of Legislative Archives, Presidential Libraries and Museum Services.
- c. Accept for deposit with the National Archives of the United States records of the Congress determined by the Archivist to have sufficient historical value to warrant their continued preservation (44 U.S.C. 2107(1)). This authority may be redelegated to the Center for Legislative Archives, and is limited to records scheduled for deposit with the National Archives of the United States.
- d. Accept for deposit from private sources documents and other materials, including motion pictures, still pictures, and sound and video recordings, that are appropriate for preservation by the U.S. Government (44 U.S.C. 2107(4) and 2111(2)). This authority may be redelegated to the Center for Legislative Archives, in consultation with Records Management Services, DC Metro Access Coordinator, also may be redelegated to the Library Directors, the Presidential Materials Director and Project and Staff Directors and approval by the Archivist in cases of special terms of access or custody, or high profile cases.

12. Appraisal

- a. Determine on behalf of the Archivist the records of the U.S. Senate, U.S. House of Representatives and the Joint Committees of Congress have sufficient historical or other value to warrant their continued preservation by the U.S. Government (44 U.S.C. 2107(1), (2)). This authority may be redelegated to the Center for Legislative Archives. There are no limitations on this delegation of authority.
- b. Review previously unappraised records included in disposition lists and schedules and recommend to the Archivist disposal of those that do not or will not, after the period specified, have sufficient administrative, legal, research, or other value to warrant their continued preservation by the U.S. Government (44 U.S.C. 3303a(a)). This authority may be redelegated to the Center for Legislative Archives. There are no limitations on this delegation of authority.
- c. Review and make a recommendation to the Archivist concerning the proposed disposal request for Presidential or Vice-Presidential records of an incumbent (44 U.S.C. 2203 (c), (d), (e); 2207). This authority is retained by Legislative Archives, Presidential Libraries and Museum Services and may not be redelegated.
- d. Recommend to the Archivist the disposal of Presidential and Vice Presidential records in NARA's legal custody that have insufficient administrative, historical, information, or evidentiary value to warrant continued preservation (44 U.S.C. 2203(f)(3); 2207). This authority may be redelegated to Presidential Library, Presidential Materials Director, Project, and Staff Directors, subject to the concurrence of Legislative Archives, Presidential Libraries and Museum Services.

13. Access to Records and Donated Historical Materials

- a. Impose restrictions on the use of records, papers, documents, or other historical materials transferred to NARA when those restrictions have been stated in writing by the transferring agency (for Federal records in keeping with the withholdings allowed by the Freedom of Information Act, 5USC 552(b) or for donor deeded papers in keeping with the donor deed of gift restrictions and concurred in by the Archivist (44 U.S.C. 2108(a); 2111). This authority is retained by Legislative Archives, Presidential Libraries and Museum Services, the Director of Presidential Materials, and the Director of a Library, Project, or Staff. There are no limitations on this delegation of authority.
- b. Administer restrictions on access to Nixon Presidential Historical Materials in accordance with the Presidential Recordings and Materials Preservation Act, (44 USC 2111note) and the Nixon Regulations (CF cite). This authority may be delegated to the Director of the Nixon Presidential Library. There are no limitations on this delegation of authority.
- c. Administer restrictions on access to Presidential and Vice-Presidential records based on restrictions imposed by the President or Vice-President in accordance with requirements of the Presidential Records Act of 1978 (44 U.S.C. 2204; 2207). Also administers exemptions on access to Presidential and Vice Presidential records in keeping with the Freedom of Information Act as it is incorporated into the Presidential Records Act, 44 USC 2204. This authority may be delegated to Presidential Library, Presidential Materials Director, Project, and Staff Directors. There are no limitations on this delegation of authority.
- d. Downgrade and declassify classified information transferred or accessioned into the National Archives of the United States with delegated guidance or declassification authority from originating equity-holding agency in accordance with the requirements of E.O.13526. This authority may be delegated to Presidential Library, Presidential Materials Director, Project and Staff Directors and the Director of the Center for Legislative Archives. The review, downgrading, and declassification of White House originated national security information may be done only in consultation with the National Security Council and by personnel who are recommended by Legislative Archives, Presidential Libraries and Museum Services, the Director of Presidential Materials, the Director of a Library, Project, or Staff, and specifically designated by the Archivist. Other national security-classified information may be reviewed, downgraded, and declassified only by personnel designated by Legislative Archives, Presidential Libraries and Museum Services and with the authority of the original equity-holding agencies. All individuals must have been granted the necessary clearances by the NARA Personnel Security Officer or another clearance granting agency.

14. Servicing Records and Donated Historical Materials

Preserve, arrange, repair, describe, rehabilitate, exhibit, and service accessioned records and donated materials; prepare and publish inventories, indexes, catalogs, and other finding aids (44 U.S.C. 2109; 2110). This authority may be redelegated to the Directors of the Center for Legislative Archives, Presidential Libraries, and Presidential Materials, and must be coordinated with Research Services, Preservation Programs Division and with Information Services, Online Public Access Branch.

15. Implementation of Presidential Records and Materials Preservation Act

Assume custody and exercise control of all tape recordings, papers, documents, memorandums, transcripts, and other objects and materials that constitute the Nixon Presidential materials as defined in the Presidential Recordings and Materials Preservation Act and perform the duties and exercise the authorities of the Archivist as stated in Pu93 526; 88 Stat. 1695; 44 U.S.C. 2111 note; 36 CFR CXII, Subchapter F. This authority may be redelegated to the Director of the Richard M. Nixon Library. An opening of materials to public access must be approved by Legislative Archives, Presidential Libraries and Museum Services, General Counsel, and the Archivist and in accordance with the regulations governing access to Nixon Presidential Historical Materials.

16. Other

- a. Provide advice, counsel, and assistance to the heads of executive departments and agencies in the preparation, production, or the creation of exhibits and displays that are found to have future value for exhibition as part of the archival and cultural heritage of the United States; accept exhibits and preserve or dispose of accepted exhibits and displays of executive departments and agencies (44 U.S.C. 2109; E.O. 11440 of December 11, 1968). This authority may be redelegated to the Directors of the Center for Legislative Archives, Presidential Libraries, Presidential Materials, Education and Public Programs, and Exhibits divisions. There are no limitations on this delegation of authority.
- b. Cooperate with and assist universities, institutions of higher learning, institutes, foundations, or other organizations or qualified individuals to conduct study or research in any historical materials deposited in a Presidential library or with the Presidential Materials Division.(44 U.S.C. 2111(1); 2112(d)). This authority may be redelegated to Presidential Library directors and the Director of the Presidential Materials Division subject to any limitations imposed by the deed of gift or other transfer document, and the restrictions contained in 36 CFR, CXII, Part 1256--Restrictions on the Use of Records.
- c. Make and preserve motion picture films, still pictures, video tapes, and sound recordings, pertaining to and illustrative of the historical development of the U.S. Government and its activities, and release for nonprofit educational purposes motion

picture films, still pictures, videotapes and sound recordings (44 U.S.C. 2114). This authority may be redelegated to the Directors of the Center for Legislative Archives, Presidential Libraries, Presidential Materials, Education and Public Programs, and Exhibits divisions. Production of audiovisual materials must be approved as part of the NARA product planning program.

17. General Administration

- a. Accept and use voluntary and uncompensated personal services for NARA (44 U.S.C. 2105(d)). This authority may be redelegated to the Director of the Center for Legislative Archives, directors of Presidential Libraries, the Director of the Presidential Materials Division, Director of the Education and Public Programs Division, and Director of the Exhibits Division. There are no limitations on this delegation of authority.
- b. Solicit and accept gifts or bequests of money, securities, or other personal property, for the benefit of, or in connection with, the national archival and records activities administered by NARA (44 U.S.C. 2305). This authority may be redelegated to the Directors of the Center for Legislative Archives, Presidential Libraries, Presidential Materials, Education and Public Programs, and Exhibits divisions. This delegation of authority is subject to the requirements of NARA 404, National Archives Gift Fund, and may not be redelegated.
- c. Accept orders from other departments, establishments, bureaus, or offices for materials, supplies, equipment, work, or service (31 U.S.C. 1535). This authority is retained by Legislative Archives, Presidential Libraries, Presidential Materials Director and Museum Services, and may not be redelegated.
- d. Reproduce, authenticate and certify records or other documentary materials; certify as to facts and make administrative determinations on the basis of records transferred from other agencies when authority has been delegated by the transferring agency (44 U.S.C. 2109, 2901, 3104). This authority may be redelegated to the Director of the Center for Legislative Archives and all Library Directors. There are no limitations on this delegation of authority.
- e. Charge and collect fees for making or authenticating copies or reproductions of materials transferred to NARA and deposit such fees in the National Archives Trust Fund (44 U.S.C. 2116(c)). This authority may be redelegated to the Director of the Center for Legislative Archives, all Library Directors, and the Director of Presidential Materials. There are no limitations on this delegation of authority.
- f. Solicit and accept gifts and bequests of money or other property for the benefit of, or in connection with, the national archival and records activities administered by NARA, or for the purpose of maintaining, operating, protecting, or improving a Presidential archival depository (44 U.S.C. 2112 (g)(1); 2305). This authority may be redelegated to Presidential Library, Director of Presidential Materials, Project and Staff Directors, subject to the requirements of [NARA 404](#), National Archives Gift Fund.
- g. Expend gifts, bequests, and the proceeds from sales of historical materials, copies or reproductions, catalogs, or other items, that have been paid into the library's account in the National Archives Trust Fund (U.S.C. 2112 (g)(1)). This authority may be redelegated to Presidential Library, Project and Staff Directors, subject to the requirements of [NARA 404](#), National Archives Gift Fund.
- h. Utilize the services of officials and personnel of other executive agencies, including the armed services, and with the consent of the agency concerned, to review for declassification purposes records and other papers and historical materials that are or may be deposited with NARA (44 U.S.C. 2105(d)). This authority may be redelegated to Presidential Library, Presidential Materials Director, Project and Staff Directors. There are no limitations on this delegation of authority.
- i. Charge and collect reasonable fees for the privilege of visiting exhibit room or museums (44 U.S.C. 2112(e)). This authority may be redelegated to the Directors of the Center for Legislative Archives, Presidential Libraries, Presidential Materials, Education and Public Programs, and Exhibits divisions. There are no limitations on this delegation of authority.
- j. Operate a museum shop and sell publications, historical materials, copies or reproductions, catalogs, and other items having to do with the Presidential library (44 U.S.C. 2112(g)(1)). This authority may be redelegated to Presidential Library, Project and Staff Directors. There are no limitations on this delegation of authority.
- k. Maintain, operate, and protect the land, facility and equipment as a Presidential depository. This authority may be redelegated to Presidential Library and Project Directors. Day-to-day operation of a facility; oversight of approved alterations, additions, improvements, or preservation work on the facility; liaison with the Public Building Service (PBS); and service as the Government technical expert when directed to do so; are delegated to the Director. Approval of alterations, additions, improvements, or preservation work paid for out of the Legislative Archives, Presidential Libraries, and Museum Services allocation is retained by the Archivist. Office-wide renovation, restoration, or facility improvement planning is retained by Legislative Archives, Presidential Libraries, and Museum Services. Legislative Archives, Presidential Libraries, and Museum Services, exercises this authority with the aid of Business Support Services, which manages 117X funds, provides special expertise and liaison with PBS when necessary, and compiles and maintains a prioritized list of facility-related projects that is the basis for fund allocation.
- l. Develop and administer the program for the efficient operation of NARA facilities in an emergency, including the self-protection program for civil defense, fire prevention, and building safety (44 U.S.C. 2112(a)(1)(A)(iii); (B)(ii)). This authority may be redelegated to Presidential Library Directors, in coordination with, and subject to review by, Business Support Services.
- m. Approve expenditures for additions, improvements, alterations, or preservation of all NARA-leased, -owned, or -operated facilities (44 U.S.C. 2903). This authority is retained by Legislative Archives, Presidential Libraries, and Museum Services, and may not be redelegated. Business Support Services may authorize a dollar limit.
- n. Solicit and accept gifts or money for the benefit of naming spaces in a Presidential library (44 U.S.C. 2112 (a)(1); 44 U.S.C. 2112 (g)(1)). This authority may be redelegated to Presidential Library Directors, subject to the concurrence of Legislative Archives, Presidential Libraries and Museum Services.



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The First Journal of the United States House of Representatives, First Congress, 1789-1791, Records of the United States House of Representatives.



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- Members
- Groups

Home » The Archives Profession » Glossary of Archival and Records Terminology » Browse Terms »

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A GLOSSARY OF ARCHIVAL AND RECORDS TERMINOLOGY

- Home
- Preface: The Archival Lexicon
- Introduction
- BROWSE TERMS
- Bibliography

original order

Relationships

Related Term:

[aggregated records](#); [arrangement](#); [context](#); [provenance](#); [restoration of original order](#)

(also **registry principle**, **respect for original order**, *l'ordre primitif*, *respect de l'ordre intérieur*), n. ~ The organization and sequence of records established by the creator of the records.

Notes:

Original order is a fundamental principle of archives. Maintaining records in original order serves two purposes. First, it preserves existing relationships and evidential significance that can be inferred from the context of the records. Second, it exploits the record creator's mechanisms to access the records, saving the archives the work of creating new access tools.

Original order is not the same as the order in which materials were received. Items that were clearly misfiled may be refiled in their proper location. Materials may have had their original order disturbed, often during inactive use, before transfer to the archives; see **restoration of original order**.

A collection may not have meaningful order if the creator stored items in a haphazard fashion. In such instances, archivists often impose order on the materials to facilitate arrangement and description. The principle of respect for original order does not extend to respect for original chaos.

Citations:

†([Guercio 2001, p. 249](#)) Since files and series reflect the aggregation of records in relation to the activity undertaken, this order should be maintained not only during the phase when the records are current, but also in the phase of preservation, whether through the identification of records selected for preservation or for purposes of research, in order to guarantee the possibility of meaningful future use.

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- [Volunteer Opportunities](#)
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Introduction to Archival Terminology

by Maygene F. Daniels (1984)

[Note on Web Version](#)

The following glossary, developed by the then National Archives and Records Service in 1984 for *A Modern Archives Reader: Basic Readings on Archival Theory and Practice*, is provided on this website as an aid to persons unfamiliar with common archival terms. These definitions are not legally binding and do not represent NARA policy. The updated and more comprehensive *A Glossary for Archivists, Manuscript Curators, and Records Managers*, compiled by Lewis J. Bellardo and Lynn Lady Bellardo, was published in 1992 and may be purchased from the [Society of American Archivists](#).

Archival terminology is a flexible group of common words that have acquired specialized meanings for archivists. Since World War II, archivists worldwide have devoted considerable attention to the definition of these words. In 1964, an international lexicon of archival terminology was published.⁽¹⁾ This dictionary in 6 languages, the work of a committee of the International Council on Archives, provides a basis for international comparison of archival terms.

The Society of American Archivists published its own glossary of archival terms in 1974 after several years of debate, drafting, and review.⁽²⁾ Definitions in the SAA glossary have been widely accepted as the basis for discussion of archival terminology in North America and have been the starting point for subsequent efforts to define American archival terms. Since publication of the SAA glossary, however, many archivists have concluded that some of its definitions require revision and that additional terms should be included. Teachers of archives administration and authors of basic archival texts, consequently, have developed their own glossaries that revise, update, or expand the 1974 work. At present, no single glossary of archival terms can be considered definitive.⁽³⁾

The most frequently used archival terms are those that describe documentary materials and archival institutions. Documentary materials can be characterized as "records," "personal papers," or "artificial collections" on the basis of who created and maintained the documents and for what purpose.⁽⁴⁾ Records are documents in any form that are made or received and maintained by an organization, whether government agency, church, business, university, or other institution. An organization's records typically might include copies of letters, memoranda, accounts, reports, photographs, and other materials produced by the organization as well as incoming letters, reports received, memoranda from other offices, and other documents maintained in the organization's files.

In contrast to records, personal papers are created or received and maintained by an individual or family in the process of living. Diaries, news clippings, personal financial records, photographs, correspondence received, and copies of letters written and sent by the individual or family are among the materials typically found in personal papers.

Traditionally, records and personal papers have been considered distinct entities, each with clearly definable characteristics. In the twentieth century, the physical qualities of records and personal papers have become more alike, however, and archivists increasingly have emphasized the similarities between these materials rather than their differences.⁽⁵⁾ In particular, today's archivists recognize that both records and personal papers are bodies of interrelated materials that have been brought together because of their function or use. Archivists respect and seek to maintain the

[Archives USA](#)[America: History and Life](#)[Fold3 \(Formerly Footnote\)](#)[JSTOR](#)[Declassified Documents Reference System](#)[Biography and Genealogy Master Index \(BGMI\)](#)[Digital National Security Archive](#)[Interagency Working Group: War Crimes](#)[Holocaust-era Assets](#)[Career Development Resource Center](#)

Artificial collections are fundamentally different both from records and from personal papers. Instead of being natural accumulations, artificial collections are composed of individual items purposefully assembled from a variety of sources. Because artificial collections comprise documents from many sources, archivists may elect to change established relationships in order to improve access or control.

Archival institutions can be termed either "archives" or "manuscript repositories" depending on the types of documentary material they contain and how it is acquired. "Archives" traditionally have been those institutions responsible for the long-term care of the historical records of the organization or institution of which they are a part.⁽⁷⁾ Many archives are public institutions responsible for the records of continuing value of a government or governmental body. The National Archives of the United States and the Public Archives of Canada are examples of public archives at the national level. Public archives also may be found at every other level of government, including state or province, county, and municipal levels. Nonpublic or nongovernmental archives care for the records of any other institution or organization of which they are a part. Church archives, for example, administer the historical records of a religious denomination or congregation. University archives are responsible for records of the university's administration. Archives acquire historical material through the action of law or through internal institutional regulation or policy.

"Manuscript repositories" are archival institutions primarily responsible for personal papers, artificial collections, and records of other organizations. Manuscript repositories purchase or seek donations of materials to which they have no necessary right. They therefore must document the transfer of materials by deed of gift or by other legal contract.

The distinctions between archives and manuscript repositories can be precisely stated, yet few archival institutions are simply "archives" or "manuscript repositories." Most archives hold some personal papers or records of other organizations. Even the National Archives of the United States is responsible for a small group of donated personal papers and nongovernment records. Similarly, many manuscript repositories serve as the archives of their own institutions. In recognition of this, the term "archives" gradually has acquired broader meaning for some archivists and is used by them in reference to any archival institution. This trend has been accelerated by the use of the word "archives" or "archive" in the names of some institutions that in the past might have been termed "manuscript repositories."⁽⁸⁾

Contemporary archival terminology provides a useful and necessary means of specialized communication within the archival profession. Its terms can be precise enough to preserve important distinctions among types of materials and archival institutions, and yet its usage also can be sufficiently flexible to reflect the changing nature of record materials and developments in the administration of archival institutions. As the archival profession grows and matures and as new technologies and records media affect the practice of archives administration, both the precision and flexibility of archival terminology will prove to be of continuing benefit to archivists.

Glossary

This glossary of commonly used archival terms is based in part on and draws several definitions from "A Basic Glossary for Archivists, Manuscript Curators, and Records Managers," compiled by Frank B. Evans, Donald F. Harrison, and Edwin A. Thompson (*The American Archivist* 37 [July 1974]: 415-433). The glossary includes most important archival terms with specialized meanings. Terms that are adequately described in dictionaries; technical manuscript, records management, and preservation terms; and terms relating to automated data processing are not included.

ACCESS

The archival term for authority to obtain information from or to perform research in archival materials.

ACCESSION

- (v.) To transfer physical and legal custody of documentary materials to an archival institution.
- (n.) Materials transferred to an archival institution in a single accessioning action.

An addition to an accession.

ACQUISITION

The process of identifying and acquiring, by donation or purchase, historical materials from sources outside the archival institution.

ADMINISTRATIVE VALUE

The value of records for the ongoing business of the agency of records creation or its successor in function.

APPRAISAL

The process of determining whether documentary materials have sufficient value to warrant acquisition by an archival institution.

ARCHIVAL INSTITUTION

An institution holding legal and physical custody of noncurrent documentary materials determined to have permanent or continuing value. Archives and manuscript repositories are archival institutions.

ARCHIVAL VALUE

The value of documentary materials for continuing preservation in an archival institution.

ARCHIVES

- (1) The noncurrent records of an organization or institution preserved because of their continuing value.
- (2) The agency responsible for selecting, preserving, and making available records determined to have permanent or continuing value.
- (3) The building in which an archival institution is located.

ARCHIVES ADMINISTRATION

The professional management of an archival institution through application of archival principles and techniques.

ARCHIVIST

The professional staff member within an archival institution responsible for any aspect of the selection, preservation, or use of archival materials.

ARRANGEMENT

The archival process of organizing documentary materials in accordance with archival principles.

COLLECTING POLICY

A policy established by an archival institution concerning subject areas, time periods, and formats of materials to seek for donation or purchase.

COLLECTION

- (1) An artificial accumulation of materials devoted to a single theme, person, event, or type of document acquired from a variety of sources.
- (2) In a manuscript repository, a body of historical materials relating to an individual, family, or organization.

COLLECTION DEVELOPMENT

The process of building an institution's holdings of historical materials through acquisition activities.

CONTINUOUS CUSTODY

- (1) In contemporary U.S. usage, the archival principle that to guarantee archival integrity, archival materials should either be retained by the creating organization or transferred directly to an archival institution.
- (2) In British usage, the principle that noncurrent records must be retained by the creating organization or its successor in function to be considered archival.

A standard measure of the quantity of archival materials on the basis of the volume of space they occupy.

DEED OF GIFT

A legal document accomplishing donation of documentary materials to an archival institution through transfer of title.

DEPOSIT AGREEMENT

A legal document providing for deposit of historical materials in physical custody of an archival institution while legal title to the materials is retained by the donor.

DESCRIPTION

The process of establishing intellectual control over holdings of an archival institution through preparation of finding aids.

DISPOSITION

The final action that puts into effect the results of an appraisal decision for a series of records. Transfer to an archival institution, transfer to a records center, and destruction are among possible dispositions.

DISPOSITION SCHEDULE

Instructions governing retention and disposition of current and noncurrent recurring records series of an organization or agency. Also called a RECORDS CONTROL SCHEDULE.

DOCUMENT

Recorded information regardless of form or medium with three basic elements: base, impression, and message.

DONATED HISTORICAL MATERIALS

Historical materials transferred to an archival institution through a donor's gift rather than in accordance with law or regulation.

EVIDENTIAL VALUE

The value of records or papers as documentation of the operations and activities of the records-creating organization, institution, or individual.

FIELD WORK

The activity of identifying, negotiating for, and securing historical materials for an archival institution.

FINDING AID

A description from any source that provides information about the contents and nature of documentary materials.

HOLDINGS

All documentary materials in the custody of an archival institution including both accessioned and deposited materials.

INFORMATIONAL VALUE

The value of records or papers for information they contain on persons, places, subjects, and things other than the operation of the organization that created them or the activities of the individual or family that created them.

INTRINSIC VALUE

The archival term for those qualities and characteristics of permanently valuable records that make the records in their original physical form the only archivally acceptable form of the records.

LEGAL CUSTODY

Ownership of title to documentary materials.

LIFE CYCLE OF RECORDS
The concept that records pass through a continuum of identifiable phases from the point of their creation, through their active maintenance and use, to their final disposition by destruction or transfer to an archival institution or records center.

LINEAR FEET (or METERS)

A standard measure of the quantity of archival materials on the basis of shelf space occupied or the length of drawers in vertical files or the thickness of horizontally filed materials.

MACHINE-READABLE RECORDS

Records created for processing by a computer.

MANUSCRIPT

A handwritten or typed document, including a letterpress or carbon copy, or any document annotated in handwriting or typescript.

MANUSCRIPT

See PERSONAL PAPERS.

MANUSCRIPT CURATOR

The professional staff member within a manuscript repository responsible for any aspect of the selection, preservation, or use of documentary materials.

MANUSCRIPT REPOSITORY

An archival institution primarily responsible for personal papers.

NONRECORD MATERIAL

Material that is not record in character because it comprises solely library or other reference items, because it duplicates records and provides no additional evidence or information, or because its qualities are nondocumentary.

ORIGINAL ORDER

The archival principle that records should be maintained in the order in which they were placed by the organization, individual, or family that created them.

PERSONAL PAPERS

A natural accumulation of documents created or accumulated by an individual or family belonging to him or her and subject to his or her disposition. Also referred to as MANUSCRIPTS.

PRIMARY VALUES

The values of records for the activities for which they were created or received.

PROCESSING

All steps taken in an archival repository to prepare documentary materials for access and reference use.

PROVENANCE

- (1) The archival principle that records created or received by one recordskeeping unit should not be intermixed with those of any other.
- (2) Information on the chain of ownership and custody of particular records.

RECORD COPY

The copy of a document which is designated for official retention in files of the administrative unit that is principally responsible for production, implementation, or dissemination of the document.

RECORD GROUP

A body of organizationally related records established on the basis of provenance with particular regard for the complexity and volume of the records and the administrative history of the record-creating institution or organization.

RECORDS

USCA Case #13-5127 Document #1499100 Filed 10/01/2013 Page 105 of 106

All recorded information, regardless of media characteristics, made, received and maintained by an organization or institution. [The Federal Records Act definition of "records" can be found at: [44 USC Sec. 3301.](#)]

RECORDS CENTER

A records storage facility established to provide efficient storage of inactive records. Legal title to records deposited in a records center is retained by the originating agency.

RECORDS MANAGEMENT

The profession concerned with achieving economy and efficiency in the creation, use, and maintenance of current records.

REFERENCE MATERIALS

Nonaccessioned items maintained by an archival institution solely for reference use.

REFERENCE SERVICE

The archival function of providing information about or from holdings of an archival institution, making holdings available to researchers, and providing copies, reproductions, or loans of holdings.

RESPECT DES FONDS

See PROVENANCE.

REVIEW

The process of surveying documentary materials in an archival institution to determine whether the materials may be open for access by researchers or must be restricted in accordance with law, a donor's requirements, or an institution's regulations.

SANCTITY OF ORIGINAL ORDER

See ORIGINAL ORDER.

SCHEDULE

(v.) To establish retention periods for current records and provide for their proper disposition at the end of active use.

(n.) See DISPOSITION SCHEDULE.

SECONDARY VALUES

The values of records to users other than the agency of record creation or its successors.

SERIES

A body of file units or documents arranged in accordance with a unified filing system or maintained by the records creator as a unit because of some relationship arising out of their creation, receipt, or use.

SUBGROUP

A body of related records within a record group, usually consisting of the records of a primary subordinate administrative unit or of records series related chronologically, functionally, or by subject.

Endnotes for "Introduction"

1. *Elsevier's Lexicon of Archive Terminology*. Compiled in French, English, German, Spanish, Italian, and Dutch by a committee of the International Council on Archives. New York: Elsevier Publishing Company, 1964. [Return to text.](#)
2. "A Basic Glossary for Archivists, Manuscript Curators, and Records Managers," compiled by Frank B. Evans, Donald F. Harrison, and Edwin A. Thompson. Edited by William L. Rofes. *The American Archivist* 37 (July 1974): 415-433. [Return to text.](#)
3. The glossary included in this *Reader* was developed for the Modern Archives Institute. It is included here to provide assistance for readers who are unfamiliar with archival terminology. [Return to text.](#)

4. Documentary materials also may be characterized on the basis of their various physical forms: textual, audiovisual, machine-readable, cartographic, printed and others. The term "manuscript" is used for any handwritten or typed document, including press or carbon copy, or any document annotated in handwriting or typescript. In common usage, the term "manuscripts" also often is used as a synonym for "personal papers." [Return to text.](#)

5. The term "records" now is even used occasionally as a general term for both records and personal papers. The Presidential Records Act of 1980 codified this usage by employing the term "personal records" to describe strictly personal and private or political papers of the President. [Return to text.](#)

6. Although some groups of personal papers and, less frequently, some series of records may have no perceptible order, if any order does exist it is likely to be meaningful and archivists seek to protect it. If no internal order is perceptible, the archivist's concern for protecting established relationships does not come into play. [Return to text.](#)

7. Records in an archival institution also are called "archives." A building in which an archival institution is located also is often referred to as an "archives." "Archives" is a collective noun. [Return to text.](#)

8. The Smithsonian Institution's Archives of American Art and the Dada Archive of the University of Iowa are both examples of this phenomenon. [Return to text.](#)

Note: This web version was prepared in 1999, based on: Maygene F. Daniels, *Introduction to Archival Terminology*, Published in **A Modern Archives Reader: Basic Readings on Archival Theory and Practice** (National Archives Trust Fund Board, 1984): 336-342.

This version may differ from the printed version.

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By Government Organization
Presidential Materials
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provenance

Relationships

Related Term:

[arrangement](#); [context](#); [creator](#); [custodial history](#); [entity of origin](#); [fonds](#); [office of origin](#); [original order](#); [provenience](#)

n. (**provenancial**, adj.) ~ 1. The origin or source of something. - 2. Information regarding the origins, custody, and ownership of an item or collection.

Notes:

Provenance¹ is a fundamental principle of archives, referring to the individual, family, or organization that created or received the items in a collection. The **principle of provenance** or the **respect des fonds** dictates that records of different origins (provenance) be kept separate to preserve their context.

Citations:

†([Duranti 1998, p. 177](#)) The principle of provenance, as applied to appraisal, leads us to evaluate records on the basis of the importance of the creator's mandate and functions, and fosters the use of a hierarchical method, a 'top-down' approach, which has proved to be unsatisfactory because it excludes the 'powerless transactions,' which might throw light on the broader social context, from the permanent record of society.

†([Gilliland-Swetland 2000a, p. 12](#)) The principle of provenance has two components: records of the same provenance should not be mixed with those of a different provenance, and the archivist should maintain the original order in which the records were created and kept. The latter is referred to as the principle of original order in English and *Registraturprinzip* in German. The French conception of *respect des fonds* did not include the same stricture to maintain original order (referred to in French as *respect de l'ordre intérieure*), largely because French archivists had been applying what was known as the principle of pertinence and rearranging records according to their subject content.

†([Hensen 1993, p. 67](#)) APPM recognizes the primacy of *provenance* in archival description. This principle holds that that significance of archival materials is heavily dependent on the context of their creation, and that the arrangement and description of these materials should be directly related to their original purpose and function.

A GLOSSARY OF ARCHIVAL AND RECORDS TERMINOLOGY

- Home
- Preface: The Archival Lexicon
- Introduction
- BROWSE TERMS
- Bibliography

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[What's New?](#)
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[Policies](#)
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Archival Arrangement -- Five Different Operations at Five Different Levels

by Oliver W. Holmes (1964)

[\[Note on Web Version\]](#)

Archives are already arranged -- supposedly. That is to say, an arrangement was given them by the agency of origin while it built them up day after day, year after year, as a systematic record of its activities and as part of its operations. This arrangement the archivist is expected to respect and maintain. Arrangement is built into archives; it is one of the inherent characteristics of "archives," differentiating them from nonarchival material.

Theoretically in the archives of an agency of government, or of any organization -- and therefore in the archival depository that has custody of such archives -- each document has its place, a natural place, so that its association and relation with all other documents produced or received by the creating agency remain clear. The archivist preserves and uses the arrangement given the records by the agency of origin on the theory that this arrangement had logic and meaning to the agency and that if the agency's employees could find and use the records when they were active, in connection with the multitudinous daily transactions of the agency, the archivist surely can do the same, using the contemporary registers, indexes, and other finding aids that came with the records as part of them. Thus artificial finding aids that the archival establishment must create are reduced to a minimum. The filing system used by the agency may not have been the best that could have been devised to start with, or it may not have been effectively carried out. It may even have broken down badly because of inefficient filing, sudden expansion or shifting of programs without adequate assistance in the file room, or for other reasons. Still, no major archival establishment will ever be given money to revise filing systems. It will have to get along with what it inherits, making minor adjustments at most.

Beyond such practical considerations as lack of time and money to create new systems, however, is the more important truth that, if the archival agency could reorganize the records, to try to do this would be unwise and undesirable. Perhaps no two archivists could agree on the arrangement concept to be built into any new system. Furthermore, what an agency has created in the past no man today can completely tear asunder. One cannot, for example, tear volumes apart. This author has seen such a process actually tried with press copy letter books, but with minute books or account books it becomes impossible. To the degree that it could be done with loose papers, the original groupings, which have meaning in themselves, would be lost; the sequences of operations and events would be difficult, or almost impossible, to reconstruct; the efficiency or inefficiency of the agency itself would be obscured; and all the registers, indexes, and other finding aids created over the years by the agency, at great cost in manpower and money, would be rendered useless. (We are here considering physical rearrangement, not rearrangement on paper, which the archivist is free to do to his heart's content if he can find time and money for it. Paper rearrangements by the archivist may usefully supplement the physical arrangement established by the agency of origin; they cannot supplant it.)

To the energetic novice, who usually wants to start classifying and cataloging documents all over in some schematic arrangement of his own, these observations must sound strange -- like the lazy man's way out. But every professional archivist knows these things. He has learned them from experience or from archivists who have had experience. These lessons have been expounded

Archives USA
 America: History and Life
 Fold3 (Formerly Footnote)
 JSTOR
 Declassified Documents
 Reference System
 Biography and Genealogy
 Master Index (BGMI)
 Digital National Security
 Archive
 Interagency Working
 Group: War Crimes
 Holocaust-era Assets
 Career Development
 Resource Center

frequently in archival literature. The classic expression of them is in the 1898 manual of the Dutch archivists, Samuel Muller, J. A. Feith, and R. Fruin, translated into English by Arthur H. Leavitt (*Manual for the Arrangement and Description of Archives*; 1940). They are embodied also in the well - known treatises in English by Sir Hilary Jenkinson (*A Manual of Archive Administration*; rev. ed., 1937) and T. R. Schellenberg (*Modern Archives: Principles and Techniques*; 1956). They have been written into the instructional material of the National Archives, notably *Staff Information Papers* nos. 15 and 18, entitled respectively *The Control of Records at the Record Group Level* and *Principles of Arrangement*.

The overall principle discussed above is, of course, what archivists call the "principle of provenance." This is signified on an upper level by the French expression *respect des fonds* (maintaining the natural archival bodies of creating agencies or offices separately from each other) and on a lower level, that is, within the *fonds*, by the phrase *respect pour l'ordre primitif* (respect for the original order). Arrangement becomes then, for the records of any one agency, the task of determining and verifying the original order, filling and labeling of the archives containers to reflect it, and shelving of the containers in the established order.

But if this is all there is to arrangement, it would seem to be relatively easy and even somewhat routine -- perhaps chiefly a physical operation. A first answer to such an observation would be that, although in theory arrangement is simple, in practice it always presents many problems. Almost the whole of the Muller, Feith, and Fruin manual is devoted to the exposition of these problems and suggested solutions to them. A second answer is that these authors treat only part of the arrangement function, the arrangement of the records of an agency -- any agency -- whereas archivists in the National Archives and in most State archival establishments have custody of the records of hundreds of agencies, more or less related to each other. There must be, first, overall arrangement policies involving the grouping of these agency records and, second, controls to implement the policies. In other words, there are in any large depository many decisions that must be made above the level of the *fonds*.

Much confusion that arises in discussing the arrangement function could be avoided, this author believes, if it could be recognized at the start that the term "arrangement" covers several different types of operations, of varying degrees of difficulty, depending in large part on the level at which they are being carried out. An identification of these levels and some analysis of the operations at each level, beginning at the top level and moving down -- the order in which control should be established -- may lead to a better understanding of this function by archivist and layman alike. In attempting this analysis, the author has had in mind as audience chiefly would -- be archivists (and position classifiers), but he hopes what is written will also make sense and ring true to those who have often dirtied their hands by actually doing arrangement work.

THE LEVELS OF ARRANGEMENT

In all large archival depositories there can be distinguished, usually, at least five levels of arrangement:

1. Arrangement at the depository level -- the breakdown of the depository's complete holdings into a few major divisions on the broadest common denominator possible and the physical placement of holdings of each such major division to best advantage in the building's stack areas. This major division of holdings is usually reflected in parallel administrative units (divisions or branches in the depository organization that are given responsibility for these major groupings).
2. Arrangement at the record group and subgroup levels -- the breakdown of the holdings of an administrative division or branch (as these may have been established on the first level) into record groups and the physical placement of these in some logical pattern in stack areas assigned to the division or branch. This level should include the identification of natural subgroups and their allocation to established record groups.
3. Arrangement at the series level -- the breakdown of the record group into natural series and the physical placement of each series in relation to other series in some logical pattern.
4. Arrangement at the filing unit level -- the breakdown of the series into its filing unit components and the physical placement of each component in relation to other components in some logical sequence, a sequence usually already established by the agency so that the archivist merely verifies and accepts it.

5. Arrangement at the document level -- the checking and arranging, within each filing unit, of the individual documents, enclosures and annexes, and individual pieces of paper that together comprise the filing unit and the physical placement of each document in relation to other documents in some accepted, consistent order.

The above five steps refer to the arrangement of the records themselves, independently of their containers. They establish the order or sequence in which records ought to be placed in containers and in which the containers ought to be labeled and shelved.

When all these steps have been completed the archival holdings of a depository may be said to be under control. This control may never be established completely (sometimes arrangement at the filing unit or document level may never be fully carried out), but it must be established to an acceptable degree before records description work is possible because finding aids have to refer to specified units in an established arrangement.

ARRANGEMENT AT THE DEPOSITORY LEVEL

A large archival depository, holding the records of hundreds of different agencies, each considered a record group, requires a first division of its holdings above the record group level, chiefly for administrative purposes. Each such division thus holds a number of record groups. This division may be:

- (1.) on a chronological basis, the breaks often coming at major changes in the organization of government (as in Latin American countries, where one usually finds at least a colonial section and a national-period section, with sometimes an independence-period section sandwiched between)
- (2.) on a hierarchical basis, according to major organizational divisions of government (as in the National Archives, where administrative divisions were first organized around the records of one or two major departments along with the records of related independent agencies, although through the years these boundaries keep changing)
- (3.) on the basis of levels of government (as central and local) ; or
- (4.) some combination of the above.

In the National Archives there is also a tendency to consider broad subject areas as a guide at this arrangement level, but this may be more apparent than real. Government organization itself normally follows subject areas to a considerable degree. Subject areas can hardly be a controlling guide but they may be an auxiliary consideration. So also are such important matters as the size and arrangement of storage areas, the physical nature of the records themselves (often necessitating special areas in the case of technical records such as maps, pictures, and film), the reference activity of the records, the degree of security to be given them, and the number and caliber of personnel needed to work with them. Because of all these considerations, this first division of the records is usually made at the highest level of administration and embodied in issuances approved by the head of the agency. Personnel of lower grade usually have no part in the decisions and no responsibility for them. Small archival depositories may not feel the need of dividing their holdings at this level; but over the years, as transfers continue from an increasing number of agencies and offices, the need to consider such a division will almost certainly arise.

ARRANGEMENT AT THE RECORD GROUP LEVEL

The basic principle of *respect des fonds* requires that the records of different creating agencies and offices be kept separate and never mixed. Under this principle an archival establishment must:

- (1) decide what creating agencies and offices are represented by records and
- (2) identify all records as belonging to one agency or another.

In the early years of the archival establishment concern for these matters may seem a bit academic, for the agencies represented are generally known to the staff and the identification of records with particular agencies is fairly obvious. Sooner or later, however, arguments will arise and decisions will be called for. How long an archival establishment may "get by" without carefully dividing its holdings into sharply delimited "record groups" to use the term coined in the National Archives in 1941 -- will depend on how far back in time and through how many agency reorganizations its holdings extend

Before the National Archives began using the term "record group" the Public Record Office in Great Britain was using the term "archive group" to designate the records of an entire agency, no matter how large, including the records of entire ministries. The British practice, we believed, if applied in the National Archives, could lead sometimes to groupings too large for administrative convenience. We thought it better to divide the records of such large "agencies" as departments into a number of separate record groups, usually reflecting the bureaus within departments and of "convenient size" for administration.

On the Continent the French term "*fonds d'archives*" -- meaning the body or stock of records of a record -- creating unit -- was widely known in archival literature and accepted as the basis of arrangement work. (The Dutch term "*archieff*" also had wide usage because of the influence of the Dutch manual.) As applied in practice, the records of any subordinate office that kept records, no matter how small the office, were considered a "*fonds*." This was going to the other extreme of "convenient size," and the "record group" principle as defined in the National Archives united the records of subordinate offices under their superior offices, usually up to the bureau level. Also the records of small though essentially independent satellite agencies were often included with the records of major agencies to which they were related. Many smaller *fonds*, such as the records of claims commissions or arbitration boards, were grouped together into what became known as "collective record groups," of which a number were established. There would otherwise be thousands of *fonds*. Thus, the National Archives, partly for administrative convenience, has aimed at the intermediate level in establishing its record groups. It established 206 such record groups in 1943 for its then existing holdings. Additional record groups have since been established and the number, considering the entire holdings of the National Archives and Records Service, now approaches 350.

Although the term "record group" has never seemed to this author a happy one for the concept, no one has suggested a better, and both the term and the concept seem to be spreading in use to other archival depositories in the United States and Canada. It is not certain that the term is always defined exactly as it is in the National Archives, and perhaps it need not be -- so long as the definition is applied consistently throughout the establishment. Some such concept is needed in all archival depositories having the care of records created by many different agencies and organizations. Once established, record groups are usually the basic units for administrative control; that is, for arrangement, description, reference service, and statistical accounting and reporting.

Inasmuch as the records of each record group are to be kept separate from those of all other record groups, any unit of records -- whether bound volume, series of loose papers, single paper or map, or whatever -- has to be identified as constituting a part of one record group and no other. There can be no overlapping, for records cannot be placed physically in two different places. Each new accession must be allocated to its proper record group; if none exists, a new record group must be established and a proper location in the depository found for it. So far as possible, all the contents of a record group should be kept together in one place in the stacks. Exceptions will often have to be made for technical records. Because decisions at the highest level are governed more by administrative than professional considerations, the establishment of a record group with the delimitation of its boundaries is the first real professional operation as one moves downward in the arrangement function. It is impossible to discuss here all of the many considerations governing decisions about allocation of records to one group or another. They are set forth clearly and in detail, so far as the National Archives is concerned, in its *Staff Information Paper* no. 15,

The Control of Records at the Record Group Level.

Recommendations for the establishment of new record groups and for their delimitation are made usually by branch or division chiefs of senior archivist level and require the approval of the head of the archival agency or a specially designated assistant. Topmost officials must also decide which division or branch is to be assigned responsibility for the record group. The division or branch chief, or a higher official in some cases, must decide where in the branch areas the record group is to be physically located. The amount of use the records may have, the quantity of additional records to be expected in the record group, and other considerations may affect the decision on the area in which the record group is to be shelved. Physical limitations of stack areas and equipment may not permit an ideal

All natural subgroups should also be recognized at this level of arrangement, accounted for in the registration statement prepared for the record group, and kept separate physically as subdivisions of the record group when it is arranged in the stacks. Subgroups must be identified and their affiliation determined when the boundaries of the record group are established; otherwise, the determination of subgroups could amount to a separate level in arrangement.

In many simpler record groups, some of which may be sizable, there are no subgroups. The subgroup determination can be made quickly except in cases of collective record groups or of records of an agency that has undergone frequent reorganizations and numerous changes of field offices, for the records of each field office ought properly to be considered a subgroup. Moreover, if the records over the years have become badly disarranged, the determination of existing subgroups can be most difficult. The untangling of the records themselves may have to be postponed to the next level of arrangement, the identification and allocation of series. The identification of subgroups and recommendations for the order of their arrangement within a record group is work of middle-professional grade or higher and is approved by the chief of the division or branch that has custody of the record group.

Although many difficult problems enter into decisions with respect to record groups and the decisions are of major importance, the time spent in arrangement at the record group level is so little as to be an almost negligible part of the total time an archival agency must devote to the arrangement function.

ARRANGEMENT OF SERIES WITHIN THE RECORD GROUP

It is arrangement at the three levels within the record group that represents the time-consuming work. Record groups in the National Archives average nearly 3,000 cubic feet each (the contents of nearly 500 4-drawer file cabinets). In other archival depositories the average may be smaller. Some record groups are so large and complicated that they contain thousands of series in many subgroups. These series must be identified and arranged in some logical order in relation to each other, so that the whole record group is given an orderly sequence on the shelves.

Although through classification schemes and filing practices an agency may have given a definitive arrangement to documents and filing units within each series, it almost never established a sequential arrangement for the many different series it created. It never dictated that a certain series was to come first, a certain other series last, and that each of the others was to have its place at some definite point in between. This larger classification sequence is what the archivist must establish for each record group. It is an operation that requires a full knowledge of the principles of archival arrangement and a knowledge of the administrative history of the agency or agencies whose records are involved. In many ways this is the heart of archival work, because the inventory and all other finding aids merely reflect this level of arrangement and are keyed into it. The person to whom the work is assigned should be well trained and experienced and should prepare himself for his specific assignment by reading laws and regulations governing the organization and programs of the agency in question; its annual reports, special reports, and other publications; and all serious historical and analytical studies of its work and accomplishments. He must pay special attention to changes in its function and organization: these are usually reflected in the records and over a long period of years will be considerable. He must know the history of predecessor agencies whose records may have been inherited and of successor or liquidating agencies that have had custody of the records and that may have disposed of some, reorganized others, absorbed some into their own record bodies, or otherwise complicated the picture. He must study particularly the agency's way of keeping its records. If he studies also the records themselves he will learn much from them that is not in print or otherwise available. By putting together the knowledge gained from all sources, he will be in a position to identify and interpret the many series and to give them an arrangement that is not only logical but revealing of an agency's history and accomplishments. His arrangement scheme should have two dimensions. It should not only present the series maintained by the agency at any given time but through time, whether it existed 10 years or 150 years.

This arrangement process is much easier to carry out if the archivist has seen the records in the agency before they are accessioned. Ideally, records should be taken directly from an agency's file room by the archivist as soon as they become inactive enough for transfer to the archives depository.

Perhaps the agency has had a central file, but certain important exceptions to centralization have been allowed. Perhaps the agency has had a number of file rooms or filing stations reflecting major functions or organizational units. Perhaps general decentralization has been the practice if not the rule. Knowing how the agency grouped its records is always helpful because the original groupings should be reflected in the final arrangement. It is less possible in these days of intermediate records centers for the archivist to see this picture. Nor is it possible to any extent with respect to the older records of agencies that existed for decades before the archival depository was established. These agencies may have moved their inactive records from building to building innumerable times before relinquishing them to the archives depository, each time further confusing any arrangement the records may have had when they were active and growing files. Even so, however, the archivist's opportunity to inspect the older records in attics or other places of storage, especially if they were still in their original containers with original labels, may have taught him much about them. In this sense arrangement begins before accessioning, and knowledge gained at this stage should be reflected so far as possible in the inventory prepared at the time of accessioning. The archivist who has had a share in the accessioning process always has a head start in arrangement if he can carry through in an advisory or supervisory capacity until the records are on the shelves.

The next step is the identification of the different series that must be assigned an order. This brings us to the definition of the word "series," one of the basic technical terms in the archivist's vocabulary. Until an archivist understands this term and is able to recognize a series, he should not undertake arrangement work on this level.

A true series is composed of similar filing units arranged in a consistent pattern within which each of the filing units has its proper place. The series has a beginning and it has an end, and everything between has a certain relationship. The pattern may be a simple one -- alphabetical, numerical, or chronological -- or a complex one, as, for example, annual reports arranged first by years, then by States, and then by counties within States. This may be complicated further by an agency's practice of filing reports of State officials in a certain order at the State level and of county officials in a like established order under each county. Such a filing pattern may be followed year after year until the records fill several thousand feet of shelving, but no matter how complex the pattern, so long as that pattern is being repeated, we still have a single series. Another series may consist of only a few feet of reports relating to Territories in a somewhat different arrangement. The boundaries of these true series are never difficult to determine; gaps and disarrangements are easily recognized.

There will occasionally be a series made up of only one file unit. Perhaps this is more often true of book records, as when some special record has been maintained in a single volume that has no successor. "Series" may not seem to be the proper word in such cases unless one thinks of the item as the beginning of an intended series that did not advance beyond the first unit. In a short-lived agency there may be many such series. It might seem that a number of these one-volume series could be brought together at the end of the record group, but this would be the equivalent of giving up in determining their proper location. They would not belong together unless they had a common provenance. Instead they might belong properly in widely separated parts of the record group, some of them perhaps between series of unbound papers that they might help to elucidate.

There will also be cases where no discernible pattern seems to exist for certain groupings of documents although a subject or transaction relationship is obvious. Often one really has just an accumulation or aggregation of documents relating to some matter because, apparently, the agency did not take the time to rationalize their arrangement. These accumulations can hardly be called "series" in the strict sense of the word, but arbitrarily we treat them as such -- just as we are somewhat arbitrary about what constitutes a record group. They represent a block of material that has to be assigned a place in the arrangement. There is no succession of file units and therefore no obvious beginning or end, so that the special problem for this type of series is to determine its boundaries. One has to look for the common denominator in subject or provenance that separates this accumulation from other true or artificial series. Perhaps these papers or other materials were collected by some investigator because they were useful in a special matter he was handling. Perhaps they related to some special operation that came to a sudden end. Whatever their history and purpose, they must be identified by their boundaries and kept separate if they ever are to be understood and assigned their places in relation to the whole.

The different series, once they are identified, are the elements of the record group that at this level of

arrangement to be given a meaningful physical order that will later be reflected in the order of inventory entries on paper. Indeed, the entries of an inventory (which are the series) are probably at this stage on paper in the form of cards or slips that can be shuffled as the arrangement is being worked out.

Although the record groups and subgroups should have been established and their order decided upon at the second level of arrangement, the final allocation of series to subgroups (if not reallocation to other record groups) may have to await the detailed identification of series that comes at the third level of arrangement. Once all series are assigned to record groups and subgroups so that the boundaries of these are finally certain, the archivist looks within the group or subgroup and works out a logical arrangement sequence for the series so assigned. It must be admitted that there is no one perfect arrangement sequence for series. Considerable variation is possible in any large record group, and no two archivists, no matter how experienced, would make the same decisions. But there are better arrangements and poorer arrangements, and the poorer one must be wrestled with until it is acceptable.

Arrangement of series is a relatively simple task if the records are the creation of a small, unified agency. Such a record group or subgroup, therefore, may be assigned to a younger archivist for training purposes. He will draw upon a few accepted principles such as the Dutch rule giving precedence to the correspondence series unless there happens to be a "backbone" series from which all else depends. Indexes and other agency-created finding aids usually precede the series they index. Facilitating and housekeeping records, if preserved, usually come last. In between, functions and the sequence of action within functions may govern the grouping of series. In larger record groups the series may be grouped according to chronological periods, by major breaks in the filing systems, or on a functional basis, and these groupings become also major divisions or breakdowns of the resulting inventory.

In most record groups of any age and size, however, there are almost certain to be many complicating factors. These may be caused by:

- (1) changes in the organization;
- (2) changes in the functions;
- (3) changes in the filing schemes;
- (4) the existence of records from one or more predecessor agencies that have not been, or have been only partially, incorporated into records series created by the later agency; and
- (5) records that have been reclassified or otherwise reorganized for proper reasons, that have been incompletely reorganized (some ambitious scheme not carried through to completion), or that have been merely tampered with by would -- be "methodizers" before being transferred to the archives depository.

The Dutch manual gives rules for dealing with these and many other complications that cannot be presented here. Although younger archivists with some experience can identify series in complicated record groups as well as they can in simpler ones, it is necessary usually for a more experienced archivist to take over and work out a rational arrangement. A person with experience can be expected not only to do a better job but to do it faster. It is a waste of time and money to employ a worker of too low a grade for arrangement work at this level. The arrangement finally decided upon should be approved by the division or branch chief having responsibility for the record group.

ARRANGEMENT OF FILING UNITS WITHIN SERIES

Although filing units within series may be single documents or single documents with enclosures and annexes, they are more likely to be assemblages of documents relating to some transaction, person, case, or subject, depending upon the filing policy or system used by the agency. The filing policy, in turn, is likely to be conditioned by the nature of the agency's operations. In the past these filing units were usually controlled in a system of registers and indexes that tied the whole body together in intricate but orderly fashion; and efficient servicing of the records now, as then, is dependent generally upon keeping the body in the same order so that all the contemporary finding aids remain valid as guides. These registry systems continue to be used, notably in the courts and regulatory agencies and in many other agencies that operate largely upon a case or project system. In still other agencies, however, they have been superseded by classified files without registry controls or with partial registry

USCA Case #10-0127 Document #1489100 Filed 10/01/2015 Page 115 of 400

controls. In these modern instances the registry numbers do not control the filing order. Instead the filing units are the folders established for the classes of the classification scheme. All sorts of combinations may be encountered.

Arrangement work at this level, obviously, is not original arrangement; it is rather a simple but time-consuming checking operation to verify the original order and correct obvious displacements that have taken place over the years. It is necessary for efficient and certain reference service. No archivist has control over his records without it, and delay can soon cost more time, if the records are at all active, than is required to carry it out immediately after accessioning. Moreover, it is best done in connection with boxing and labeling. This is not to say that if a record group is without immediate importance from the point of view of service, or if it is never likely to be very active, such arrangement cannot be delayed or even dispensed with: when a decision such as this is made the records are boxed and labeled without close checking. Although nothing is so lost as a misplaced file, one can delay file unit checking until it can be seen that the records are active enough to justify the work. The highly active series in a record group should receive the more careful checking. These decisions, including the determination of priorities, should be made by branch chiefs on the basis of recommendations of their experienced professional assistants. If the series is composed of numbered or lettered volumes, nothing is simpler than to arrange these in sequence on the shelves. It can be done by a laborer once the place for them is decided upon. Only when backstrip or other identification marks are missing, so that one must determine sequence from internal evidence, need an archivist or subprofessional employee, depending upon the complexity of the problem, be called upon. The alphabetical, numerical, or otherwise designated files (fastened together by various devices) or the folders containing loose papers are lined up and checked for order and completeness as they are placed in archives boxes, and a box list is prepared for labeling purposes. This becomes more than a routine job only if the agency's filing system is complicated or if an apparent arrangement has been disturbed intentionally or through accident or neglect. Inadvertent irregularities may call for considerable detective work in the records themselves and in outside sources to arrive at the explanation. Only when the facts are known can the archivists decide whether to allow space for what appears to be missing or whether to leave what appears to be an alien intrusion where he finds it. Some checking for irregularities can be done by the more intelligent and careful laborers and certainly by subprofessional personnel. It is more efficiently and reliably done by the latter if filing systems are complicated, for there are more elements to be watched. Perhaps three-fourths of the arrangement work on this level can be done by experienced subprofessionals; the degree of experience needed depends on the complexity of the filing system.

Frequently this level of arrangement calls for the integration of files drawn from different chronological blocks. The central files of an agency may have been accessioned in three chronological blocks -- for example, 1905-10, 1911-15, and 1916-20 with so much overlapping that they cannot be serviced efficiently. Maintained originally in the agency as one series, they had been arbitrarily broken into period blocks, as the older files became less active, to facilitate interim storage in a records center. Now, permanent storage and frequent use for research call for restoring the records to their original order. As this is done certain categories that can be disposed of are dropped out; in other words, three or four tasks can be performed simultaneously. Ideally, so that the records can be shelved to stay, everything that has to be done to a series should be done in one multiple-purpose operation before it is boxed and labeled. Nothing is more wasteful than to have to go over and over the same records because all operations were not planned and carried through at once. Such multiple-purpose arrangement projects require at least subprofessional personnel of higher grades or professional workers in the beginning grades.

In many record groups there are rats' nests of bundles, irregularly sized papers, or other groupings that appear never to have been incorporated into systematically arranged and controlled series or that have been pulled out of such series for forgotten purposes and never put back, perhaps because a file clerk did not know where they belonged. The longer the records have remained in storage in attic or basement -- so that over the years they have been serviced by many different persons, most of them unfamiliar with the old filing systems -- the larger the rats' nests. Yet, they are often made up of fairly important records. Going through them calls for the skill of an archivist thoroughly familiar with not only the record group in question but also related record groups. Indeed, if the responsible person does not know the record group thoroughly, he had better keep away from the rat's nest. This is time-consuming arrangement work that must be done unless disorder is to be perpetuated, but is hardly ever done properly and efficiently by anyone but an experienced archivist of at least middle grade.

A final type of operation that may be encountered in the arrangement of file units is the deliberate reorganization of these units in cases where an arrangement different from the original one would seem to serve more efficiently to meet longterm reference demands. For example, an agency often lazily allows reports to pile up year after year, keeping those for each year together in some repetitive pattern, arranged perhaps alphabetically by jurisdiction. In reference service, however, the reports will almost always be called for by jurisdiction, which means that the archivist must draw them from as many places as there may be years involved. It is a relatively simple job to reorder the reports so that all for a jurisdiction are together in sequence. This is physical rearrangement, of course, but it is the simplest sort of rearrangement and does not really violate the integrity of the files. It can be entrusted to subprofessional personnel under proper supervision.

More complicated reorganizations may be decided upon if records have been so badly disarranged that the original organization cannot be fully restored with confidence unless excessive time is spent in research. One does not decide lightly to reorganize a series completely, for in the end the work can prove to be more difficult than expected. It is not easy to devise a new scheme; the records will not fit into any scheme of reorganization as well as they fitted into the original scheme; and they will not be the same body of records when so reordered even though all the documents have been worked into a new arrangement. In cases where an agency has allowed records to accumulate without organization, the archivist must decide whether to leave the records in this disorganized state (which he probably will do if they are not in much demand) or to devise an organization for them. Usually these are short series and the organization can be relatively simple; for example, chronological, alphabetical, or by personal name. Some organization is prerequisite if the records are to be microfilmed. The planning of such organization or reorganization must be by professional archivists of high grade and much experience. It may be carried out by middle-grade archivists working under supervision.

It is obvious that arrangement work on the level involving filing units is of various grades of difficulty and calls for the time of personnel of various grades from that of literate laborers through the subprofessional grades, and from the lower professional grades up to the middle grades. A professional archivist must supervise arrangement work performed by workers of any grade in the sense of spot checking, being present to answer questions, investigating gaps and irregularities, making decisions on whether to go ahead despite irregularities, bringing larger matters to the attention of his superiors, and the like. Planning and supervising arrangement on this level is work of considerable complexity and responsibility and should be done by middle-grade archivists and above. Finally, such projects before their inauguration should be approved by senior archivists and even division chiefs, depending on the amount of equipment and manpower involved or the lack of guiding precedent.

ARRANGEMENT OF DOCUMENTS WITHIN FILE UNITS

A bound volume may contain many individual documents, but their arrangement was fixed at the time of recording; they cannot get out of order, nor can their order be altered. Loose papers are a different matter. Many ways have been tried over the years to keep related papers of a file unit together and in some kind of order, but none is entirely satisfactory. In the days before flat files, order was maintained by folding papers together. Modern ways to preserve the order involve the use of paper clips, wire staples, or rivets -- the two last in connection with cover and backing sheets -- or of folders and metal fasteners of various kinds within folders. In the days of folded records -- roughly before World War I -- enclosures were folded within the covering letters, and enclosures often had enclosures folded within them. A letter of transmittal might cover many enclosures, some of which had their own enclosures. This was true especially of legal records, vouchers, and reports. When records such as these are flattened, considerable ingenuity, careful checking, and use of folders or envelopes are all necessary to ensure that the proper documents are kept together and their relationships thus preserved. An archivist is likely to develop considerable admiration for the old system of folded records and the revealing endorsements on the middle fold, and he is not likely to want to unfold them permanently until the physical condition of the records requires that he do so. Increased handling to find and scrutinize flattened endorsements can result in more rapid deterioration than if the records had been left unflattened.

It is partly in connection with the flattening of records, then, that one is required to ensure that proper documents and individual sheets of paper are kept together and in a consistent order.

The other major process requiring arrangement within the file unit and down to the individual document is in connection with microfilming. There is an increasing amount of this these days as:

- (1) scholars blithely order hundreds of dollars worth of film of records they have not seen,
- (2) we are trying to include more and more of our best and most valuable records in microfilm publications,
- (3) we are filming vast quantities of records either with a view of destroying the originals or, contrariwise, to preserve them by encouraging the use of microfilm rather than of originals.

One using film instead of originals suffers under many handicaps at best, and if the records are not in perfect order and filmed in a consistent manner -- so that endorsements come first, for example, and enclosures are in their proper order and all sheets of a multi-paged document are in order -- the film becomes unusable and therefore useless. There are many instances of film made but never used in government agencies because the records were not carefully arranged beforehand.

One does not normally go within folders or cases to arrange original documents if they are going to be retained and used in their original form. If there is disorder, one can usually see by size or color of sheets which ones belong together and can, if he is interested in those particular records, puzzle out their arrangement more quickly and confidently than he could if they had been placed on microfilm in the same disorder.

Arrangement on this lowest level, then, is done chiefly in connection with flattening and microfilming (often both at once). It can be done by experienced subprofessional employees, or by lower grade -- that is, less experienced professional workers. It is usually a good task for a beginner because it familiarizes him with filing methods and the contents of files at the same time. Always a more experienced archivist should be on hand as supervisor, to answer questions and to iron out complications. Often arrangement of file units and individual documents is performed simultaneously, especially when records are being prepared for microfilming. This usually saves time and labor, but, insofar as the process becomes more complicated, a person of higher grade may be required. If the filing unit is the document, which happens in some files, arrangement on the file unit level and on the document level becomes one and the same job, usually a relatively simple one.

BOXING, SHELVING, AND LABELING

The five levels of arrangement described above have to do with the analysis and identification of records and with checking them to determine their proper arrangement. Presumably the decisions have been made and recorded on paper or are otherwise well understood. We have now to discuss the execution of the decisions. This can be done in relatively quick time by laborers, typists, and lower grade subprofessional personnel operating under higher grade subprofessional or professional supervision, depending on the complexity of the job. Usually the professional personnel responsible for decisions on arrangement should supervise their execution, lest time be wasted in identifying subgroups and series and determining their boundaries all over again. Checking arrangement on the file unit level and boxing the series can proceed with one crew while the supervisor works on the overall arrangement of the series. The shelving of the boxed series in the determined order is then the last operation except for typing and affixing the labels.

Boxing

Normally only loose papers are "boxed," that is, put into archival containers that afterwards are placed on shelves. In transferring a file to these containers, one tries to divide it at natural breaks (between file units if possible) and yet not to pack the box so tightly that records cannot be withdrawn or inserted without damage or so loosely that papers slump and bend and space is wasted. One checks the arrangement of the file units placed in the box and writes down the necessary data, usually the beginning and ending file numbers, for the label. Efforts are made to end a series in one box, without a waste of space, and to begin a new series in a new box. Unless the order of series has been worked out ahead of time with finality and the series are boxed in order, these boxed series will, of course, be given only temporary positions on the shelves. Only with smaller and simpler record groups or accessions is it likely that everything can be ready for shelving at once. Boxing can be the work of high-grade laborers or subprofessional employees. Professional personnel is rarely needed unless complicated arrangement work is being done at the same time and is really the controlling operation,

Shelving

Both boxes containing loose papers and bound volumes must be shelved. When the arrangement of their contents has been finished, the boxes can be shelved by laborers in locations and in the order, so far as series are concerned, that professional archivists have determined. This is largely a physical operation. The shelving of volumes, especially if they are of all sizes, is more complicated. Although it will be done with the aid of laborers, it will have to be closely supervised by professionals or experienced subprofessionals unless there are long runs of volumes, well labeled and of uniform size, to be set on the shelves. The supervisor should decide whether volumes are too large or too poorly bound to stand vertically on shelves. He must watch the order very closely if there are many series of a few volumes or of one volume each. He must approve any shelving of volumes out of order, deciding when enough space can be saved thereby to warrant it, or when the condition of the volumes demands it, or perhaps when the leaving of indexes and registers out of sequence so that they can be placed near desks or made available to searchers in a searchroom is desirable to save time or to permit a degree of self-service. These irregularities in the established order should be signaled by cross-references in the proper places.

Labeling

Labeling is of two kinds:

- (1) of the containers,
- (2) of row ends in the stack areas after the shelving has been completed.

The container labeling usually comes first. Lists of box contents should have been made up at the time of boxing. A container label must show the name and number of the record group, the name of any subgroup, the name of the series, and the particular contents of the box. It should also bear a number to show the place of the box in the record group or subgroup or at least in the series sequence. The first two or three elements, if they extend over a hundred containers or more, should be typed on stencils so that the labels can be processed in sheets; if this is done, only the contents of the individual boxes will need to be typed on individual labels. Sometimes there will be no subgroup. If a subgroup is well known, there need be shown only the number of the record group of which it is a part. Row -- end labels must be typed in full, since each one varies so much in wording. Labels can be worked out by lower grade professional personnel or higher grade subprofessional personnel, but they should be reviewed by higher grade professionals before time is wasted in processing and typing. The affixing of the labels can be done by literate and careful laborers if work is reviewed by high-grade subprofessionals or low-grade professionals. The assignment of the lower or higher grade worker is determined by the complexity of the job.

There are of course reboxing, and reshelving, and relabeling jobs that follow after the internal disposal of accessioned material in order to consolidate the space gained by such disposal. They can be handled by the same grades of personnel that handled the original jobs of this nature. Occasionally there are major reshiftings of holdings as a record group or several of them are assigned to different areas. Such shiftings afford the opportunity to improve arrangement and correct any errors that may have been made originally. The planning of such a shift in order to get the most out of the available space in the new areas is usually work of professional level, but the execution can be by laborers and supervision by experienced subprofessional personnel.

REPORTING ARRANGEMENT RESULTS IN WRITING

For each level of arrangement except the lowest, there is likely to result some kind of archival instrument:

1. Depository level -- an administrative issuance.
2. Record group level -- a record group registration statement or summary for each established record group.
3. Series level -- an inventory of the record group in which each series appears as a numbered entry.

USCA Case #13-51271 Document #1499100 Filed 10/31/2013 Page 119 of 100

5.1 Filing unit level checklists of filing units for important series. These checklists are sometimes, for very long and important series, offered as separate documents, but more often they are presented as appendixes to inventories of the record groups. Very short series and series of lesser importance are deemed sufficiently accounted for in the inventory itself.

On the document level a written statement is not normally produced to reflect arrangement.

Most of these archival instruments serve a double purpose in that, although really produced as control documents to account for the holdings and show their arrangement, they serve also as finding aids. In one sense the depository-level document might be said to tell a searcher which way to turn when he enters the depository, the record group statement tells him which threshold to cross, the inventory tells him in which part of the room to look, and the filing-unit list tells him which unit to take off the shelf as likely to contain the document or documents he wishes to see. The searcher will not take these steps except in imagination as he consults the finding-aid documents, but some member of the archives staff must take them physically if the documents are to be made available to the searcher in a central searchroom.

It will be seen that with respect to finding-aid documents that reflect arrangement, which we may designate as primary finding aids, the real work involved is determining the arrangement. Presenting that arrangement in writing afterwards is a subsidiary activity. There are, of course, archival finding aids that do not follow the arrangement pattern of the records but cut across these patterns in index fashion. These may be designated as secondary finding aids. They must come later because established units of arrangement with fixed designations must first exist to which units of entry in secondary finding aids can refer. Thus, arrangement is the basic internal activity of an archival establishment. All other internal activities depend upon its proper accomplishment.

Note: This web version was prepared in 1999, based on:

Oliver W. Holmes, *Archival Arrangement -- Five Different Operations at Five Different Levels*, published by the Society of American Archivists in the **American Archivist**, Volume 27, Number 1 (January 1964): 21-41.

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- [Archives and Preservation Home Page](#)
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[^ Top of Page](#)

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[Home](#) > [Preservation](#) > [Information For Archives Professionals](#) > [The Archivist's Code](#)

Resources

Introduction

[Questions About Archives and Archivists](#)
[What is the Archivist's Code?](#)
[Quick Facts about the National Archives](#)
[What's the Difference between the National Archives and the Library of Congress?](#)
[Professional Organizations](#)
[Professional Certification Programs](#)
[Archives and Records Management Links](#)
[Other Archives and Organizations](#)
[Researching in an Archive](#)

The Archivist's Code

Note: The The Archivist's Code, presented below, was developed by the National Archives in 1955 to guide staff in making professional decisions. For many years, it was the only written guidance on this topic for the archival profession in the United States. Although the guidance remains sound even today, as archival issues increased in complexity the profession saw the need for a fuller code of ethics. Accordingly, in 1992, the Council of the Society of American Archivists adopted the [Code of Ethics for Archivists](#).

- The Archivist has a moral obligation to society to take every possible measure to ensure the preservation of valuable records, not only those of the past but those of his own times, and with equal zeal.
- The Archivist in appraising records for retention or disposal acts as the agent of future generations. The wisdom and impartiality he applies to this task measure his professionalism, for he must be as diligent in disposing of records that have no significant or lasting value as in retaining those that do.
- The Archivist must protect the integrity of records in his custody. He must guard them against defacement, alteration, or theft; he must protect them against physical damage by fire or excessive exposure to light, dampness, and dryness; and he must ensure that their evidentiary value is not impaired in the normal course of rehabilitation, arrangement, and use.
- The Archivist should endeavor to promote access to records to the fullest extent consistent with the public interest, but he should carefully observe any proper restrictions on the use of records. He should work unremittingly for the increase and diffusion of knowledge, making his documentary holdings freely known to prospective users through published finding aids and personal consultation.
- The Archivist should respond courteously and with a spirit of helpfulness to reference requests. He should not place unnecessary obstacles in the way of researchers but should do whatever he can to save their time and ease their work. He should not idly discuss the work and findings of one researcher with another; but where duplication of research effort is apparent, he may properly inform another researcher.
- The Archivist should not profit from any commercial exploitation of the records in his custody, nor should he withhold from others any information he has gained as a result of his official duties—either in order to carry out private professional research or to aid one researcher at the expense of another. He should, however, take every legitimate advantage of his situation to develop his professional interests in historical and archival research.
- The Archivist should freely pass on to his professional colleagues the results of his own or his organization's research that add to the body of archival and historical knowledge. He should leave

A116

Wayne C. Grover
Archivist of the United States
1948-1965

Preservation >

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- Records Managers
- The Press

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- Federal Register
- Free Publications
- Prologue Magazine
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- More...

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- Plans and Reports
- Open Government
- Our Plain Language Efforts

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- View Online Exhibits
- Apply for a Grant

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- Attend an Event
- Donate to the Archives
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[Home](#) » [About Us](#) » [Position Statements & Resolutions](#) » [SAA Core Values Statement And Code Of Ethics](#)

SAA Core Values Statement and Code of Ethics

Introduction

Statements of ethics emerge from the core values of a profession. The [Core Values of Archivists](#) and the [Code of Ethics for Archivists](#) are intended to be used together to guide archivists, as well as to inform those who work with archivists, in shaping expectations for professional engagement. The former is a statement of what archivists believe; the latter is a framework for archivists' behavior.

Core Values of Archivists

(Approved by the SAA Council May 2011.)

PURPOSE

Archivists select, preserve, and make available primary sources that document the activities of institutions, communities and individuals. These archival sources can be used for many purposes including providing legal and administrative evidence, protecting the rights of individuals and organizations, and forming part of the cultural heritage of society. The modern archives profession bases its theoretical foundations and functions on a set of core values that define and guide the practices and activities of archivists, both individually and collectively. Values embody what a profession stands for and should form the basis for the behavior of its members.

Archivists provide important benefits and services such as: identifying and preserving essential parts of the cultural heritage of society; organizing and maintaining the documentary record of institutions, groups, and individuals; assisting in the process of remembering the past through authentic and reliable primary sources; and serving a broad range of people who seek to locate and use valuable evidence and information. Since ancient times, archives have afforded a fundamental power to those who control them. In a democratic society such power should benefit all members of the community. The values shared and embraced by archivists enable them to meet these obligations and to provide vital services on behalf of all groups and individuals in society.

This statement of core archival values articulates these central principles both to remind archivists why they engage in their professional responsibilities and to inform others of the basis for archivists' contributions to society. Archivists are often subjected to competing claims and imperatives, and in certain situations particular values may pull in opposite directions. This statement intends to provide guidance by identifying the core values that guide archivists in making such decisions and choices. Core values provide part of the context in which to examine ethical concerns.

CORE VALUES OF ARCHIVISTS

Access and Use: Archivists promote and provide the widest possible accessibility of materials, consistent with any mandatory access restrictions, such as public statute, donor contract, business/institutional privacy, or personal privacy. Although access may be limited in some instances, archivists seek to promote open access and use when possible. Access to records is essential in personal, academic, business, and government settings, and use of records should be both welcomed and actively promoted. Even individuals who do not directly use archival materials benefit indirectly from research, public programs, and other forms of archival use, including the symbolic value of knowing that such records exist and can be accessed when needed.

Accountability: By documenting institutional functions, activities, and decision-making, archivists provide an important means of ensuring accountability. In a republic such accountability and transparency constitute an essential hallmark of democracy. Public leaders must be held accountable both to the judgment of history and future generations as well as to citizens in the ongoing governance of society. Access to the records of public officials and agencies provides a means of holding them accountable both to public citizens and to the judgment of future generations. In the private sector, accountability through archival documentation assists in protecting the rights and interests of consumers, shareholders, employees, and citizens. Archivists in collecting repositories may not in all cases share the same level of responsibility for accountability, but they too maintain evidence of the actions of individuals, groups, and organizations, which may be required to provide accountability for contemporary and future interests.

Advocacy: Archivists promote the use and understanding of the historical record. They serve as advocates for their own archival programs and institutional needs. They also advocate for the application of archival values in a variety of settings including, to the extent consistent with their institutional responsibilities, the political arena. Archivists seek to contribute to the formation of public policy related to archival and recordkeeping concerns and to ensure that their expertise is used in the public interest.



Tell us how you celebrated!
Send to saahq@archivists.org



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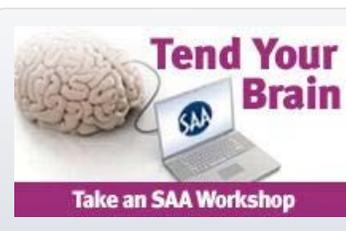


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Diversity: Archivists collectively seek to document and preserve the record of the broadest possible range of individuals, socio-economic groups, governance, and corporate entities in society. Archivists embrace the importance of identifying, preserving, and working with communities to actively document those whose voices have been overlooked or marginalized. They seek to build connections to under-documented communities to support: acquisition and preservation of sources relating to these communities' activities, encouragement of community members' use of archival research sources, and/or formation of community-based archives. Archivists accept and encourage a diversity of viewpoints on social, political, and intellectual issues, as represented both in archival records and among members of the profession. They actively work to achieve a diversified and representative membership in the profession.

History and memory: Archivists recognize that primary sources enable people to examine the past and thereby gain insights into the human experience. Archival materials provide surrogates for human memory, both individually and collectively, and when properly maintained, they serve as evidence against which individual and social memory can be tested. Archivists preserve such primary sources to enable us to better comprehend the past, understand the present, and prepare for the future.

Preservation: Archivists preserve a wide variety of primary sources for the benefit of future generations. Preserving materials is a means to this end not an end in itself. Within prescribed law and best practice standards, archivists may determine that the original documents themselves must be preserved, while at other times copying the information they contain to alternate media may be sufficient. Archivists thus preserve materials for the benefit of the future more than for the concerns of the past.

Professionalism: Archivists adhere to a common set of missions, values, and ethics. They accept an evolving theoretical base of knowledge, collaborate with colleagues in related professions, develop and follow professional standards, strive for excellence in their daily practice, and recognize the importance of professional education, including lifelong learning. They encourage professional development among their co-workers, foster the aspirations of those entering the archival profession, and actively share their knowledge and expertise. Archivists seek to expand opportunities to cooperate with other information professionals, with records creators, and with users and potential users of the archival record.

Responsible Custody: Archivists ensure proper custody for the documents and records entrusted to them. As responsible stewards, archivists are committed to making reasonable and defensible choices for the holdings of their institutions. They strive to balance the sometimes competing interests of various stakeholders. Archivists are judicious stewards who manage records by following best practices in developing facilities service standards, collection development policies, user service benchmarks, and other performance metrics. They collaborate with external partners for the benefit of users and public needs. In certain situations, archivists recognize the need to deaccession materials so that resources can be strategically applied to the most essential or useful materials.

Selection: Archivists make choices about which materials to select for preservation based on a wide range of criteria, including the needs of potential users. Understanding that because of the cost of long-term retention and the challenges of accessibility most of the documents and records created in modern society cannot be kept, archivists recognize the wisdom of seeking advice of other stakeholders in making such selections. They acknowledge and accept the responsibility of serving as active agents in shaping and interpreting the documentation of the past.

Service: Within the mandates and missions of their institutions, archivists provide effective and efficient connections to (and mediation for) primary sources so that users, whoever they may be, can discover and benefit from the archival record of society, its institutions, and individuals. Archivists serve numerous constituencies and stakeholders, which may include institutional administrators, creators and donors of documentary materials, rights holders, un/documented peoples, researchers using the archives for many distinct purposes, corporate and governmental interests, and/or citizens concerned with the information and evidence held in archival sources. Archivists seek to meet the needs of users as quickly, effectively, and efficiently as possible.

Social Responsibility: Underlying all the professional activities of archivists is their responsibility to a variety of groups in society and to the public good. Most immediately, archivists serve the needs and interests of their employers and institutions. Yet the archival record is part of the cultural heritage of all members of society. Archivists with a clearly defined societal mission strive to meet these broader social responsibilities in their policies and procedures for selection, preservation, access, and use of the archival record. Archivists with a narrower mandate still contribute to individual and community memory for their specific constituencies, and in so doing improve the overall knowledge and appreciation of the past within society.

Code of Ethics for Archivists

(Approved by the SAA Council February 2005; revised January 2012.)

Archives are created by a wide array of groups and provide evidence of the full range of human experience. Archivists endeavor to ensure that those materials, entrusted to their care, will be accessible over time as evidence of human activity and social organization. Archivists embrace principles that foster the transparency of their actions and that inspire confidence in the profession. A distinct body of ethical norms helps archivists navigate the complex situations and issues that can arise in the course of their work.

The Society of American Archivists is a membership organization comprising individuals and organizations dedicated to the selection, care, preservation, and administration of historical and documentary records of enduring value for the benefit of current and future generations.

The Society of American Archivists for Archival Principles of the Profession. The Code should be read in conjunction with SAA's "Core Values of Archivists." Together they provide guidance to archivists and increase awareness of ethical concerns among archivists, their colleagues, and the rest of society. As advocates for documentary collections and cultural objects under their care, archivists aspire to carry out their professional activities with the highest standard of professional conduct. The behaviors and characteristics outlined in this Code of Ethics should serve as aspirational principles for archivists to consider as they strive to create trusted archival institutions.

Professional Relationships

Archivists cooperate and collaborate with other archivists, and respect them and their institutions' missions and collecting policies. In their professional relationships with donors, records creators, users, and colleagues, archivists are honest, fair, collegial, and equitable.

Judgment

Archivists exercise professional judgment in appraising, acquiring, and processing materials to ensure the preservation, authenticity, diversity, and lasting cultural and historical value of their collections. Archivists should carefully document their collections-related decisions and activities to make their role in the selection, retention, or creation of the historical record transparent to their institutions, donors, and users. Archivists are encouraged to consult with colleagues, relevant professionals, and communities of interest to ensure that diverse perspectives inform their actions and decisions.

Authenticity

Archivists ensure the authenticity and continuing usability of records in their care. They document and protect the unique archival characteristics of records and strive to protect the records' intellectual and physical integrity from tampering or corruption. Archivists may not willfully alter, manipulate, or destroy data or records to conceal facts or distort evidence. They thoroughly document any actions that may cause changes to the records in their care or raise questions about the records' authenticity.

Security and Protection

Archivists protect all documentary materials for which they are responsible. They take steps to minimize the natural physical deterioration of records and implement specific security policies to protect digital records. Archivists guard all records against accidental damage, vandalism, and theft and have well-formulated plans in place to respond to any disasters that may threaten records. Archivists cooperate actively with colleagues and law enforcement agencies to apprehend and prosecute vandals and thieves.

Access and Use

Recognizing that use is the fundamental reason for keeping archives, archivists actively promote open and equitable access to the records in their care within the context of their institutions' missions and their intended user groups. They minimize restrictions and maximize ease of access. They facilitate the continuing accessibility and intelligibility of archival materials in all formats. Archivists formulate and disseminate institutional access policies along with strategies that encourage responsible use. They work with donors and originating agencies to ensure that any restrictions are appropriate, well-documented, and equitably enforced. When repositories require restrictions to protect confidential and proprietary information, such restrictions should be implemented in an impartial manner. In all questions of access, archivists seek practical solutions that balance competing principles and interests.

Privacy

Archivists recognize that privacy is sanctioned by law. They establish procedures and policies to protect the interests of the donors, individuals, groups, and institutions whose public and private lives and activities are recorded in their holdings. As appropriate, archivists place access restrictions on collections to ensure that privacy and confidentiality are maintained, particularly for individuals and groups who have no voice or role in collections' creation, retention, or public use. Archivists promote the respectful use of culturally sensitive materials in their care by encouraging researchers to consult with communities of origin, recognizing that privacy has both legal and cultural dimensions. Archivists respect all users' rights to privacy by maintaining the confidentiality of their research and protecting any personal information collected about the users in accordance with their institutions' policies.

Trust

Archivists should not take unfair advantage of their privileged access to and control of historical records and documentary materials. They execute their work knowing that they must ensure proper custody for the documents and records entrusted to them. Archivists should demonstrate professional integrity and avoid potential conflicts of interest. They strive to balance the sometimes-competing interests of all stakeholders.

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Comments

2005 CODE OF ETHICS FOR ARCHIVISTS

Jane Zhang - 07/28/2012 - 5:56pm

<http://web.archive.org/web/20110725013613/http://www2.archivists.org/code-of-ethics>

USCA Case #13-5127

Document #1459100

Filed: 10/01/2013

Page 125 of 406

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REVISIONS TO THE CODE OF ETHICS

jsn14 - 03/29/2012 - 12:37pm

While I am glad that the Code of Ethics is posted online and is updated as changes are made, I am disappointed because there is no way to view the Code's previous iterations. Not only does this make it more difficult for those not directly involved in revising it to track changes and comment on them, but it is an example of poor documentation. I have been searching in vain to find the Code as it existed in 1992 without much success. Including links to previous versions of the Code, highlighting changes, and allowing comments directly on the text would make this page a lot more useful and hopefully encourage more participation in the Code's development.

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UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

CAUSE OF ACTION.)
)
 Plaintiff)
)
 v.) Civil Action No. 12-1342 (JEB)
)
 NATIONAL ARCHIVES AND)
 RECORDS ADMINISTRATION.)
)
 Defendant.)

DECLARATION OF ROBERT MATTHEW FULGHAM, Jr.

I, Robert Matthew Fulgham, Jr., pursuant to 28 U.S.C. § 1746, do hereby declare and state:

1. I am the Assistant Director in the Center for Legislative Archives, National Archives and Records Administration (“NARA” or the “National Archives”). I have served in this position since 2004. My duties are to oversee all archival activities of NARA’s Center for Legislative Archives (“the Center”), the unit responsible for processing, preserving and making accessible legislative branch records. My supervisory role consists of overseeing accessioning, processing, reference, access, description, loans, and preservation activities in the Center, as well as consulting and serving as lead liaison with staff in the U.S. House of Representatives, the Senate, and legislative branch entities on records issues.
2. I have personal knowledge of the facts set out herein, based on my 20 years of service with NARA.
3. I have worked at the National Archives since 1992. Prior to my present position, I was a Supervisory Archivist at the Center from 2002 to 2004. I previously worked at NARA as an access archivist in the Special Access and FOIA Branch, where I provided reference service to researchers and screened records under the Freedom of Information Act.

4. I earned a Bachelor's and Master's degrees in History from James Madison University in Virginia.

**BACKGROUND ON LEGISLATIVE BRANCH RECORDS IN THE CUSTODY
OF THE NATIONAL ARCHIVES**

5. Pursuant to the Federal Records Act, the National Archives of the United States accepts for deposit "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." 44 U.S.C. § 2107(1). Thus, NARA accepts federal records from all three branches of government.
6. As relevant to this case, NARA accepts records from numerous different legislative entities. NARA accepts congressional records—which are the actual records of the House, the Senate, and their Committees—as well as records from agencies and temporary commissions established within the legislative branch.

Congressional Records

7. At the close of every Congress, non-current records of the Congress are transferred to NARA for preservation. 44 U.S.C. § 2118. The records of Congress, including committees and subcommittee of the House and Senate, remain the property of Congress,¹ but are preserved and made available by NARA's Center for Legislative Archives. The

¹ See House Rule VII, § 2, <http://www.archives.gov/legislative/research/house-rule-vii.html>; Senate Res. 474 (96th Cong.), <http://www.archives.gov/legislative/rcsearch/senate-resolution-474.html>.

records of the House, Senate, and their official committees are not otherwise subject to the substantive provisions of the Federal Records Act. see 44 U.S.C. § 2901(14).

8. Congressional records are also not subject to the Freedom of Information Act (FOIA). *See* 5 U.S.C. § 551(1)(A) (exempting Congress from FOIA's definition of an "agency"). Nonetheless, under longstanding tradition and practice, going back many decades, congressional records that are deposited in the physical custody of NARA are made available by NARA staff in conformance with the stipulations regarding access contained in S. Res. 474 (96th Cong.) and House Rule VII (see n.1. *supra*). *See also* 44 U.S.C. § 2118 (permitting the House and Senate to each make rules regarding the transfer of their records to NARA).
9. Most non-exempt Congressional records are available to researchers 20 years after their creation for Senate records, and 30 years after their creation for House of Representatives records, subject to statutory and other exceptions.² *See* S. Res. 474 & House Rule VII, § 4(a) (providing for certain categories of records closed for 50 years), *supra*, n.1
10. Upon receipt of a request for congressional records, Center staff locate responsive records, and if the records have reached the age threshold of the respective chamber, staff screen the files for information prohibited from release by S. Res. 474 or House Rule VII, as appropriate. After screening, the releasable material is served in the National Archives

² Pursuant to statutes, as well as various decrees originating in the Executive and Judicial branches, these exceptions include for national security classified documents (subject to Executive Order 13526); income tax returns received directly from the IRS (closed indefinitely under 26 U.S.C. § 6103); grand jury material closed under Rule 6(e) of the Fed. R. Crim. P.; information gathered through a court-ordered wiretap or electronic surveillance (closed under 18 U.S.C. § 2510); and personal privacy restricted information that is determined to still be restricted.

Building's Central Research Room or photocopies are purchased by the requester and mailed.³

Legislative Records of Federal Agencies and Commissions

11. The Center for Legislative Archives also functions within NARA as the archival repository for the records of federal agencies within the legislative branch that are subject to the Federal Records Act, 44 U.S.C. Chaps. 21, 29, 31, and 33, and that have been appraised to be worthy of permanent preservation in the National Archives. The longstanding federal legislative agencies are the Congressional Budget Office, the Government Accountability Office (GAO, formerly known as the General Accounting Office), the Government Printing Office, and the Library of Congress.

12. Legislative agencies may also be temporary commissions or panels that go out of existence without a named successor. With increasing frequency in recent years, the Center has accepted records from commissions established by Congress within the legislative branch. In addition to the records of the Financial Crisis Inquiry Commission (FCIC), described in more detail *infra*, among the commission records the Center has accepted are:

- (a) Records of the National Commission on Terrorist Attacks Upon the United States (known colloquially as "the 9/11 Commission"), consisting of approximately 578 cubic feet of textual (hard-copy or paper) records and 1 terabyte of electronic records;

³ In the event the requestor objects to any withholding, he may appeal to (for House records) the Office of the Clerk of the House or to (for Senate records) the Senate committee of origin. Because the House and Senate retain legal custody of their records, the Center applies the rules on their behalf; however, each chamber maintains authority over the application of the access rules.

- (b) Commission on Wartime Contracting, consisting of approximately 32 cubic feet of textual records and 600 Gigabytes of electronic records.
- (c) Records of the Abraham Lincoln Bicentennial Commission, consisting of approximately 19 cubic feet of textual records and 10 gigabytes of electronic records;
- (d) Commission to Assess U.S. National Security Space Management and Organization, consisting of approximately 37 cubic feet of unclassified textual records and 5 cubic feet of classified textual records;
- (e) Congressional Oversight Panel, consisting of approximately 13 cubic feet of textual records and 32 gigabytes of electronic records; and
- (t) Commission on the Prevention of Weapons of Mass Destruction Proliferation and Terrorism, consisting of approximately 16 cubic feet of textual records and 25 gigabytes of electronic records.

13. The Center also has taken custody of the FCIC records, some of which are at issue in this case. The FCIC was a temporary commission established within the legislative branch. *See* Fraud and Enforcement Recovery Act, § 5, Pub. L. 111-21. With respect to FCIC records, the Center has taken custody of approximately 293 cubic feet of textual records and 16 terabytes of electronic records.

14. Cumulatively for both congressional records and other legislative branch federal records, the Center holds approximately 190,000 cubic feet of textual records, and 28 terabytes of electronic records. *See* Center for Legislative Archives, "Research." <http://www.archives.gov/legislative/research/>.

15. Just as with congressional records, the records of legislative agencies and commissions are excluded from FOIA. *See* 5 U.S.C. § 551(1)(A). As noted above, ¶ 11, unlike the House and Senate, these legislative entities *are* subject to the Federal Records Act. *See* 44 U.S.C. § 2901(14) (defining the term “Federal agency”, for Federal Records Act purposes, as including “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)” (emphasis added)).
16. Under the Federal Records Act, these legislative agencies are required to “make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency[.]” 44 U.S.C. § 3101. Many of these records are transferred to the legal custody of NARA’s Center for Legislative Archives for further preservation. Related to this transfer process, the legislative entities create “records schedules”—negotiated with and approved by NARA—that classify the agencies’ various records either as permanent records of the United States, or as temporary records subject to destruction after a term of years. *See* 44 U.S.C. §§ 3303, 3303a. At the time of transfer, federal agency records from the legislative branch are made subject to transfer documentation, the Standard Form 258, which memorializes the transfer of legal custody to the Archivist. (See Tab A for relevant Standard Form 258 for FCIC records, with accompanying letter from Chairman Phil Angelides dated February 10, 2011, at Tab B.)

Restrictions on Access to Legislative Entities' Records

17. As part of this transfer of the records' legal custody, the agency head, with NARA's concurrence, may impose restrictions on public access to the agencies' records. *See* 44 U.S.C. § 2108(a). That is because, with respect to all federal agency records originating in legislative branch components, NARA always has considered that the records retain their status as legislative branch records in NARA's legal custody, consistent with bedrock archival principles of provenance and original order. (See Declaration of Thomas E. Mills, dated October 31, 2012). As records created in the legislative branch are not subject to the FOIA, access to the legislative agencies' records is governed instead by the Archivist's determination that controls placed by the agency head at the time of transfer are in the public interest. 44 U.S.C. § 2108(a). In the case of a Federal agency that is terminated without a successor in function – including the case of a legislative commission – section 2108 provides that “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.”
18. Consistent with the above statutory scheme, and as delegated by the Archivist, the Director of NARA's Center for Legislative Archives is given responsibility to “[c]onsul[t] with legislative branch agencies and commissions to establish access provisions for their records as they are not subject to the Freedom of Information Act.” NARA 101, NARA Organization and Delegations, Part 8: Legislative Archives, Presidential Libraries, and Museum Services, § 2(c)(11). See Tab C. It has been the Center's practice to include NARA's General Counsel in these negotiations. Separate and apart from FOIA, therefore, the agency head and NARA jointly create an administrative process for making the legislative entities' records publicly available.

The Administrative Scheme for Requesting and Processing Legislative Records

19. In general, and as set forth in more detail below, the administrative scheme for requesting and processing legislative branch records proceeds in five steps: (i) NARA receives records from an agency and begins processing them, creating general descriptions of what records are available; (ii) a researcher or other third-party submits a request for legislative records; (iii) NARA's reference staff assists the researcher in locating pertinent material, sometimes negotiating with the researcher in an effort to focus the request; (iv) NARA staff perform a line-by-line review of responsive materials for any information that is restricted; and (v) NARA staff then provide the releasable materials to the researcher. Although these steps are not entirely discrete, and they may be occurring contemporaneously at given points in time, they are still generally accurate in terms of the Center's administrative scheme for making legislative records publicly available. Each of the five steps is discussed in more detail below.

20. First, depending on anticipated researcher interest and volume of the records, Center staff prepares a list of folder titles for paper records and a directory list for electronic records. These become what is known as the primary "finding aid." Folder titles are particularly important for collections that require extensive detailed subsequent screening for restricted materials; they act as an aid to researchers in finding pertinent material to their research, while at the same time providing notice on restricted material that is not available for access. We also prepare narrative descriptions of particular groupings of records, for eventual online posting and public use.

21. Second, a researcher contacts the Center with a request, either via traditional correspondence, phone calls, emails, or by visiting the Archives. All requests are logged and a response is sent within 10 days.
22. Third, an archivist from the Center works with the researcher to find responsive materials. This usually involves providing the researcher with a finding aid, which is very valuable for allowing the researcher and archivist to locate and identify the records of interest. If the request is too voluminous for the length of the researcher's visit or cost of copying, the archivist negotiates with the requester to narrow the scope of the request. This also decreases the response time
23. Fourth, in processing material for opening, Center staff use primary and secondary sources to research the topic of the records to familiarize themselves with information already in the public domain. In addition, they familiarize themselves with Commission-specific restrictions imposed on the records as well as NARA's General Restrictions (36 C.F.R. § 1256.40). For each record responsive to a researcher's request, a Center staff member reads each line on each page to identify any information that may be subject to the restrictions. If restricted information is found, the restricted information is either redacted, or the whole record is closed and a notation made in the file to alert the researcher to withdrawn records and the reason for the withdrawal.
24. Fifth, the records are served in the Central Research Room of the National Archives Building in Washington, D.C. , or copies are made and mailed to the researcher. NARA charges for duplication costs for archival records. *See* 36 C.F.R. § 1258.
25. To date, the most prominent example of the Center performing reference and access functions has been with respect to our processing and opening of a select group of records

from the 9/11 Commission collection. The Final Report of the 9/11 Commission was issued on July 22, 2004, and was open immediately. The Commission was terminated on August 21, 2004, at which point all of its records were transferred to the Center for further preservation. One day before the Commission's termination, on August 20, 2004, the 9/11 Commission Co-Chairs Kean and Hamilton sent a letter to the Archivist of the United States discussing the records transfer. The letter encouraged the Archivist "to conduct a systematic review of the records that are not currently available to the public with the goal of releasing to the public as much information as is allowable by law and regulation on January 2, 2009, or as soon thereafter as possible." *See* <http://www.archives.gov/research/9-11/letter-to-carlin.pdf> (attached at Tab D). The letter also imposed restrictions lasting beyond January 2009 on particular types of information, such as "private information that the Commission agreed to protect from public disclosure." *Id.*

26. Upon receiving the 9/11 Commission records, the Center, anticipating significant researcher and public interest in the materials, began initial processing and cataloging of the records. To date, approximately 35% of the textual records have been processed, and NARA has posted a general listing of the records at <http://www.archives.gov/research/9-11/commission-series.html> (attached at Tab E).
27. My staff continues to process portions of the collection, as evidenced on the following listing of memoranda for the record showing which are open and which remain restricted, see <http://www.archives.gov/research/9-11/commission-memoranda.html> (attached at Tab F).

28. The remaining access restrictions on 9/11 Commission Records have been codified in a document, prepared by NARA staff entitled "Guidance Defining Exemption Categories for 9/11 Commission Records." <http://www.archives.gov/research/9-11/exemption-definitions.pdf> (attached at Tab G).
29. Additionally, consistent with NARA regulations applicable to donated historical materials, see 36 C.F.R. 1256.36, the Center has established guidelines for appealing denials of withheld legislative records, including in written guidance for 9/11 Commission records. *See* Tab H ("Guidelines for Appealing Denials of Withheld Records of the 9/11 Commission"). The guidelines establish an administrative appeal procedure for requesters who are denied access to legislative branch commission records. Appeals may be made based on NARA's refusal to release a record, in whole or in part. All appeals must be in writing and received by NARA within 35 calendar days of the date of NARA's denial letter. The appeal is sent to the Deputy Archivist of the United States. Should the record contain national security information, the appeal is properly made to the agency with responsibility for protecting and declassifying that information. NARA commits to attempting to respond to appeals within 20 working days after receipt. Responses either to reverse or modify initial decisions, or to uphold initial decisions, will be in writing with an explanation for the decision with reference to specific exemption categories (e.g., in the case of 9/11 records, from the Guidelines Defining Exemption to 9/11 Commission Records).

The Administrative Scheme for Processing and Access to FCIC Records

30. Consistent with the above, the Center is currently undertaking this administrative scheme with respect to the FCIC records. The Center is currently creating a folder title finding aid

for FCIC records, as part of the process of preserving and making available for access the paper and electronic records of the FCIC. Before the FCIC terminated, NARA and FCIC staff prepared a records disposition schedule, which categorized certain records as permanent, which NARA then approved. *See* Tab I. At that time, the Center provided examples of other legislative commissions' guidelines regarding future access to commission records.

31. Shortly before the FCIC terminated on February 13, 2011, FCIC Chairman Phil Angelides wrote to Archivist of the United States David Ferriero to inform NARA of restrictions that the FCIC was placing on future access to its records. *See* Tab B. The letter set forth "the Commission's continued interest in government and public access to information created or gathered during its investigation" and "establishe[d] criteria under which these records should be made available." Chairman Angelides went on to detail how the Commission already had released many documents, including memoranda, e-mails, witness statements, interviews, transcripts and summaries, audio and video files, and press releases, while cognizant of personal privacy, law enforcement, private commercial, financial regulatory and other concerns and sensitivities in remaining documents being withheld. Chairman Angelides stated that all information that was already publicly available should continue to be made publicly available by NARA.

32. For information that was not already publicly available, Chairman Angelides further conveyed that the "Commission recommends to NARA that records not already publicly available should be made available to the public, to the greatest extent possible consistent with the terms of this letter, beginning in February 13, 2016." He stated that:

The Commission encourages NARA to conduct a systematic review of the records that are not currently available . . . Records should not be disclosed immediately

after February 13, 2016, if they contain (a) personal privacy information that the Commission agreed to protect from public disclosure for longer than 5 years; (b) confidential financial supervisory or regulatory information which remains sensitive at the time of release; (c) proprietary business information which remains confidential or contains trade secrets at the time of release, including any such information that the Commission has agreed will remain confidential for a longer period of time; or (d) information which is otherwise barred from public disclosure by law, as determined by the Archivist.

33. I concurred with these restrictions by signing the SF-258 on February 8 2011, on behalf of the Archivist and NARA. *See* Tab A. The SF 258 incorporated access instructions specified in the agency head's letter to the Archivist. SF 258, NN3-14-8-11-001. The SF-258 was also specifically hand-annotated (Terms of Agreement section at top) to reflect the parties' intent to negate any possibility that the Freedom of Information Act, 5 U.S.C. § 552, would apply to these materials. NARA considers the SF 258 to be a legal document embodying the expressed intent of the parties in agreeing to conditions on future use of permanent records at the National Archives.
34. It is clear to me—based on my personal involvement in this process, Chairman Angelides' letter, and the subsequent signing of the SF-258 between NARA and FCIC—that the FCIC acted in signing the transfer documentation with the clear intent and desire to put controls on the future access to, and use and disclosure of, FCIC records. The FCIC expected that the National Archives would honor the closure period and restrict future access to FCIC documents consistent with its expressed intent.
35. As discussed in more detail below, one of the reasons the FCIC imposed a five-year restriction on public access to the records was to give the Center some advance time to begin processing and organizing the FCIC records. This time period represents a similar period of repose as is given to NARA archivists in administering the provisions of the Presidential Records Act, 44 U.S.C. § 2204. We intend to move forward with systematic

processing of the collection as time and resources permit. As stated above, the Center is currently preserving and proceeding to describe the FCIC's records. In preparation for screening, we intend to consult with the agencies that provided information to the FCIC, to better understand the sensitivities in the records and ensure consistent review in keeping with statutory requirements. In sum, the Center is duly processing FCIC records with the intent to eventually make the records publicly available to all.

Subjecting the FCIC Records to FOIA Would Significantly Disrupt this Administrative Scheme and Harm Legislative Commissions Generally

36. This administrative scheme for FCIC records is exclusive, as the FCIC records are not subject to FOIA. Applying FOIA to the FCIC records would cause two harms. First, applying FOIA to legislative records would disrupt the Center's overall mission. Second, applying FOIA may also change the manner in which legislative commissions perform their duties, causing less documentation created as well as transferred to NARA for the purpose of preserving a historical record.
37. First, subjecting the FCIC records to FOIA would impair the Center's ability to orderly process the FCIC records. With the exception of the transfer of Presidential records at the end of recent Administrations, I believe the FCIC collection represents the greatest number of *recently created* records accessioned into the holdings of the Archives, coupled with the *shortest* restriction period on withholding those records from public access (5 years). In particular, the FCIC's records contain substantially more electronic records than this office has ever accessioned from a commission (or from any legislative component of government). The Center employs only seven archivists (6.5 full-time employees) under my supervision to accomplish all of the related accessioning, description, processing, reference, preservation and access responsibilities for congressional records and other

legislative branch records from agencies and commissions. Given these staff limitations, we would normally determine processing priorities based on anticipated research interest in a given collection of legislative records. Subjecting legislative records to FOIA, which would permit immediate access to the records, would prevent the Center from determining appropriate processing priorities based on the expected public interest in certain records. Instead, the Center would have to prioritize individuals' requests for particular records based on those individuals' preferences. This would decrease the Center's ability to make the most widely requested records publicly available at the earliest possible date.

38. Additionally, if the FCIC's records were deemed to fall under the FOIA, it would interfere with the Center's ability to orderly process the records and make them available to researchers in an organized fashion. We would be unable to undertake systematic organization, indexing, or finding aid development, which is expected to be accomplished at least in part by the time of lifting the general restriction period in 2016. The five-year restricted period, modeled in part on the PRA's five-year period, is critical to allowing the Center to begin at least preliminary organizing and processing of records before access requests are submitted. Moreover, the shifting of staff resources to accommodate FOIA requests for FCIC records would greatly disrupt the performance of other reference and access functions for all remaining Congressional and Legislative records, including for responding to requests from Congress (the primary customer of the Center). See NARA 101, Part 08, § 2(c)(t)-(12), *supra* (Tab C) (setting forth the Center's various duties and responsibilities).
39. In particular, the line-by-line review process is extremely time-consuming. For every commission's records we accession, our staff must research the topic and determine what

information should be exempt from public release. This research begins with reading the commission's final and interim reports as well as public hearing transcripts. The National Archives does not have the resources to hire staff with expertise in every topic, especially in records so recently created. Most agencies do not transfer their records to NARA until they are 20 to 30 years old, during which time many of the sensitivities diminish significantly. Thus, the release and processing of legislative records is particularly burdensome, and those burdens would only be increased if the records were subject to FOIA instead of NARA's current administrative scheme.

40. Second, applying FOIA to the FCIC records may result in the improper release of sensitive information. Our past experience with legislative commission records, particularly with records of the 9/11 commission, is that commission staff make promises of confidentiality to individuals and organizations (from both the private and public sectors) who come forward to supply highly sensitive information within the scope of commission inquiries. For example, in the case of the 9/11 commission, to facilitate interviews with New York City first responders, the 9/11 commission entered into an agreement with New York City to keep the interviews confidential for a period of at least 25 years, and the National Archives intends to honor that agreement as embodied in transfer documentation at the time we took legal custody of those records. *See 9/11 Commission FAQ*, <http://www.archives.gov/research/9-11/faqs.html> (Tab J). This information might not be fully protectable under FOIA, and thus subjecting legislative records to FOIA could lead to the improper release of sensitive information. This could not only cause harm to those who provided the information under guarantees of confidentiality by releasing their sensitive

information, but it could also seriously hamper the efforts of future commissions to gather information from individuals.

41. My experience in dealing with legislative commissions generally is that they might be less likely to document their activities if legislative staff operated under the belief that records transferred to NARA would be immediately subject to public scrutiny. Moreover, agencies and private parties that work with legislative commissions under the assumption that documents are not subject to the FOIA could be less willing to share documentation in the future, if such records are immediately subject to FOIA immediately upon the close of a commission's business. Upsetting the long-held expectations of legislative commissions regarding access to their work could be especially chilling to future commissions trying to access non-government records, because those commissions could no longer offer a firm promise of confidentiality that will withstand a court challenge.
42. For all of the reasons given above, this collection presents singular challenges to our Agency in going forward with processing records for opening while being respectful and cognizant of restrictions on access imposed by the Chairman of the FCIC. Notwithstanding these challenges, I recognize, as does every member of my staff, the important public interest that exists in obtaining access to records reflecting the work of the FCIC. The Archivist of the United States expects that the staff of the Center for Legislative

Archives will act in a manner consistent with the intent of the FCIC, to provide access “to the greatest extent possible” once the five-year restriction period is lifted.

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


ROBERT MATTHEW FULGHAM, JR.

Executed this 31st day of October, 2012.



August 20, 2004

Thomas H. Kean
CHAIR

Lee H. Hamilton
VICE CHAIR

Richard Ben-Veniste

Fred F. Fielding

Jamie S. Gorelick

Siade Gordon

Bob Kerrey

John F. Lehman

Timothy J. Roemer

James R. Thompson

Philip D. Zelikow
EXECUTIVE DIRECTOR

The Honorable John W. Carlin
Archivist of the United States
National Archives and Records Administration
8601 Adelphi Road
College Park, MD 20740

Dear Mr. Carlin:

When the National Commission on Terrorist Attacks Upon the United States (the "Commission") terminates, by statute, on August 21, 2004, the records of the Commission will be transferred to the National Archives and Records Administration (NARA) for preservation and public access. This letter sets forth the Commission's continued interest in government and public access to information created or gathered during its investigation and establishes criteria under which these records will be made available.

The Commission has established a policy of making available to the public as much information as possible, while safeguarding national security, personal privacy, intelligence, law enforcement, and other sensitive information. The Commission's final report is highly detailed and discloses a significant amount of previously classified material. In addition, the Commission has released through its website many supplemental documents, including staff statements, witness statements, transcripts, and press releases. All of the records and information that the Commission has made available to the public should continue to be made publicly available by NARA. This includes the records that are accessible on the Commission's website, which NARA will maintain after August 21, 2004. Because the Commission was established in the legislative branch, its records have not been subject to the Freedom of Information Act (FOIA), and we understand that the FOIA will not apply to Commission records even after they are transferred to NARA.

Commission records not already publicly available should be made available to the public, to the greatest extent possible consistent with the terms of this letter, beginning on January 2, 2009. The Commission encourages NARA to conduct a systematic review of the records that are not currently available to the public with the goal of releasing to the public as much information as is allowable by law and regulation on January 2, 2009, or as soon thereafter as possible. In the course of this review, NARA should refer to the originating agencies copies of records that remain classified and request a review for declassification by January 2, 2009, or as soon thereafter as is possible. Records should not be disclosed if they (a) contain information that continues to be classified; (b) disclose private information that the Commission agreed

Hon. John W. Carlin
August 20, 2004
Page 2

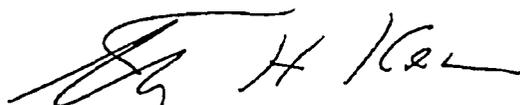
to protect from public disclosure; or (c) are otherwise barred from public disclosure by law, as determined by the Archivist.

We understand that there will be an initial period of at least several months during which NARA's staff will be organizing and processing the Commission's records. During this period, access to the records should be provided to the ten members of the Commission and the following members of the Commission staff: Philip Zelikow, Daniel Marcus, Christopher Kojm, Steven Dunne, Dietrich Snell, Dianna Campagna, Stephanie Kaplan, and Tracy Shycoff. In addition, certain administrative staff of the Commission may have access as part of their duties to transfer the records to NARA. It is important that the ten Commissioners and the designated members of the Commission staff have continuing access to the Commission's records once the records are transferred to NARA, both during and after this initial processing period.

Only individuals with the necessary clearances may have access to classified Commission records, and all instructions in this letter should be interpreted to conform with applicable laws and regulations regarding access to, and handling of, classified materials.

Thank you for your cooperation in carrying out the important task of preserving and providing access to the Commission's voluminous records.

Yours sincerely,



Thomas H. Kean
Chair



Lee H. Hamilton
Vice Chair



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Front Office Files

The front office consisted of Philip Zelikow, Executive Director; Christopher A. Kohm, Deputy Executive Director; Daniel Marcus, General Counsel and Steven M. Dunne, Deputy General Counsel. The front office dealt not only with administrative issues involving the structure and personnel of the commission, they also provided guidance to the commissioners on policy, strategy, and legal issues. The files, arranged chronologically by meeting/hearing date, contain agendas and minutes of commission meetings, briefing books for each meeting and public hearing, team work plans, and summaries of the status of each team's progress.

Subject Files of General Counsel Daniel Marcus

These files, arranged alphabetically by subject, contain memoranda, correspondence, articles, work plans, briefs, and memoranda of understanding created and collected by Marcus in his capacity as the commission's general counsel.

Subject Files of Deputy General Counsel Steve Dunne

These files, arranged alphabetically by subject, contain memoranda, correspondence, articles, legal research, subpoenas, and memoranda of understanding created and collected by Dunne in his capacity as the commission's deputy general counsel.

Subject files of Special Assistant and Managing Editor Stephanie Kaplan

These files, arranged by subject and there under roughly chronologically, contain memoranda, notes and minutes of the commission's meetings, and drafts of the final report created and collected by Stephanie Kaplan in her capacity as the commission's special assistant and managing editor. These files also include notes by Deputy Executive Director Christopher Kojm.

Subject Files of Counsel Dana Hyde

These files, arranged by subject, contain memoranda for the record; notes of interviews with federal government personnel; briefing slides; articles; private sector reports; the commission's briefing book for the June 17, 2004 public hearing; copies of records from federal agencies; drafts of Staff Statement #17 "Improving a Homeland Defense;" drafts of chapter one of the commission's final report; the commission staff report entitled "The Story of the Financial Market Closure, September 11 - 17, 2001;" and other background materials compiled by team member Dana Hyde.

Team 1 Files

Team 1's task was to examine issues relating to international terrorism and al Qaeda. These files contain intelligence reports and cables responsive to the commission requests to the Central Intelligence Agency (CIA); Director of Central Intelligence George Tenet's "We are at war" memorandum; threat assessments; congressional briefing summaries; Federal Bureau of Investigation (FBI) 302 reports; memorandums for the record and notes of interviews conducted by Team 1 staff; draft questions for interviewees; drafts of document requests; materials used to prepare for select



Team 1A Files

Team 1A split from Team 1 to focus on al Qaeda's role in the organization of the 9/11 Attacks. These files contain intelligence cables and reports; FBI 302s; memos and prints from the Automated Case System; handwritten notes of interviews; briefings; and foreign trips; drafts of statements and final report chapters; correspondence with agencies including document and briefing requests; memorandum for the record of interview including with FBI field office personnel and agents involved with the PENTTBOM investigation; published articles; and other records created and compiled by Team 1A during its investigation of the September 11, 2001 plot. The records are arranged by subject.

Team 2 Files

Team 2 was created to investigate intelligence collection, analysis, and management including oversight and resource allocation. These files contain memorandums for the record and notes of interviews conducted by Team 2 staff; draft questions for interviewees; printed Power Point slides sent to commission staff by government agencies; drafts of document requests; materials used to prepare for select commission public hearings; reports of government and private sector entities; transcripts of public testimony and interviews given by intelligence community leaders; published articles and monographs; congressional hearing transcripts; copies of materials from the congressional Joint Inquiry into the events of September 11, 2001; team work plans; team leader's notes on staff meetings; administrative memorandums relating to the commission's office policies; and other records used by Team 2 to examine issues related to intelligence collection, analysis, management, oversight and resources. The records are arranged by subject.

Team 3 Files

Team 3 was created to investigate international counterterrorism policy, including states that harbor or harbored terrorists, or offer or offered terrorists safe havens. This series contains memorandums for the record and notes of interviews conducted by Team 3 staff; draft questions for interviewees; prints of Power Point slides from briefings received by commission staff from agencies; drafts of document requests; materials used to prepare for select commission public hearings; drafts and final versions of commission staff statements and the team's sections of the Final Report; reports of government and private sector entities; transcripts of public testimony and interviews given by government officials; published articles and monographs; a study of counterterrorism strategy from 1968-1993; copies of the final report of the congressional Joint Inquiry into the events of September 11, 2001; printed e-mails; correspondence; team work plans; team leader's notes on staff meetings; administrative memorandums relating to the commission's office policies; and other records used by Team 3 to examine issues relating to U.S. counterterrorism policy. The records are arranged by subject.

Team 4 Files

Team 4 was created to investigate terrorist financing. These records include government and private sector reports; slides of federal agency presentations given to commission staff; documents received by the commission from agencies; transcripts of court testimony and other court records including motions and other filings; congressional hearing transcripts; transcripts of interviews conducted by the commission; Team 4's work plan; notes of commission staff meetings and interviews; and published articles and monographs. The records are arranged by subject.

Team 5 Files

Team 5 was created to investigate border security and foreign visitors. These files contain memorandums for the record and notes of interviews conducted by Team 5 staff; airman files on the four September hijackers; hijacker visa and Immigration and Naturalization Service (INS) files; articles printed from the Internet; congressional hearing transcripts; FBI files; U.S. District Court documents from terrorist trials; and other records used by Team 5 to examine border security and foreign visitor issues. Also included are drafts of Team 5's monograph "9/11 and Terrorist Travel." The records are arranged by subject.

Team 6 Files-closed

Team 7 Files

Team 7 was created to investigate commercial aviation and transportation security, including an investigation into the circumstances of the four hijackings. These files contain notes of interviews conducted by Commission staff; notes on visits to sites such as Logan International Airport and Dulles International Airport; slides of presentations given to Commission staff from federal agencies and private sector entities including the Transportation Security Administration of the Department of Homeland Security (TSA), Federal Aviation Administration (FAA), American Airlines, and United Airlines; documents received by the commission from agencies including the FBI and airlines; reports from the General Accounting Office (GAO) on transportation security; other government and private sector reports; drafts of chapter one of the commission's final report; congressional hearing transcripts; and published articles and monographs. The records are arranged by subject.

Team 8 Files

Team 8 investigated the immediate response to the 9/11 attacks at the national, state, and local levels, including issues of continuity of government. Teams 8 and 9 were merged to access the local and national response on the day of September 11, 2001. The files contain records investigating the events of September 11, 2001 primarily relating to the activities of air traffic controllers, both military and FAA, and the military response by the North American Aerospace Defense Command (NORAD) and its Northeast Air Defense Sector (NEADS). The records also contain some materials relating to the emergency responses at the Pentagon and in Shanksville, Pennsylvania. The records are arranged by subject.

Press Clippings

These records, arranged chronologically, consist of press clippings relating to the commission and its work.

Files of the New York City Office

The records of the New York City (NYC) Team reflect the commission's examination of the immediate response to the 9/11 attacks. The NYC office also investigated the immediate response and subsequent recovery of businesses affected. The files are arranged primarily by staff person and reflect information collected by staff in the course of the investigation. There is some duplication within the files as several staff obtained and retained copies of the same documents.

[^ Top of Page](#)

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* Status

O=open

R=redacted

H=withheld

P=pending

Name	Affiliation	Date (y-m-d)	# of Pages	Team	Status *	Box #	Notes
10th Mountain Division Soldiers, Bagram Military Base	Department of Defense	2003-10-22	3	N/A	R	20	
A Marine reenlists at US Embassy Kabul	9/11 Commission	2003-10-23	2	N/A	O	20	
Abdullah, Abdullah	Government of Afghanistan	2003-10-23	6	N/A	H	20	
Abeyta, Ashley		2004-06-23	1	1A	R	02	
Able, Allen	PriceWaterhouse Coopers						see American Bankers' Association
Adams, John S.	Federal Bureau of Investigation	2003-11-03	2	8	O	09	
Adams, Theresa	Federal Aviation Administration	2003-09-25	2	8	O	11	
Afghan Interview #1	Government of Afghanistan	2003-10-23	4	N/A	H	20	
Ahern, Timothy	American Airlines	2004-01-07	8	7	O	01	
Aires, Edward	NEADS	2004-01-23	3	8	O	14	
Al Ashaikh, Saleh bin Abdulaziz	Saudi Arabia	2003-10-13	4	N/A	R	20	folder: Staff Delegation International Trip, Tab 1
Al-Bayoumi, Omar	Saudi Arabia	2003-10-16 and 2003-10-17	9	1A	R	20	folder: Staff Delegation International Trip, Tab 1
Al-Qudhaieen, Muhammad	Imam University	2003-10-25 and 2003-10-26	9	1A	R	20	folder: Staff Delegation International Trip, Tab 1
al-Rasheed, Saud	Saudi Arabia	2004-02-24	5	1A	R	21	
Al-Shalawi, Hamdan Bin Gharib	Imam University	2003-10-22 and 2003-10-23	7	1A	R	20	folder: "Staff Delegation International Trip, Tab 1
Al-Thumairy, Fahad	Saudi Arabia	2004-02-24 and 2004-02-25	4; 9	1A	R	21	
al-Yafai, Khalid Abdulrab	Saudi Arabia	2004-02-24	8	1A	R	21	
Albright, Madeleine	Department of State	2004-01-07	6	3	R	01	
Alfaro, Charles	Federal Aviation Administration	2003-09-30	4	8	O	20	
American Bankers' Association (ABA)		2004-03-18	4	4	O	01	
American Express Briefing	American Express	2003-08-14	7	8	O	01	
American National Standards	American National Standards	2003-12-03	26	8	O	01	

A145

Institute (ANSI)	Institute	Document #	Filed: 10/01/2013	Page 150 of 406
ANA Live Fire Exercise	Department of Defense	2003-10-22	2	N/A O 20
Anderson, Frank	Central Intelligence Agency	2003-09-15	5	2 R 01
Anderson, Penny	Federal Aviation Administration	2003-12-18	2	7 R 01
Anderson, Walter	Department of State	2003-08-14	4	3 R 01
ANSI Homeland Security Standards Panel on Emergency Preparedness and Continuity of Business for the Private Sector	American National Standards Institute	2004-01-28; 2004-02-27; 2004-03-22	10	8 O 01
ANSI Homeland Security Standards Panel on Emergency Preparedness and Continuity of Business for the Private Sector Conference	American National Standards Institute	2004-04-29	49	8 O 01
Arias, Don	Continental United States North American Aerospace Defense Command Region (CONR)	2004-02-04	2	8 O 04
ARINC	ARINC	2004-05-27	4	7 O 01
Armitage, Richard	Department of State	2004-01-12	7	3 R 01
Arnold, Larry	Continental United States North American Aerospace Defense Command Region (CONR)	2004-02-03	11	8 O 04
Arpey, Gerard	American Airlines	2004-01-08	4	7 O 01
Arriza, John Gerald	Department of State	2003-09-30	5	5 H 01
Arroyo, Marcus	Transportation Security Administration	2003-10-24	12	7 R 01
Ashcroft, John D.	Department of Justice	2003-12-17	11	6 R 01
Ashooh, Pete	Federal Bureau of Investigation	2003-10-10	3	1A R 09
ASIS Briefing	ASIS	2003-12-02	2	8 O 01
ATF Special Agent #1	Bureau of Alcohol, Tobacco, and Firearms	2004-05-25	1	5 R 01
ATF Special Agent #2	Federal Bureau of Investigation	2003-11-20	2	1A R 06
Atoigue, Joann		2004-06-22	2	1A R 02
Atta and al Shehhi's travel to Virginia Beach, summary		2001-02-17 [sic]	3	1A R 01
Atta's suitcases, review of investigation by FBI of		2004-02-10	3	1A R 01
Austin, [FNU]	Department of Defense	2003-10-23	1	N/A O 20
Avalon Bay Communities, Inc.		2003-11-25	2	1A O 01
Bach, Robert	Immigration and Naturalization Service	2004-05-14	17	5 R 01
Background Briefing on Afghanistan and the Taliban		2003-08-01	4	3 O 11
Background Briefing on DoD		2003-06-30	4	3 R 15
Baginski, Maureen	Federal Bureau of Investigation	2003-11-13	8	2 H 01
Ballinger, Ed	United Airlines	2004-04-14	10	7 R 19
Baltimore, Richard	Department of State	2003-12-02	4	5 R 01
Bandar, Prince	Government of Saudi Arabia	2003-10-07	3	N/A H 20
Bank of New York	Bank of New York	2003-10-15	3	8 O 01
Banks, John H.	Consolidated Edison Company of New York			see Consolidated Edison Company of New York
Barber, Mike	United Airlines			see "Briefing on UAL Systems Operation and Crisis Center"
Barnik, Mark	Cleveland Air Traffic Control Center	2003-10-02	4	8 O 03
Barno, Dave	Department of Defense	2003-10-21	2	N/A O 20

Barrett, Lorraine	Federal Aviation Administration	2003-10-01	6	1A	R	20	
Basnan, Osama	Saudi Arabia	2003-10-20 and 2003-10-21	6	1A	R	20	folder: Staff Delegation International Trip, Tab 1
Baughman, Bruce	Federal Emergency Management Agency	2003-11-17	5	8	R	01	
Bauman, John	Federal Bureau of Investigation	2004-01-05	2	1A	R	08	
Belger, Monte	Federal Aviation Administration	2003-11-24	9	7	O	01	
Belme, Rich	United Airlines	2003-11-21	3	7; 8	R	19	
Ben-Veniste, Richard [Shootdown Authority]	9/11 Commission	2003-08-27	6	8	R	18	
Berez, Morrie	Immigration and Naturalization Service	2003-10-02	14	5	R	02	
Beringer, Richard	Federal Aviation Administration	2003-09-22	3	8	O	20	
Berkowitz, Bruce	Central Intelligence Agency	2003-09-02	7	2	R	02	
Bertapelle, Joe	American Airlines						see Marquis, Craig
Bertini, Judith	Drug Enforcement Administration	2003-10-16	5	2	R	05	
Betts, Richard K.	Columbia University	2003-08-19	5	2	O	02	
Bianchi, Steve	NEADS	2003-10-27	3	8	O	14	
BICE Employee #1	Bureau of Immigration and Customs Enforcement	2004-01-05	2	1A	R	08	
BICE Employee #2	Immigration and Customs Enforcement (DHS)	2003-07-29	4	6	R	10	
BICE Employee #3	BICE	2004-06-30	1	1A	R	02	
BICE Employee #4	Immigration and Customs Enforcement (DHS)	2003-09-30	3	6	R	07	
BICE Employee #5	Bureau of Immigration and Customs Enforcement	2003-07-29	4	6	R	09	
Bickham, Terry	Transportation Security Administration						see "TSA 'Red Team' Briefing," 10/20/2004
Biggio, Terry	Federal Aviation Administration	2003-09-22	3	8	O	20	
Biggs, Charlie	Federal Emergency Management Agency						see FEMA Briefs
Billy, Joe	Federal Bureau of Investigation	2004-01-20	13	6	R	07	
Birch, Robert	Federal Aviation Administration	2003-12-16	3	8	R	05	
Black, Cofer	Department of State	2003-08-14	46	5	R	05	
Bloom, Alina	Federal Bureau of Investigation	2003-08-04	6	6	O	09	
Blunt, E.T.	Arlington County Fire Department	2003-10-20	3	8	O	02	
Boden, Katherine L.	Consolidated Edison Company of New York						see Consolidated Edison Company of New York
Bodner, James	Cohen Group	2004-03-01	2	3	O	02	
Bodner, James	Cohen Group						see "Cohen Group"
Boehning, Richard	Insurance Services Office						see Insurance Services Office, Inc."
Boicourt, Renee	Moody's Investor Services						see "Meeting with Moody's Investor Services"
Boivin, Leo	Federal Aviation Administration	2003-09-17	4	7	R	02	
Bolcar, Keith	Federal Bureau of Investigation	2003-10-09	2	1A	R	09	
Bonner, Robert	Customs and Border Protection	2003-12-18	11	5	O	02	
Boone, Dave	Federal Aviation Administration	2003-09-25	2	8	O	11	
Boston, MA Summary		2004-02-02	11	1A	R	02	
Bottiglia, David	Federal Aviation Administration	2003-10-01	7	8	O	20	
Bower, Daniel	National Transportation Safety Board						See NTSB Briefing
Boykin, William	Department of Defense	2003-11-07	11	3	O	02	

Author	Organization	Date	Pages	NYC	NYC	NYC	NYC
Brahimi, Lakhdar	United Nations	2003-10-24	4	NYC	21		
Breen, Ken	US Attorney's Office	2004-04-23	3	4	O	02	
Brett, Diana P.	Federal Bureau of Investigation	2003-10-03	5	6	O	06	
Briefing by Federal Reserve Bank of New York		2004-01-09	15	8	O	10	
Briefing by Fiduciary Trust	Federal Emergency Management Agency	2003-10-06	3	9 [NYC]	O	10	
Briefing by NCIS	Naval Criminal Investigative Service	2003-11-05	7	6	H	14	
Briefing on Activities of Nawaf al-Hazmi and Khalid al-Midhar	Federal Bureau of Investigation	2003-07-22	6	1A	R	05	
Briefing on Financing of Sept. 11 Plot		2003-07-16	10	4	R	05	
Briefing on UAL Systems Operations Center and Crisis Center		2003-11-20	8	7; 8	O	19	
Briefing re Mohdar Abdullah	Department of Justice/FBI	2004-06-07	3	1A	R	05	
British Interview #1	Great Britain	2003-11-19	2		H	01	
British Interview #2	MI-5	2003-10-29	5	6	H	17	
Brust, Peter	Federal Bureau of Investigation	2003-11-05	2	1A	R	06	
Bryant, R. Jeep	Bank of New York						see Bank of New York
Buckingham, Virginia	MASSPORT	2003-11-05	9	7	R	02	
Bueno, Daniel D.	Federal Aviation Administration	2003-09-22	4	8	O	20	
Bukowski, Bob	Federal Bureau of Investigation	2003-11-06	2	1A	R	07	
Bureau of Citizenship and Immigration Services Briefing		2003-07-24	5	5	O	04	
Burgess, Ronald Jr.	Department of Defense	2003-11-10	3	2	R	02	
Burkhardt, Roger	New York Stock Exchange						see New York Stock Exchange Meeting
Burnett, Deena	family member	2004-04-26	2	7	R	05	
Burns, William	Department of State	2003-11-25	3	3	R	02	
Butterworth, Bruce	Federal Aviation Administration	2003-09-29	10	7	R	02	
Byard, Richard	Federal Aviation Administration	2003-09-24	2	8	O	11	
Byrne, John	American Bankers' Association						see American Bankers' Association
Caine, John Daniel	U.S. Air Force	2004-03-08	4	8	R	01	
Camp, Donald	Department of State	2003-11-25	5	3	R	03	
Canadian Interview #1	Canadian Government	2003-09-30	3	2	H	03	
Canadian Interview #2	Canadian Government	2003-09-30	3	2	H	03	
Canadian Interview #3	Canadian Government	2003-09-30	3	2	H	03	
Canadian Interview #4	Canadian Government	2003-09-30	4	2	H	03	
Canadian Interview #5	Canadian Government	2003-09-30	3	2	H	03	
Canavan, Mike	Federal Aviation Administration	2003-11-04	7	7	R	03	
Canvas of language schools in Los Angeles		2004-06-23 and 2004-06-24	1	1A	O	02	
Canvas of motels and hotels within walking distance of King Fahad Mosque, Culver City, CA		2004-06-23 and 2004-06-24	3	1A	O	02	
Carney, Christopher	Department of Defense	2004-02-05	3	1	R	03	
Carney, Tim	Department of State	2003-12-04	6	3	R	03	
Carson, Patty	American Airlines	2003-11-19	2	7	O	01	
Caruso, Nick	Riggs Bank						see American Bankers' Association
Cash, James	National Transportation Safety Board						See NTSB Briefing

Name	Organization	Date	Page 1	Page 2	Page 3	Page 4
Casson, William	Federal Aviation Administration					see "Norfolk TRACON visit"
Castello, James	Department of Justice	2003-11-07	4	5	O	03
Catalano, Mike	Solomon Smith Barney	2004-01-16	3	8	O	03
Cates, Veronica	Immigration and Naturalization Service	2004-05-25	4	5	R	03
Cavanaugh, Thomas	Conference Board	2003-07-17; 2003-10-16	65	8	O	04
Cawley, Jean	Options Clearing Corporation					see "Harrison, David H."
Cella, Joseph J. III	Securities and Exchange Commission	2004-05-07, 2004-10-11	2	4	O	03
Cella, Joseph J. III	Securities and Exchange Commission	2003-09-16	20	4	P	03
Center for Strategic and International Studies	Center for Strategic and International Studies	2003-07-23	3		O	03
Cerda, Victor X.	Immigration and Customs Enforcement (DHS)					see Dougherty, Mike (2003-09-29)
Cervantes, Anthony	Federal Bureau of Investigation	2003-10-27	2	4	R	07
Chamberlin, Wendy	Department of State	2003-10-28	6	3	R	03
CIA Employee #1	Central Intelligence Agency	2004-02-24	7	5	H	12
CIA Employee #10	Central Intelligence Agency	2003-10-03	2	5	H	11
CIA Employee #11	Central Intelligence Agency	2004-05-10	4	2	H	12
CIA Employee #12	Central Intelligence Agency	2003-09-05	6	2	R	18
CIA Employee #13	Central Intelligence Agency	2003-05-30	3	2	H	10
CIA Employee #14	Central Intelligence Agency	2003-12-04	7	6	R	19
CIA Employee #15	Federal Bureau of Investigation	2003-12-29	7	6	R	05
CIA Employee #16	Central Intelligence Agency	2003-09-16	7	6	H	08
CIA Employee #2	Central Intelligence Agency	2003-10-20	2	N/A	H	21
CIA Employee #3	Central Intelligence Agency	2003-10-03	10	5	H	13
CIA Employee #4	Central Intelligence Agency	2003-12-19	16	5	H	12
CIA Employee #5	Central Intelligence Agency	2003-10-13	3	N/A	H	20
CIA Employee #6	Central Intelligence Agency	2003-10-21	4	N/A	H	20
CIA Employee #7	Central Intelligence Agency	2003-10-26	4	N/A	H	21
CIA Employee #8	Central Intelligence Agency	2004-02-24	4	5	H	05
CIA Employee #9	Central Intelligence Agency	2004-01-01	6	2	H	10
Clark, Suzanne	American Airlines	2003-11-18	2	7	R	01
Classification Review Pending	Federal Bureau of Investigation	2003-12-23	7	1	P	01
Classification Review Pending	Central Intelligence Agency	2004-01-27; 2003-09-22	17	1	P	01
Classification Review Pending	Defense Intelligence Agency	2004-01-01	4	2	P	05
Classification Review Pending		2004-03-03	13	N/A	P	11
Classification Review Pending		2004-03-03	10	N/A	P	12
Classification Review Pending		2003-11-28	5		P	16
Classification Review Pending	Central Intelligence Agency	2003-12-11; 2004-01-06	25		P	18
Classification Review Pending	Department of Defense	2004-02-05	3	1	P	18
Classification Review Pending		n.d.	9		P	18
Classification Review Pending	Financial Crimes Enforcement Network (FinCEN)	2003-11-14	7	4	P	18
Classification Review Pending	Federal Aviation Administration	2004-07-1	4	8	P	18
Classification Review Pending	formerly Central Intelligence Agency	2003-09-04	9	2	P	18
Classification Review Pending	Central Intelligence Agency	2004-05-12	4	3	P	18

Classification	Agency	Date	Count	Category	Page
Classification Review Pending	Defense Intelligence Agency	2003-11-10	7	2	P 01
Classification Review Pending	Department of the Treasury	2004-02-12	7	4	P 01
Classification Review Pending	Federal Bureau of Investigation	2004-01-07	8	6	P 01
Classification Review Pending	Financial Crimes Enforcement Network (FinCEN)	2003-11-05	6	4	P 01
Classification Review Pending		2004-02-04	14	N/A	P 01
Classification Review Pending	Saudi Arabia	2004-05-05	1	1	P 01
Classification Review Pending	Department of State	2003-10-20	9	1	P 01
Classification Review Pending	National Security Council	2003-07-29; 2003-12-04	15	3	P 01
Classification Review Pending	National Security Council	2004-01-14	27	N/A	P 02
Classification Review Pending	Central Intelligence Agency	2003-12-09	12	N/A	P 02
Classification Review Pending	National Security Agency	2004-01-21	8	2	P 02
Classification Review Pending	Central Intelligence Agency	2003-12-11	14	N/A	P 02
Classification Review Pending	Department of State	2003-10-21	12	3	P 02
Classification Review Pending	Federal Bureau of Investigation	2004-02-02	11	6	P 02
Classification Review Pending	Federal Bureau of Investigation	2003-11-13	4	1	P 02
Classification Review Pending		2004-01-21	11	N/A	P 02
Classification Review Pending		2003-11-17	9	N/A	P 02
Classification Review Pending	Department of Justice	2004-02-17	9	4	P 02
Classification Review Pending	Central Intelligence Agency	2003-10-08; 2004-01-06	12	2	P 02
Classification Review Pending	Federal Bureau of Investigation	2003-09-09	15	4	P 02
Classification Review Pending	Federal Bureau of Investigation	2003-12-18	12	6	P 02
Classification Review Pending	Defense Intelligence Agency	2003-12-11	9	2	P 02
Classification Review Pending	Immigration and Naturalization Service	2003-10-07, 2003-10-17; 2003-11-21	18	5	P 02
Classification Review Pending	U.S. Air Force	2003-09-09	19	2	P 03
Classification Review Pending	Defense Intelligence Agency	2003-09-29	5	2	P 03
Classification Review Pending	Federal Bureau of Investigation	2004-03-24	3	6	P 03
Classification Review Pending	White House	2004-03-31	6	3	P 05
Classification Review Pending	Central Intelligence Agency	2003-10-31	8	2	P 06
Classification Review Pending	National Security Agency	2003-11-07	6	2	P 03
Classification Review Pending	Financial Crimes Enforcement Network (FinCEN)	2003-06-24	5	4	P 03
Classification Review Pending	Office of Foreign Assets Control	2003-11-19	5	4	P 03
Classification Review Pending	Central Intelligence Agency	2003-07-15	9	4	P 03
Classification Review Pending	Central Intelligence Agency	2003-08-14	6	2	P 03
Classification Review Pending	Central Intelligence Agency	2004-01-06	4	2	P 03
Classification Review Pending	National Security Council	2004-01-12; 2004-02-03; 2003-12-18	67	N/A	P 03
Classification Review Pending	Central Intelligence Agency	2003-09-16	9	2	P 03
Classification Review Pending	Federal Bureau of Investigation	2003-07-30	5	6	P 03
Classification Review Pending	Customs and Border Protection	2003-07-05	6		P 04
Classification Review Pending	National Security Agency	2003-12-09	11	2	P 04
Classification Review Pending	National Security Agency	2003-11-07	6	2	P 04
Classification Review Pending	Central Intelligence Agency	2003-11-18	9	N/A	P 04
Classification Review Pending	Federal Bureau of Investigation	2003-12-04	7	6	P 04
Classification Review Pending	Federal Bureau of Investigation	2004-01-20	5	6	P 04

Classification	Agency	Date	Count	Code	Category	Page
Classification Review Pending	Counterterrorist Center	2003-07-29	10	2	P	04
Classification Review Pending		2003-12-15	12	N/A	P	04
Classification Review Pending	Brookings Institution	2003-09-05	3	3	P	04
Classification Review Pending	President's Foreign Intelligence Advisory Board	2003-11-12	11	3	P	04
Classification Review Pending	Central Intelligence Agency	2003-08-12	5	3	P	04
Classification Review Pending	Bureau of Customs and Border Protection	2003-07-25	3	2	P	04
Classification Review Pending	National Targeting Center	2003-07-25	1	2	P	04
Classification Review Pending	Department of the Treasury	2003-09-25	4	4	P	04
Classification Review Pending	National Security Agency	2003-11-06	5	2	P	05
Classification Review Pending		2003-09-03	9		P	05
Classification Review Pending	Federal Bureau of Investigation	2004-01-05	7	6	P	05
Classification Review Pending	Federal Bureau of Investigation	2003-11-05	3	1A	P	06
Classification Review Pending	Federal Bureau of Investigation	2003-12-10	2	4	P	06
Classification Review Pending	Federal Bureau of Investigation	2003-12-11	4	4	P	06
Classification Review Pending	Federal Bureau of Investigation	2003-12-10	2	4	P	06
Classification Review Pending	Federal Bureau of Investigation	2003-12-11	2	4	P	06
Classification Review Pending	Federal Bureau of Investigation	2003-12-10	14	4	P	06
Classification Review Pending	Federal Bureau of Investigation	2003-10-29	4	4	P	06
Classification Review Pending	Federal Bureau of Investigation	2003-10-29	2	4	P	06
Classification Review Pending	Federal Bureau of Investigation	2003-10-29	2	4	P	06
Classification Review Pending	Federal Bureau of Investigation	2003-10-29	8	4	P	06
Classification Review Pending	Federal Bureau of Investigation	2003-07-31	50	5	P	06
Classification Review Pending	Federal Bureau of Investigation	2003-09-30	2	1A	P	06
Classification Review Pending	Federal Bureau of Investigation	2003-09-29	5	6	P	06
Classification Review Pending	Bureau of Immigration and Customs Enforcement/JTTF	2003-09-30	3	6	P	06
Classification Review Pending	Federal Bureau of Investigation	2003-10-02	8	6	P	06
Classification Review Pending	Federal Bureau of Investigation	2003-10-03	8	6	P	06
Classification Review Pending	Federal Bureau of Investigation	2003-09-30	5	6	P	06
Classification Review Pending	Central Intelligence Agency	2003-10-02	5	6	P	06
Classification Review Pending	Federal Bureau of Investigation	2003-09-29	7	6	P	06
Classification Review Pending	Defense Intelligence Agency	2003-10-03	3	6	P	07
Classification Review Pending	Federal Bureau of Investigation	2003-10-03	9	6	P	07
Classification Review Pending	Federal Bureau of Investigation	2003-10-27 and 2003-10-28	9	4	P	07
Classification Review Pending	Federal Bureau of Investigation	2003-11-06	4	1A	P	07
Classification Review Pending	Federal Bureau of Investigation	2003-10-27	4	4	P	07
Classification Review Pending	Federal Bureau of Investigation	2003-08-26	4	6	P	07
Classification Review Pending	Central Intelligence Agency	2003-09-16	3	6	P	07
Classification Review Pending	Federal Bureau of Investigation	2003-09-16	6	6	P	07
Classification Review Pending	Federal Bureau of Investigation	2003-08-27	5	6	P	07
Classification Review Pending	Federal Bureau of Investigation	2003-09-16	7	6	P	07
Classification Review Pending	Federal Bureau of Investigation	2003-08-25	12	6	P	07
Classification Review Pending	Federal Bureau of Investigation	2004-01-20	3	6	P	07
Classification Review Pending	Naval Criminal Investigative Service	2003-09-16	4	6	P	07
Classification Review Pending	Federal Bureau of Investigation	2003-09-03	6	6	P	07

Classification	Agency	Date	Page 1	Page 2	Page 3	Page 4
Classification Review Pending	Federal Bureau of Investigation	2003-09-04	3	6	P	07
Classification Review Pending	Immigration and Customs Enforcement (DHS)/JTTF	2003-09-03	3	5	P	07
Classification Review Pending	Federal Bureau of Investigation	2003-09-16	7	6	P	07
Classification Review Pending	Federal Bureau of Investigation	2003-09-04	8	6	P	07
Classification Review Pending	Federal Bureau of Investigation	2003-09-02	7	6	P	07
Classification Review Pending	Federal Bureau of Investigation	2003-08-27	6	6	P	07
Classification Review Pending	Federal Bureau of Investigation	2003-09-03	6	6	P	07
Classification Review Pending	U.S. Secret Service	2003-08-26	7	6	P	07
Classification Review Pending	New York Police Department/JTTF	2003-08-26	5	6	P	07
Classification Review Pending	Federal Bureau of Investigation	2003-09-03	5	5;6	P	07
Classification Review Pending	Federal Bureau of Investigation	2003-09-04	6	6	P	07
Classification Review Pending	Federal Bureau of Investigation	2003-09-04	8	6	P	08
Classification Review Pending	Federal Bureau of Investigation	2003-09-03	4	6	P	08
Classification Review Pending	Federal Bureau of Investigation	2003-08-26	8	6	P	08
Classification Review Pending	Immigration and Customs Enforcement (DHS)/JTTF	2003-09-03	4	5; 6	P	08
Classification Review Pending	Federal Bureau of Investigation	2003-08-27	8	6	P	08
Classification Review Pending	Federal Bureau of Investigation	2003-08-26 & 2003-09-15; 2003-11-12	12	5; 6	P	08
Classification Review Pending	Immigration and Customs Enforcement (DHS)/JTTF	2003-09-03	4	6	P	08
Classification Review Pending	New York Police Department/JTTF	2003-08-26	4	6	P	08
Classification Review Pending	Central Intelligence Agency	2003-09-16	4	6	P	08
Classification Review Pending	Federal Bureau of Investigation	2003-10-21	11	6	P	08
Classification Review Pending	Federal Air Marshal Service/JTTF	2003-10-20	4	6	P	08
Classification Review Pending	Federal Bureau of Investigation	2004-01-07	2	1A	P	08
Classification Review Pending	Federal Bureau of Investigation	2003-10-22	4	6	P	08
Classification Review Pending	Federal Bureau of Investigation	2004-01-07	2	1A	P	08
Classification Review Pending	Federal Bureau of Investigation	2003-10-21	6	6	P	08
Classification Review Pending	Scottsdale Police Department/JTTF	2003-10-20	6	6	P	08
Classification Review Pending	Federal Bureau of Investigation	2003-10-22	8	6	P	08
Classification Review Pending	Central Intelligence Agency	2003-11-19	5	6	P	09
Classification Review Pending	Federal Bureau of Investigation	2003-11-18	3	1A	P	09
Classification Review Pending	Immigration and Customs Enforcement (DHS)/JTTF	2003-11-17	2	1A	P	09
Classification Review Pending	Federal Bureau of Investigation	2003-10-16	5	1A	P	09
Classification Review Pending	Central Intelligence Agency	2003-08-12	6	6; 2	P	09
Classification Review Pending	Federal Bureau of Investigation	2003-11-13	4	1	P	09
Classification Review Pending	Federal Bureau of Investigation	2003-07-30	5	6	P	09
Classification Review Pending	Federal Bureau of investigation	2003-07-29	5	6	P	09
Classification Review Pending	Federal Bureau of Investigation	2003-08-06	7	6	P	09
Classification Review Pending	Federal Bureau of Investigation	2004-04-01	8	6	P	09
Classification Review Pending	Federal Bureau of Investigation	2003-08-07	7	6	P	09
Classification Review Pending	Federal Bureau of Investigation	2003-08-04	7	6	P	09
Classification Review Pending	Federal Bureau of Investigation	2003-08-04	4	6	P	09
Classification Review Pending	Federal Bureau of Investigation	2003-08-07	5	6	P	09

Classification Review Pending	Federal Bureau of Investigation	2003-07-29	6	6	P	10
Classification Review Pending	Federal Bureau of Investigation	2003-08-05	7	6	P	10
Classification Review Pending	Federal Bureau of Investigation	2003-08-07	6	6	P	10
Classification Review Pending	Federal Bureau of Investigation	2003-08-08	5	6	P	10
Classification Review Pending	Federal Bureau of Investigation	2004-03-04	10	6	P	10
Classification Review Pending	Federal Bureau of Investigation	2003-08-04	8	6	P	10
Classification Review Pending	Federal Bureau of Investigation	2003-08-11	7	6	P	10
Classification Review Pending	Arlington County Fire Department/JTTF	2003-08-12	7	6	P	10
Classification Review Pending	Federal Bureau of Investigation	2003-08-07	14	6	P	10
Classification Review Pending	Federal Bureau of Investigation	2003-07-31	5	6	P	10
Classification Review Pending	Federal Bureau of Investigation	2003-07-31	6	6	P	10
Classification Review Pending	Federal Bureau of Investigation	2003-08-06	8	6	P	10
Classification Review Pending	Central Intelligence Agency	2003-08-12	6	6; 2	P	10
Classification Review Pending	Department of the Treasury	2003-12-11	5	8	P	10
Classification Review Pending	Department of Justice	2004-01-28	9	1; 4	P	10
Classification Review Pending	Department of Justice	2004-03-11	2	1;6	P	10
Classification Review Pending	Financial Crimes Enforcement Network (FinCEN)	2004-02-06	9	4	P	10
Classification Review Pending	CENTCOM	2004-04-09	18	3	P	10
Classification Review Pending		2004-01-19	12	N/A	P	10
Classification Review Pending	Federal Bureau of Investigation	2004-01-08	16	6	P	10
Classification Review Pending		2003-12-29	14	N/A	P	10
Classification Review Pending		2004-01-28	12	3	P	10
Classification Review Pending	General Accounting Office	2003-08-18; 2003-08-19; 2003-09-12; 2003-09-23	15	5; 7; 8	P	11
Classification Review Pending	Central Intelligence Agency	2004-03-02	8	4	P	11
Classification Review Pending		2004-05-04	6	1A; 6	P	11
Classification Review Pending	Federal Bureau of Investigation	2004-02-03	3	4	P	11
Classification Review Pending	Federal Bureau of Investigation	2004-02-11	4	5	P	11
Classification Review Pending	Department of State	2003-09-10	3	3	P	11
Classification Review Pending	White House	2004-05-13	3	N/A	P	11
Classification Review Pending	Federal Bureau of Investigation	2003-10-16 through 2003-10-20	10	4	P	11
Classification Review Pending	Federal Bureau of Investigation	2004-05-10	5	6	P	11
Classification Review Pending	National Security Council	2003-11-20	9	3; 8	P	11
Classification Review Pending	National Security Council	2004-01-31	14	N/A	P	11
Classification Review Pending	National Security Council	2004-01-31	10	3	P	11
Classification Review Pending	9/11 Commission	2004-05-12	1	3	P	11
Classification Review Pending	National Security Agency	2004-01-23	10	2	P	11
Classification Review Pending	Central Intelligence Agency	2003-08-25	14	2	P	11
Classification Review Pending	Department of Defense	2003-11-10	12	4	P	11
Classification Review Pending	U.S. NORTHCOM	2003-10-29	11	3	P	11
Classification Review Pending	U.S. NORTHCOM	2003-10-29	6	3	P	11
Classification Review Pending	Central Intelligence Agency	2003-11-24	5	3	P	11
Classification Review Pending	Crescent Partnerships	2004-05-07	12	3	P	11
Classification Review Pending	formerly Department of State	2004-02-18	14	3	P	11
Classification Review Pending	National Security Agency	2003-11-06	7	2	P	12

Classification	Agency	Date	7	2	P	12
Classification Review Pending	National Security Agency	2004-01-09	4	2	P	12
Classification Review Pending	National War College	2003-08-29	8	2	P	12
Classification Review Pending	Central Intelligence Agency	2003-04-12	4	2	P	12
Classification Review Pending	Central Intelligence Agency	2003-09-12	6	2	P	12
Classification Review Pending	Financial Crimes Enforcement Network (FinCEN)	2003-11-05	5	4	P	12
Classification Review Pending	Central Intelligence Agency	2004-03-18	2	3	P	12
Classification Review Pending	National Security Council	2003-12-22	12		P	12
Classification Review Pending	National Security Council	2003-12-16	6	3	P	12
Classification Review Pending		2003-12-09	17		P	12
Classification Review Pending	Los Angeles Police Department	2003-11-20	11	6	P	12
Classification Review Pending	Federal Bureau of Investigation	2004-01-16	12	4	P	12
Classification Review Pending	Federal Bureau of Investigation	2004-01-28	7	6	P	12
Classification Review Pending		2003-11-05	8	6	P	12
Classification Review Pending	Office of Foreign Assets Control	2003-11-19 and 2003-11-20	7	4	P	13
Classification Review Pending	Federal Bureau of Investigation	2003-10-03	14	4	P	13
Classification Review Pending		2003-12-08	7		P	13
Classification Review Pending	Federal Bureau of Investigation	2003-07-31	2	6	P	13
Classification Review Pending		2003-10-20	8	3	P	13
Classification Review Pending	Defense Intelligence Agency	2003-03-11	5	5	P	13
Classification Review Pending	Department of Justice	2004-02-13	13	5	P	13
Classification Review Pending		2004-01-21	1	5	P	13
Classification Review Pending	National Security Agency	2003-12-15	9	2	P	13
Classification Review Pending		2004-04-19	12		P	13
Classification Review Pending	Central Intelligence Agency	2004-04-29	3	1A	P	13
Classification Review Pending	Central Intelligence Agency	2004-03-18	2	3	P	13
Classification Review Pending	Department of Defense	2003-11-05	8	2	P	13
Classification Review Pending	Central Intelligence Agency	2003-08-29	8	2	P	13
Classification Review Pending	Office of Foreign Assets Control	2003-11-18	13	4	P	13
Classification Review Pending		2004-02-06	14		P	13
Classification Review Pending	Federal Bureau of Investigation	2004-02-11	1	FO	P	13
Classification Review Pending	Federal Bureau of Investigation	2004-01-13	15	6	P	13
Classification Review Pending	Department of Treasury	2003-11-13	7	4	P	13
Classification Review Pending	NORAD	2004-02-17	11		P	13
Classification Review Pending	NORAD	n.d.	7	N/A	P	13
Classification Review Pending		2003-09-29	15		P	14
Classification Review Pending	Office of Foreign Assets Control	2004-02-04	5	4	P	14
Classification Review Pending	National Security Agency	n.d.	3	2	P	14
Classification Review Pending	National Security Agency	2004-03-03	7	4	P	14
Classification Review Pending	National Security Agency	2004-05-19	21	2	P	14
Classification Review Pending		2003-12-17	17		P	15
Classification Review Pending	Department of Defense	2003-11-12	4	2	P	15
Classification Review Pending		2004-01-08	16		P	16
Classification Review Pending	United States Attorney's Office	2003-10-01	5	6	P	16
Classification Review Pending	Defense Intelligence Agency	2003-12-29	9	2	P	16
Classification Review Pending	Federal Bureau of Investigation	2004-01-21	18	6	P	16

Classification	Agency	Date	Pages	Category	Page	Notes
Classification Review Pending	Federal Bureau of Investigation	2003-12-04	5	P	16	
Classification Review Pending		2004-01-15	10	P	16	
Classification Review Pending	Central Intelligence Agency	2003-09-24	8	3	P	16
Classification Review Pending	Central Intelligence Agency	2003-08-18	7	2	P	16
Classification Review Pending	Federal Bureau of Investigation	2003-12-11	3	4	P	17
Classification Review Pending	Federal Bureau of Investigation	2003-10-28	2	4	P	17
Classification Review Pending	Department of Justice	2003-12-16	5	6	P	17
Classification Review Pending	Department of Justice	2003-12-16	12	6	P	17
Classification Review Pending	National Security Council	2004-02-07	15		P	17
Classification Review Pending		2004-01-09	11		P	17
Classification Review Pending	Central Intelligence Agency	2003-09-15	7	2	P	17
Classification Review Pending		2004-01-07	9		P	17
Classification Review Pending	Federal Bureau of Investigation	2003-08-07	14	6	P	17
Classification Review Pending	Financial Crimes Enforcement Network (FinCEN)	2003-11-05	5	4	P	17
Classification Review Pending	Central Intelligence Agency				P	17
						see Classification Review Pending, CIA, 2003-10-02
Classification Review Pending	Central Intelligence Agency	2003-10-02	4	4	P	17
Classification Review Pending	former National Security Council	2003-08-18	3	3	P	17
Classification Review Pending	National Security Agency	2003-11-07	5	2	P	17
Classification Review Pending	Department of Defense	2004-01-30	11		P	17
Classification Review Pending	Federal Bureau of Investigation	2003-11-03; 2004-06-14	14	7	P	18
Classification Review Pending	Central Intelligence Agency	2003-10-30	10	5	P	18
Classification Review Pending	Federal Bureau of Investigation	2004-02-12	4	6	P	18
Classification Review Pending		2003-12-16	13		P	18
Classification Review Pending	Department of Defense	2004-02-05	19		P	18
Classification Review Pending		2004-02-25	18		P	18
Classification Review Pending	Central Intelligence Agency	2004-01-13	6	2	P	18
Classification Review Pending	Gordeon and Simmons	2004-04-13	4	4	P	18
Classification Review Pending	Citigroup, Inc.	2003-09-02	6	4	P	18
Classification Review Pending	National Security Council	2003-09-15	5	3	P	18
Classification Review Pending		2003-09-08	7		P	18
Classification Review Pending	Department of State					see Classification Review Pending, 6/3/2003
Classification Review Pending	Department of State					see Classification Review Pending, 2004-06-03
Classification Review Pending		2003-12-04	8		P	18
Classification Review Pending	Bureau of Alcohol, Tobacco, and Firearms	2004-04-12	3	1A; 6	P	18
Classification Review Pending	National Security Agency	2003-12-10	14		P	19
Classification Review Pending	Central Intelligence Agency	2004-01-22; 2004-01-28	39		P	19
Classification Review Pending	Central Intelligence Agency	2004-07-18	24	2	P	19
Classification Review Pending	National Security Agency	2003-11-06	6	2	P	19
Classification Review Pending		2003-07-30	4	5; 7	P	19
Classification Review Pending	Transportation Security Administration					see Classification Review Pending, 7/30/3006
Classification Review Pending	Transportation Security Administration					see Classification Review Pending, 7/30/3007
Classification Review Pending	Transportation Security Administration					see Classification Review Pending, 7/30/3003

Classification	Agency	Date	Page	Page	Page	Page	Page	Page
Classification Review Pending	Transportation Security Administration							see Classification Review Pending, 7/30/3004
Classification Review Pending	Transportation Security Administration							see Classification Review Pending, 7/30/3005
Classification Review Pending		2003-08-05	5	7	P	19		
Classification Review Pending	Transportation Security Administration							see Classification Review Pending, 2003-08-05
Classification Review Pending	Transportation Security Administration							see Classification Review Pending, 8/5/2004
Classification Review Pending	Transportation Security Administration							see Classification Review Pending, 8/5/2005
Classification Review Pending		2004-06-02	11	7	P	19		
Classification Review Pending	Transportation Security Administration						P	19
Classification Review Pending	Transportation Security Administration						P	19
Classification Review Pending	Transportation Security Administration						P	19
Classification Review Pending	Transportation Security Administration						P	19
Classification Review Pending	Transportation Security Administration						P	19
Classification Review Pending	Central Intelligence Agency	2003-09-17	7	2	P	19		
Classification Review Pending	Federal Bureau of Investigation	2004-03-23	5	4	P	19		
Classification Review Pending	Federal Bureau of Investigation	2004-01-06; 2004-02-05	9; 9	6	P	19		
Classification Review Pending	National Security Council	2003-10-24	4	3	P	19		
Classification Review Pending	Immigration and Naturalization Service	2003-11-13	10	5	P	19		
Classification Review Pending	Transportation Security Administration	2003-10-20	4	7	P	19		
Classification Review Pending	National Imagery and Mapping Agency	2004-01-09	6	2	P	19		
Classification Review Pending	Federal Bureau of Investigation	2003-11-10	4	4	P	19		
Classification Review Pending	Department of State							see Classification Review Pending, State Dept., 2003-11-07
Classification Review Pending	Department of State	2003-11-07	7	4	P	19		
Classification Review Pending	Alston & Bird	2003-07-14	5	5	P	20		
Classification Review Pending	Immigration and Customs Enforcement	2003-07-15	6	5	P	20		
Classification Review Pending	Department of Defense	2004-01-20	11		P	20		
Classification Review Pending		2003-12-23	12		P	20		
Classification Review Pending	former National Security Council	2003-10-08	27	3	P	20		
Classification Review Pending	Department of Defense	2004-01-29	18	3	P	20		
Classification Review Pending	Federal Bureau of Investigation	2003-10-13	4	N/A	P	20		
Classification Review Pending	Federal Bureau of Investigation	2003-10-16	3	N/A	P	20		
Classification Review Pending	Saudi Arabia	2003-10-17	7	N/A	P	20		
Classification Review Pending	Federal Bureau of Investigation	2003-10-25	2	N/A	P	21		
Classification Review Pending	Department of Defense	2003-10-26	9	N/A	P	21		
Classification Review Pending	Department of Defense	2003-10-27	2	N/A	P	21		
Classification Review Pending	Central Intelligence Agency	2004-04-29	3	1A	P	21		
Classification Review Pending	Federal Bureau of Investigation	2003-07-22	6	1A	P	21		
Classification Review Pending	Federal Bureau of Investigation	2004-02-13	3	1A	P	21		
Classification Review Pending		2004-03-03	7		P	18		
Classified Interview #1		2004-04-14	5	3	H	13		

Clymer, Robert L.	Federal Bureau of Investigation	2004-01-05	2	1A	R	06	
Cockburn, Carl	State Department	2003-10-29	8	5	R	03	
Coda, Robert	Newark Liberty International Airport	2004-05-06	4	7	O	03	
Cohen Group	Cohen Group	2003-12-12	5	3	O	03	
Cohen, David	Central Intelligence Agency	2004-06-21	6	2	R	03	
Cohen, William	Cohen Group						see "Cohen Group"
Colgate, Stephen	Department of Justice	2004-05-19	8	6	O	04	
Collins, Ted	Moody's Investor Services						see "Meeting with Moody's Investor Services"
Colucci, Joanne T.	American Express						see American Express Briefing
Columbia University Skyscraper Safety Campaign; World Trade Center Evacuation Study		2002-10-21	26	8	O	04	
Concepcion, Rocky	Immigration and Naturalization Service	2004-06-15	2	5	O	04	
Conference sponsored by DHS Department of Homeland Security		2004-01-12 and 2004-01-13	36	8	O	04	
Connor, Benjamin L.	Freeway Airport Flight School	2004-04-12	1	1A	R	10	
Consolidated Edison Company of New York	Consolidated Edison Company of New York	2004-02-26	6	8	O	04	
Contingency Planning Exchange Conference	Contingency Planning Exchange	2004-03-03	72	8	O	04	
Cook, Tom	Immigration and Naturalization Service	2004-01-14	5	5	O	04	
Cooper, Joseph	Federal Aviation Administration	2003-09-22	3	8	O	20	
Coschignano, Jimmy	Federal Aviation Administration	2003-12-16	3	8	O	05	
Country Team Briefing, Embassy Kabul	Department of State	2003-10-21	2	N/A	R	20	folder title: Staff Delegation International Trip
Country Team, Embassy Islamabad	Department of State	2003-10-26	2	N/A	R	21	
Cox, Christopher	House Select Committee on Homeland Security	2004-05-04	3	FO	O	04	
Cox, Edward T.	Dulles Airport	2003-10-16	5	7	R	04	
Crane, Richard	NEADS	2003-10-28	2	8	O	14	
Creaghe, James J.	American Express						see American Express Briefing
Critchlow, Paul W., Sr.	Merrill Lynch	2003-07-16	2	9 [NYC]	R	04	
Customs Inspector #1	Customs and Border Protection	2004-03-26	10	5	R	04	
Customs Inspector #2	Customs and Border Protection	2004-04-16	6	5	R	04	
Customs Inspector #4	Customs and Border Protection	2004-03-22	14	5	R	04	
Customs Inspector #5	Customs and Border Protection	2004-03-26	5	5	R	04	
Customs Inspector #6	Customs and Border Protection	2004-03-25	6	5	R	04	
Customs Inspector #7	Customs and Border Protection	2004-03-17	11	5	R	04	
Cutler, Michael William	Immigration and Naturalization Service	2003-09-26	5	5	R	04	
Danilevicius, Linas	Federal Bureau of Investigation	2003-09-29	2	1A	R	06	
David, Ruth	ANSER	2003-06-10	5	2	R	04	
Davies, Fred	NEADS						See NEADS Briefing
Davies, Tom	Federal Emergency Management Agency	2003-12-02	4	8	O	04	
Davies, Tom	Federal Emergency Management Agency						see FEMA Briefs

Author	Agency	Date	Pages	Category	Review	Comments
Davis, Linda	Federal Emergency Management Agency					see FEMA Briefs
Dayhoff, William E.	Federal Bureau of Investigation	2003-11-17	1	1A	R	
Dayton, Keith	Department of Defense	2004-01-10	4	2	R	
de la Vina, Gus	Border Patrol	2003-11-19	11	5	O	
Dean, William	Federal Aviation Administration	2003-09-22	3	8	O	
Deane, Matthew	American National Standards Institute					see ANSI
DeBlasio, Stephen M., Sr.	Federal Emergency Management Agency	2003-03-15	3	8	O	
Defense Department Employees #1-3	Department of Defense	2003-10-21	1	N/A	R	folder: Staff Delegation International Trip, Tab 3
Del Toro, Robert	Continental United States Air Defense Region (CONR)					See Millovich, Jim
Delaney, Kevin	Federal Aviation Administration	2003-09-30	5	8	O	
DeMauro, Joe	Verizon	2004-02-25	2	8	O	
Dept. of Transportation Employee #1	Department of Transportation	2003-11-07	2	8	R	
Deskins, Dawne	NEADS	2003-10-30	8	8	O	
Determine the hotel...occupied by Jarrah in Las Vegas		2004-04-06	7	1A	R	
DHS Agent #1	Department of Homeland Security	2003-09-30	1	6	R	
DHS Intel Flow on Border Security Intel and Information Briefing	Department of Homeland Security	2003-07-17	6	5	R	
Dickson, Edward	Federal Bureau of Investigation	2003-11-06	2	1A	R	
Dies, Bob	Federal Bureau of Investigation	2004-02-04	8	6	O	
Dillman, Don	American Airlines	2003-11-18	7	7	R	
Dillon, Jim	US Airways					see "Severance, Chuck"
Dion, Richard	Federal Aviation Administration	2003-09-22	2	8	O	
Divincenzo, Anthony		2004-06-22	1	1A	R	
Dockery, Tracy L.	Federal Bureau of Investigation	2004-01-05	2	1A	O	
DOD 9/11 Historical Project Meeting	Department of Defense	2003-07-31	3	8	O	
DOD Employee #4	Department of Defense	2003-10-20	4	3	R	
DoJ briefing on cell and phone calls from UA Flight 175		2004-05-13	3	7	R	
DoJ briefing on cell and phone calls from UA Flight 93		2004-05-13	3	7	R	
Don, Caysan Bin		2004-04-20	6	1A	R	
Donahue, Jennifer	Federal Aviation Administration	2003-09-22	2	8	O	
Donlon, Tom	Federal Bureau of Investigation	2003-09-05	6	6	R	
Dooley	NEADS					See NEADS Briefing
Dorn, Alan	Arlington County Fire Department	2003-10-16	2	8	O	
DOS Consular Affairs/Fraud Programs; Diplomatic Security; OIG briefing		2003-06-19	53	6	R	
DOS Diplomatic Security Briefing		2003-08-21	10		R	
DOS Office of Inspector General Briefing	Department of State	2003-06-30	8	5	R	
DOS PRM Briefing on Refugee Entry and Security Clearances	Department of State	2003-08-20	60	5	R	
Doucet, Phillip	Federal Bureau of Investigation	2003-12-04	2	1A	R	
Dougherty, Mike	Immigration and Customs Enforcement (DHS)	2003-09-29	8	4	R	

Author	Organization	Date	Pages	Category	Notes	
Dougherty, Mike	Immigration and Customs Enforcement (DHS)	2003-07-15	6	R	05	
Dowis, Evanna	Federal Aviation Administration	2003-09-30	3	8	O	20
Downing, Joel	New York State Police	2003-09-03	3	6	R	07
Drucker, Adam	Federal Bureau of Investigation	2004-01-12; 2004-05-19	18	4	R	05
Drumheller, Tyler	Central Intelligence Agency	2004-04-20	4	2	R	05
Drury, Jill	SEVIS Program Office					see "SEVIS"
Dubee, Melvin	Senate Intelligence Committee	2004-03-12	4	2	R	05
Ducharme, Richard J.	Federal Aviation Administration	2003-12-17	5	8	O	05
Duffy, Timothy	United States Air Force	2004-01-07	4	8	R	16
Dukeman, Greg	Cleveland Air Traffic Control Center	2003-10-02	4	8	O	03
Dulles Employee #1		2004-01-19; 2004-02-10	24	1A; 7	R	11
Dulles International Airport briefing and site tour		2003-09-29	4	7	R	05
Dunbar, Carson J., Jr.	Mutual of America					see Polanco, Elvis
Dunn, Frank E.	Metropolitan Washington Airports Authority					see Dulles International Airport briefing and site tour
Durbin, Richard	U.S. Senate	2004-04-27	2		O	05
Dyer, Bob	Civil Aviation Security Field Office	2004-01-12	2	7	R	05
Eastham, Alan		2003-12-19	15		R	05
Eberhart, Arthur R.	formerly with Federal Bureau of Investigation	2003-12-15	3	8	O	05
Eberhart, Edward	NORAD	2004-03-01	9	8	R	14
Edmonds, Sibel	Federal Bureau of Investigation	2004-02-11	7	6	R	05
Ehrensperger, John	SunTrust Bank					see "SunTrust Bankers interview"
Ellingston, Vernon	National Transportation Safety Board					See NTSB Briefing
Erenbaum, Allen	Immigration and Naturalization Service	2003-10-16	11	5	O	05
Ervin, Tim	Federal Bureau of Investigation	2003-10-17	3	1A	R	09
Evans, Mark	Cleveland Air Traffic Control Center	2003-10-02	4	8	O	03
FAA Employee #1	Federal Aviation Administration	2003-10-22	4	8	R	02
FAA Flight Standards and NTSB Briefing		2004-01-13; 2004-01-25	36	7	O	05
FAA New York Air Route Center (ZNY)	Federal Aviation Administration	2003-09-30	2	8	O	20
FAA Operations Center visit and follow-up	Federal Aviation Administration	2003-06-04; 2004-02-06	7	7	R	05
FAA Special Agent #1	Federal Aviation Administration	2003-08-18	3	7	R	18
Fabian, Frank; Hathaway, Eric	Federal Bureau of Investigation	2003-10-20	3	4	R	05
Faggen, Edward S.	Metropolitan Washington Airports Authority					see Dulles International Airport briefing and site tour
Fakihi, Muhammad Jabber Hassan	Saudi Arabia	2003-10-17	7	1A	R	20
Fanger, David L.	Moody's Investor Services					see "Meeting with Moody's Investor Services"
Fanno, Steven R.	Federal Aviation Administration	2003-12-16	3	8	O	05
Farris, Leonard Travis	Department of State	2003-10-24	1		O	05
FBI Analyst #1	Federal Bureau of Investigation	2003-09-02	5	6	R	08
FBI Analyst #2	Federal Bureau of Investigation	2003-09-02	7	6	R	07
FBI Analyst #3	Federal Bureau of Investigation	2003-08-05	4	6	R	09

FBI Briefing on Trading	Federal Bureau of Investigation	2003-08-15	12	4	R	09
FBI Employee #1	Federal Bureau of Investigation	2003-08-01	3	6	R	09
FBI Employee #2	Federal Bureau of Investigation	2003-12-16	4	4	R	13
FBI Employee #3	Federal Bureau of Investigation	2003-07-31	5	6	R	10
FBI Employee #4	Federal Bureau of Investigation	2003-08-01	5	6	R	09
FBI Employee #5	Federal Bureau of Investigation	2003-10-28	3	4	R	07
FBI Intelligence Operations Specialist #1	Federal Bureau of Investigation	2003-08-06	4	6	R	09
FBI Intelligence Operations Specialist #2	Federal Bureau of Investigation	2003-10-02	5	6	R	07
FBI Intelligence Research Specialist #1	Federal Bureau of Investigation	2003-09-16	4	6	R	08
FBI Intelligence Research Specialist #2	Federal Bureau of Investigation	2003-10-03	4	6	R	06
FBI Language Specialist #1	Federal Bureau of Investigation	2003-08-01	5	6	R	10
FBI Language Specialist #2	Federal Bureau of Investigation	2003-10-02	4	6	R	07
FBI Language Specialist #3	Federal Bureau of Investigation	2003-09-03	4	6	R	07
FBI Language Specialist #4	Federal Bureau of Investigation	2003-08-06	6	6	R	10
FBI Language Specialist #5	Federal Bureau of Investigation	2003-08-01	4	6	R	09
FBI Language Specialist #6	Federal Bureau of Investigation	2003-10-02	3	6	R	06
FBI Language Specialist #7	Federal Bureau of Investigation	2003-10-02	6	6	R	07
FBI Language Specialist #8	Federal Bureau of Investigation	2003-10-01	4	6	R	06
FBI Legal Attache #1	Federal Bureau of Investigation	2004-02-16	2	1A	R	21
FBI Special Agent #1	Federal Bureau of Investigation	2003-11-06	3	1A	H	07
FBI Special Agent #10	Federal Bureau of Investigation	2003-11-20	2	1A	R	06
FBI Special Agent #11	Federal Bureau of Investigation	2003-09-30	1	6	R	06
FBI Special Agent #12	Federal Bureau of Investigation	2003-09-30	2	6	R	06
FBI Special Agent #13	Federal Bureau of Investigation	2003-11-06	2	1A	H	07
FBI Special Agent #14	Federal Bureau of Investigation	2004-05-05	3	7	R	05
FBI Special Agent #15	Federal Bureau of Investigation	2003-12-04	3	1A	R	08
FBI Special Agent #16	Federal Bureau of Investigation	2004-01-05	3	1A	R	08
FBI Special Agent #17	Federal Bureau of Investigation	2004-01-06	1	1A	R	08
FBI Special Agent #18	Federal Bureau of Investigation					see Wentle, Don
FBI Special Agent #19	Federal Bureau of Investigation	2003-11-18	2	1A	R	09
FBI Special Agent #2	Federal Bureau of Investigation	2004-02-11	3	1	H	01
FBI Special Agent #20	Federal Bureau of Investigation	2003-11-17	2	1A	H	09
FBI Special Agent #21	Federal Bureau of Investigation	2003-10-09	2	1A	R	09
FBI Special Agent #22	Federal Bureau of Investigation	2003-10-09	2	1A	R	09
FBI Special Agent #23	Federal Bureau of Investigation	2004-01-28	2	1A	R	09
FBI Special Agent #24	Federal Bureau of Investigation	2004-01-06	4	1A	R	08
FBI Special Agent #25	Federal Bureau of Investigation	2003-11-06	3	1A	R	07
FBI Special Agent #26	Federal Bureau of Investigation	2004-01-28	1	1A	H	10
FBI Special Agent #27	Federal Bureau of Investigation	2003-10-01	1	1A	R	06
FBI Special Agent #28	Federal Bureau of Investigation	2003-10-29	2	4	R	06
FBI Special Agent #29	Federal Bureau of Investigation	2004-01-28	2	3	R	10
FBI Special Agent #3	Federal Bureau of Investigation	2003-11-05	2	1A	R	06
FBI Special Agent #30	Federal Bureau of Investigation	2004-01-07	2	1A	R	08
FBI Special Agent #31	Federal Bureau of Investigation	2003-11-17	4	1A	R	09
FBI Special Agent #32	Federal Bureau of Investigation	2004-01-28	3	1A	H	10

FBI Special Agent #	Federal Bureau of Investigation	2003-10-18	4	4	R	07
FBI Special Agent #34	Federal Bureau of Investigation	2003-10-28	4	4	R	07
FBI Special Agent #35	Federal Bureau of Investigation	2003-11-18	2	1A	R	09
FBI Special Agent #36	Federal Bureau of Investigation	2003-11-17	1	1A	R	09
FBI Special Agent #37	Federal Bureau of Investigation	2004-01-05	2	1A	R	08
FBI Special Agent #38	Federal Bureau of Investigation	2003-11-06	2	1A	R	07
FBI Special Agent #39	Federal Bureau of Investigation	2003-11-05	2	1A	R	06
FBI Special Agent #4	Federal Bureau of Investigation	2004-01-05	2	1A	R	06
FBI Special Agent #40	Federal Bureau of Investigation	2003-09-30	2	1A	R	06
FBI Special Agent #41	Federal Bureau of Investigation	2003-11-05	2	1A	R	06
FBI Special Agent #42	Federal Bureau of Investigation	2003-11-06	5	1A	R	07
FBI Special Agent #43	Federal Bureau of Investigation	2003-11-18	2	1A	R	09
FBI Special Agent #44	Federal Bureau of Investigation	2003-11-18	3	1A	R	09
FBI Special Agent #45	Federal Bureau of Investigation	2003-10-23	6	6	R	08
FBI Special Agent #46	Federal Bureau of Investigation	2003-10-01	2	1A	R	06
FBI Special Agent #47	Federal Bureau of Investigation	2003-10-17	3	1A	R	09
FBI Special Agent #48	Federal Bureau of Investigation	2003-10-09	3	1A	R	10
FBI Special Agent #49	Federal Bureau of Investigation	2003-10-03	3	6	R	07
FBI Special Agent #5	Federal Bureau of Investigation	2003-11-20	2	1A	R	06
FBI Special Agent #50	Federal Bureau of Investigation	2003-12-04	4	1A	R	08
FBI Special Agent #51	Federal Bureau of Investigation	2003-10-01	4	6	R	06
FBI Special Agent #52	Federal Bureau of Investigation	2004-01-07	3	1A	R	08
FBI Special Agent #53	Federal Bureau of Investigation	2004-01-06	2	1A	R	08
FBI Special Agent #54	Federal Bureau of Investigation	2004-01-07	2	1A	R	09
FBI Special Agent #55	Federal Bureau of Investigation	2003-10-01	2	1A	R	06
FBI Special Agent #56	Federal Bureau of Investigation	2003-11-20	2	1A	R	06
FBI Special Agent #57	Federal Bureau of Investigation	2003-11-18	3	1A	R	09
FBI Special Agent #58	Federal Bureau of Investigation	2003-11-17	2	1A	R	09
FBI Special Agent #59	Federal Bureau of Investigation	2003-11-18	2	1A	R	09
FBI Special Agent #6	Federal Bureau of Investigation	2003-10-01	1	1A	R	06
FBI Special Agent #60	Federal Bureau of Investigation	2003-11-17	3	1A	R	09
FBI Special Agent #61	Federal Bureau of Investigation	2003-11-17	2	1A	R	09
FBI Special Agent #62	Federal Bureau of Investigation	2003-11-18	3	1A	R	09
FBI Special Agent #63	Federal Bureau of Investigation	2003-11-17	4	1A	R	09
FBI Special Agent #64	Federal Bureau of Investigation	2003-11-18	2	1A	R	09
FBI Special Agent #65	Federal Bureau of Investigation	2003-11-18	2	1A	R	09
FBI Special Agent #67	Federal Bureau of Investigation	2003-10-21	5	4	H	04
FBI Special Agent #68	Federal Bureau of Investigation	2004-01-07	2	1A	R	08
FBI Special Agent #69	Federal Bureau of Investigation	2004-03-11	5	6	R	09
FBI Special Agent #7	Federal Bureau of Investigation	2003-11-20	2	1A	H	06
FBI Special Agent #70	Federal Bureau of Investigation	2003-10-21	4	6	R	09
FBI Special Agent #71	Federal Bureau of Investigation	2003-10-28	2	4	R	07
FBI Special Agent #72	Federal Bureau of Investigation	2003-11-18	3	1A	R	09
FBI Special Agent #73	Federal Bureau of Investigation	2003-07-28	6	6	R	09
FBI Special Agent #8	Federal Bureau of Investigation	2003-11-20	1	1A	R	06
FBI Special Agent #9	Federal Bureau of Investigation	2003-11-20	2	1A	R	06
FBI Washington Field Office Brief on Pentagon Response	Federal Bureau of Investigation	2003-08-05	5	8	O	05

and Incident Command System

USCA Case #13-5127

Document #1459100

Filed: 10/01/2013

Page 166 of 406

Feinstein, Diane	United States Senate	2004-06-01	1	FO	O	10
Feith, Douglas	Department of Defense	2003-08-18	3	3	O	10
FEMA Briefs	Federal Emergency Management Agency	2003-08-20; 2003-09-16	8	8	O	10
Ferrill, Arlene	Department of State	2003-10-25	2	N/A	R	21
Filbert, Brian	Federal Bureau of Investigation	2004-01-28	2	4	O	08
Filbert, Brian	Federal Bureau of Investigation	2004-01-07	2	1A	R	08
Findley, Rick	Canadian Forces					see NORAD Filed Site Visit
Fingar, Tom	Department of State	2003-11-19	8	2	R	10
First Responder	Fire Department, City of New York	2004-01-12	4	8	H	14
First Responder	Fire Department, City of New York	2004-01-09	4	8	H	14
First Responder	Fire Department, City of New York	2004-01-09	2	8	H	14
First Responder	Fire Department, City of New York	2004-01-23	5	8	H	14
First Responder	Fire Department, City of New York	2004-02-10	6	8	H	14
First Responder	Fire Department, City of New York	2004-01-12	3	8	H	14
First Responder	Fire Department, City of New York	2004-01-09	4	8	H	14
First Responder	Fire Department, City of New York	2004-03-05	3	8	H	14
First Responder	Fire Department, City of New York	2004-02-12	10	8	H	14
First Responder	Fire Department, City of New York	2003-12-16	6	8	H	14
First Responder	Fire Department, City of New York	2004-01-13	5	8	H	14
First Responder	Fire Department, City of New York	2004-02-13	4	8	H	14
First Responder	Fire Department, City of New York	2004-01-12	3	8	H	14
First Responder	Fire Department, City of New York	2004-02-11	7	8	H	14
First Responder	Fire Department, City of New York	2004-02-09	2	8	H	14
First Responder	Fire Department, City of New York	2004-01-28	7	8	H	14
First Responder	Fire Department, City of New York	2004-01-22	6	8	H	14
First Responder	Fire Department, City of New York	2004-01-13	3	8	H	14
First Responder	Fire Department, City of New York	2004-02-12	3	8	H	14
First Responder	Fire Department, City of New York	2004-03-03	5	8	H	14
First Responder	Fire Department, City of New York	2004-02-13	4	8	H	14
First Responder	Fire Department, City of New York	2004-01-22	4	8	H	14
First Responder	Fire Department, City of New York	2003-12-15	5	8	H	14
First Responder	Fire Department, City of New York	2004-01-23	7	8	H	14
First Responder	Fire Department, City of New York	2004-01-08	3	8	H	14

A162

First Responder	Fire Department, City of New York	2004-01-23	3	8	H	14
First Responder	Fire Department, City of New York	2004-03-11	5	8	H	15
First Responder	Fire Department, City of New York	2004-02-13	2	8	H	15
First Responder	Fire Department, City of New York	2004-01-07	4	8	H	15
First Responder	Fire Department, City of New York	2004-01-14	8	8	H	15
First Responder	Fire Department, City of New York	2004-01-22	4	8	H	15
First Responder	Fire Department, City of New York	2004-01-14	5	8	H	15
First Responder	Fire Department, City of New York	2004-02-12	7	8	H	15
First Responder	Fire Department, City of New York	2004-01-30	4	8	H	15
First Responder	Fire Department, City of New York	2004-02-10	3	8	H	15
First Responder	Fire Department, City of New York	2004-01-28	5	8	H	15
First Responder	Fire Department, City of New York	2004-01-22	4	8	H	15
First Responder	Fire Department, City of New York	2004-01-16	2	8	H	15
First Responder	Fire Department, City of New York	2004-01-22	2	8	H	15
First Responder	Fire Department, City of New York	2004-03-08	6	8	H	15
First Responder	Fire Department, City of New York	2004-01-07	5	8	H	15
First Responder	Fire Department, City of New York	2004-02-10	3	8	H	15
First Responder	Fire Department, City of New York	2004-02-12	2	8	H	15
First Responder	Fire Department, City of New York	2004-01-22	10	8	H	15
First Responder	Fire Department, City of New York (retired)	2004-03-26	4	8	H	15
First Responder	Fire Department, City of New York	2004-01-29	5	8	H	15
First Responder	Fire Department, City of New York	2004-02-10	4	8	H	15
First Responder	Fire Department, City of New York	2004-01-13	3	8	H	15
First Responder	Fire Department, City of New York	2004-01-13	5	8	H	15
First Responder	Fire Department, City of New York	2004-03-24	3	8	H	15
First Responder	Fire Department, City of New York	2004-02-09	6	8	H	15
First Responder	Fire Department, City of New York	2004-01-08	8	8	H	15
First Responder	Fire Department, City of New York	2004-02-11	2	8	H	15
First Responder	Fire Department, City of New York	2004-01-22	4	8	H	15
First Responder	Fire Department, City of New York	2004-01-23	7	8	H	15
First Responder	Fire Department, City of New York	2004-03-19	4	8	H	15

Respondent	Agency	Date	Page 1	Page 2	Page 3	Page 4
First Responder	Fire Department, City of New York	2004-01-30	2	8	H	15
First Responder	Fire Department, City of New York	2004-03-11	5	8	H	15
First Responder	Fire Department, City of New York	2004-01-23	4	8	H	15
First Responder	Fire Department, City of New York	2004-01-21	3	8	H	15
First Responder	Fire Department, City of New York	2004-02-10	4	8	H	15
First Responder	Fire Department, City of New York	2004-01-22	2	8	H	15
First Responder	Fire Department, City of New York	2004-01-20	6	8	H	15
First Responder	Fire Department, City of New York	2004-03-09	6	8	H	15
First Responder	Fire Department, City of New York	2004-03-08	5	8	H	15
First Responder	Fire Department, City of New York	2004-02-09	2	8	H	15
First Responder	New York City Office of Emergency Management	2004-03-04	5	8	H	15
First Responder	New York City Office of Emergency Management	2004-03-16	5	8	H	15
First Responder	New York City Office of Emergency Management	2004-03-24	4	8	H	15
First Responder	New York City Office of Emergency Management	2004-03-16	2	8	H	15
First Responder	New York City Office of Emergency Management	2004-03-10	3	8	H	15
First Responder	New York City Office of Emergency Management	2004-03-16	3	8	H	15
First Responder	New York City Office of Emergency Management	2004-03-19	4	8	H	15
First Responder	New York City Office of Emergency Management	2004-03-18	3	8	H	15
First Responder	New York City Police Department	2004-02-19	6	8	H	15
First Responder	New York City Police Department	2004-02-19	5	8	H	15
First Responder	New York City Police Department	2004-03-09	3	8	H	15
First Responder	New York City Police Department	2004-05-04	2	8	H	15
First Responder	New York City Police Department	2004-02-04	8	6	H	15
First Responder	New York City Police Department	2004-03-01	4	8	H	15
First Responder	New York City Police Department	2004-01-14	6	8	H	15
First Responder	New York City Police Department	2004-02-24	4	8	H	15
First Responder	New York City Police Department	2004-03-10	3	8	H	15
First Responder	New York City Police Department	2004-03-09	4	8	H	15
First Responder	New York City Police Department	2004-02-19	2	8	H	15
First Responder	New York City Police Department	2004-03-10	3	8	H	15
First Responder	New York City Police Department	2004-02-24	5	8	H	15
First Responder	New York City Police Department	2004-03-09	3	8	H	15
First Responder	New York City Police Department	2004-01-14	3	8	H	15
First Responder	New York City Police Department	2004-02-24	3	8	H	15
First Responder	New York City Police Department	2004-02-19	4	8	H	15
First Responder	New York City Police Department	2004-02-17	2	8	H	15
First Responder	New York City Police Department	2004-02-24	3	8	H	15

First Responder	New York City Police Department	2004-02-10	3	8	H	15
First Responder	New York City Police Department	2004-02-20	5	8	H	15
First Responder	New York City Police Department	2004-02-04	6	6	H	15
First Responder	New York City Police Department	2004-02-20	2	8	H	15
First Responder	New York City Police Department	2004-02-20	6	8	H	15
First Responder	New York City Police Department	2004-02-24	4	8	H	15
First Responder	New York City Police Department (retired)	2004-03-11	3	8	H	15
First Responder	New York City Police Department	2004-02-17	2	8	H	15
First Responder	New York City Police Department	2004-02-20	5	8	H	15
First Responder	Port Authority of New York and New Jersey	2003-10-24	7	7	H	16
First Responder	Port Authority of New York and New Jersey	2003-11-10	2	8	H	16
First Responder	Port Authority of New York and New Jersey	2004-03-31	2	8	H	16
First Responder	Port Authority of New York and New Jersey	2004-03-29	2	8	H	16
First Responder	Port Authority of New York and New Jersey	2004-03-31	2	8	H	16
First Responder	Port Authority of New York and New Jersey	2003-11-10	2	8	H	16
First Responder	Port Authority of New York and New Jersey	2003-11-20; 2004- 02-24	8	8	H	16
First Responder	Port Authority of New York and New Jersey	2003-11-20	7	8	H	16
First Responder	Port Authority of New York and New Jersey	2003-11-25	4	8	H	16
First Responder	Port Authority of New York and New Jersey	2003-10-27	2	8	H	16
First Responder	Port Authority of New York and New Jersey	2003-11-25	2	8	H	16
First Responder	Port Authority of New York and New Jersey	2003-11-24	8		H	16
First Responder	Port Authority of New York and New Jersey	2004-03-31	3	8	H	16
First Responder	Port Authority of New York and New Jersey	2003-11-12	4	8	H	16
First Responder	Port Authority of New York and New Jersey	2003-11-24	2	8	H	16
First Responder	Port Authority of New York and New Jersey	2003-11-03	5	8	H	16
First Responder	Port Authority of New York and New Jersey	2004-03-30	2	8	H	16
First Responder	Port Authority of New York and New Jersey	2004-04-01	2	8	H	16
First Responder	Port Authority of New York and New Jersey	2003-11-06; 2004- 05-10	9	8	H	16
First Responder	Port Authority of New York and New Jersey	2004-03-30	3	8	H	16
First Responder	Port Authority of New York and New Jersey	2003-10-14	4	8	H	16
Fitzgerald, Patrick	US Attorney's Office	2004-03-11	7	1;6	O	10
Flynn, Cathal "Irish"	Federal Aviation Administration	2003-09-09	9	7	R	11
Flynn, Edward A.	formerly Arlington County Police Department	2003-11-26	4	8	O	11
Foley, Michael	Trammel Crow Company					see American Express Briefing
Ford, Carl	Department of State	2003-10-22	10	2	R	11

Forensic Document Laboratory	Investigation and Customs Enforcement (DHS)	2003-10-19	2003-10-19	2003-10-19	2003-10-19	2003-10-19	2003-10-19
Fortin, Raymond	SunTrust Bank						see "SunTrust Bankers interview"
Fournier, Martin	Federal Aviation Administration	2003-09-30	4	8	O		20
Fowler, Wyche, Jr.	Department of State	2003-11-13	4	3; 4	R		11
Fox, James	NEADS	2003-10-29	13	8	R		14
Freeman, Chas	Department of State	2003-12-03	3	1;3	R		10
Friebel, Kathy	Department of State						see "DOS Consular Affairs/Fraud Programs; Diplomatic Security; OIG briefing"
Fruin, Richard K.	Mutual of America						see Polanco, Elvis
Furey, Thomas	State Department	2003-12-05	6	5	R		10
Gabrielle, Monica	Skyscraper Safety Campaign						see "Skyscraper Safety Campaign Meeting"
Galloway, Bret	Morgan Stanley						see "Morgan Stanley briefing"
Garrett	Department of Defense	2003-10-20	2	N/A	R		20
Garzon, Baltasar	Government of Spain	2004-02-13	6	1A	H		21
Gause, F. Gregory, III	University of Vermont	2003-11-21	3	1; 3	O		11
Gayde, Rudolph	Federal Aviation Administration	2003-09-25	2	8	O		11
Gayle, Michael A.	Department of State	2003-09-08	3	1; 3	R		11
Genton, Gina	National Imagery and Mapping Agency	2003-10-09	4	2	R		11
George, Jim	Federal Bureau of Investigation	2004-01-06	2	1A	R		08
Gephard, Paul	Cohen Group						see "Cohen Group"
GIANT KILLER Visit	U.S. Navy	2003-12-03	11	8	R		14
Gilmartin, Gregory J.	Federal Bureau of Investigation	2004-01-09	3	1A	R		06
Glick, Lyzbeth	family member	2004-04-22	2	7	R		05
Glossman, Diane		2003-09-22	2	9 [NYC]	R		11
Gonzales, Daniel	Federal Bureau of Investigation	2003-11-18	5	1A	R		09
Gonzalez, Nydia	American Airlines	2003-11-19	2	7;8	O		01
Gorelick, Jamie	Department of Justice	2003-09-03	3	3	O		11
Gorelick, Jamie	Department of Justice	2004-01-09	3		O		11
Gorelick, Jamie	Department of Justice	2004-01-13	8	5	R		11
Gower, James T.	Alexandria Fire Department	2003-11-04	3	8	O		11
Goyer, Tim	Immigration and Naturalization Service	2003-10-01	6	5	R		11
Grano, Joseph	Paine Webber	2004-02-24	3	8	O		11
Grant, Nicholas P.	Transportation Security Administration	2004-05-26	7	7	R		11
Grappo, Gary A.	Department of State	2003-10-30	8	4	R		11
Green, Ubie	United Airlines						see "Briefing on UAL Systems Operation and Crisis Center"
Greene, Brenton C.	National Communications System	2004-03-16	4	8	R		11
Grigg, Gurvais Clayton	Federal Bureau of Investigation	2004-03-23	2	4	R		11
Gripper, Willie	Federal Aviation Administration	2004-05-05	7	7	R		11
Grizzle, Jerry	Joint Task Force - Civil Support						See NORTHCOM Joint Task Force - Civil Support Site Visit
Groenenboom, Jill	representing Benevolence International Foundation						see "Rowland, Mary M."

USCA Case #13-5127		Document #1459100		Filed: 10/01/2013		Page 171 of 406	
Grossman, Marc	Department of State	2004-01-20	6	8	R	11	
Hagel, Chuck	United States Senate	2004-06-21	1	N/A	O	11	
Haider, Anwar	Government of Pakistan	2003-10-20	2	N/A	R	21	
Haider, Moinuddin	Government of Pakistan	2003-10-20	3	N/A	R	21	
Haley, Robert	Federal Bureau of Investigation	2003-12-04	3	1A	R	08	
Halleck, Bill	American Airlines	2004-01-08	4	7	O	01	
Halleck, Bill	American Airlines						see SOC
Hallenbeck, Lane	American National Standards Institute						see ANSI
Hallett, Carol	Air Transport Association	2003-10-22	11	7	O	11	
Hamre, John	Department of Defense	2003-12-09	5	3	R	11	
Hanback, Pat	Central Intelligence Agency	2003-09-12	3	2	R	11	
Hancock, Don	International Association of Assembly Managers	2003-10-01	2	9 [NYC]	O	12	
Harris, Robert	Border Patrol						see de la Vina, Gus
Harrison, David H.	Options Clearing Corporation	2004-04-02	2	4	O	15	
Hart, Corey W.	Cedars-Sinai Hospital	2004-04-19 and 2004-04-20	1	1A	R	02	
Harter, John	Federal Aviation Administration						see "Norfolk TRACON visit"
Hartling, John	Federal Aviation Administration	2003-09-22	3	8	O	20	
Harty, Maura	Department of State	2003-11-20	6	5	R	11	
Hauer, Jerome M.	Response to Emergencies and Disasters Institute at George Washington University	2004-03-30	8	8	R	15	
Hawley, John Steven	Transportation Security Administration	2003-10-08	10	7	R	11	
Hawley, Len		2003-07-30	4	3	R	11	
Helgeson, John	Central Intelligence Agency	2003-09-05	6	2	R	11	
Hendershot, John	Federal Aviation Administration	2003-12-22	2	8	O	05	
Hendrick, Steve	NEADS	2003-10-27	2	8	O	14	
Herak, Bob	Cleveland Air Traffic Control Center	2003-10-02	2	8	R	03	
Hess, Charlie	Federal Emergency Management Agency						see FEMA Briefs
Higgie, Lincoln		2003-11-19	2	1A	R	09	
Hillock, Eileen	Morgan Stanley						see "Morgan Stanley briefing"
Hinger, Robert	Joint Force Headquarters						See NORTHCOM Joint Force Headquarters - Homeland Security Site Visit
Hoekstra, Peter	U.S. House of Representatives	2004-06-02	1		O	11	
Holbrooke, Richard	Department of State	2003-11-20	3	N/A	R	11	
Holl, Stephen	Arlington County Police Department	2003-10-15	3	8	R	11	
Holley, Robert	Federal Bureau of Investigation	2003-12-12	1	4	R	06	
Hollick, Tony		2004-06-18	1		O	11	
Holmes, David	Transportation Security Administration						see "TSA 'Red Team' Briefing," 2003-10-20
Holmes, David	Transportation Security Administration						see "TSA 'Red Team' Briefing," 2003-09-03
Holmes, Henry Allen	Department of Defense	2003-12-23	4	3	R	11	
Homa-Arther, Catherine	SunTrust Bank						see "SunTrust Bankers interview"
Homeland Security Industries Association	Homeland Security Industries Association	2004-03-04	7	8	O	11	

Honore, Maj. Gen.							
Hoover Dam, Boulder City, NV, Mileage Review		2004-01-06	1	1A	O	06	
Hortman, Herbert	Hortman Aviation	2004-04-27	2	1A	R	10	
Houck, Peggy	American Airlines						see Halleck, Bill
Howland, Ray	American Airlines						see SOC
Hoylman, Brad	Partnership for New York City						see "Partnership for New York City Meeting"
Huezy, Peter F.	Morgan Stanley						see "Morgan Stanley briefing"
Hughes, Patrick M.	Department of Homeland Security	2004-04-02	5	6	R	11	
Hull, Edmund	Department of State	2003-10-18	6	2; 3	R	11	
HUNTRESS Personnel	Department of Defense	2003-01-27	6	5	O	14	
IBM Crisis Response Team	IBM	2004-02-09	4	8	O	11	
Iden, Ron	Federal Bureau of Investigation	2003-09-29	1	1A	O	06	
Impressions of CJTF Phoenix	9/11 Commission	2003-10-22	20	N/A	O	20	
Indyk, Martin	National Security Council	2003-10-10	6	3	R	11	
Insurance Services Office, Inc.		2003-12-04; 2004-01-15	37	8	O	12	
Intelligence Employee #1		2003-10-08	7	2	H	12	
Intelligence Employee #1		2003-11-19	5	2	H	12	
Intelligence Employee #2		2004-01-09	4	2	H	19	
Interviews of UAL and AAL personnel in key roles on 9/11/2001	American Airlines; United Airlines	2003-11-17 through 2003-11-21	5	7; 8	R	19	
Investigation of Mohdar Mohamed Abdullah's California DMV records	California Department of Motor Vehicles	2004-05-28	3	1A	R	03	
Investigation of Omer Salmain Bakarbashat's California DMV records	California Department of Motor Vehicles	2004-05-27	2	1A	R	03	
IRS Employee #1	Internal Revenue Services/JTTF	2003-07-29	3	6	R	09	
Jackson, Jack	Federal Aviation Administration	2003-12-15	3	8	O	20	
Jackson, Tim	Transportation Security Administration	2004-04-12	5	7	H	12	
Jalali, Ali	Government of Afghanistan	2003-10-23	1	N/A	O	20	
Jefferson, Lisa	GTE Airphone	2004-05-11	3	7	R	11	
Jenkins, Brian Michael	RAND Corporation	2004-04-01	13	7	R	12	
Jenkins, Steve	Transportation Security Administration	2004-02-24	7	7	R	12	
Jeremiah, David	U.S. Navy	2003-10-22	6	2	R	12	
Jervis, Robert	Columbia University	2003-08-19	4	2	O	12	
JFK airport visit re: immigration inspection process	Department of Homeland Security	2003-07-28	54	5	R	04	
Jimenez, Freddy		2004-06-22	1	1A	R	02	
Jiricek, Karl	Federal Aviation Administration	2003-12-16	2	8	O	05	
Jones, Robert	Federal Aviation Administration	2003-09-22	2	8	R	20	
Jordan, Bob	Department of State	2004-01-14	7	4; 1	R	12	
Jordan, Bob	United Airlines	2003-11-20	2	7; 8	R	19	
JTTF Member #1	Miami-Dade Police Department/JTTF	2003-10-01	3	6	R	06	
JTTF Member #10	Los Angeles Police Department	2003-09-30	2	1A	R	06	
JTTF Member #11	Passaic County/JTTF	2003-11-06	3	1A	R	07	

JTTF Member #	Organization	Date	1	2	R	06
JTTF Member #1	Florida Department of Law Enforcement/JTTF	2003-10-01	4	6	R	06
JTTF Member #2	Florida Department of Law Enforcement/JTTF	2003-10-01	4	6	R	06
JTTF Member #3	Port Authority Police Department/JTTF	2003-09-03	3	5	R	07
JTTF Member #4	Metro Transit Police/JTTF	2003-07-30	3	6	R	10
JTTF Member #5	JTTF	2003-10-02	5	6	R	07
JTTF Member #6	New York City Department of Investigation	2003-09-04	4	6	R	08
JTTF Member #7	Los Angeles Police Department/JTTF	2003-11-20	7	6	R	06
JTTF Member #8	Capitol Police/JTTF	2003-07-30	4	6	R	10
JTTF Member #9	New York State Police/JTTF	2003-09-04	6	6	R	08
Julius, Chris	National Transportation Safety Board					See NTSB Briefing
Justice, Linda	Cleveland Air Traffic Control Center	2003-10-02	4	8	O	03
Kahn, Abdul Faheem	Government of Afghanistan	2003-10-23	2	N/A	R	20
Kashkett, Steve	Department of State	2003-11-04	7	4	R	12
Kath, Randy	Federal Aviation Administration	2003-09-25	2	8	O	11
Kattouf, Theodore H.	Department of State	2004-04-21	6; 1	3; 4	R	12
Kelley, Shawn	Arlington County Fire Department	2003-10-16	3	8	O	12
Kelly, Michael	United States Air Force	2003-10-14	4	8	R	16
Kerinko, Tom	Cleveland Air Traffic Control Center	2003-10-02	4	8	R	03
Kerr, Don	Central Intelligence Agency	2003-09-09	6	2	R	12
Kerr, John	Federal Bureau of Investigation	2003-10-17	2	1A	R	09
Kettel, Richard	Cleveland Air Traffic Control Center	2003-10-01	6	8	R	03
Khalil, Khalil A.	Saudi Arabia	2004-02-24	8	1A	R	21
Khalili, Karim	Government of Afghanistan	2003-10-23	3	N/A	R	20
Khalilzad, Zalmay	Department of State	2003-11-21	4	3	R	12
King County Office of Emergency Management and Partners		2003-09-30	10	8	O	12
Kingston, John	Federal Bureau of Investigation	2003-11-17	2	1A	R	09
Kinton, Tom	MASSPORT	2003-11-06	10	7	R	12
Kline, Kevin; Turkington, John	Federal Bureau of Investigation	2003-11-06	4	1A	R	07
Klotzman, Dave		2004-07-26	1		O	12
Knier, Thomas J.	Federal Bureau of Investigation	2003-12-10	1	4	O	12
Kolly, Joseph	National Transportation Safety Board					See NTSB Briefing
Kos, Dino	Federal Reserve Bank of New York					see Briefing by Federal Reserve Bank of New York
Kruthof, Arne	Florida Flight Training Center	2004-04-12	1	1A	R	10
Kuhn, Jeffrey R.	Bank of New York					see Bank of New York
Kuhn, Lance	Federal Bureau of Investigation	2003-10-23; 2004-01-05	10	6; 1A	R	08
Kula, Shirley	Federal Aviation Administration	2003-09-22	2	8	O	20
Kurtter, Robert	Moody's Investor Services					see "Meeting with Moody's Investor Services"
Kurz, James	Federal Aviation Administration	2003-09-30	4	8	O	20
La Mesa Police Department	La Mesa Police Department	2004-06-23	2	1A	R	02
	Los Angeles Police Department	2003-07-21	3	9	R	13

LA Police Department #1	USCA Case #13-5127	Document #1459100	Filed: 10/01/2013	Page 174 of 406		
LaCates, David	Federal Aviation Administration	2003-10-02	4	8	O	20
LaMarche, Jeffrey	NEADS	2003-10-27	6	8	O	14
Lance, Peter		2004-03-15	4	1A	R	12
Landsman, Cliff	Immigration and Naturalization Service	2003-10-27	7	5	R	12
Lang, Gary	Immigration and Customs Enforcement					see "SEVIS"
Lannon, George	Department of State	2003-10-15	9	5	R	12
Larson, Bud	New York City Office of Management and Budget					see New York City Meeting
Las Vegas Investigative Summary		n.d.	8	1A	R	12
Lawless, Joe	MASSPORT	2003-11-05	12	7	R	12
Lawson, Sheila	Federal Bureau of Investigation	2003-10-03	2	4	R	12
Leidig, Charles Joseph	Department of Defense	2004-04-29	7	8	R	12
Leonard, George	Federal Aviation Administration	2003-09-30	2	8	O	20
Levitt, Matthew	Washington Institute for Near East Policy	2003-10-28	4	1; 3	O	12
Lewis, Chuck	J2					See NORTHCOM Joint Task Force - Civil Support Site Visit
Libutti, Frank	Department of Homeland Security	2003-12-19	2	5	O	12
Lichtenstein, Jack	ASIS					see ASIS briefing
Lindsey, Larry	formerly of the National Economic Council	2004-01-20	3	8	O	12
Liscouski, Robert	Department of Homeland Security	2004-01-20	4	8	O	12
List of mosques in San Diego		2004-05-06	3	1A	O	02
Local Leaders in Bagram	Afghanistan	2003-10-23	6	N/A	R	20
Local Leaders in Kandahar Province	Afghanistan	2003-10-21	2	N/A	R	20
Longmire, Lee	Transportation Security Administration	2003-10-28	7	7	R	12
Longstretch, Thomas	RAND Corporation					see Background Briefing on DoD
Lopez, Dametra	Olive Avenue Apartments	2004-06-22	1	1A	R	02
Louch, Andrea Rae		2004-06-22	2	1A	R	02
Lowder, Michael	Federal Emergency Management Agency					see FEMA Briefs
Loy, James	Department of Homeland Security	2003-12-10; 2003-12-15	25	5; 7	R	12
Luongo, Stephen	Logan Airport	2004-02-11	8	7	R	12
Lutomski, Steve	Federal Aviation Administration	2003-09-24	2	8	O	11
Lyons, Amy Jo	Federal Bureau of Investigation	2003-09-05	5	6	R	09
Mabahith Officials, Meeting with	Saudi Arabia	2003-10-14 and 2003-10-15	4	N/A	R	20
Mabahith Officials, Meeting with	Saudi Arabia	2004-02-22	3	1A	R	21
Mackey, Dave	MASSPORT	2003-09	3	7	O	12
Madani, Nizar	Government of Saudi Arabia	2003-10-15	2	N/A	R	20
Mamula, Christopher	Federal Bureau of Investigation	2004-01-28	4	1A	R	09
Manningham-Buller, Elizabeth	British Secret Service	2003-11-07	7	2; 6	H	12
Manno, Claudio	Transportation Security Administration	2003-10-01	11	7	R	12
Marquis, Craig	American Airlines	2003-11-19	9	7; 8	R	01

USCA Case #13-5127		Document #1459100		Filed: 10/01/2013		Page 175 of 406	
Marquis, Chris	American Airlines						see SOP
Marr, Robert	NEADS	2004-01-23	9	8	O	14	
Martens, Brazillino	Federal Aviation Administration	2003-09-22	2	8	O	20	
Martinez-Fonts, Al	Department of Homeland Security	2004-01-20	3	8	O	12	
McAleer, Gregory J.	United Airlines	2003-08-12	4	1A	R	13	
McCain, Joe	NEADS	2003-10-28; 2004-01-20	9	8	O	14	
McCarthy, John A.	Critical Infrastructure Protection Project	2004-01-21	2	8	O	13	
McCarthy, Patrick	Insurance Services Office						see Insurance Services Office, Inc.
McCartney, John	Federal Aviation Administration	2003-12-17	5	8	O	05	
McClelland, Gene L., Jr.	Federal Bureau of Investigation	2003-07-31	3	6	R	10	
McCloskey, Peter	Federal Aviation Administration	2003-10-01	4	8	O	20	
McCormick, Mike	Federal Aviation Administration	2003-12-15	5	8	O	20	
McCormick, Mike	Federal Aviation Administration	2003-10-01	8	8	O	20	
McCurdy, Chad	United Airlines						see "Briefing on UAL Systems Operation and Crisis Center"
McDonnell, Patrick	formerly Federal Aviation Administration	2003-09-24	12	7	H	13	
McDonough, William J.	formerly of Federal Reserve Bank of New York	2004-01-21	3	8	O	13	
McFadden, Robert	Naval Criminal Investigative Service	2003-12-30	5	1	R	13	
McFeely, Richard A.	Federal Bureau of Investigation	2003-11-05	2	8	R	10	
McFeely, Richard A.	Federal Bureau of Investigation	2004-01-28	2	1A	R	10	
McGraw, Mark	Immigration and Customs Enforcement (DHS)						see Dougherty, Mike (7/15/2003)
McGraw, Mark	Immigration and Customs Enforcement (DHS)						see Dougherty, Mike (2003-09-29)
McKinley, Craig R.	Continental United States North American Aerospace Defense Command Region (CONR)	2004-02-03	6	8	O	04	
McLaughlin, Robert C.	Federal Aviation Administration	2004-06-03	5	7	R	13	
McNulty, David	U.S. Air Force	2004-03-11	6	8	R	01	
Meeting at Center for Strategic and International Studies		2003-07-23	3		O	17	
Meeting of Team 1A		2003-12-01	4	1A	O	19	
Meeting of Team 3		2003-11-13	3	3	O	19	
Meeting of Team 4		2003-11-25	3	4	O	19	
Meeting of Team 5		n.d.	3	5	O	19	
Meeting of Team 6		2003-12-02	4	6	O	19	
Meeting of Team 7		2003-10-29	3	7	O	19	
Meeting with BKA and Federal Prosecutors in Berlin, Germany	German Government	2004-02-18	13	1A	H	11	
Meeting with Langley Tower Personnel	U.S. Air Force	2003-10-06	4	8	R	12	
Meeting with MOI Officials	Government of Germany	2004-02-16	9	1A	H	21	
Meeting with Moody's Investor Services		2004-01-06	5	8	O	13	
Meissner, Doris	Immigration and Naturalization Service	2003-11-25; 2004-01-06; 2004-01-12	29	5	R	13	
Mekhemar, Sami A.	Med Choice International, Inc.	2004-04-21	3	1A	R	02	
Melendez-Perez, Jose	Customs Border Patrol	2003-11-12	13	5	R	13	

Members of Majlis Ash-Shura	Government of Saudi Arabia	2003-10-01	5	N/A	R	20
Merced, Mark	Federal Aviation Administration	2003-10-01	3	8	O	20
Merchant, Ken	NORAD	2003-11-14	3	8	O	14
Milam, William	Department of State	2004-05-10	3	3	R	13
Milam, William	Department of State	2003-12-29	7	3	R	13
Miles, Rich	United Airlines	2003-11-21	4	7; 8	O	19
Miller, Alan	Federal Aviation Administration	2003-09-22	1	8	O	20
Miller, Judith	formerly with the Department of Defense	2004-01-29	4	3	R	13
Miller, Mark	Central Intelligence Agency	2003-12-23	10	6	R	13
Miller, Marty	Union Oil Company of California (UNOCAL)	2003-11-07	3	5	O	13
Miller, Toby	Federal Aviation Administration	2003-09-22	2	8	O	20
Millovich, Jim	Continental United States Air Defense Region (CONR)	2004-02-04	3	8	O	04
Mineta, Norman	Department of Transportation	2004-01-08	3	7; 8	O	13
Molario, Dan	Immigration and Naturalization Service	2003-11-17	3	5	O	13
Monette, Ted	Federal Emergency Management Agency					see FEMA Briefs
Monks, Donald R.	Bank of New York					see Bank of New York
Moose, Dick	Department of State	n.d.	7	5	R	13
Moose, George	Department of State	2003-10-09	7	3	R	13
Morgan Stanley briefing		2003-10-23	4	8	O	13
Morley, Mark	Department of State					
Morris, Randy	Continental United States North American Aerospace Defense Command Region (CONR)	2004-02-03	3	8	O	04
Morris, Randy	Air Operations Center (CONR)	2004-02-02	2	8	O	04
Morse, Mike	Federal Aviation Administration	2003-09-15	11	7	H	13
Moss, Frank	Department of State	2003-09-10	19	5	R	18
Moussaoui Team Briefing	Department of Justice	2004-03-18	3	1A	R	13
Mulcahy, Mike	American Airlines					see Marquis, Craig
Mulroy, Peter J.	Merill Lynch Global Technology and Services	2004-01-05	3	8	O	13
Murphy, Sharon	Federal Bureau of Investigation	2003-10-02	1	2	O	07
Myers, Henry		2004-06-18	1		R	13
Nahmias, David	Department of Justice	2003-12-12	3	6	O	14
Napoli, Louis	New York Police Department/JTTF	2003-09-04	5	6	R	08
Naquin, Douglas	Central Intelligence Agency	2004-01-06	3	2	R	14
Naranjo, Luis						see Pogrell
Nardi, Louis	Immigration and Naturalization Service	2003-10-20	2	5	R	14
Naser, Ashraf	Government of Pakistan	2003-10-27	3	N/A	R	21
Nash, Daniel S	United States Air Force	2003-10-14	6	8	R	16
Nasypany, Kevin J.	NEADS	2004-01-22 and 2004-01-23	6	8	O	14
Navarrete, Frank	Arizona Office of Homeland Security	2003-10-21	4	6	O	14
Navratil, Thomas J.	Department of State	2003-09-01	15	4	R	14
NCIS Agent #1	Naval Criminal Investigative Service	2003-11-18	1	1A	H	09
NEADS Briefing		2003-10-27	6	8	O	14

Topic	Organization	Date	1	2	3	4
Neighborhood canvas...Sepulveda Blvd		2004-11-09	11	10	0	12
Nestor, Lisa	Federal Bureau of Investigation	2003-10-22	4	6	R	08
New York City Meeting		2004-03-11	13	8	O	14
New York Stock Exchange Meeting		2003-12-11	8	8	O	14
Newberry, Robert	Department of Defense	2004-06-21	4	3	O	14
Ng, [FNU]	United States Air Force	2003-10-14	2	8	O	16
NIMA Employee #1	NIMA	2003-12-11	3	2	H	03
Nolte, Bill	Central Intelligence Agency	2003-07-01	2	N/A	O	14
Nonimmigration visa process...briefing		2003-06-03	33	5	R	18
Noonan, Patty	Partnership for New York City					see "Partnership for New York City Meeting"
Noorani, Tasneem	Government of Pakistan	2003-10-27	2	N/A	O	21
NORAD Field Site Visit	NORAD	2004-03-01	9	8	R	14
Norfolk TRACON visit		2003-12-01	8	8	O	14
Norgaard	Department of Defense	2003-10-23	33	N/A	H	20
NORTHCOM Joint Force Headquarters - Homeland Security Site Visit		2003-10-02	6	8	O	05
NORTHCOM Joint Task Force - Civil Support Site Visit		2003-10-02	4	8	O	05
Novis, Gary	Department of State	2003-10-10	7	4	R	14
NSA Employee #1	National Security Agency	2003-09-29	6	2	H	03
NTSB Briefing		2003-09-11	4	8	O	14
O'Callaghan, John	National Transportation Safety Board					See NTSB Briefing
O'Connell, Thomas	Department of Defense	2004-06-29	2	3	R	15
O'Connor, Barry	Federal Aviation Administration	2003-09-22	2	8	O	20
O'Mara, Pete	NEADS	2003-10-28	3	8	O	14
O'Neill, Bard	National War College	2003-09-03	6	8	O	15
O'Neill, Kevin	Department of State	2004-02-12	5	5	R	15
Oakley, Robert	Department of State	2003-09-17	6	3	R	15
Ochmanek, David	RAND Corporation					see Background Briefing on DoD
Ohlsen, Richard	Federal Emergency Management Agency	2004-03-16	3	8	O	15
Orientation and Tour of National Military Command Center and National Military Joint Intelligence Center	Department of Defense	2003-07-21	4	8	R	14
Orr, Bill	Federal Aviation Administration	2003-09-25	2	8	O	11
Osmus, Lynne	Federal Aviation Administration	2003-10-03	7	7	R	16
Ott, Marvin	National War College	2003-09-16	7	2	O	16
Pace, Peter	Joint Chiefs of Staff	2004-01-16	8	3	R	16
Padgett, James	Federal Aviation Administration	2003-10-07	9	7	R	16
Pakistan Interview #1	Pakistan	2003-10-25	3	N/A	H	21
Pakistan Interview #2	Government of Pakistan	2003-10-27	2	N/A	H	21
Pakistan Interview #4	Northwest Frontier Province	2003-10-25	1	N/A	H	21
Palmieri, Anthony	Federal Aviation Administration	2003-10-01	3	8	O	20
PANYNJ Employee #1	Port Authority Police Department/ JTTF	2003-09-04	4	6	R	08
Parfitt, Craig	American Airlines					see Marquis, Craig

Parfitt, Craig	American Airlines	Document #1459100	Filed: 10/01/2013	Page 178 of 406
Park, Tom	Federal Emergency Management Agency			see FEMA Briefs
Parkinson, Larry R.	Federal Bureau of Investigation	2004-02-24	7	6 R 16
Parks, Bruce	Civil Aviation Security Field Office	2003-10-27	6	7 R 16
Partnership for New York City Meeting		2003-08-07	4	8 O 16
Pasha Raffat	Northwest Frontier Province Police	2003-10-25	1	N/A H 21
Payne, Gail	Conrad Villa Apartments	2004-06-23	1	1A R 02
Penn, Mark L.	Arlington County Fire Department	2003-10-20	3	8 R 16
Pennington, Laurie	SunTrust Bank			see "SunTrust Bankers interview"
PENTTBOM Briefing on Abderraouf Jdey	Federal Bureau of Investigation	2004-06-24	2	1A R 06
PENTTBOM Timeline Briefing	Federal Bureau of Investigation	2003-12-10 and 2003-12-11	8	1A R 05
Perdue, Doug	Federal Bureau of Investigation	2003-11-05	3	1A R 06
Perez, Rick	Department of Defense	2003-09-24	2	8 O 05
Perry, William	Department of Defense	2004-04-12	4	FO O 16
Personnel in key roles	American Airlines; United Airlines	2003-11-17 through 2003-11-21	5	7; 8 R 01
Peterson, Grant C.	Titan Systems Corp.	2004-01-15	4	8 O 16
Peterson, Steve	Department of State	2003-08-20	47	5 R 16
Petro, Joseph	Citigroup, Inc.	2003-08-26	4	8 O 03
Petterson, Donald	Department of State	2003-09-30	7	3 R 16
Phillips, Jeffrey	Federal Aviation Administration	2003-09-25	2	8 O 11
Phillips, Charisse	Department of State			see "DOS Consular Affairs/Fraud Programs; Diplomatic Security; OIG briefing"
Phillpott, Scott	Department of Defense	2004-07-13	2	1A O 16
Pickering, Thomas		2003-12-22	7	R 16
Pitt, Harvey	Securities and Exchange Commission	2003-12-18	4	8 O 16
Pitts, Dana A.	Metropolitan Washington Airports Authority			see Dulles International Airport briefing and site tour
Platosh, Damian	Federal Bureau of Investigation	2003-10-10	2	1A R 10
Plaugher, Edward	Arlington County Fire Department	2003-10-16	6	8 O 16
Pogrell, Jason		2004-06-23	2	1A R 02
Polanco, Elvis	Mutual of America	2003-12-17	4	8 O 05
Policastro, Marc	United Airlines	2003-11-21	2	7; 8 R 19
Polt, Michael Christian	Department of State	2003-10-09	16	5 R 16
Pond, Terri Lind	IBM			see IBM Crisis Response Team
Ponder, D. Philip	Federal Bureau of Investigation	2003-07-30	3	6 O 10
Povinelli, Linda	Federal Aviation Administration	2003-09-24	2	8 O 11
Powell, Colin	Department of State	2004-01-21	6	FO;3 R 16
Powell, David	Hortman Aviation	2004-04-12	2	1A R 10
Powell, Jeremy	NEADS	2003-10-27	6	8 O 14
Prominent Afghan Citizens	Afghanistan	2003-10-21	2	N/A H 20
Pugrud, John	Department of Defense	2003-10-24	2	8 R 16
Push, Stephen		2003-06-09	2	8 R 16

Author	Organization	Date	Pages	Category	Review	Notes
Quinn, Maureen	Department of State	2003-10-19	2	N/A	R	21
Rahman, Yousef	New York City Office of Management and Budget					see New York City Meeting
Raisch, William	New York Safety Council					see "Meeting with Moody's Investor Services"
Raisch, William G.	Greater New York Safety Council	2003-09-10; 2003-09-30; 2003-10-08	2	8	O	11
Raisch, William G.	Greater New York Safety Council					see "Skyscraper Safety Campaign Meeting"
Raisch, William G.	Greater New York Safety Council					see ANSI
Ralston, Joseph	Cohen Group					see "Cohen Group"
Rana, Louis L.	Consolidated Edison Company of New York					see Consolidated Edison Company of New York
Randol, Mark	Civil Aviation Security Field Office	2003-10-08	7	7	R	17
Rantz, Alicia		2004-06-23	1	1A	R	02
Rantz, Jim		2004-06-23	1	1A	R	02
Raphel, Robin	Department of State	2003-12-08	3	3	O	17
Rashid, Ahmed	Pakistan	2003-10-27	2	N/A	R	21
Ratliffe, Gerri	Immigration and Naturalization Service	2003-10-16	4	5	O	17
Redman, Kathy	Department of Homeland Security					see "Sackett, Kenneth"
Regan, George	Immigration and Naturalization Service	2003-10-21	2	5	R	17
Regenhard, George	Skyscraper Safety Campaign					see "Skyscraper Safety Campaign Meeting"
Regenhard, Sally	Skyscraper Safety Campaign					see "Skyscraper Safety Campaign Meeting"
Reno, Janet	Department of Justice	2004-01-09	2	FO	O	17
Report of California DMV re: Qualid Moncef Benomrane	California Department of Motor Vehicles	2004-05-06	5	1A	R	03
Resheske, Frances A.	Consolidated Edison Company of New York					see Consolidated Edison Company of New York
Review of FBI database [re: Garth and Nancy Nicholson interview]		2007-02-26	5	1A	R	14
Reynolds, Jim	Department of Justice	2004-04-12	4	4	R	17
Richardson, Bill	formerly Department of State	2003-12-15	3	3	R	17
Richmond, Jeffrey	NEADS					See LaMarche, Jeffrey
Ricks, Mark	City of New York					see New York City Meeting
Riffe, Janet	Federal Aviation Administration	2004-02-26	8	7	P	17
Riffe, Janet	Federal Aviation Administration	2003-09-11	2	7	O	17
Ritter, Jim	National Transportation Safety Board					See NTSB Briefing
Rivas, Elizabeth	Federal Bureau of Investigation	2003-09-29	3	1A	R	06
Roberts, Sherry		2004-06-23	1	1A	R	02
Robinson, Michael	Transportation Security Administration	2003-08-13	5; 1	7	R	17
Rocca, Christina	Department of State	2004-01-29	7	3	R	17
Rockefeller, Jay	United States Senate	2003-10-16	2		O	17
Roebuck, Steven	Federal Aviation Administration	2003-09-22	3	8	O	20
Rogers, Sandy	United Airlines					see "Briefing on UAL Systems Operation and Crisis Center"
Rohn, Douglas C.	Department of State	2003-10-20	2	N/A	R	21
	Transportation Security					see "TSA 'Red Team'"

Author	Organization	Date	Page	Section	Code	Page	Notes
Rooney, John	Administration						Briefing, 9/6/2005
Rose, Susan Marie	NEADS	2004-01-23	1	8	O	14	
Rosenberg	Federal Aviation Administration	2003-10-01	3	8	O	20	
Rosenberg, Michael	Santa Monica Police Department	2004-04-19 and 2004-04-20	2	1A	O	17	
Rosenblum, Deborah	Cohen Group						see "Cohen Group"
Rosenzweig, David A.	Verizon	2004-02-25	62	8	O	17	
Ross, Chris	Department of State	2003-10-23	3	3	R	17	
Rost, Sherri O.	Federal Bureau of Investigation	2003-09-30	2	1A	R	06	
Roundtree, Stacie	NEADS						See NEADS Briefing
Roundtree, Stacie	NEADS	2004-01-21	2	8	O	14	
Rowland, Mary M.	representing Benevolence International Foundation	2004-04-02	7	4	R	17	
Roy, Bill	United Airlines						see "Briefing on UAL Systems Operation and Crisis Center"
Roy, Stapleton	Department of State	2003-09-22	8	2	R	17	
Rubock, Daniel B.	Moody's Investor Services						see "Meeting with Moody's Investor Services"
Rudman, Mara	Cohen Group						see "Cohen Group"
Rudman, Warren	President's Foreign Intelligence Advisory Board	2003-11-13	5	2	O	17	
Ruggeri, Ron	Federal Aviation Administration	2003-12-17	6	8	R	05	
Ruiz, Griselda		2004-06-22	1	1A	R	02	
Ruiz, Hector		2004-06-22	1	1A	R	02	
Ruiz, Yajaira		2004-06-22 and 2004-06-24	4	1A	R	02	
Ruppert, Greg	Federal Bureau of Investigation	2003-10-03	5	4	R	17	
Ryan, Mary	Department of State	2003-09-29	6	5	R	17	
Ryan, Mary	Department of State	2003-10-09	5	5	R	17	
Sackett, Kenneth	Department of State	2003-10-15	2	N/A	R	20	
Sagman, Bud		2004-06-23	2	1A	R	02	
Sale, Christina	Immigration and Naturalization Service	2003-10-20	5	5	R	18	
Sanderson, Ian	NEADS	2003-10-29	4	8	O	14	
Saneh, Fouad	Metro Cab	2004-04-21	1	1A	R	02	
Santana, Hector	Transportation Security Administration						see "TSA 'Red Team' Briefing," 10/20/2005
Santana, Hector	Transportation Security Administration						see "TSA 'Red Team' Briefing," 9/3/2004
Sarwari, Arif	Government of Afghanistan	2003-10-24	4	N/A	H	21	
Sasseville, Marc	U.S. Air Force	2004-03-11	4	8	R	01	
Saudi Institute Interview #1	Saudi Institute	2004-04-16	4	1A	H	18	
Saudi Interview #1	Government of Saudi Arabia	2003-10-14	2	N/A	H	20	
Saudi Interview #2	Government of Saudi Arabia	2003-10-14	4	N/A	H	20	
Saudi Interview #3	Government of Saudi Arabia	2003-10-29 and 2003-10-30	12	N/A	H	21	
Saudi Interview #4	Saudi Arabia	2004-02-23 and 2004-02-24	4	1A	R	21	
Saul, Steve	Federal Aviation Administration	2003-12-16	4	8	R	05	
Schifano, Anthony	Federal Aviation Administration	2003-09-24	2	8	O	11	
Schippani, Jon	Federal Aviation Administration	2003-09-22	2	8	O	20	
Schoch, Robert	Immigration and Customs						see "SEVIS"

Schoomaker, Peter	Department of Defense	2004-02-19	8	3	R	18	
Schott, Kevin	Federal Aviation Administration	2003-09-25	2	8	O	11	
Schrotter, Fran	American National Standards Institute						see ANSI
Schulz, Andreas	German Law Firm	2004-02-18	2	1A	R	21	
Schurott, Peter	Federal Aviation Administration	2004-03-03	3	7	R	18	
Schwartz, Alan	PAN AM Commission	2003-07-07	3	7	O	18	
Schwartz, Steve	Department of State	2003-12-30	4	3	R	18	
Scobey, Margaret	Department of State	2003-10-13	3	N/A	R	20	
Scobey, Margaret	Department of State	2003-10-15	2	N/A	R	20	
Scoggins, Collin	Federal Aviation Administration	2003-09-22	3	8	O	20	
Scott, William A.	Continental United States North American Aerospace Defense Command Region (CONR)	2004-02-04	6	8	O	04	
Scowcroft, Brent		2003-09-23	5		O	18	
Secret Service Employee #1	Secret Service/JTTF	2003-07-30	5	6	R	09	
Secret Service Employee #2	Secret Service/JTTF	2003-10-20	4	6	R	08	
Sedney, David	Department of State	2003-10-21	2	N/A	O	20	
Seetin, Robert E.	U.S. Army	2004-03-03	2	8	R	14	
Service of subpoena on NEXTEL Communications		2004-04-12	4	1A	O	14	
Sesay, Hannah S.	American Express						see American Express Briefing
Severance, Chuck	US Airways	2004-04-15	6	7	R	19	
SEVIS (Student Exchange and Visitor Information System)	Department of Homeland Security	2003-08-06	2	5	O	18	
Shaffer	United States Air Force	2003-12-02	7	2	R	18	
Shaffer, Gary	City of New York						see New York City Meeting
Shah, Syed Iftikhar Hussain	Northwest Frontier Province	2003-10-25	3	N/A	R	21	
Shaheen, Mark	Department of State	2003-11-06	7	4	R	18	
Shalev, Eddie Guigui	Congressional Air Charters	2004-04-09	2	1A	R	11	
Shaloff, Stanley	Department of State	2003-08-28	5	3	R	18	
Shays, Chris	U.S. House of Representatives	2004-06-02	1		O	18	
Shea, Robert	Federal Emergency Management Agency						see FEMA Briefs
Shinn, David	Department of State	2003-08-29	4	3	R	18	
Sigler, John	Department of Defense	2003-07-10	4	3	O	18	
Simmons, Wickford	formerly of NASDAQ	2004-01-14	2	8	O	14	
Simons, Thomas	Department of State	2003-12-12	3	3	O	18	
Sison, Michelle	Department of State	2003-12-11	6	3	R	18	
Site visit to FAA to listen to audio	Federal Aviation Administration	2003-06-12	3	8	R	05	
Site visit to Logan Airport		2003-08-15	4	7	R	12	
Site Visit to Portland International Jetport		2003-08-18	3	7	R	16	
Skyscraper Safety Campaign Meeting		2003-09-22	36	9 [NYC]	O	18	
Slocombe, Walter	Department of Defense	2003-12-19	9	3	O	18	
Smith, Daniel	Department of State						see "DOS Consular Affairs/Fraud Programs; Diplomatic Security; OIG briefing"
Smith, Jeff	Arnold & Porter/Kerry Campaign	2004-06-23	2	FO	O	18	

Snell, Terry	Department of State	2003-10-04	4	8	R	18
Sobchack, James R.	Federal Bureau of Investigation	2003-10-16	2	1A	O	10
Sodano, Salvatore F.	American Stock Exchange	2004-01-14	4	8	O	01
Soliday, Ed	United Airlines	2003-11-21	21	7;8	R	19
Speicher, Clark	NEADS	2004-01-22	3	8	O	14
Spence, Tim	Federal Aviation Administration	2003-09-30	3	8	O	05
Stack, Michael	ASIS					see ASIS briefing
Staeben, Derwood	Department of State	2004-05-11	1	5	O	18
Staff Impressions of Kandahar Base, Helicopter tour of UBL Sites	9/11 Commission	2003-10-21	3	N/A	R	20
Staff Visit to Boston Center, New England Region, FAA	Federal Aviation Administration	2003-9-22 to 2003-9-24	6	8	R	20
Star-Fix Operator #1	United Airlines	2003-11-21	3	7	R	01
State Consular Officer #1	Department of State	2003-10-14	3	5	R	19
State Consular Officer #2	Department of State	2003-12-30	6	5	R	18
State Consular Officer #3	Department of State	2004-03-01	10	5	R	12
State Department Employee #1	Department of State	2004-02-20	6	5	R	20
State Department Employee #2	Department of State	2004-03-02	10	5	R	02
State Department Employee #3	Department of State	2003-10-14	3	5	R	13
State Department Employee #4	Department of State	2003-09-24	4	5	R	05
Steinberg, Andrew	Federal Aviation Administration	2003-12-12	4	8	O	18
Steinitz, Mark	Department of State	2003-09-25	11	3	R	18
Stevens, Rich	Federal Aviation Administration	2004-03-01	4	7	O	18
Stiers, [FNU]	United States Air Force					see Ng, [FNU], USAF, 10/14/2003
Strauss, Brandon	Transportation Security Administration					see "TSA 'Red Team' Briefing," 10/20/2006
Strong, Elsa	family member	2004-04-22	1	7	R	05
Strother, Michael	Federal Aviation Administration					see "Norfolk TRACON visit"
Stuart, Mark	NEADS	2003-10-30	5	8	R	14
Studdert, Andy	United Airlines	2003-11-20	6	7	O	19
Submission of calling cards		2004-06-27	3	1A	O	03
Summary of Interviews Conducted in Saudi Arabia	9/11 Commission	2004-02-25	9	1A	R	21
SunTrust Bankers interview	SunTrust Bank	2004-04-01	9	4	O	19
Surveillance footage of interest from Dulles Airport on 9-10 and 9-11		2004-04-06	4	2	R	05
Suter, Stephen E.	Federal Bureau of Investigation	2003-11-07	9	6	R	08
Sylvester, John	Federal Bureau of Investigation	2003-11-18	1	1A	R	09
System Operations Command Center (SOCC)	American Airlines	2003-11-19	5	7; 8	R	01
Systems Operation Center (SOC)	American Airlines	2004-04-26	3	7; 8	O	01
Talbott, Strobe	Department of State	2004-01-15	7	3	R	19
Tariq	Karachi Police Department	2003-10-20	2	N/A	H	21
Tatlock, Anne	Fiduciary Trust					see Briefing by Fiduciary Trust
Tawil, Izzat	Marina Del Ray Hotel	2004-04-21	2	1A	R	02

USCA Case #13-5127		United Airlines Document #1459100		Filed: 10/01/2013		Page 183 of 406	
Taylor, Dennis	United Airlines						see Jordan, Bob
Taylor, Frank	Department of State	2003-12-23	4	4	O	19	
Temple, Caleb	Defense Intelligence Agency	2004-03-04	9	5	H	19	
Texteira, Frank	Federal Bureau of Investigation	2003-11-18	4	1A	R	09	
Thibault, Albert A., Jr.	Department of State	2003-11-05	10	5	R	19	
Thorlin, Scott	Federal Bureau of Investigation	2004-01-05	1	1A	R	08	
Thornton, Charlene	Federal Bureau of Investigation	2003-11-14	10	6	R	08	
Threadgill, Cathy	Park Newport Apartments	2004-06-23	2	1A	R	02	
Thumser, Paul	Federal Aviation Administration	2003-10-01	6	8	O	20	
TIPOFF, SAOs, clearances....briefing	Department of State	2003-07-17	6	5	H	18	
TIPOFF/CLASS briefing		2003-06-16	5	7	H	18	
Tollerson, Ernest	Partnership for New York City						see "Partnership for New York City Meeting"
Tomsen, Peter	Department of State	2003-10-08	6	3	R	19	
Tomsen, Peter	Department of State	2004-07-15	1	3	O	19	
Tour of GIANT KILLER	Department of Defense	2003-10-07	6	8	O	11	
Townsend, Frances Fragos	Department of Justice	2004-02-13	3	6	R	19	
TSA "Red Team" Briefing		2003-10-20	3	7	R	19	
TSA "Red Team" Briefing		2003-09-03	4	7	R	19	
TSA Analyst #1	formerly Federal Aviation Administration	2004-02-13	11	7; 2	H	12	
Tucker, Courtney L.	Transportation Security Administration	2004-06-03	6	7	R	19	
Tucker, David	Department of Defense	2003-09-05	10	7	R	19	
Tueller, Matthew	Department of State	2003-10-15	3	N/A	R	20	
Tuohy, Michael	US Airways	2004-05-27	3	7	O	19	
Turano, Mary Carol	Civil Aviation Security Field Office	2004-03-11	6	7	R	19	
Turley, Frank	Department of State						see "DOS Consular Affairs/Fraud Programs; Diplomatic Security; OIG briefing"
Tyrer, Robert	Cohen Group						see "Cohen Group"
UAL Passenger #1		2003-08	2	7	R	16	
Underwood, James	United States Coast Guard	2003-09-17	6	7	R	19	
United Airlines #1	United Airlines	2003-11-21	2	7; 8	R	19	
Usher, Steve	Continental United States North American Aerospace Defense Command Region (CONR)	2004-02-04	3	8	O	04	
Valencia, Pedro	Sunshine Yellow Cab	2004-04-19	2	1A	R	03	
Varney, Kevin	Business Executives for National Security	2003-09-10	2	4	O	19	
Varri, Marc L.	Federal Bureau of Investigation	2003-10-01	5	6	R	07	
Vatis, Michael	Department of Justice	2004-01-21	3	6	R	08	
Verdery, Stewart	Department of Homeland Security	2003-07-21	4	5	O	04	
Verga, Peter	Department of Defense	n.d.	4	N/A	O	19	
Visit to 119th Fighter Wing	U.S. Air Force	2003-10-07	6	8	R	12	
Visit to Air Force Rescue Coordination Center	U.S. Air Force	2003-10-06	3	8	R	12	
Visit to FAA Air Traffic Control System Command Center (ATCSCC) and Dulles Airport Control Tower	Federal Aviation Administration	2003-07-22	9	7	R	05	
Visit to Langley Air Force Base, Base Operations	U.S. Air Force	2003-10-06	4	8	R	12	

Name	Organization	Date	Page	Section	Code	Page	Notes
Visit to Reagan National Airport Control Tower and Andrews Air Force Base Control	Federal Aviation Administration	2003-07-28	9	8	R	05	
Vito, Salvatore	Fiduciary Trust						see Briefing by Fiduciary Trust
Vollaro, Steve	Federal Aviation Administration	2003-12-16	2	8	O	05	
Von Jeinsen, Ulrich	Gohmann, Wrede, Haas, Kappus & Hartmann	2004-02-19	6	1A	O	21	
Vu, Trung	Federal Bureau of Investigation						see FBI Special Agent #9
Wainwright, Duncan	Federal Bureau of Investigation	2003-08-13	6	6	R	10	
Walker, Edward	Department of State	2004-01-06	2	1;3	R	19	
Walsh, Steven	Federal Aviation Administration	2003-09-30	3	8	O	05	
Waltman, Susan C.	Greater New York Hospital Association	2004-04-15	4	8	O	11	
Wansley, Larry	American Airlines	2004-01-08	6	7	O	01	
Watchorn, Kristin E.	ASIS						see ASIS briefing
Watson, Dale	Federal Bureau of Investigation	2004-06-03	7	6	O	19	
Watson, Shelley	NEADS						See NEADS Briefing
Watson, Shelley	NEADS	2004-01-20	1	8	O	14	
Wayne, E. Anthony	Department of State	2004-01-14	9	4	R	19	
Weed, Sally	Federal Aviation Administration	2003-09-25	3	8	O	11	
Weeks, Bill	Fiduciary Trust						see Briefing by Fiduciary Trust
Weidner, Brian	Federal Bureau of Investigation	2004-01-28	3	1A	R	10	
Weinbaum, Marvin	Department of State	2003-08-12	4	3	R	19	
Wente, Don	Federal Bureau of Investigation	2004-01-06	3	1A	R	08	
Wernica, Kim	Cleveland Air Traffic Control Center	2003-10-02	4	8	O	03	
Werth, John	Cleveland Air Traffic Control Center	2003-10-01	6	8	O	03	
Whereley, David	United States Air Force	2003-08-28	2	N/A	R	19	
White, John J.	Arlington County Fire Department	2003-10-20	4	8	O	19	
White, Russell	Transportation Security Administration	2004-02-25	5	7	R	19	
Whitmore, Vincent	Alexandria Fire Department	2003-11-04	2	8	O	19	
Widawski, Lou	Transportation Security Administration						see "TSA 'Red Team' Briefing," 9/3/2006
Wilcox, Phillip	Department of State	2003-11-17	4	3	O	19	
Wiley, Winston	Central Intelligence Agency	2003-11-25	12	2	R	19	
Willey, George	Federal Aviation Administration	2003-12-16	2	8	O	05	
Williams, Kenneth	Federal Bureau of Investigation	2004-05-11	1	N/A	O	08	
Williams, Kenneth	Federal Bureau of Investigation	2003-10-22; 2004-01-07	17	6; 1A	R	08	
Wilson, Thomas	United States Navy	2003-12-04	8	2	R	19	
Wolbers, Leo	Cleveland Air Traffic Control Center	2003-10-02	4	8	O	03	
Wolosky, Lee	Council on Foreign Relations Task Force on Terrorist Financing	2004-01-09	3	4	R	20	
Wong, Mark	Department of State	2003-12-03	4	3	R	20	
Woodward, Michael	American Airlines	2004-01-25	4	7	O	01	
Woodworth, Brent H.	IBM						see IBM Crisis Response Team
Worcester, Paul	United States Air Force	2003-10-14	18	8	O	16	
Wright, Beverly	formerly of Federal Bureau of	2004-02-17	6	7	R	20	

Wylde, Kathryn	Partnership for New York City						see "Partnership for New York City Meeting"
Wyrsch, Mary Ann	Immigration and Naturalization Service	2003-10-10	14	5	O	20	
Yemen Interview #1	Yemen	2004-02-29	6	1A	R	21	
Yim, Randall	Government Accountability Office	2004-03-04	14	8	O	20	
Yowell, Thomas	Florida Department of Law Enforcement/JTTF	2003-12-04	2	1A	R	08	
Yun, William	Fiduciary Trust						see Briefing by Fiduciary Trust
Zalewski, Peter	Federal Aviation Administration	2003-09-22	2	8	R	20	
Zebley, Aaron	Federal Bureau of Investigation	2004-01-13	3	4	R	08	
Zechter, Lee A.	Federal Bureau of Investigation	2004-01-05	2	1A	O	06	
Ziglar, James	Immigration and Naturalization Service	2003-11-14	24	5	R	20	
Zito, Robert T.	EVP Communications						see New York Stock Exchange Meeting

[Return to 9/11 Commission main page](#)

[Top of Page](#)

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Guidance Defining Exemption Categories for 9/11 Commission Records

- Part 1 - Scope of subpart
- Part 2 - Purpose of subpart
- Part 3 - Personal Privacy
- Part 4 - Law Enforcement Privacy/Law Enforcement Sensitive
- Part 5 - Working-level Employee
- Part 6 - First Responder/Family Privacy
- Part 7 - Confidential Source
- Part 8 - Classified Information
- Part 9 - Closed by Statute
- Part 10 - New York City Agreement
- Part 11 – Agency Internal Matters

Part 1 Scope of subpart.

This guidance applies only to the records of the National Commission on Terrorist Attacks Upon the United States (9/11 Commission) accessioned into the National Archives and Records Administration.

Part 2 Purpose of subpart.

The purpose of this subpart is to define the records exemption categories used during the processing of the Commission's records. NARA is processing the records of the 9/11 Commission under guidelines established by the Commission when the records were archived. As a legislative branch entity, the Commission was not subject to the provisions of the Freedom of Information Act (5 U.S.C. 552). These records retained their status as legislative branch records after they were accessioned into NARA custody. See 36 C.F.R. 1250.6. The nature and currency of the Commission's records require additional exemptions beyond NARA's General Restrictions (36 CFR 1256.10-18); however, several exemptions listed below mirror those General Restrictions.

Part 3 Personal Privacy

a) Records.

Records containing information about a living individual of a private or personal nature that could reasonably be expected to cause a clearly unwarranted invasion of privacy, including but not limited to information about the physical or mental health or the medical or psychiatric care or treatment of the individual, and that (1) contain personal information not known to have been previously made public, and (2) relate to events less than 75 years old. This information includes social security numbers, addresses and telephone numbers of those closely connected with the hijackers and not accused of complicity, and visa and immigration information not compiled for law enforcement purposes.

b) Restrictions.

Such records may be disclosed only to the subject individual or his/her duly authorized representative (the individual requesting access will be required to furnish reasonable and appropriate identification). However, the subject individual or his/her duly authorized

representative will not be granted access to records containing the following categories of information: (1) Investigatory material compiled for law enforcement purposes or if supplied under an expressed promise of confidentiality; (2) Security classified information; (3) Information exempt from disclosure by statute.

Part 4 Law Enforcement Privacy /Law Enforcement Sensitive

a) Records.

Records compiled for law enforcement purposes, such as records of the Federal Bureau of Investigation and records of the Bureau of Immigration and Customs Enforcement and its precursors. This includes records that reveal the name of undercover law enforcement personnel.

b) Restrictions.

Privacy: Such records may be disclosed only (1) if the release of the information would not constitute an unwarranted invasion of personal privacy, (2) if the release of the information would not endanger the safety of law enforcement personnel, (3) if in the judgment of the Archivist of the United States, the passage of time is such that the public interest in disclosure outweighs the continued need for confidentiality.

Sensitive: Such records may be disclosed only (1) if the release of the information does not interfere with enforcement proceedings, and (2) if confidential sources and/or confidential information are not revealed, and (3) confidential investigative techniques are not described, and (4) if the release of the information would not endanger the safety of law enforcement personnel, and (5) if the release of the information would not disclose techniques or procedures that could reasonably be expected to risk circumvention of the law, or (6) if in the judgment of the Archivist of the United States, the passage of time is such that: (i) the safety of persons is not endangered, and (ii) the public interest in disclosure outweighs the continued need for confidentiality.

Part 5 Working-level Employee

a) Records.

Records containing names or personal identifiers of working-level employees of the Department of State, the Bureau of Immigration and Customs Enforcement and its precursors, or private corporations who had direct contact with the hijackers or are working-level federal employees who were on duty on September 11, 2001

b) Restrictions.

The names of these employees or personal identifiers cannot be released unless the subject's contact with the hijackers is publicly known or the fact of the individual's duty status on that day is publicly known.

Part 6 First Responder/Family Privacy

a) Records.

Records that contain information concerning the events in New York City, the Pentagon, and within the hijacked airplanes on September 11, 2001.

b) Restrictions.

The 9-1-1 calls and gruesome details of deaths and injuries, unless otherwise publicly known, are withheld out of deference to the privacy of the first responders and the surviving family members of the victims of the terrorist attacks. Also withheld is information about victims or their families that has not previously been made public.

Part 7 Confidential Source

a) Records.

Records containing names or personal identifiers that would reveal the identity of a confidential source.

b) Restrictions.

Such records could be disclosed if they could not 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 a criminal investigation, or by an agency conducting lawful national security intelligence investigation, information furnished by a confidential source.

Part 8 Classified (National Security) Information

a) Records.

Records containing information regarding national defense or foreign policy classified under Executive Order 12958, as amended, or a previous Executive Order.

b) Restrictions.

Such records may be disclosed only in accordance with the provisions of such Executive order and its implementing directive.

Part 9 Closed by Statute

a) Records.

Records containing information which is specifically exempted from disclosure by statute.

b) Restrictions.

Such records may be disclosed only in accordance with 44 USC 2108.

Part 10 New York City Agreement

a) Records.

Memoranda for the record (MFRs) that describe the interviews with New York City firefighters and policemen whose oral histories were not released by New York City in the lawsuit filed by the *New York Times* (4 NY 3d 477).

b) Restrictions.

The MFRs of firefighters and policemen whose oral histories were not released as a result of the *New York Times* lawsuit are withheld under an agreement between the Commission and the New York City government.

Part 11 Agency Internal Matters

a) Records.

Records that contain sensitive internal agency information the disclosure of which would risk circumvention of legal requirements. i.e., protections to life or safety.

b) Restrictions.

Such records may be disclosed only if they do not compromise critical infrastructure information (as defined in 42 USC 5195c(e) (Supp III 2003)) employed to protect against incapacity of vital systems and assets, the loss of which would have a debilitating impact on security, national economic security, national public health or safety

GUIDELINES FOR APPEALING DENIALS OF WITHHELD RECORDS OF THE 9/11 COMMISSION

Scope of Guidelines

These guidelines establish an administrative appeal procedure for requesters who are denied access to the records of the National Commission on Terrorist Attacks Upon the United States (the 9/11 Commission). As a legislative branch entity, the records of the Commission are not subject to the provisions of the Freedom of Information Act (5 U.S.C. 552), and therefore judicial review is not available.

How do I request access to documents that have been denied in part or in full during the initial review of the records of the Commission?

- Documents that have been denied in full during the processing of the records of the Commission have been replaced by withdrawal notices. An initial request for review of any withdrawn document should include a copy of the withdrawal notice. An initial request for a document released with deletions should include a copy of the partially-released document.

What are my appeal rights under the National Archives and Records Administration's (NARA) Guidelines Defining Exemption Categories for 9/11 Commission Records?

- You may appeal in writing NARA's refusal to release a record, either in whole or in part. The appeal may be sent by regular mail or email.

How do I file an appeal?

- All appeals must be in writing and received by NARA within 35 calendar days of the date of NARA's denial letter. Both the letter and the envelope must be marked with the words "9/11 Commission Records Access Restrictions Appeal." The appeal must include a copy of your initial request and our denial response.
- Your appeal must include an explanation of why we should release the records.

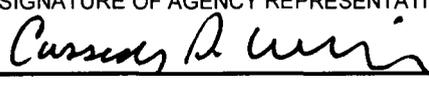
Where do I send my appeal?

- Your appeal should be sent to the Deputy Archivist of the United States (ATTN: 9/11 Commission Records Access Restrictions Appeal Staff), Room 4200, National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740-6001.
- Denials of access to national security information in the custody of NARA are made by designated officials of the originating or responsible agency or by NARA under a written delegation of authority. You must appeal determinations that records remain classified for reasons of national security to the agency with responsibility for protecting and declassifying that

information. NARA will provide you with the necessary appeal information in those cases.

How does NARA handle appeals?

- NARA will attempt to respond to your appeal within 20 working days after its receipt. If we reverse or modify our initial decision, we will inform you in writing and reprocess your request. If we do not change our initial decision, our response to you will explain the reasons for our decision and the exemption categories from the Guidelines Defining Exemptions to 9/11 Commission Records that apply.

REQUEST FOR RECORDS DISPOSITION AUTHORITY		JOB NUMBER N1-148- 11 - 1	
To NATIONAL ARCHIVES & RECORDS ADMINISTRATION 8601 ADELPHI ROAD COLLEGE PARK, MD 20740-6001		Date received 2/8/11	
1 FROM (Agency or establishment) Financial Crisis Inquiry Commission		NOTIFICATION TO AGENCY In accordance with the provisions of 44 U.S.C. 3303a, the disposition request, including amendments, is approved except for items that may be marked "disposition not approved" or "withdrawn" in column 10	
2 MAJOR SUBDIVISION			
3 MINOR SUBDIVISION			
4 NAME OF PERSON WITH WHOM TO CONFER Cassidy Waskowicz	5 TELEPHONE NUMBER 202-292-1350	DATE 13 Apr 11	ARCHIVIST OF THE UNITED STATES 
6 AGENCY CERTIFICATION I hereby certify that I am authorized to act for this agency in matters pertaining to the disposition of its records and that the records proposed for disposal on the attached _____ page(s) are not needed now for the business for this agency or will not be needed after the retention periods specified, and that written concurrence from the General Accounting Office, under the provisions of Title 8 of the GAO Manual for Guidance of Federal Agencies, <input type="checkbox"/> is not required <input type="checkbox"/> is attached, or <input type="checkbox"/> has been requested			
DATE 2/7/2011	SIGNATURE OF AGENCY REPRESENTATIVE 		TITLE Deputy General Counsel
7 ITEM NO	8 DESCRIPTION OF ITEM AND PROPOSED DISPOSITION	9 GRS OR SUPERSEDED JOB CITATION	10 ACTION TAKEN (NARA USE ONLY)
	See attached		

1. Files documenting the Commission's establishment, membership, policy, Organization, deliberations, findings, and recommendations, including such records as

- Original charter, organization charts, directives or memorandums to staff concerning their responsibilities, and other materials that document the organization and functions of the Commission and its components
- Agendas, minutes, testimony, transcripts, and video and audio records of meetings and hearings
- Reports, studies, news releases, and commissioners' speeches
- Correspondence (paper and electronic), subject and other files maintained by key commission staff, such as the executive director and legal counsel documenting the functions of the commission
- Substantive records relating to research studies and other projects
- Correspondence (paper and electronic), briefing books, agendas, appropriations reports and other records relating to substantive interactions with Congress and the Administration
- Documentation of subcommittees, working groups, or other subgroups of advisory committees, that support their reports and recommendations to the full or parent committee This documentation may include, but is not limited to minutes, transcripts, reports, correspondence, briefing materials, and other related records
- Documentation of formally designated subcommittees and working groups This documentation may include, but is not limited to minutes, transcripts, reports, correspondence, briefing materials, and other related records
- Documentation obtained from Federal and private sources
- Final report and proposed standards presented to the President, the Congress, and other Federal and State officials

PERMANENT Transfer to the National Archives on termination of the Commission

2. Web site records

- a Electronic version of web site

PERMANENT Transfer to the National Archives on termination of the Commission

- b Design, management, and technical operation records

PERMANENT Transfer to the National Archives on termination of the Commission

RECOMMENDATION TO THE ARCHIVIST ON RECORDS DISPOSITION REQUEST

Job No N1-148-11-1
Item Count: 3

SUMMARY

The Financial Crisis Inquiry Commission (FCIC) requests disposition authority for their Organization Files

The FCIC was a bipartisan commission created to research, analyze, and report on the causes of the financial crisis originating in 2006. The FCIC had broad subpoena powers and obtained a substantial amount of records from public and private entities, including Wall Street firms and Government agencies. The FCIC also conducted hearings across the country. The final report was issued on January 27, 2011, and the commission sunset on February 13, 2011. These records have high research value and document the actions of Federal officials because of the breadth of records obtained by the FCIC and it's an in depth analysis reported to the Congress, the Administration, and the public.

RECOMMENDATION

- 1 APPROVED FOR DISPOSAL. The records described under all items of the schedule, except those that may be listed in blocks 2, 3, and 4 of this section, are disposable because they do not, or will not after the lapse of the period specified, have sufficient administrative, legal, research or other value to warrant their continued preservation by the Government.
- 2 APPROVED FOR PERMANENT RETENTION. The records described under the following item or items have been appraised by the National Archives and Records Administration (NARA) and are determined to have sufficient historical or other value to warrant their continued preservation by the United States Government. The agency will transfer these records to the National Archives as specified 1, 2a, and 2b.
- 3 DISPOSITION NOT APPROVED. The records described under the following item or items are not approved for disposition.
- 4 WITHDRAWN. The records described under the following item or items have been withdrawn at the request of the agency and/or NARA.

FEDERAL REGISTER NOTICE

- Not required
- Required - Publication Data
Copies Requested 0
Comments Received 0

SIGNATURES	TITLE	SIGNATURE	DATE
Appraisal <i>SA 4/11/11</i> <i>MM 4/11/11</i>	Appraiser	<i>Lauren Crisler</i>	<i>4/10/11</i>
	NWML	<i>Lauren Crisler</i>	<i>4-11-2011</i>
CONCURRENCES	NWM	<i>Julie H...</i>	<i>4-11-2011</i>



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FAQs on the 9/11 Commission Records



When will the records be available?

The records of the National Commission on Terrorist Attacks Upon the United States (9/11 Commission) are housed in the National Archives Building in Washington, D.C. The initial opening will be held on January 14, 2009. Subsequent releases will occur as the remainder of the collection is processed.

Why were the records not open until January 14, 2009?

On [20 August 2004](#), 9/11 Commission Co-Chairs Kane and Hamilton encouraged the Archivist of the United States "...to conduct a systematic review of the records that are not currently available to the public with the goal of releasing to the public as much information as is allowable by law and regulation on January 2, 2009, or as soon thereafter as possible." This request was a direct result of deliberations by the Commissioners at a [21 July 2004 meeting](#). The result was a vote to allow public access to these records, to the fullest extent of the law, beginning January 2, 2009, or as soon thereafter as is possible. NARA was able to process a significant portion of the collection to be made available to the public on Wednesday, January 14.

Are any of these records online?

In addition to the [Commission's web site](#), NARA has posted the released [Memoranda for the Record](#) (MFRs) online. The MFR series contains summaries of the interviews the Commission conducted with federal, State, and local employees, individuals from the private sector, and scholars.

Can I access the records without coming to Washington, DC?

The [MFRs](#) that are processed are also available online. For those researchers who cannot visit the National Archives, we accept reference requests via mail, fax, e-mail, or telephone. Your request should be specific and, ideally, should cite particular folders from the online folder title lists. The National Archives charges a reproduction fee for all copies provided to the public. Details of the NARA fee schedule are [available on our website](#).

Is there a list of all the people the Commission interviewed?

Some of the interviewees hold or formerly held sensitive positions that do not allow their names and/or details of their activities to be released. Consequently, the [list available online](#) with some names protected is the only list available at this time.

Why are the interviews with New York City first responders closed?

To facilitate interviews with New York City first responders, the Commission entered into an agreement with the City to keep the interviews confidential for a period of at least 25 years. The National Archives is honoring that agreement. The MFRs of certain high-ranking New York City officials as well as former mayor Rudolph Giuliani have been reviewed and released.

I'm finding withdrawal notices in the boxes. What are those?

The Commission records that were withdrawn or redacted fall within one or more of the specific exemptions listed in our [review guidelines](#). The majority of the withdrawn items have been

How can I access the withdrawn records?

If the withdrawal notice indicates the record is classified, you may file a mandatory declassification review request (MDR) for that item. Please keep in mind that NARA does not have declassification authority for these records -- the agency whose information is in the document must review it for declassification. Due to the complex coordination review process, declassification review may take several years to complete. For access to information that is not classified, researchers must submit a review request for specific documents. All requests must be submitted to the Center for Legislative Archives.

Can I file a Freedom of Information Act request for these records?

No. The Commission was established in the legislative branch and legislative branch records are not subject to Freedom of Information Act (FOIA) provisions. FOIA only applies to records of the executive branch and [Presidential Records Act](#) records.

How can I appeal a disclosure decision?

NARA has [established guidelines](#)  for appealing disclosure decisions. For access to information that is not classified, submit a review request for specific documents to the Center for Legislative Archives.

Do you have any audiovisual records?

Yes. The Commission compiled approximately 1,700 discrete audiovisual items, primarily audiocassettes of air traffic control recordings. These records have not been processed and must be preserved and screened prior to release. At this time, the records are not in a format that allows them to be readily available to the public. NARA has established a working group to develop a system whereby we can preserve and process these records. The working group will begin its work later in 2009. The video of the Commission's hearings is accessible on the [Commission's website](#).

Where are the Commission's electronic records?

The Commission created more than a terabyte of electronic data, including word processing files and e-mails (both classified and unclassified). While the electronic versions of these records are not yet available, many of the documents were printed by Commission staff and were filed with the textual records. NARA has preserved the electronic records, but has not yet screened them for research. This process is expected to begin in 2009 after development of the infrastructure to process and review these records.

Are other 9/11 Commission records in NARA custody?

Yes. Approximately 150 cubic feet of records are publicly available, which represents 35% of the Commission's archived textual records. Due to the collection's volume and the high percentage of national security classified files, NARA staff were unable to process the entire collection by January 2009. As a result NARA made the decision to focus on the unclassified series of the collection, which contain most of the unique documents created by the Commission that reveal the scope of the investigation and the internal workings of the Commission and its staff.

NARA will continue to process the remaining 420 cubic feet. These files contain primarily copies of the documents produced by federal agencies in response to requests by the Commission, many of which are highly classified. The originals of some of these documents are still in the custody of the creating agencies and in some cases have been reviewed and released by the originating agency under the provisions of the FOIA.

 [Top of Page](#)



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The U.S. National Archives and Records Administration

1-86-NARA-NARA or 1-866-272-6272

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

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

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

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

REQUEST FOR HEARING

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

Dated: December 19, 2012

Respectfully submitted,

/s/ Karen M. Groen
Karen M. Groen
(D.C. Bar No. 501846)

/s/ Daniel Z. Epstein
Daniel Z. Epstein
(D.C. Bar No. 1009132)
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Counsel for Plaintiff

TABLE OF CONTENTS

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

PLAINTIFF’S STATEMENT OF MATERIAL FACTS NOT IN DISPUTE IN SUPPORT OF ITS
CROSS-MOTION FOR SUMMARY JUDGMENT14

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

 SUMMARY OF ARGUMENT 21

 STATEMENT OF FACTS 22

 STANDARD OF REVIEW 27

 ARGUMENT 29

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

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

 B. NARA disposed of the Commission’s records 33

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

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

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

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

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

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

 CONCLUSION 44

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

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

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

SUMMARY OF THE ARGUMENT

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

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

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

STATEMENT OF FACTS

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

STANDARD OF REVIEW

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

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

PLAINTIFF’S STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SUMMARY OF THE ARGUMENT

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

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

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

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

STATEMENT OF FACTS

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

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

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

On February 10, 2011, FCIC Chairman Phil Angelides wrote to the Archivist of the United States David Ferriero stating that the FCIC would soon be terminated and its records would be deposited with the National Archives and Records Administration (“the Archives” or “NARA”). Compl. Ex. 1. The letter requested that the Archives impose a five-year categorical bar on public access to all FCIC records that were not yet publically available. Compl. Ex. 1. It also requested that the Commission’s records would not be subject to the FOIA until February 13, 2016. Compl. Ex. 1. Angelides asked that the Commissioners and certain staff have immediate and continuing access to the records. Compl. Ex. 1.⁶ (“[A]fter February 13, 2011, it is important that the ten Commissioners and the designated members of the Commission staff and advisors have continuing access to the Commission’s records once the records are transferred to NARA.”). Although no provisions of FERA addressed the preservation or dissemination of the Commission’s records, the FCIC gave copies of select records to Stanford Law School to create a website containing information that the Commission had made public during its investigation.⁷ Pl’s. Mat. Facts, Ex. 5.

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

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

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

the use of these records are in conformance with the requirements of 5 U.S.C. 552.” Pl’s. Mat. Facts, Ex. 4; Compl. Ex. 2. In contravention of the Instructions accompanying the SF-258, and presumably violating the pattern and practice of both agencies and NARA⁸, Commission employee Sarah Zuckerman—at the direction of former FCIC Chairman Angelides—drew a line through the language, quoted above, that subjected the records to FOIA. Compl. Ex. 2. Nothing in the Instructions to the SF-258 allow for striking language embedded in the Terms of Agreement.⁹ Mr. Fulgham’s Declaration claims that Ms. Zuckerman’s action in striking language from the Agreement reflected “the parties intent to negate any possibility that the Freedom of Information Act, 5 U.S.C. § 552, would apply to these materials.” Fulgham Decl. at ¶ 33. The central premise of Defendant’s Motion, however mistaken and misguided, that the FCIC records remain legislative records not subject to FOIA, which NARA claims is absolutely clear and cannot be challenged, is belied by the actions of both Ms. Zuckerman and NARA in executing the SF-258. Simply put, if the status of the FCIC records is as crystal clear as NARA contends, there would have been no need for Ms. Zuckerman to strike the 5 U.S.C. § 552 language from the SF-258. These facts are a textbook example of overreach, on the part of both NARA and the FCIC, in attempting to exclude records that are *prima facie* subject to FOIA from disclosure to the citizens of the United States, violating the express will of Congress under both the FERA’s and the FOIA’s bias towards disclosure—and as expressed by the current Executive Branch. Pl’s. Mat. Facts, Ex. 1. Memorandum from Attorney General Eric Holder for Heads of Exec. Dep’ts and Agencies (Mar. 19, 2009) (on file with author) (“Holder Memo”).

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

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

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

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

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

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

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

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

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

STANDARD OF REVIEW

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

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

601-02.¹¹ Therefore, because Congress did not state otherwise when creating the FCIC, section 2108 of the Federal Records Act governs the deposit of the FCIC records. Moreover, section 2108(a) of the Federal Records Act specifically governs the facts of this case when it describes the Archives' authority to grant access to the records generated by a temporary agency that has no successor in function—as was true of the FCIC. 44 U.S.C. § 2108(a). Section 2108(a) gives the Archivist discretion to modify any restrictions placed on access to the records, so long as those restrictions are in the public interest. *Id.*

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

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

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

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

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

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

B. NARA disposed of the Commission's records

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The FCIC records were—prior to transfer by the FCIC—legislative records, not congressional records. The FCIC is not and was not an official congressional committee. The FCIC is not identified within the official committee structure of Congress.¹³ Instead, it was a “temporary, independent investigative body created by law and made up of private citizens.” *The House Explained*, U.S. HOUSE OF REP., <http://www.house.gov/content/learn/> (click commissions) (last visited Dec. 13, 2012). The FCIC was comprised of private citizens; no Member of Congress could serve on the Commission. FERA § 5(b)(2)(B). Unlike official congressional committees, the FCIC was not located on congressional property, but took residence in private office space at 1717 Pennsylvania Avenue, N.W., Suite 800, Washington, D.C. 20006.¹⁴ Furthermore, the FCIC’s documents were subject to transfer under 44 U.S.C. § 2108, and not § 2118 governing the transfer of congressional documents. Compl. Ex. 2. Under this same provision of the Federal Records Act, § 2108, NARA has accepted the records of legislative branch support agencies including the Congressional Budget Office, the Government Printing Office, and the former Office of

¹³ Comprehensive lists of the official committees can be found online. Committees, United States Senate, http://www.senate.gov/pagelayout/committees/d_three_sections_with_teasers/committees_home.htm (last visited Dec. 5, 2012); Committee Information, Office of the Clerk, U.S. House of Representatives, http://clerk.house.gov/committee_info/index.aspx (last visited Dec. 5, 2012).

¹⁴ *See* Letterhead (Oct. 1, 2010), http://fcic-static.law.stanford.edu/cdn_media/fcic-testimony/TBTF/Dick%20Fuld%20Follow%20Up.pdf.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

DATED: December 19, 2012

Respectfully submitted,

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March 19, 2009

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: THE ATTORNEY GENERAL
SUBJECT: The Freedom of Information Act (FOIA)

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

A Presumption of Openness

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

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

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

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

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

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

Page 2

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

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

FOIA Is Everyone's Responsibility

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

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

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

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

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

Page 3

Working Proactively and Promptly

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

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

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

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

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



Media Advisory

For Immediate Release
January 27, 2011

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

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

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

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

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

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

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

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

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

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

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

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

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

###

Work of the Commission

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

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

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

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

For more, visit FCIC.gov

AGREEMENT TO TRANSFER RECORDS TO THE NATIONAL ARCHIVES OF THE UNITED STATES	1. INTERIM CONTROL NO. <i>(NARA Use Only)</i>
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TERMS OF AGREEMENT	
<p>The records described below and on the attached _____ pages are deposited in the National Archives of the United States in accordance with 44 U.S.C. 2107. The transferring agency certifies that any restrictions on the use of these records are in conformance with the requirements of 5 U.S.C. 552.</p> <p>In accordance with 44 U.S.C. 2108, custody of these records becomes the responsibility of the Archivist of the United States at the time of transfer of the records. It is agreed that these records will be administered in accordance with the provisions of 44 U.S.C. Chapter 21, 36 CFR XII, 36 CFR Part 1256 and such other rules and regulations as may be prescribed by the Archivist of the United States (the Archivist). Unless specified and justified below, no restrictions of the use of these records will be imposed</p>	<p>other than the general and specific restrictions on the use of records in the National Archives of the United States that have been published in 36 CFR Part 1256 or in the <i>Guide to the National Archives of the United States</i>. The Archivist may destroy, donate or otherwise dispose of any containers, duplicate copies, unused forms, blank stationery, nonarchival printed or processed material, or other nonrecord material in any manner authorized by law or regulation. Without further consent, the Archivist may destroy deteriorating or damaged documents after they have been copied in a form that retains all of the information in the original document. The Archivist will use the General Records Schedule and any applicable records disposition schedule (SF 115) of the transferring agency to dispose of nonarchival materials contained in this deposit.</p>
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4A. RECORDS SERIES TITLE	
4B. DATE SPAN OF SERIES	<i>(Attach any additional description)</i>
5A. AGENCY OR ESTABLISHMENT	9. PHYSICAL FORMS <input type="checkbox"/> Paper Documents <input type="checkbox"/> Posters <input type="checkbox"/> Paper Publications <input type="checkbox"/> Maps and Charts <input type="checkbox"/> Microfilm / Microfiche <input type="checkbox"/> Arch / Eng Drawings <input type="checkbox"/> Electronic Records <input type="checkbox"/> Motion / Sound / Video <input type="checkbox"/> Photographs <input type="checkbox"/> Other <i>(Specify):</i> _____
5B. AGENCY MAJOR SUBDIVISION	
5C. AGENCY MINOR SUBDIVISION	
5D. UNIT THAT CREATED RECORDS	10. VOLUME: _____ CONTAINERS: _____ Cu. Mtr. (Cu. Ft.) Number Type
5E. AGENCY PERSON WITH WHOM TO CONFER ABOUT THE RECORDS Name: _____ Telephone Number: () _____	11. DATE RECORDS ELIGIBLE FOR TRANSFER TO THE ARCHIVES
6. DISPOSITION AUTHORITY	12. ARE RECORDS FULLY AVAILABLE FOR PUBLIC USE? <input type="checkbox"/> YES <input type="checkbox"/> NO <i>(If no, attach limits on use and justification.)</i>
7. IS SECURITY CLASSIFIED INFORMATION PRESENT? <input type="checkbox"/> NO <input type="checkbox"/> YES LEVEL: <input type="checkbox"/> Confidential <input type="checkbox"/> Secret <input type="checkbox"/> Top Secret SPECIAL MARKINGS: <input type="checkbox"/> RD/FRD <input type="checkbox"/> SCI <input type="checkbox"/> NATO <input type="checkbox"/> Other _____ INFORMATION STATUS: <input type="checkbox"/> Segregated <input type="checkbox"/> Declassified	13. ARE RECORDS SUBJECT TO THE PRIVACY ACT? <input type="checkbox"/> YES <input type="checkbox"/> NO <i>(If yes, cite Agency System Number and Federal Register volume and page number of most recent notice and attach a copy of this notice.)</i>
8. CURRENT LOCATION OF RECORDS ____ Agency (Complete 8A only) ____ Federal Records Center (Complete 8B only)	14. ATTACHMENTS <input type="checkbox"/> Agency Manual Excerpt <input type="checkbox"/> Listing of Records Transferred <input type="checkbox"/> Additional Description <input type="checkbox"/> NA Form 14097 or Equivalent <input type="checkbox"/> Privacy Act Notice <input type="checkbox"/> Microfilm Inspection Report <input type="checkbox"/> Other <i>(specify):</i> _____ <input type="checkbox"/> SF(s) 135
8A. ADDRESS _____ _____	
8B. FRC ACCESSION NUMBER	CONTAINER NUMBER(S) FRC LOCATION

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

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

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

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

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

* * *

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

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

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

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

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

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

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

Hon. Bill Thomas
Vice Chairman
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Brooksley Born
Commissioner
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Douglas Holtz-Eakin
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Heather H. Murren, CFA
Commissioner
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John W. Thompson
Commissioner
(/about/biographies/john-

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

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

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

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

Staff (/about/staff)

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

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

Congress of the United States
Washington, DC 20515

February 18, 2011

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

Dear Mr. Ferriero:

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

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

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

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

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

Sincerely,



Darrell Issa
Chairman
Committee on Oversight
and Government Reform



Spencer Bachus
Chairman
Committee on Financial Services



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



Randy Neugebauer
Chairman
Subcommittee on Oversight and
Investigations

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



AN EXAMINATION OF ATTACKS AGAINST THE FINANCIAL CRISIS INQUIRY COMMISSION

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

Prepared for Ranking Member Elijah E. Cummings

July 13, 2011

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

TABLE OF CONTENTS

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

EXECUTIVE SUMMARY

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

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

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

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

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

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

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

Work Guided by Politics Rather Than Fact-Finding

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

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

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

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

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

Campaign to Blame Economic Crisis on Government Housing Policy

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

BACKGROUND

The Financial Crisis Inquiry Commission was established by the Fraud Enforcement and Recovery Act of 2009, which was passed by Congress and signed by the President in May 2009.¹ The Commission was created in the wake of the most severe financial crisis in the United States since the Great Depression to “examine the causes, domestic and global, of the current financial and economic crisis in the United States.”²

The Act authorized the appropriation of “such sums as are necessary.”³ The Commission received an initial appropriation of \$8 million from the Supplemental Appropriations Act of 2009 (enacted June 24, 2009).⁴ The Commission was subsequently appropriated an additional \$1.8 million by the Supplemental Appropriations Act of 2010, which was enacted on July 29, 2010.⁵

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

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

¹ P.L. 111-21.

² *Id.*

³ *Id.*

⁴ P.L. 111-32.

⁵ P.L. 111-212.

⁶ P.L. 111-21.

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

⁸ *Id.*

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

The Commission issued its final report on January 27, 2011.¹⁰ The report concluded that “the crisis was avoidable” and was caused by “[w]idespread failures in financial regulation,” “[d]ramatic breakdowns in corporate governance,” and “[a]n explosive mix of excessive borrowing and risk by households and Wall Street,” among other factors.¹¹ The Commission also published on its website “nearly 2,000 documents and more than 300 witness interviews in audio, transcript or summary form” on which its report was based.¹²

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

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

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

¹¹ *Id.*

¹² Financial Crisis Inquiry Commission, *Financial Crisis Inquiry Commission Releases Additional Material and Concludes Work* (Feb. 10, 2011) (online at http://fcic-static.law.stanford.edu/cdn_media/fcic-news/Press_Release_2.10.11.pdf).

¹³ Financial Crisis Inquiry Commission, *Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States* (online at http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_commissioner_votes.pdf).

¹⁴ Financial Crisis Inquiry Commission, *Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States – Dissenting Statement of Commissioner Keith Hennessey, Commissioner Douglas Holtz-Eakin, and Vice Chairman Bill Thomas* (Jan. 2011) (online at http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_hennessey_holtz-eakin_thomas_dissent.pdf).

¹⁵ Financial Crisis Inquiry Commission, *Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States – Dissenting Statement of Peter J. Wallison* (Jan. 2011) (online at http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_wallison_dissent.pdf).

¹⁶ *Id.*

I. WORK GUIDED BY POLITICS RATHER THAN FACT-FINDING

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

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

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

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

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

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

¹⁷ P.L. 111-203.

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

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

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

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

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

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

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

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

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

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

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

Although the Commission was scheduled to issue its report on January 27, 2011, Chairman Issa sent a letter to Chairman Angelides two days earlier, on January 25, 2011, to “renew the request for documents in the original letter.” He directed the production of all documents in less than a week, by January 31, 2011.²⁷

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

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

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

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

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

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

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

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

II. CAMPAIGN TO BLAME ECONOMIC CRISIS ON GOVERNMENT HOUSING POLICY

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

Peter Wallison joined AEI in 1999 and became the Arthur F. Burns Fellow in Financial Policy Studies in 2007.³¹ In his previous positions as White House Counsel and General Counsel at the Treasury Department under President Reagan, "he had a significant role in the development of the Reagan administration's proposals for the deregulation of the financial

²⁸ Financial Crisis Inquiry Commission, *Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States – Dissenting Statement of Commissioner Peter Wallison* (Jan. 2011) (online at http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_wallison_dissent.pdf).

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

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

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

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

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

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

A. Wallison Leaked Confidential Information

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

³² American Enterprise Institute, *Biography of Peter J. Wallison* (accessed July 8, 2011) (online at www.aei.org/scholar/58).

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

³⁴ American Enterprise Institute, *Biography of Edward Pinto* (accessed July 8, 2011) (online at www.aei.org/scholar/100080).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁴⁴ *Id.*

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

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

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

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

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

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

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

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

In response, Mr. Brill wrote back:

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

The Vice Chairman’s special assistant responded:

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

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

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

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

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

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

C. Wallison Inaccurately Claimed Commission Ignored AEI Position

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

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

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

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

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

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

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

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

Internal Commission documents obtained by the Committee contradict this claim. Commission staff conducted a recorded interview of Mr. Pinto on July 19, 2010.⁵⁴ On August 9, 2010, the Commission's Executive Director, Wendy Edelberg, sent an e-mail to all Commissioners regarding Mr. Pinto's work. In addition to referencing previous materials that had been circulated to Commissioners, Ms. Edelberg attached a new memo prepared by Commission staff analyzing Mr. Pinto's work. She wrote:

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

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

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

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

⁵³ Financial Crisis Inquiry Commission, *Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States – Dissenting Statement of Commissioner Peter J. Wallison* (Jan. 2011) (online at http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_wallison_dissent.pdf).

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

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

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

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

D. All Other Republican Commissioners Rejected AEI Position

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

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

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

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

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

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

⁵⁶ Memorandum, Commission Staff (Jan. 23, 2011).

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

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

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

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

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

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

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

Commissioner Keith Hennessey, Commissioner Douglas Holtz-Eakin, and Vice Chairman Bill Thomas (Jan. 2011) (online at http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_hennessey_holtz-eakin_thomas_dissent.pdf).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Financial Crisis Inquiry Commission, *Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States – Dissenting Statement of Commissioner Peter J. Wallison* (Jan. 2011) (online at http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_wallison_dissent.pdf).

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

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

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

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

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

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

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

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

⁶³ Financial Crisis Inquiry Commission, *Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States – Dissenting Statement of Commissioner Keith Hennessey, Commissioner Douglas Holtz-Eakin, and Vice Chairman Bill Thomas* (Jan. 2011) (online at http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_hennessey_holtz-eakin_thomas_dissent.pdf).

⁶⁴ *Id.*

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

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

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

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

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

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

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

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

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

⁶⁶ Matrix Global Advisors, *Our Clients* (accessed July 8, 2010) (online at www.matrixglobaladvisors.com/our-clients/).

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

⁶⁸ *Id.*

The firm's website also states:

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

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

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

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

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

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

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

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

⁶⁹ Buchanan, Ingersoll, and Rooney, *Federal Government Relations* (accessed July 8, 2011) (online at www.bipc.com/federalgovernmentrelations/) (emphasis in original).

⁷⁰ Financial Crisis Inquiry Commission, Ethics Guidelines for Staff (online at fcic.law.stanford.edu/about/policies/staff-ethics)

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

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

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

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

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

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

In response, Mr. Brill wrote:

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

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

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

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

⁷⁵ Financial Crisis Inquiry Commission, *Media Advisory: Financial Crisis Inquiry Commission Announces Next Public Hearing* (Mar. 11, 2010) (online at fcic-static.law.stanford.edu/cdn_media/fcic-news/2010-0311-Advisory.pdf).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. UNSUBSTANTIATED ALLEGATIONS BY CHAIRMAN ISSA

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

A. Financial Mismanagement

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

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

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

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

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

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

⁸² P.L. 111-21.

Commission's operations.⁸³ The Commission received an initial appropriation of \$8 million in the Supplemental Appropriations Act of 2009 enacted June 24, 2009.⁸⁴

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

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

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

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

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

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

⁸³ *Id.*

⁸⁴ P.L. 111-32.

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

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

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

In response, Vice Chairman Thomas replied, "It is ok by me."⁸⁸

The final increase to the Commission's budget was less than the estimate in March. On July 29, 2010, Congress appropriated an additional \$1.8 million in the Supplemental Appropriations Act of 2010.⁸⁹ There is no indication that the request for additional funds was a result of mismanagement, as Chairman Issa alleged.

B. Conflicts of Interest and Partisan Staff

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

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

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

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

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

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

⁸⁹ P.L. 111-212.

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

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

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

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

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

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

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

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

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

⁹² Financial Crisis Inquiry Commission, Rules of Procedure (Sept. 16, 2009).

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

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

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

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

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

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

C. Decision to Delay Report

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

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

Chairman Issa's letter failed to note that short delays of this kind are typical and have occurred numerous times in the past on similar commissions, including those led by both Republicans and Democrats. For example, in 1999, then-Rep. Bill Thomas co-chaired the National Bipartisan Commission on the Future of Medicare. Although the Commission's report was due on March 1, 1999, it was not submitted until March 16, 1999.⁹⁹

Other examples include the following:

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

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

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

- A report by the Commission on Wartime Contracting in Iraq and Afghanistan was due on March 1, 2009, but was not submitted until June 10, 2009.¹⁰⁰
- A report by the Congressional Commission on the Strategic Posture of the United States was due on December 1, 2008, but was not submitted until May 6, 2009.¹⁰¹
- A report by the Commission on the Prevention of Weapons of Mass Destruction Proliferation and Terrorism was due on November 12, 2008, but was not submitted until December 3, 2008.¹⁰²
- A report by the Commission on Military Training and Gender-Related Issues was due on September 16, 1998, but was not submitted until July 30, 1999.¹⁰³
- A report by the Commission on Affordable Housing and Health Facility Needs for Seniors in the 21st Century was due on December 31, 2001, but was not submitted until June 30, 2002.¹⁰⁴
- A report by the Commission to Assess the Organization of the Federal Government to Combat the Proliferation of Weapons of Mass Destruction was due on April 11, 1998, but was not submitted until July 14, 1999.¹⁰⁵

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

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

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

¹⁰³ P.L. 105-85. *See* Congressional Commission on Military Training and Gender-Related Issues, *Final Report Findings and Recommendations* (July 30, 1999) (online at www.dtic.mil/dtfs/doc_research/p18_16v1.pdf).

¹⁰⁴ P.L. 106-74. *See* Commission on Affordable Housing and Health, *A Quiet Crisis in America* (June 30, 2001) (online at govinfo.library.unt.edu/seniorscommission/pages/final_report/finalreport.pdf).

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

D. Disclosure of Confidential Information

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

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

Chairmen Issa and McHenry requested a "summary of the OCC's concerns related to the release of confidential OCC information by the FCIC" and a "description of any challenges the OCC has encountered in performing its regulatory responsibilities as a result."¹⁰⁷

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

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

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

¹⁰⁷ *Id.*

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

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

Commission Approval of Review Process

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

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

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

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

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

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

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

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

¹¹² *Id.*

¹¹³ *Id.*

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

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

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

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

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

¹¹⁴ *Id.*

¹¹⁵ *Id.*

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

APPROVED: 9-0 (Commissioner Holtz-Eakin was absent.)¹¹⁶

Commission Approval of Disclosure Process

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

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

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

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

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

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

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

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

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

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

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

Information Disclosed Citigroup's Deficiencies

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

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

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

¹²³ Office of the Comptroller of the Currency, Supervisory Letter 2008-5 Issued to Citigroup Inc. (Feb. 14, 2008) (online at http://fcic-static.law.stanford.edu/cdn_media/fcic-docs/2008-02-14_OCC_Letter_from_John_C_Lyons_to_Vikram_Pandit_Serious_Problems_at_Citibank.pdf).

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

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

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

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

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

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

¹²⁴ *Id.*

¹²⁵ Letter from John J. Ruocco, Assistant Vice President, Federal Reserve Bank of New York, to Board of Directors (c/o Vikram Pandit, CEO), Citigroup Inc. (Apr. 15, 2008) (online at http://fcic-static.law.stanford.edu/cdn_media/fcic-docs/2008-04-15_FRBNY_Letter_from_John_J_Ruocco_from_Board_of_Directors_Re_annual_report_for_Citigroup_Inc_as_of_December_31_2007.pdf).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

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

¹³⁰ *Id.*

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

¹³¹ Financial Crisis Inquiry Commission, *Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States – Dissenting Statement of Commissioner Keith Hennessey, Commissioner Douglas Holtz-Eakin, and Vice Chairman Bill Thomas* (Jan. 2011) (online at http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_hennessey_holtz-eakin_thomas_dissent.pdf).

¹³² *Id.*

¹³³ *Id.*

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

March 13, 2012

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

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

Dear Mr. Ferriero:

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

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

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

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

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

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

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

Sincerely,

Peter J. Wallison
Commissioner
Financial Crisis Inquiry Commission

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

April 5, 2012

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

RE: Phone Conversation on 3/29

Dear Gary:

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

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

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

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

Sincerely,

PETER WALLISON
FORMER COMMISSIONER
FINANCIAL CRISIS INQUIRY COMMISSION

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

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

DECLARATION OF DANIEL Z. EPSTEIN

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

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

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

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

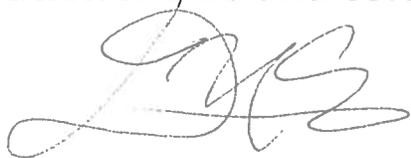
6. The House Oversight Committee requested FCIC records, including e-mails, from FCIC in late 2010 and early 2011.
7. NARA produced all of the records and materials requested by the House Oversight Committee in an electronic format on electronic disks.
8. NARA's production of FCIC records and materials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

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

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

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

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



DANIEL Z. EPSTEIN

Executed this 18 day of December, 2012.

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

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

DECLARATION OF PETER J. WALLISON

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

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

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

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

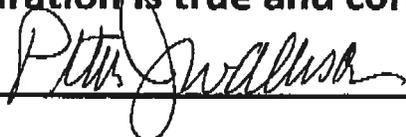
7. The personal attacks referenced in ¶ 6 were inaccurate and taken out of the context in which they were embedded, and specifically involved use of FCIC materials that NARA formatted and turned over to the House Oversight Committee.
8. My purpose in seeking access to the Commission records, with counsel,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

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

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

- the limited purpose of responding to queries or preparing for Congressional testimony.
14. Mr. Stern's April 18, 2012 letter, referenced in ¶ 13, did not correct or dispute my assertion, in my March 13, 2012 letter, that NARA had provided the FCIC documents to the House Oversight Committee, nor did Mr. Stern dispute that NARA refused to allow counsel to accompany me while I accessed Commission records.
15. On December 4, 2012, I was permitted by NARA to view the FCIC records at NARA's facility in Washington, DC. NARA's General Counsel, Gary Stern, placed the following restrictions on my viewing of the FCIC records: (1) I could not make copies of the documents; (2) I could not print the documents. The records I reviewed appeared to be exact copies of FCIC documents.
16. In all of NARA's communications with me regarding access to FCIC documents and materials, NARA never said that there was an official or statutory policy concerning a former commissioner's right to engage counsel for assistance in the review of records.

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



PETER J. WALLISON

Executed this 18th day of December, 2012.

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

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

PLAINTIFF’S MOTION TO STRIKE THE DECLARATIONS OF ROBERT MATTHEW FULGHAM, JR. AND THOMAS E. MILLS OR IN THE ALTERNATIVE FOR LEAVE OF COURT TO TAKE LIMITED DISCOVERY

Plaintiff, Cause of Action, Inc. (“CoA” or “Plaintiff”), pursuant to Local Rule 7 and Federal Rule of Civil Procedure 56, hereby respectfully moves this Honorable Court to Strike the Declarations of Defendant National Archives and Records Administration’s (“NARA” or “Defendant”) employees, Thomas E. Mills (“Mills Decl.”) and Robert Matthew Fulgham, Jr. (“Fulgham Decl.”), or in the alternative to take limited discovery in the form of a deposition of Mr. Fulgham which would be restricted to the four corners of his Declaration. Mr. Mills and Mr. Fulgham executed Declarations on behalf of Defendant in the above-referenced matter, in furtherance of Defendant’s Motion to Dismiss or in the Alternative for Summary Judgment (“Defs.’ Motion”). Both the Mills Decl. and the Fulgham Decl. contain inadmissible matter that is irrelevant, immaterial, without foundation, not based on personal knowledge, and conclusory both factually and legally.

Pursuant to Local Rule 7(m), the undersigned counsel contacted counsel for Defendant, who opposed this motion. A Memorandum of Points and Authorities in Support Hereof, and a proposed Order, are attached.

REQUEST FOR HEARING

Plaintiff, Cause of Action, hereby respectfully requests, pursuant to Local Rule 7(f), a hearing on its Motion to Strike the Declarations of Thomas E. Mills and Robert Matthew Fulgham, Jr., or in the alternative to take Limited Discovery.

Dated: December 20, 2012

Respectfully submitted,

/s/ Karen M. Groen
Karen M. Groen
(D.C. Bar No. 501846)

/s/ Daniel Z. Epstein
Daniel Z. Epstein
(D.C. Bar No. 1009132)
Cause of Action
1919 Pennsylvania Ave, NW, Suite 650
Washington, D.C. 20006
Telephone: (202) 499-4232
daniel.epstein@causeofaction.org
karen.groen.olea@causeofaction.org

Counsel for Plaintiff

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

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

**PLAINTIFF’S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS
MOTION TO STRIKE THE DECLARATIONS OF THOMAS E. MILLS AND ROBERT
MATTHEW FULGHAM, JR., OR IN THE ALTERNATIVE TO TAKE LIMITED
DISCOVERY**

Plaintiff, Cause of Action, Inc., hereby files this Memorandum of Points and Authorities in Support of its Motion to Strike the Declarations of Thomas E. Mills (“Mr. Mills”) and Robert Matthew Fulgham, Jr. (“Mr. Fulgham”), or in the Alternative to Take Limited Discovery, stating as follows:

I. **STANDARD OF REVIEW**

Fed.R.Civ.P. 56(c) governs declarations submitted in support of motions for summary judgment. Simply put, such declarations “must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.” Fed.R.Civ.P. 56(c)(4); *see Hall v. CIA*, 538 F.Supp.2d 64, 66 (D.D.C. 2008) (discussing former Rule 56(e)).

II. RELEVANCE AND MATERIALITY

It is well-settled that “[i]n considering a motion for summary judgment on a FOIA claim, a court may rely upon an agency’s affidavits so long as they ‘contain sufficient detail’ and ‘are not controverted by contrary evidence.’” *Walsh v. FBI*, No. 11-2214, 2012 U.S. Dist. LEXIS 166239, at *6 (D.D.C. Nov. 21, 2012) (citations omitted). “Agency affidavits are afforded a ‘presumption of good faith’ and can be rebutted only with evidence that the agency did not act in good faith.” *Id.* (citing *Defenders of Wildlife v. Dep’t of the Interior*, 314 F.Supp.2d 1, 8 (D.D.C. 2004)).

Rule 401 of the Federal Rules of Evidence (“FRE”) states that evidence is relevant if “(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.” Under FRE 402, only relevant evidence is admissible.

Accordingly, Mr. Fulgham’s recitation of the nooks and crannies, as well as the definitional and administrative process, regarding NARA’s handling of congressional and legislative records is wholly irrelevant and immaterial to the central issue in this case: NARA’s possession and control of the Financial Crisis Inquiry Commission’s (“FCIC”) records at the time of Plaintiff’s Freedom of Information Act (“FOIA”) request on October 3, 2011, such that the FCIC records were agency records subject to the FOIA. *See* Fulgham Decl. at ¶¶ 7-29. This is so because NARA’s contention, without legal basis and belied by the actions of NARA in the handling of the FCIC records after it took possession of same, that the records maintained their legislative character is erroneous under the case law in the District of Columbia Circuit, and in this Court, as to whether records are “agency records” for purposes of the FOIA. *See* Plaintiff’s Memorandum of Points and Authorities in Support of its Opposition to Defendant’s Motion to Dismiss or in the Alternative for Summary Judgment; Plaintiff’s Memorandum of Points and Authorities in Support of Plaintiff’s Cross-Motion for Summary Judgment.

Mr. Mills' Declaration¹ is similarly defective in that a recitation of the background of the National Archives, Presidential records and other materials, and legislative records is completely irrelevant because NARA's possession of and control of the FCIC records, at the time of Plaintiff's FOIA request on October 3, 2011, made those records agency records and subject to FOIA. Mills Decl. ¶¶ 1-23, 25-33, 35.

III. PERSONAL KNOWLEDGE

The Fulgham Declaration contains many statements that are not based upon personal knowledge. *See* § IV., *infra*. Of particular concern are ¶¶ 33-34. Mr. Fulgham does not, and cannot, express any opinion as to the "parties' intent" with specific regard to the language struck from the SF 258 by Ms. Sarah Zuckerman. Fulgham Decl. at ¶ 33; § IV., ¶ 2.

More alarmingly, Mr. Fulgham states as follows in paragraph 34: "**It is clear to me**—based on my personal involvement in the process, Chairman Angelides' letters, and the subsequent signing of the SF-258 between NARA and FCIC—that the FCIC **acted in signing the transfer documentation with the clear intent and desire to put controls on the future access to, and use and disclosure of, FCIC records.**" Fulgham Decl. ¶ 34 (emphasis supplied). Mr. Fulgham cannot possibly know the "clear intent and desire" of the FCIC.

IV. NO FOUNDATION FOR DECLARANT'S CONCLUSORY STATEMENTS

The Fulgham Declaration contains a number of conclusory statements that have no foundation and, therefore, are inadmissible. *See Lujan v. Nat'l. Wildlife Fed'n*, 497 U.S. 871, 888 (1990) ("The object of [Rule 56(e)] is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit.") (citations omitted); *Gov't of the Republic of China v. Compass Communications Corp.*, 473 F.Supp. 1306, 1308 (D.D.C. 1979) (declarations containing "hearsay and generalized, conclusory and unsubstantiated statements" are insufficient

¹ Knowledge based "on information and belief" is improper for a Rule 56(c)(4) declaration. *See Automatic Radio Mfg. Co. v. Hazeltine Research*, 339 U.S. 827, 831 (1950); *Hicks v. Baines*, 593 F.3d 159, 167 (2d Cir. 2010); Mills Decl. at ¶ 2.

and inadmissible, and “will not be considered by the court...” (citing *Citizens Envtl. Council v. Volpe*, 484 F.2d 870 (10th Cir. 1973), *cert. denied*, 416 U.S. 936 (1973)).

For example, Mr. Fulgham states that “[t]he SF 258 was also specifically hand-annotated (Terms of Agreement section at top) **to reflect the parties’ intent to negate any possibility that the [FOIA] would apply to these materials.**” Fulgham Decl. ¶ 33 (emphasis added). The Declaration makes no mention of the individual who signed the SF-258 on behalf of the FCIC, nor does it state whether either party had the authority to so alter the document, which Mr. Fulgham states is “a legal document.” Fulgham Decl. ¶ 33. There is no foundation for either statement. The Declaration is stating a legal conclusion for which Mr. Fulgham has neither the competency nor the personal knowledge because he is not in a position to speak of or testify to the “intent” of FCIC in altering the SF-258. **Moreover, if the argument advanced by the Defendant in this case—that the FCIC records are legislative and not subject to the FOIA—then why was it necessary for Ms. Zuckerman to alter the SF-258?** Based on the assertions of Mr. Fulgham, “the parties” should have the knowledge, and the competency, to realize that such an alternation was not necessary. Perhaps they do not.

Another conclusory statement is found at paragraph 35 of the Fulgham Declaration regarding the purported five-year restriction imposed on NARA by the FCIC. “[O]ne of the reasons the FCIC imposed a five-year restriction on public access to the records was to give the Center some advance time to begin processing and organizing the FCIC records.”² Mr. Fulgham provides no factual basis for this assertion and provides no explanation of how he might possibly know this. Moreover, the factual foundation for this statement appears nowhere in either the SF-258 or the Angelides letter. Compl. Exs. 1 and 2.

² Defendant’s attempt to compare the FCIC records with the five-year period under the Presidential Records Act, 44 U.S.C. § 2204, is completely incongruous.

We find another blatantly obvious legal conclusion at paragraph 36 of the Fulgham Declaration: “This administrative scheme for FCIC records is exclusive, as the FCIC records are not subject to FOIA.” Mr. Fulgham backstops a legal conclusion—the legal status of the FCIC records when transferred into the custody and control of NARA—without any foundational factual basis in the Record. Stating that “the FCIC records are not subject to FOIA” is a legal conclusion—in fact, it is the question of law presented to this Court—and should be stricken from the Declaration by this Court. Mr. Fulgham goes on to speculate as to the potential “harms” that may be caused by granting CoA’s FOIA request: Fulgham Decl. at ¶ 41. “. . . Second, applying FOIA may also change the manner in which legislative commissions perform their duties, causing less documentation created as well as transferred to NARA for the purpose of preserving a historical record .” Fulgham Decl. ¶ 36 (emphasis supplied). Mr. Fulgham’s fears for the future of legislative commissions and the historical record are wholly speculative, as he himself admits in his Declaration by using speculative language and phraseology, as set forth *infra*.

The Fulgham Declaration is chock full of conclusory statements: “may also,” “might be,” and “could be.” “Second, applying FOIA to the FCIC records **may result** in the improper release of sensitive information.” Fulgham Decl. ¶ 40 (emphasis added). “My experience in dealing with legislative commissions generally is that they **might be** less likely to document their activities if legislative staff operated under the belief that records transferred to NARA would be immediately subject to public scrutiny.” Fulgham Decl. ¶ 41 (emphasis added). The Declarant goes on in the rest of ¶ 41 to state what “**could be**.” That is, what “could be” as between agencies and private parties that interact with legislative commissions as well as future commissions. Mr. Fulgham even goes so far as to speculate as to the “chilling to future commissions” if Plaintiff prevails here. Of course, it is only what “**could be**.” These are not admissible facts. These inadmissible conclusory statements comprise wholesale speculation, for which Mr. Fulgham provides neither competence nor foundation.

The Mills Declaration contains a conclusion of law similar to the legal conclusion in paragraph 36 of the Fulgham Declaration: “NARA has treated these records as legislative records and has controlled access as specified in the letter from the agency head.” Mills Decl. at ¶ 24. This is the legal issue to be decided by this Court, namely, whether the FCIC records were legislative or agency records at the time of CoA’s FOIA request on October 3, 2011. Moreover, Mr. Mills’ statement creates a factual dispute, namely, whether NARA’s treatment of the FCIC records after transfer—by virtue of control and possession—rendered those records agency records subject to FOIA.

Mr. Mills creates another factual dispute in ¶ 24. Mr. Mills states that NARA has “controlled access as specified in the letter from the agency head.” However, he does not address the decisions of NARA to make FCIC records available to the House Oversight and Financial Services Committees and to former Commissioner Peter J. Wallison. First, the “letter from the agency head” did not proscribe disclosure to the Committees. Second, the “letter from the agency head” requested that each Commissioner have access to the records; it did not, however, proscribe any restrictions on their access. *See* Compl. Ex. 1; Declaration of Daniel Z. Epstein, Exhibit 10 to Plaintiff’s Statement of Material Facts Not in Dispute at ¶¶ 3-11; Declaration of Peter J. Wallison, Exhibit 11 to Plaintiff’s Statement of Material Facts Not in Dispute at ¶¶ 10-16. The wish is the father of the thought in this regard.

Mr. Mills again makes a conclusory statement regarding the FCIC Chairman:³ “The [FCIC] Chairman, serving as head of the Federal agency under the Federal Records Act, wrote to the Archivist specifying the restrictions **he believed to be necessary or desirable in the public interest.** These restrictions were accepted by NARA in the SF 258.” Mills Decl. at ¶ 34 (emphasis

³ Mr. Mills and Mr. Fulgham appear to possess this same clairvoyance when it comes to the intent of the FCIC when transferring its records to NARA. Mr. Angelides’ intent, however, is not Congressional intent and is not the controlling factor here. *See* Plaintiff’s Memorandum of Points and Authorities in Support of its Cross-Motion for Summary Judgment at 29-31.

added). Mr. Mills has no way of knowing with certitude what the FCIC Chairman intended, nor what he believed to be “desirable in the public interest.” This is at once a legal conclusion and a statement made without personal knowledge. Therefore it is inadmissible.

V. **ALTERNATIVE MOTION FOR LIMITED DISCOVERY**

Plaintiff also moves the Court, in the alternative, for limited discovery in the form of a deposition of Robert Matthew Fulgham, Jr., restricted to an examination of the four corners of his Declaration. This is necessary because of the many evidentiary irregularities present in the Declaration on its face. *See* §§ I. through IV., *supra*. Moreover, there is no other method by which Plaintiff may ascertain the foundation and credibility of Mr. Fulgham’s statements.

“Depositions are the most efficient means of discovery for the plaintiffs in the context of the instant case.” *American Broadcasting Cos., Inc. v. U.S. Info. Agency*, 599 F.Supp. 765, 769 (D.D.C. 1984) (discussion of deposition in the Rule 56(d) context). ““Where an agency head possesses particular information necessary to the development or maintenance of the party’s case, which cannot be reasonably obtained by another discovery mechanism; the deposition should be allowed to proceed.’ *See Sykes v. Brown*, 90 F.R.D. 77, 78 (E.D.Pa. 1981).” *Id.*

Accordingly, Plaintiff requests leave of Court to take a limited deposition of Mr. Fulgham specifically restricted to the four corners of his Declaration.

Dated: December 20, 2012

Respectfully submitted,

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

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

**DEFENDANT’S OPPOSITION TO PLAINTIFF’S MOTION TO STRIKE OR IN THE
ALTERNATIVE FOR LEAVE TO TAKE DISCOVERY**

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 2

I. Cause of Action’s Motion is Moot, Because It Will Not Affect the Court’s
Resolution of NARA’s Motion to Dismiss 2

II. Even Were the Court to Consider the Motion to Strike, It Should Be Denied As
Procedurally Improper and Lacking On the Merits 4

A. Cause of Action’s Motion to Strike is Procedurally Improper and Should
Be Denied on That Basis Alone. 4

B. NARA’s Declarations Are Fully Consistent with Well-Established FOIA
Caselaw, and There Is No Basis for Striking the Declarations or Granting
Discovery 6

CONCLUSION 11

INTRODUCTION

In this straightforward lawsuit arising under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, defendant National Archives and Records Administration (“NARA”) has moved to dismiss the complaint for failure to state a claim (ECF No. 8), arguing that the requested records—documents from the Financial Crisis Inquiry Commission (“FCIC”), a temporary commission established within the legislative branch—are legislative in character, and thus outside the reach of FOIA. NARA’s motion to dismiss was supported by two declarations from NARA officials, primarily providing background information about how NARA handles and provides access to legislative records. Plaintiff Cause of Action, Inc. has now filed a motion to strike the declarations or in the alternative for leave to take discovery. Specifically, Cause of Action argues that the declarations are irrelevant, and that the declarants lack adequate personal knowledge and foundation for their statements.

Cause of Action’s motion is fundamentally flawed and should be denied. Most glaringly, the motion is wholly lacking on the merits. NARA’s two declarations provide relevant information regarding NARA’s treatment of legislative records, and the declarants have more than adequate personal knowledge and foundation for their statements. Indeed, the declarations are fully consistent with well-settled FOIA caselaw permitting courts to grant summary judgment based solely on agency declarations. There is simply no basis for striking the declarations or permitting discovery in this case.

Cause of Action’s motion also suffers from two threshold defects. First, the Court should deny Cause of Action’s motion as moot, because NARA is entitled to dismissal of this lawsuit even absent the declarations. There is no need for the Court even to address Cause of Action’s motion.

Second, Cause of Action's motion is procedurally improper because it is a second-bite at defeating NARA's motion to dismiss. All of the arguments against the declarations could have—and should have—been raised in Cause of Action's opposition brief. The second-bite nature of the motion is further highlighted by the fact that the Federal Rules of Civil Procedure do not even recognize a motion to strike a declaration, and the fact that Cause of Action waited over six weeks to request discovery from NARA. Even apart from the motion being wholly lacking on the merits, therefore, each of these threshold defects also warrants denial of the motion.

ARGUMENT

I. CAUSE OF ACTION'S MOTION IS MOOT, BECAUSE IT WILL NOT AFFECT THE COURT'S RESOLUTION OF NARA'S MOTION TO DISMISS.

Cause of Action's motion should be denied as moot for three reasons. First, for the reasons stated in NARA's motion to dismiss (as well as in its upcoming reply memorandum, which will be filed on January 11, 2013), NARA is entitled to dismissal of this lawsuit even without considering the information in NARA's declarations. In that event, Cause of Action's motion to strike is clearly moot. *See, e.g., Petit-Frere v. U.S. Attorney's Office for Southern Dist. of Fla.*, 800 F. Supp. 2d 276, 281 (D.D.C. 2011) (Boasberg, J.) (denying a motion to strike in a FOIA case as moot because the defendant was entitled to summary judgment).

Second, even were the Court inclined to rely on the information in NARA's declarations, the motion to strike would still be moot: The vast majority, if not all, of the information discussed in NARA's declarations is appropriately considered on a motion to dismiss even absent the declarations. For instance, the Court can always consider NARA's governing statutes and regulations, and the Court can also take judicial notice of the information posted on NARA's website. *See, e.g., Hyson v. Architect of the Capitol*, 802 F. Supp. 2d 84, 91 n.4 (D.D.C. 2011); *Hamilton v. Geithner*, 616 F. Supp. 2d 49, 57 n.6 (D.D.C. 2009).

Additionally, all of the FCIC's record-transfer documents—such as the letter from Chairman Angelides to NARA, and the SF-258 entered into by the FCIC and NARA—were attached to and incorporated into Cause of Action's Complaint, and thus can properly be considered on a motion to dismiss. *See EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997) (when ruling on a motion to dismiss, a court may consider “the facts alleged in the complaint, any documents either attached to or incorporated in the complaint and matters of which [the court] may take judicial notice”); Compl. (ECF No. 1) at ¶¶ 15-22, Exhs. 1-2. Even were the Court to strike NARA's declarations, therefore, all of the underlying information could still be considered by the Court.

Third, even if the Court concluded that information in the declarations was necessary and could not be relied on in resolving a motion to dismiss, the Court is free to treat NARA's motion as a motion for summary judgment. Cause of Action still would not be entitled to any discovery: Cause of Action has not contradicted any of the statements offered by the declarants, nor has Cause of Action proven any bad faith by the declarants, a lack of specificity in the declarants' statements, or any other defect that would justify withholding summary judgment. *Cf. Military Audit Project v. Casey*, 656 F.2d 724, 751-52 (D.C. Cir. 1981) (denying discovery in a FOIA case where “it appears that discovery would only have afforded [the plaintiff] an opportunity to pursue a bare hope of falling upon something that might impugn the affidavits” (internal quotation marks omitted)).

Because Cause of Action's motion will thus have no practical effect on the Court's resolution of NARA's underlying motion, the Court should simply deny Cause of Action's motion as moot.

II. EVEN WERE THE COURT TO CONSIDER THE MOTION TO STRIKE, IT SHOULD BE DENIED AS PROCEDURALLY IMPROPER AND LACKING ON THE MERITS.

A. Cause of Action's Motion to Strike is Procedurally Improper and Should Be Denied on That Basis Alone.

Cause of Action's motion to strike is simply a second-bite at seeking to defeat NARA's motion to dismiss. All of the arguments challenging NARA's declarations could have—and should have—been raised in Cause of Action's opposition brief. Some of Cause of Action's arguments are expressly conditioned on the underlying merits issues, or even directly raise merits issues. *See, e.g.*, Pl.'s Mot. to Strike (ECF No. 14) at 2 (arguing that information regarding “NARA's handling of congressional and legislative records is wholly irrelevant” because “NARA's contention . . . that the records maintained their legislative character is erroneous under the case law”); *id.* at 4 (“Moreover, if the argument advanced by the Defendant in this case—that the FCIC records are legislative and not subject to the FOIA—then why was it necessary for [the FCIC] to alter the SF-258?”). Cause of Action should not be permitted to duplicate the proceedings by filing this ancillary motion to strike, raising only arguments that could have been presented in its opposition brief.

The second-bite nature of Cause of Action's motion is further highlighted by two facts. First, the Federal Rules of Civil Procedure do not recognize a motion to strike a declaration. Although the Rules recognize a motion to strike material from a pleading, *see* Fed. R. Civ. P. 12(f), a declaration is not a pleading. *See* Fed. R. Civ. P. 7 (providing the complete list of pleadings, which are distinguished from “motions and other papers”); *see also Aftergood v. CIA*, 355 F. Supp. 2d 557, 564 (D.D.C. 2005) (“[B]y the plain terms [of] Rule 12(f), the rule cannot be used to strike an affidavit.”); 2 J. Moore, et al., *Moore's Federal Practice* § 12.37[2] (3d ed. 2008) (“Motions, briefs or memoranda, objections, or affidavits may not be attacked by the

motion to strike.”). Cause of Action does not provide any legal authority justifying a motion to strike a declaration, further highlighting why the proper vehicle for challenging the declarations was its opposition brief.

Second, even assuming a legal basis for Cause of Action’s motion, the motion would nonetheless be untimely. For starters, the motion to strike was filed *after* Cause of Action filed its opposition to NARA’s motion to dismiss, contrary to Rule 12. *See* Fed. R. Civ. P. 12(f)(2) (requiring that, when a pleading permits a response, the motion to strike must be filed “before responding to the pleading”).¹ Additionally, Cause of Action waited over six weeks to contact NARA to request discovery, and conferred with NARA regarding the motion to strike only after its opposition brief was already filed.² This six-week delay highlights how Cause of Action is simply attempting to re-litigate the merits of NARA’s motion: Cause of Action is essentially requesting a second round of merits briefing after a deposition occurs, which would be not only wasteful but also contrary to the briefing schedule agreed upon by the parties and entered by the Court. *See* ECF No. 10. The time for Cause of Action to attempt to request discovery from NARA was six weeks ago, not two days prior to the deadline for its opposition brief.

At bottom, Cause of Action’s motion to strike is both legally improper as well as untimely. This belated attempt to re-litigate NARA’s motion to dismiss should be denied.

¹ Cause of Action’s first motion to strike, *see* ECF No. 12, was denied without prejudice for failure to comply with Local Civil Rule 7(m). Even that first motion to strike, however, was filed after Cause of Action’s opposition brief, *see* ECF No. 11.

² Cause of Action first contacted NARA on December 17, 2012—two days prior to its opposition-brief deadline—requesting to depose Mr. Fulgham. NARA stated on December 18, 2012 that it did not consent to the deposition. Cause of Action then conferred with NARA regarding the motion to strike on December 20, 2012, the day after Cause of Action filed its opposition brief.

B. NARA's Declarations Are Fully Consistent with Well-Established FOIA Caselaw, and There Is No Basis for Striking the Declarations or Granting Discovery.

Even apart from the two threshold defects identified above, Cause of Action's motion is also wholly meritless. Courts routinely grant summary judgment in FOIA cases based solely on agency declarations, without providing the plaintiff an opportunity for discovery. Here, the declarations are complete on their face and provide relevant information about NARA's handling of legislative records. The two declarants—two NARA officials who collectively have over thirty years' experience at NARA—have more than adequate personal knowledge and foundation for their statements. There is no basis, therefore, for striking the declarations or permitting discovery in this case.

Courts generally disfavor motions to strike. *See Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distrib.*, 647 F.2d 200, 201 (D.C. Cir. 1981) (per curiam) (stating that “motions to strike, as a general rule, are disfavored” because “[t]he points raised in the motion might have been presented, concisely, in the reply brief” and “[t]here was no need . . . to burden this court with a motion to strike”). Because “[a] motion to strike is considered an exceptional remedy and is generally disfavored, [] the proponent of such a motion must shoulder a formidable burden.” *United States ex rel. K & R Ltd. P'ship v. Mass. Hous. Fin. Agency*, 456 F.Supp.2d 46, 53 (D.D.C. 2006) (internal quotation marks and citations omitted).

Here, Cause of Action does not even come close to meeting this “formidable burden” justifying the disregard of NARA's declarations. First, Cause of Action is incorrect to argue that the declarations contain irrelevant information. *See Mot. to Strike* at 2-3. The Fulgham declaration's discussion of “NARA's handling of congressional and legislative records,” *id.* at 2, is relevant for numerous reasons: (i) to establish that NARA considers the FCIC records to be legislative in character; (ii) to set forth the administrative scheme governing public access to the

FCIC records; and (iii) to explain how and why the FCIC intended to exercise control over their records. For the reasons set forth in NARA's motion to dismiss, each of these facts is potentially relevant to the Court's resolution of the underlying legal issue—whether the FCIC records are legislative in character. *See, e.g.*, NARA's Br. at 13-15 (discussing NARA's view that the FCIC records are legislative in character); 16-21 (explaining how applying FOIA to the FCIC records would disrupt the goals of “orderly processing and protection of the rights of all affected persons” (quoting *Ricchio v. Kline*, 773 F.2d 1389, 1395 (D.C. Cir. 1985)); 24-26 (discussing “the FCIC's intent to establish controls over the future disclosure of its documents”). The Fulgham declaration is therefore relevant to the issues in this case.

Cause of Action also challenges the Mills declaration as being irrelevant, because it provides “the background of the National Archives, Presidential records and other materials[.]” Mot. to Strike at 3. But this information highlights how NARA possesses a wide variety of records collections, many of which are not subject to FOIA. Thus, the declaration is relevant to explain why “the formal deposit of records with NARA does not alter [the records'] original character.” NARA's Br. at 24. At the very least, the Mills declaration provides helpful background information that places the FCIC records collection within the proper context. *See Patton Boggs, LLP v. Chevron Corp.*, 791 F. Supp. 2d 13, 22 (D.D.C. 2011) (“[I]t is routine for parties to provide the Court with a certain amount of background information that is not directly relevant to the merits of the claim or motion at issue. This practice ensures that the Court understands the context in which the dispute arose.”); *see also Stanbury Law Firm v. IRS*, 221 F.3d 1059, 1063 (8th Cir. 2000) (reversing the grant of a motion to strike because the challenged

information “provides important context and background”). There is no basis for striking NARA’s declarations on relevance grounds.³

Cause of Action also argues that Mr. Fulgham lacks personal knowledge to “express any opinion as to the ‘parties’ intent’” in executing the SF-258. Mot. to Strike at 3. But Mr. Fulgham was himself a party to the execution of the SF-258, *see* Fulgham Decl. at ¶ 33, and he and his staff also worked with the FCIC beforehand on record-retention issues, *see id.* at ¶¶ 17-18. Based on this personal experience and involvement in the process, it is entirely proper for Mr. Fulgham to testify as to the parties’ intent in executing this contract. *Cf. Southwestern Elec. Co-op., Inc. v. FERC*, 347 F.3d 975, 983 (D.C. Cir. 2003) (“In determining the intent of the parties in forming the contract, the Commission properly credited the testimony of those with first-hand knowledge of the negotiations.”).

Finally, Cause of Action argues that the Fulgham and Mills declarations “contain[] a number of conclusory statements that have no foundation and, therefore, are inadmissible.” Mot. to Strike at 3. As discussed above, however, there is ample foundation for Mr. Fulgham’s statements regarding the SF-258 and other record-retention decisions made by the FCIC.

Additionally, Cause of Action’s assertion that many of Mr. Fulgham’s statements are “wholesale speculation” is meritless. *See* Mot. to Strike at 5 (attacking the statement that

³ Cause of Action also attacks the Mills declaration for including statements based on “information and belief.” *See* Mot. to Strike at 3 n.1. In the FOIA context, however, courts routinely permit agency declarants to make statements based on information provided to them in the course of their official duties. *See, e.g., Safecard Servs. Inc. v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991) (upholding an agency’s affidavit, even though it contained some “second-hand” information); *Blunt-Bey v. Dep’t of Justice*, 612 F. Supp. 2d 72, 74 (D.D.C. 2009) (upholding two agency declarations because “the declarants’ statements are based on their personal knowledge acquired through the performance of their official duties and their review of the official files”); *see also Patterson v. IRS*, 56 F.3d 832, 840-41 (7th Cir. 1995) (holding that agency declarant had personal knowledge of a search, even though he learned about the search entirely from information his predecessor recorded in an agency file).

“applying FOIA to the FCIC records *may result* in the improper release of sensitive information,” and the statement that legislative commissions “*might be* less likely to document their activities if legislative staff operated under the belief that records transferred to NARA would be immediately subject to public scrutiny”). Mr. Fulgham’s statements cannot be struck simply because he did not express them with absolute certainty. He is discussing potential future events, and therefore it is entirely proper to use predictive language. That language does not, however, equate his statements with “wholesale speculation.” *Cf. Halperin v. CIA*, 629 F.2d 144, 149 (D.C. Cir. 1980) (recognizing that descriptions of “a potential future harm rather than an actual past harm” will “always be speculative to some extent,” but nonetheless crediting such agency predictions).

Mr. Fulgham’s predictions were based on his own “past experience with legislative commission records,” Fulgham Decl. at ¶ 40, and his own “experience in dealing with legislative commissions generally,” *id.* at ¶ 41. These personal experiences—combined with Mr. Fulgham’s over 20 years’ experience at NARA—provide him a more than adequate foundation to make predictive statements about how applying FOIA to legislative records might lead to negative consequences. Indeed, *Ricchio* itself requires nothing more. *See Ricchio*, 773 F.2d at 1395 (holding that Nixon materials were not subject to FOIA because applying FOIA “*might frustrate* the achievement of the legislative goals of orderly processing and protection of the rights of all affected persons” (internal quotation marks omitted, emphasis added)).

Cause of Action’s challenges to the Mills declaration are equally meritless. *See* Mot. to Strike at 6-7. First, Mr. Mills, as NARA’s Chief Operating Officer, clearly has the proper foundation to discuss how NARA has treated the FCIC records. The two “factual disputes” relied upon by Cause of Action—NARA’s providing FCIC records to a Congressional

committee, and refusing to grant access to former Commissioner Wallison’s representatives, *see* Mot. to Strike at 6—have absolutely nothing to do with whether Mr. Mills has an adequate foundation for his declaration’s statements. (There is also nothing improper about these actions, as will be discussed more fully in NARA’s upcoming reply brief.) Finally, it should be uncontroversial to describe the FCIC Chairman’s letter to the Archivist as setting forth “the restrictions [the FCIC Chairman] believed to be necessary or desirable in the public interest,” Mills Decl. at ¶ 34, because that is precisely what the Chairman was authorized to do under federal law. *See* 44 U.S.C. § 2108 (permitting agency heads to set forth “restrictions that appear to him to be necessary or desirable in the public interest”); *see also* Mills Decl. at ¶ 33 (discussing § 2108).

At bottom, both the Fulgham and Mills declarations were submitted in good faith, contain reasonable specificity, and are entirely appropriate for the Court’s consideration. As Cause of Action itself acknowledges, agency declarations “are afforded a presumption of good faith and can be rebutted only with evidence that the agency did not act in good faith.” Mot. to Strike at 2 (internal quotation marks omitted). Notwithstanding Cause of Action’s rhetoric, therefore, there is no basis for striking either declaration.

Similarly, there is no basis for granting discovery in this FOIA lawsuit. As discussed above, this lawsuit is properly resolved on NARA’s motion to dismiss, and litigants are not entitled to any discovery in opposing such motions. Even on a motion for summary judgment, moreover, in the FOIA context courts routinely grant summary judgment based solely on agency declarations. *See, e.g., Stanko v. Fed. Bureau of Prisons*, 842 F. Supp. 2d 132, 136-37 (D.D.C. 2012) (Boasberg, J.). Cause of Action has not identified any unusual circumstances that would justify discovery—much less a deposition—in this straightforward FOIA lawsuit. *See, e.g.,*

Schrecker v. Dep't of Justice, 217 F. Supp. 2d 29, 35 (D.D.C. 2002) (“Discovery in FOIA is rare and should be denied where an agency’s declarations are reasonably detailed, submitted in good faith and the court is satisfied that no factual dispute remains.”), *aff'd*, 349 F.3d 657 (D.C. Cir. 2003); *see also Taylor v. Babitt*, 673 F. Supp. 2d 20, 22-23 (D.D.C. 2009). Thus, the request for discovery should be denied.⁴

CONCLUSION

Cause of Action’s motion to strike or in the alternative for leave to take discovery should be denied.

Dated: January 7, 2013

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⁴ Were the Court to agree that NARA’s declarations contain defects, the Court still should not strike the declarations or order discovery. Rather, the Court should first allow NARA to supplement its declarations to cure the defects. *See, e.g., Campbell v. Dep't of Justice*, 164 F.3d 20, 31 (D.C. Cir. 1998); *Judicial Watch v. Dep't of Justice*, 185 F. Supp. 2d 54, 65 (D.D.C. 2002).

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

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

**MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR
SUMMARY JUDGMENT, AND REPLY MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS**

TABLE OF CONTENTS

INTRODUCTION1

ARGUMENT2

I. Binding Precedent Confirms That Legislative Records in NARA’s Custody Are Wholly Outside The Reach of FOIA.2

 A. The D.C. Circuit’s *Ricchio* Decision Conclusively Resolves the Present Lawsuit.....3

 B. Congressional and Executive Precedents Also Conclusively Establish that Legislative Records Transferred To NARA Are Not Subject to FOIA.5

 C. Applying FOIA to Legislative Records Would Disrupt NARA’s Administrative Scheme for Orderly Processing, and Risk the Disclosure of Improper Information.....7

 D. The FCIC Records Are Indistinguishable From NARA’s Other Collections That Are Not Subject to FOIA.10

II. Cause Of Action’s Proposed FOIA-Based Framework Is, By Its Own Terms, Inappropriate for Legislative Records Transferred to NARA.....13

III. Even Under Cause Of Action’s FOIA-Based Framework, NARA Is Still Entitled to Dismissal.....15

 A. The FCIC Clearly Intended to Exercise Future Control Over the Records, and That Fact is Dispositive.....15

 B. The Three Other Proposed Factors Also Weigh in NARA’s Favor.18

 1. NARA’s Ability to Dispose of the FCIC Records.....19

 2. NARA’s Reliance Upon the FCIC’s Records.....20

 3. Integration Into NARA’s Files.22

IV. NARA’s Motion is Fully Compliant with the Local Rules, and Is the Only Basis for Entering Judgment in this Case.....23

 A. NARA’s Motion Complies with Local Civil Rule 7(h).23

 B. Cause of Action’s Cross-Motion for Summary Judgment is Premature and Must Be Denied.25

CONCLUSION.....25

INTRODUCTION

Plaintiff Cause of Action, Inc. has submitted a request pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, for records pertaining to the Financial Crisis Inquiry Commission (“FCIC”), which was a temporary commission established in the legislative branch. Although the FCIC’s records have now been legally transferred to defendant National Archives and Records Administration (“NARA”), the FCIC’s records remain legislative in character and thus exist wholly apart from FOIA. The FOIA disclosure scheme is effectively superseded, and instead the FCIC’s records are governed by the Federal Records Act and NARA’s administrative disclosure scheme. The FCIC records, like all legislative records transferred to NARA’s custody, are not subject to FOIA.

Cause of Action cannot overcome this threshold defense. In arguing that the FCIC records are subject to FOIA, Cause of Action relies exclusively on cases interpreting the term “agency records” within the FOIA statute. These FOIA precedents are irrelevant, however, because NARA’s collection of legislative records exists wholly outside of FOIA. Indeed, the D.C. Circuit has already confirmed that certain collections within NARA’s custody exist wholly apart from FOIA, and Cause of Action concedes as much. Thus, Cause of Action’s argument is both circular and unresponsive: it seeks to prove that FOIA has not been superseded by interpreting FOIA itself, rather than confronting NARA’s actual argument.

Even under the FOIA-based framework that Cause of Action proposes, moreover, the particular FCIC records at issue here are not “agency records” subject to FOIA. The FCIC clearly intended to exercise control over the records, which is dispositive under the D.C. Circuit’s caselaw governing legislative records. And even if the Court were to consider the other factors proposed by Cause of Action, those too weigh in NARA’s favor. Even under Cause of

Action's framework, therefore, the FCIC records are legislative in character and not subject to FOIA.

In the end, Cause of Action has offered no persuasive reason why the FCIC records should be subject to FOIA's disclosure scheme, rather than the Federal Records Act scheme (as implemented by NARA's longstanding administrative processes). By establishing the FCIC within the legislative branch, Congress implicitly adopted NARA's administrative disclosure scheme (rather than FOIA) as the appropriate mechanism governing public release of the FCIC records. For numerous reasons, both legal and practical, the Court should honor this Congressional judgment, and dismiss Cause of Action's lawsuit for failure to state a claim.

ARGUMENT

I. BINDING PRECEDENT CONFIRMS THAT LEGISLATIVE RECORDS IN NARA'S CUSTODY ARE WHOLLY OUTSIDE THE REACH OF FOIA.

All three branches of the Federal Government—the courts, Congress, and the Executive—agree that legislative records, even after they have been transferred to NARA's custody, remain wholly outside of FOIA. Cause of Action's response is to cite a series of FOIA precedents, and argue that legislative records can indeed “become agency records” subject to FOIA when the records are “under the control of an executive agency[.]” Cause of Action's Br. at 3.

Cause of Action's argument fundamentally misses the mark. FOIA and its accompanying precedents are irrelevant, because legislative records in NARA's custody exist wholly outside the FOIA universe. Instead, these legislative records are governed by the Federal Records Act, and NARA's administrative implementation of that Act. In effect, FOIA has been superseded with respect to legislative records transferred to NARA.

Cause of Action effectively concedes this very point in its discussion of the D.C. Circuit's decision in *Ricchio v. Kline*, 773 F.2d 1289 (D.C. Cir. 1985). Moreover, Cause of Action fails to seriously challenge the Congressional and Executive authorities confirming that legislative records are not subject to FOIA, and Cause of Action's attempts to distinguish the FCIC records are both legally and factually flawed.

A. The D.C. Circuit's *Ricchio* Decision Conclusively Resolves the Present Lawsuit.

The D.C. Circuit has already confirmed the correctness of NARA's central argument in this lawsuit—that some of NARA's holdings exist wholly outside of FOIA. *See Ricchio*, 773 F.2d at 1391; *see also* NARA's Opening Br. (ECF No. 8-1) at 11, 16-21. Cause of Action's attempts to distinguish *Ricchio* are unpersuasive, and in fact only confirm the correctness of NARA's arguments.

In *Ricchio*, the D.C. Circuit addressed a FOIA request for access to certain Nixon materials, which had been transferred to NARA's custody and control pursuant to the Presidential Recordings and Materials Preservation Act ("PRMPA"), *see* 44 U.S.C. § 2111 note. The court held that the materials could not be accessed through FOIA, and instead could be accessed only through the PRMPA's disclosure provisions. *Ricchio*, 773 F.2d at 1391. Effectively, FOIA had been displaced and was irrelevant to the lawsuit; instead, only the PRMPA governed disclosure. *See id.* (declining to address whether the materials are "agency records" under FOIA, and instead holding that "the [PRMPA] is the sole basis upon which the transcripts may be disclosed").

Cause of Action concedes this interpretation of *Ricchio*. Specifically, Cause of Action agrees that "*Ricchio* did not address the question of whether the Presidential transcripts . . . were 'agency records' subject to FOIA," because *Ricchio* instead held that the PRMPA "superseded FOIA" and "obviated the application of FOIA[.]" Cause of Action's Br. at 4-5.

This concession is dispositive. Just as the Nixon materials exist outside of FOIA, so too does NARA's collection of legislative records. Specifically, NARA's implementation of the Federal Records Act "supersedes" FOIA with respect to legislative records transferred to NARA for preservation. In other words, the specific disclosure scheme of the Federal Records Act (and NARA's administrative implementation of that Act) trump the general disclosure scheme of FOIA. See *Church of Scientology of Cal. v. IRS*, 792 F.2d 146, 149 (D.C. Cir. 1986) (stating that a disclosure scheme could supersede FOIA if it "established some rules and procedures—duplicating those of FOIA—for individual members of the public to obtain access to [government] documents"); cf. *Lake v. Rubin*, 162 F.3d 113, 116 (D.C. Cir. 1998) ("[W]e believe that the specific provisions of § 6103 rather than the general provisions of the Privacy Act govern the disclosure of the sort of tax information requested here." (citing *Ricchio*, 773 F.2d at 1395)). Under *Ricchio* and its progeny, therefore, NARA's administrative disclosure scheme of legislative records is exclusive; FOIA does not apply to those records.

Cause of Action is indeed correct that "NARA's custody and control [of the Nixon materials] had nothing to do with the [*Ricchio*] Court's decision." Cause of Action's Br. at 4. And that is because *Ricchio* was not applying a FOIA-based framework interpreting the term "agency records." Instead, *Ricchio* held that the Nixon materials existed wholly *outside* of FOIA, and thus a FOIA-based inquiry was unnecessary. Similarly here, Cause of Action's reliance on FOIA precedents—likewise interpreting the term "agency records"—is unpersuasive. Just as *Ricchio* declined to address the "agency records" question (in order to hold that the materials were wholly outside FOIA's reach), so too should this Court decline to address the "agency records" issue. Every one of Cause of Action's arguments exists within this FOIA-based framework, and are thus non-responsive to NARA's *Ricchio* argument.

At bottom, *Ricchio* holds that some of NARA's collections exist wholly outside FOIA. For the reasons stated in NARA's opening brief (at 10-21), both legal and practical considerations confirm that NARA's legislative records also exist wholly outside FOIA. The *Ricchio* decision is dispositive, and confirms that the Court should dismiss Cause of Action's FOIA lawsuit for failure to state a claim.¹

B. Congressional and Executive Precedents Also Conclusively Establish that Legislative Records Transferred To NARA Are Not Subject to FOIA.

Cause of Action fails to seriously dispute the Congressional and Executive authorities discussed in NARA's opening brief (at 11-15), further proving that NARA's collection of legislative records is not subject to FOIA.

First, regarding NARA's statutory argument involving the text of the Presidential Records Act, Cause of Action offers a perplexing response. NARA's argument is that a particular phrase in 44 U.S.C. § 2204(c)(1) would be unnecessary if Congress understood all records within NARA's custody and control to be agency records. *See* NARA's Opening Br. at 11-13. Cause of Action's response is that the particular phrase in § 2204(c)(1) is irrelevant, because "the White House is not an agency for the purposes of FOIA[.]" Cause of Action's Br. at 5-6.

This argument is non-responsive and once again confirms the correctness of NARA's position. There is no dispute that many offices within the White House create only presidential

¹ Cause of Action also contends (at 4) that *Ricchio* is inapposite because the PRMPA, as well as the Presidential Records Act, 44 U.S.C. § 2201 *et seq.*, are actually Exemption 3 statutes within the meaning of FOIA, *see* 5 U.S.C. § 552(b)(3). This argument is false. For one thing, it is inconsistent with Cause of Action's admission that, in *Ricchio*, the Court held that the PRMPA wholly exempted records from FOIA's reach. *See, e.g.*, Cause of Action's Br. at 4 ("The Presidential transcripts were not subject to FOIA" because the PRMPA "obviated the application of FOIA[.]"). Moreover, even a cursory examination of *Ricchio* reveals that the court did not engage in the traditional Exemption 3 analysis, and instead held that the materials existed outside of FOIA. *See Ricchio*, 773 F.2d at 1391, 1394-95; *see also Essential Info., Inc. v. U.S. Info. Agency*, 134 F.3d 1165, 1169-70 (D.C. Cir. 1998) (Henderson, J., concurring) (describing the *Ricchio* decision as holding "that the FOIA does not govern disclosure" of the Nixon materials).

records, which are not subject to FOIA. The critical issue for this case, however, is whether those presidential records become subject to FOIA when transferred to NARA's custody and control at the conclusion of a President's time in office. *See* 44 U.S.C. §§ 2202, 2203(f). Based on the last phrase in § 2204(c)(1), it is clear that Congress does *not* view the presidential records as becoming subject to FOIA simply because they are transferred into NARA's custody and control. So too in this case, legislative records do not become subject to FOIA simply because they are transferred into NARA's custody and control.

Cause of Action's argument actually confirms NARA's position in this case. Cause of Action contends that, because presidential records were created by an entity not subject to FOIA (the White House), those records always remain outside of FOIA. *See* Cause of Action's Br. at 5-6. If presidential records remain outside of FOIA even after their transfer to NARA, as Cause of Action maintains, then the same should hold true for legislative records.²

Second, Cause of Action ignores several Executive Branch precedents confirming that legislative records are not subject to FOIA. *See* NARA's Opening Br. at 13-15. Cause of Action dismisses all of these authorities on the basis that "NARA confuses and conflates accepting records for deposit at the Archives, and controlling those records and altering their format." Cause of Action's Br. at 6.

This response is difficult to understand. As will be discussed in more detail below, *see* Section I.D, this purported distinction is meaningless. But more fundamentally, this distinction has nothing to do with the regulations and other authorities discussed in NARA's opening brief. The fact remains that Cause of Action's lawsuit is premised on a theory that legislative records

² It is true that "Congress has enacted legislation explicitly stating that such [presidential] records are not subject to FOIA." Cause of Action's Br. at 5. But Congress also expressly stated that legislative records are not subject to FOIA. *See* 5 U.S.C. § 551(1)(A); NARA's Opening Br. at 9.

within NARA's custody and control are subject to FOIA. This theory, however, has been rejected by formal NARA regulations—which Cause of Action does not dispute are entitled to deference, *see* NARA's Opening Br. at 14—as well as principles fundamental to NARA's operation. Consistent with these Executive authorities, therefore, the Court should hold that NARA's legislative records exist wholly outside of FOIA.³

C. Applying FOIA to Legislative Records Would Disrupt NARA's Administrative Scheme for Orderly Processing, and Risk the Disclosure of Improper Information.

Not only do the legal precedents discussed above compel the conclusion that NARA's legislative records exist outside FOIA, but practical considerations also confirm this approach. Specifically, NARA has already established an administrative scheme governing the disclosure of legislative records. Supplanting this administrative scheme with FOIA's disclosure scheme would not only be wasteful, but would also disrupt NARA's orderly processing of legislative records, and would risk the disclosure of sensitive information.

Cause of Action first responds with a paragraph laying out four quick arguments, seemingly unrelated to each other, but apparently intended to argue that these practical considerations are “irrelevant and immaterial to the present dispute.” Cause of Action's Br. at 7. To be sure, NARA agrees that the Court can dismiss this lawsuit based solely on the legal precedents discussed above. But these practical considerations are at least potentially relevant, as they are precisely the ones considered by the *Ricchio* court. *See Ricchio*, 773 F.2d at 1395

³ Cause of Action also seeks to downplay NARA's regulations by arguing that the regulations “are tailored specifically for Presidential, Judicial and Congressional records, for which Congress has enacted specific laws which govern whether FOIA is applicable or not.” Cause of Action's Br. at 6. For the reasons discussed above in connection with the Presidential Records Act, however, it is irrelevant whether Congress has enacted a specific law governing the FOIA status of those records prior to those records' transfer to NARA. Moreover, this argument is simply not true: Congress has not enacted specific laws governing the FOIA status of judicial records, presidential records from administrations ending before President Reagan (with the exception of President Nixon), or other donated records. *See Mills Decl.* at ¶¶ 13-20.

(holding that the materials are not subject to FOIA because the application of FOIA “might frustrate the achievement of the legislative goals of orderly processing and protection of the rights of all affected persons” (internal quotation marks omitted)).

Cause of Action next argues that neither harm would actually occur here, because the requested FCIC records were already provided to the House Committee on Oversight and Government Reform (“the House Oversight Committee”) and thus there would be no burden on orderly processing, and also because all of the sensitive financial information can be protected through Exemption 4. This response is both legally and factually flawed. On the legal front, Cause of Action’s response is unduly narrow because it focuses solely on the current FOIA request, and solely on the FCIC records collection. The status of NARA’s legislative records is a matter of law, however, that cannot vary with each individual FOIA request or individual commission. The proper inquiry must instead ask, as a general matter, whether application of FOIA to legislative records could lead to the two harms identified by NARA. And on that question, Cause of Action does not refute the detailed explanations offered by NARA. *See* Fulgham Decl. at ¶¶ 36-42.

Cause of Action’s arguments are also factually flawed. As an initial matter, there is no basis for crediting Cause of Action’s speculation about the low likelihood of the harms occurring, instead of crediting the detailed explanations offered by a NARA official with over twenty years’ experience at NARA and who clearly has the proper expertise to make these predictions. *See* Fulgham Decl. at ¶ 3.

Moreover, Cause of Action’s speculation about the low likelihood of these harms fails as a matter of logic. Regarding the interference with NARA’s orderly processing, Cause of Action argues that “NARA has already ordered and processed the records for submission to the

Oversight Committee,” and therefore “no material burden is presented on NARA.” Cause of Action’s Br. at 7. But this argument fails to recognize the difference between providing unredacted duplicate copies of the files to the House Oversight Committee, versus processing the files under FOIA in order to redact all of the information under the relevant exemptions. *See* Supplemental Fulgham Decl. (filed herewith) at ¶ 6. The latter is obviously far more burdensome, and is what NARA would be forced to do if legislative records were generally subject to FOIA. Thus, Cause of Action is indeed “asking for the burdensome processing of records.” Cause of Action’s Br. at 7.⁴

As for the improper disclosure of sensitive information, Cause of Action’s sole response is to argue that sensitive financial information in the FCIC records can be withheld under FOIA’s Exemption 4, *see* 5 U.S.C. § 552(b)(4). It is true that much of the sensitive information in the FCIC records could likely be withheld under that exemption, but there is no guarantee that *all* sensitive information will be protected. In fact, Cause of Action ignores the concrete example provided by NARA officials—namely, the potential inability to protect information that is obtained by a legislative commission under a promise of confidentiality. *See* NARA’s Opening Br. at 19; Fulgham Decl. at ¶ 40 (discussing this possibility, particularly with respect to the 9/11 Commission and their interview of New York City first responders).

In sum, applying FOIA to NARA’s legislative records would interfere with NARA’s orderly processing of those records, would risk improper disclosure of information, and would harm future legislative commissions generally. *See* NARA’s Opening Br. at 15-20. These

⁴ Cause of Action also ignores NARA’s discussion of the other harms that would follow from subjecting legislative records to FOIA. For instance, NARA could no longer “make the most widely requested records publicly available at the earliest possible date,” because NARA would instead have to prioritize individuals’ preferences. Fulgham Decl. at ¶ 37. Additionally, applying FOIA would interfere with NARA’s ability to “undertake systematic organization, indexing, or finding aid development” of the records. *Id.* at ¶ 38.

practical considerations only confirm the legal authorities discussed above—*i.e.*, that legislative records transferred to NARA are not subject to FOIA.

D. The FCIC Records Are Indistinguishable From NARA's Other Collections That Are Not Subject to FOIA.

Throughout its brief, Cause of Action argues that the FCIC records are different from the remainder of NARA's collections not subject to FOIA, because NARA somehow "altered" the FCIC records as part of its transmission of copies of those records to the House Oversight Committee. *See, e.g.*, Cause of Action's Br. at 6, 6 n.5, 8, 21, 30, 34. The transmission of copies of records to the House Oversight Committee is legally irrelevant, however, and in any event Cause of Action vastly overstates any "alteration" or "formatting" of the records that occurred. The FCIC records are no different than NARA's other collections not subject to FOIA.

First, the mere fact that NARA provided copies of certain FCIC records to the House Oversight Committee does not change the legal status of the records as falling outside of FOIA. NARA's longstanding practice has been to provide current government officials from all three branches of the government with access to records—including otherwise closed federal records—that are needed to conduct their official governmental business. This practice makes good sense, given that government officials, including Congress and the Courts, regularly require access to NARA's archival records in order to fulfill their official duties. *Cf. Nixon v. Adm'r of GSA*, 433 U.S. 425, 452 (1977) ("An incumbent President should not be dependent on happenstance or the whim of a prior President when he seeks access to records of past decisions that define or channel current governmental obligations.").

Virtually all of NARA's holdings are subject to some form of special-access provisions for current government officials. For instance, presidential records are subject to a statutory special-access provision, *see* 44 U.S.C. § 2205, and the Nixon materials are subject to regulatory

special-access provisions. *See* 36 C.F.R. §§ 1275.32-34. Here, NARA's transmission of copies of certain FCIC records to the House Oversight Committee was entirely proper and consistent with the special-access procedures governing federal records (and other non-presidential donated materials). *See* NARA Interim Guidance 1605-2, *Special Access by Government Officials to Classified and Unclassified, Closed Federal Records in NARA's Legal Custody* (Mar. 21, 2006), available at <http://www.archives.gov/foia/directives/ig1605-2.html>. Given that virtually all of NARA's holdings are subject to some form of special access—including the Nixon materials, which the D.C. Circuit has already held are outside of FOIA—this fact alone cannot distinguish the FCIC records from other NARA holdings not subject to FOIA.

Moreover, the D.C. Circuit has already held, based on convincing policy reasons, that providing records to Congress should not affect a court's analysis. *See* *Murphy v. Dep't of Army*, 613 F.2d 1151, 1155-58 (D.C. Cir. 1979) (holding that the provision of information to Congress does not waive any FOIA exemptions with respect to the public at large, due to the “public policy [of] encourag[ing] broad congressional access to governmental information”); *see also* *Rockwell Int'l Corp. v. Dep't of Justice*, 235 F.3d 598, 603-04 (D.C. Cir. 2001). Thus, NARA's provision of FCIC records to the House Oversight Committee is legally irrelevant to this lawsuit.

Second, Cause of Action vastly overstates the extent of any “alteration” or “formatting” that occurred in this process, and whatever did occur is certainly not significant enough to affect the analysis. For starters, it should go without saying that NARA does not alter its records,⁵ given that NARA's mission involves the preservation of those records. *See* Mills Decl. at ¶ 7; *cf.* 36 C.F.R. § 1230.12 (discussing criminal penalties for the unlawful alteration of federal records).

⁵ The long-term preservation of electronic records may, of course, involve updating or migrating the software format of records in order to ensure that the records remain accessible as computer software and hardware evolves.

Furthermore, the only “formatting” that Cause of Action alleges to have occurred is that NARA provided the FCIC records to the House Oversight Committee “in the form of database files, which were subsequently uploaded into Concordance, a form of discovery management software, by the Oversight Committee.” Compl. (ECF No. 1) at ¶ 28; *see also* Epstein Decl. (ECF No. 11-10) at ¶ 10. These allegations are mistaken. NARA was not the entity that uploaded the files into a Concordance database; that function was performed by the House Oversight Committee’s own staff. *See* Supplemental Fulgham Decl. at ¶¶ 3-4. NARA’s involvement was simply to provide the House Oversight Committee with exact, unaltered duplicates of the relevant FCIC records—as the House Oversight Committee requested. *See* Letter from House Oversight Committee to NARA (ECF No. 11-6) at 1 (requesting that NARA produce “identical copies of the internal work product of the FCIC”); *see also* Supplemental Fulgham Decl. at ¶¶ 3-5 (discussing how, even though NARA converted the FCIC e-mail files into a different file format, NARA still provided exact duplicates of all FCIC files to the House Oversight Committee). This simple duplication of the FCIC records is a far cry from the “alteration” and “formatting” that Cause of Action alleges.⁶ Thus, the Court should dismiss Cause of Action’s lawsuit for failure to state a claim, because the requested records are not subject to FOIA.

⁶ Even accepting Cause of Action’s allegations as true, they would not affect the analysis. Uploading the FCIC records into a Concordance database still would not meaningfully distinguish the FCIC records collection from others within NARA’s custody. Numerous records within NARA’s custody (but outside FOIA) have been digitized into a more usable electronic format. *See, e.g.*, Virtual Library, Nixon Presidential Library & Museum, *available at* <http://www.nixononlibrary.gov/virtuallibrary/index.php>; Fulgham Decl. at ¶¶ 26-27 (stating how approximately 35% of the 9/11 Commission records have now been processed, many of which are now digitally available through the website located at Tab F). This mere act of digitization cannot be sufficient to subject the FCIC’s records to FOIA.

II. CAUSE OF ACTION’S PROPOSED FOIA-BASED FRAMEWORK IS, BY ITS OWN TERMS, INAPPROPRIATE FOR LEGISLATIVE RECORDS TRANSFERRED TO NARA.

As alluded to above, Cause of Action primarily relies on cases setting forth what constitutes an “agency record,” as that term is used in FOIA. The leading case, Cause of Action says, is *Burka v. Dep’t of Health & Human Servs.*, 87 F.3d 508, 515 (D.C. Cir. 1996), which establishes a control-based framework, as well as a four-factor test “to evaluate whether an agency is in control of the records it possesses.” Cause of Action’s Br. at 21. As discussed in Section I.A, above, this FOIA-based framework is inapplicable, because NARA’s legislative records exist wholly outside the FOIA universe. Even apart from this threshold legal reason, however, Cause of Action’s proposed FOIA framework is inapplicable on its own terms.

First, as discussed in NARA’s opening brief (at 21-24), this control-based framework arose in the Congressional oversight context. The particular concern animating this framework—distinguishing between different classes of records (congressional vs. executive)—is simply not present when a temporary legislative agency, at the conclusion of its term, transfers its records to NARA for preservation. *See* NARA’s Opening Br. at 23-24.

Cause of Action responds that the relevant precedents do not expressly limit themselves to only the Congressional oversight context. *See* Cause of Action’s Br. at 9-10. Additionally, Cause of Action argues that control is a relevant factor in a wide variety of other contexts—such as evaluating the FOIA status of private records and judicial records. *Id.*

It is true, as Cause of Action argues, that nothing in the precedents expressly limits the control-based framework to the Congressional oversight context. But Cause of Action does not dispute that the concerns motivating the control-based framework are inapplicable to the present context—the transfer of records to NARA for preservation. Thus, there is an ill fit between Cause of Action’s proposed analysis and the context in which this case arises. It does not make

sense to apply a four-factor test, intended to distinguish between different types of records in situations where information is being repeatedly exchanged, in a context where NARA is fulfilling an entirely separate role—*i.e.*, fulfilling its unique role within the federal government as a repository for records. *See* Mills Decl. at ¶ 7; *see also* Cause of Action’s Br. at 41 (acknowledging that the control-framework cases are intended to protect “Congress’s ‘constitutional prerogative’ to keep its records secret”). The concerns underlying the control-based framework are not present here, which only confirms the control-based framework’s inapplicability.

Furthermore, NARA is not arguing that control has been considered as a relevant factor *only* in the context of Congressional oversight. Rather, NARA contends that this control-based framework, originally arising in the context of Congressional oversight, ought not to be extended to these circumstances. The concern animating the control-based framework (the need to distinguish between different classes of records) applies equally with respect to executive agencies’ possession of private and judicial records. But that concern has no applicability with respect to a temporary legislative agency transferring its records to NARA for preservation. *See* NARA’s Opening Br. at 23-24. Thus, the control-based framework should be rejected here.

Finally, it bears emphasizing that all of Cause of Action’s precedents arise in a context where the requested records are either subject to FOIA, or subject to no disclosure scheme whatsoever. The FCIC records, by contrast, will still be subject to NARA’s administrative disclosure scheme regardless of whether FOIA applies or not. *See generally* Fulgham Decl. at ¶¶ 19-24, 41. Any doubt on the inapplicability of the control-based framework, therefore, should be resolved in NARA’s favor.

III. EVEN UNDER CAUSE OF ACTION'S FOIA-BASED FRAMEWORK, NARA IS STILL ENTITLED TO DISMISSAL.

Even were the Court to conclude that a control-based framework applied, NARA would still be entitled to dismissal. The FCIC clearly intended to exercise control over the future disclosure of its records, and that fact alone warrants dismissal. Even apart from this critical first factor, the three other factors in Cause of Action's proposed FOIA-based framework also weigh in NARA's favor.

A. The FCIC Clearly Intended to Exercise Future Control Over the Records, and That Fact is Dispositive.

When the FCIC transferred its records to NARA, the FCIC clearly intended to impose restrictions on future access to those records. These restrictions are evident from Chairman Angelides' letter to NARA, as well as the SF-258 form between the FCIC and NARA. *See* NARA's Opening Br. at 24-26. This clear evidence of intent to control is dispositive; the FCIC records are legislative in character.

Cause of Action offers a long series of arguments in response, none of which is persuasive. First, Cause of Action argues that "Congress did not clearly express its intent to control [the FCIC] documents," and "Chairman Angelides—who is not a Member of Congress—cannot . . . express the will of Congress." Cause of Action's Br. at 11; *see also id.* at 31-32. But the D.C. Circuit's cases do not require Congress itself to express the intent to control; it is sufficient for an agent acting on behalf of Congress to express that intent. *See, e.g., United We Stand Am., Inc. v. IRS*, 359 F.3d 595 (D.C. Cir. 2004) (holding that Congress expressed its intent to control, relying solely on a letter from the Chief of Staff of a Joint Committee). Here, Congress's agent was Chairman Angelides, exercising his authority as an agency head to impose restrictions (with NARA's consent) on access to records. *See* 44 U.S.C. § 2108(a). Pursuant to

both the D.C. Circuit's caselaw and the Federal Records Act, therefore, the relevant intent to control may be expressed by a legislative agency head.⁷

Second, Cause of Action argues that the FCIC is an expired legislative commission, and therefore NARA, not the FCIC, currently has complete control over the FCIC records. *See* Cause of Action's Br. at 32, 43-44. Under the D.C. Circuit's precedents, however, the relevant inquiry is whether the legislative entity intended to exercise control over the records *at the time of transfer*. *See Paisley v. CIA*, 712 F.2d 686, 694 (D.C. Cir. 1983) (examining whether documents were transferred to the CIA "in such a way as to manifest any intent by Congress to retain control," but finding no intent to control based on a lack of "*contemporaneous and specific instructions . . . limiting either the use or disclosure of the documents*"); *see also United We Stand*, 359 F.3d at 603 (interpreting *Paisley* as "chang[ing] the focus from agency control to congressional intent").

Here, at the time of transfer to NARA, the FCIC clearly intended to set forth restrictions on the use and disclosure of the FCIC records. *See* NARA's Opening Br. at 24-26. Moreover, at the time of transfer (February 11, 2011, *see* Compl. Exh. 2), the FCIC had not yet expired. Compl. at ¶ 14 (stating that the FCIC terminated on February 13, 2011). Thus, at the time of

⁷ Relatedly, Cause of Action repeatedly highlights how the FCIC records are legislative records, rather than Congressional records. *See* Cause of Action's Br. at 31-32, 38-41. This distinction is certainly accurate, but is also wholly irrelevant. Cause of Action does not meaningfully dispute that all legislative entities are exempt from FOIA. *Compare* NARA's Opening Br. at 9, *with*, Cause Of Action's Br. at 2 n.1; *see also Mayo v. Gov't Printing Ofc.*, 9 F.3d 1450, 1451 (9th Cir. 1993). And because the entire legislative branch is exempt from FOIA, temporary legislative commissions are entitled to maintain control over their records just as much as Congress itself. Furthermore, Cause of Action appears to argue that only the two houses of Congress and their official committees are entitled to maintain control over their records. *See* Cause of Action's Br. at 40-41, 43. If anything, this argument about the inapplicability of the congressional records line of cases only proves NARA's threshold argument—that the control-based framework is inapplicable, because legislative records transferred to NARA are not subject to FOIA as a matter of law.

transfer, the FCIC did, in fact, exercise control over the use and disclosure of the documents. *See* 44 U.S.C. § 2108(a) (stating that, for agencies still in existence that have restricted access to their records, the Archivist “may not relax or remove such restrictions without the written concurrence of the head of the agency from which the material was transferred”). In short, the relevant time for examining a legislative agency’s intent to control is at the time of transfer—not the present day, as Cause of Action suggests—and here, the FCIC clearly intended to, and did in fact, exercise control over the use and disclosure of its records.

Next, Cause of Action asserts that “the [FCIC] itself intended to relinquish control over the [FCIC] documents when it deposited its records with [NARA].” Cause of Action’s Br. at 32. Cause of Action attempts to support this argument by selectively quoting only the very first sentence of Chairman Angelides’ letter, which states that the FCIC records will be transferred to NARA “for preservation and public access.” Cause of Action’s Br. at 32. This single sentence, Cause of Action says, “expresses an explicit intent to transfer both physical custody and ultimate control of Commission’s records to NARA, without exception.” *Id.*

This argument is frivolous. The very next sentence of Chairman Angelides’ letter confirms that his letter “establishes criteria under which [the FCIC] records should be made available.” Compl. Exh. 1 at 1. The next three paragraphs then describe, in detail, the various access restrictions that should be placed on the FCIC records. *Id.* at 1-2. Even Cause of Action admits that Chairman Angelides’ letter imposed restrictions on the FCIC records. *See* Cause of Action’s Br. at 32-33. The notion that the Angelides letter—not to mention the SF-258 and other indicia of control discussed in NARA’s opening brief—could somehow be construed as “relinquishing control of the FCIC records” is absurd. Cause of Action’s Br. at 33.

Finally, Cause of Action argues that Congress created the FCIC to promote transparency, and this general Congressional purpose somehow trumps the access restrictions imposed on the FCIC records. *See* Cause of Action’s Br. at 11, 41-43. This argument is meritless. Whatever the purpose underlying the creation of the FCIC, that type of abstract, general purpose cannot trump the specific statutory authority granted to Commissioner Angelides and NARA to impose access restrictions on the FCIC records. *See* 44 U.S.C. § 2108(a).

In sum, when the FCIC transferred its records to NARA for permanent preservation, the FCIC acted “with the clear intent and desire to put controls on the future access to, and use and disclosure of, FCIC records.” Fulgham Decl. at ¶ 34. Even under Cause of Action’s FOIA-based framework, this fact is dispositive. The most analogous FOIA cases—the ones distinguishing between congressional and executive records—all hinge on whether the legislative entity expressed an intent to control the document at the time of transfer. *See United We Stand*, 359 F.3d at 597 (“In this circuit, whether the IRS response is subject to FOIA turns on whether Congress manifested a clear intent to control the document.”); *see also Paisley*, 712 F.2d at 693-94; *Goland v. CIA*, 607 F.2d 339, 346-48 (D.C. Cir. 1978).⁸ Here, because the FCIC clearly intended to exercise control over the use and disclosure of its records even after transfer to NARA, Cause of Action’s lawsuit must be dismissed even under a FOIA-based framework.

B. The Three Other Proposed Factors Also Weigh in NARA’s Favor.

Even apart from the FCIC’s intent to retain control over the FCIC records (which is itself dispositive), the three other factors in Cause of Action’s proposed framework also confirm that

⁸ Although Cause of Action asserts that the third *Burka* factor is the most important, *see* Section III.B.3, below, that is only true with respect to “documents [that] are created by an agency employee and located within the agency[.]” *Bureau of Nat’l Affairs v. Dep’t of Justice*, 742 F.2d 1484, 1490 (D.C. Cir. 1984). Obviously, the FCIC records were not created by NARA. And in this context, where records have been transferred from one agency to another, control is the dispositive factor. *See id.* (“In certain contexts, such as where a document is created by one agency and transferred to a second agency, control or possession is the critical analysis.”).

the FCIC records are legislative, and thus outside of FOIA. Those three other factors are: NARA's ability "to use and dispose of the record as it sees fit"; the extent to which NARA personnel "have read or relied upon the document"; and "the degree to which the document was integrated into [NARA's] record system or files." *Burka*, 87 F.3d at 515 (internal quotation marks omitted). Under this *Burka* framework, all four factors must weigh in Cause of Action's favor for the records to be considered "agency records" subject to FOIA. *See Tax Analysts v. Dep't of Justice*, 845 F.2d 1060, 1069 (D.C. Cir. 1988) (requiring that "all four factors be present"), *aff'd on other grounds*, 492 U.S. 136 (1989).

1. NARA's Ability to Dispose of the FCIC Records.

NARA's longstanding practice has been to honor the access restrictions imposed on records, even for records whose originating agency has expired. *See* Mills Decl. at ¶ 35 ("To the best of my knowledge, I know of no instance in the history of the National Archives since its inception in 1934 where the Archivist of the United States or his staff intentionally overrode or contravened the expressed intent of a donor of records with respect to the imposition of restrictions on access."). In effect, then, NARA is not absolutely free to dispose of the FCIC records as it sees fit. NARA must still, out of respect for the originating entity, take into account the access restrictions imposed by the FCIC.

Cause of Action asserts that NARA is indeed free to dispose of the FCIC records, as shown by NARA's provision of records to the House Oversight Committee, and by NARA's refusal to permit former Commissioner Wallison to review the FCIC records with counsel. *See* Cause of Action's Br. at 34-35. Neither of these facts alters the analysis. First, providing records to the House Oversight Committee was consistent with another longstanding practice at NARA—*i.e.*, providing special access to current government officials. *See* Section I.D, above. There is nothing improper about assisting current government officials in the exercise of their

duties and responsibilities, and the Court should not discourage NARA from doing so by ruling that such actions will cause records to become subject to FOIA.

Second, NARA's refusal to permit former Commissioner Wallison's counsel to review the FCIC records only proves NARA's commitment to honoring the FCIC's restrictions. Chairman Angelides' letter—agreed to by NARA and incorporated into the SF-258—states that the ten former Commissioners may access the records, but it does not provide for access by the former Commissioners' representatives (such as counsel). Adhering to the FCIC's access restrictions hardly proves that NARA is free to dispose of the records as it sees fit. Thus, this second *Burka* factor also weighs in NARA's favor.

2. NARA's Reliance Upon the FCIC's Records.

Cause of Action fundamentally misunderstands the application of this third *Burka* factor, regarding NARA's reliance on the requested records. Specifically, Cause of Action argues that NARA has read and relied upon the FCIC records when it provided the House Oversight Committee with access to the records, and also when the Center for Legislative Archives began its organization and processing of these records. *See* Cause of Action's Br. at 35-36. Because these actions were "in the legitimate and ordinary performance of [NARA's] official duties," Cause of Action says, this "third *Burka* factor weighs conclusively in favor of Cause of Action." *Id.* at 36-37.

This argument incorrectly applies the third *Burka* factor. It is true that NARA's official duties include processing, preserving, and providing access to the FCIC records, and that NARA has begun to undertake those actions. NARA has not, however, read or relied upon the FCIC records when conducting its *own* operations or agency decisionmaking. And *that* is what the third *Burka* factor's inquiry is about—were the underlying records relied upon as part of an executive agency's own decisionmaking process?

This interpretation of the third *Burka* factor is confirmed by a recent D.C. Circuit decision, holding that records from Fannie Mae and Freddie Mac were not agency records, even after those entities were placed under conservatorship by the Federal Housing Finance Agency. *See Judicial Watch, Inc. v. Fed. Hous. Fin. Agency*, 646 F.3d 924 (D.C. Cir. 2011). In that case, the third *Burka* factor was “fatal to [the plaintiff’s] claim,” because the underlying documents shed no light on executive agency decisionmaking:

The public cannot learn anything about agency decisionmaking from a document the agency neither created nor consulted, and requiring disclosure under these circumstances would do nothing to further FOIA’s purpose of “open[ing] agency action to the light of public scrutiny.” *Dep’t of Air Force v. Rose*, 425 U.S. 352, 372 (1976). . . . Although we appreciate Judicial Watch’s interest in how much money Fannie and Freddie gave to which politicians in the years leading up to our current financial crisis, satisfying curiosity about the internal decisions of private companies is not the aim of FOIA, and there is no question that disclosure of the requested records would reveal nothing about decisionmaking at the FHFA.

Judicial Watch, 646 F.3d at 927-28; *see also Gallant v. NLRB*, 26 F.3d 168, 172 (D.C. Cir. 1994) (describing the inquiry as whether “employees acting within the scope of their employment relied upon the document *to carry out the business of the agency*” (emphasis added, internal quotation marks omitted)). The FCIC records at issue here similarly shed no light on how NARA conducts its operations, or the decisionmaking processes of NARA. Thus, NARA has not “relied upon” the FCIC records in the *Burka* sense of the phrase. *Cf. Burka*, 87 F.3d at 515 (holding that the third factor was met because the agency “read and relied significantly on the information in *writing articles and developing agency policies*” (emphasis added)).

Furthermore, Cause of Action’s interpretation of this third factor would prove far too much. Cause of Action is essentially arguing that records are subject to FOIA when NARA has screened the records or made them publicly available. But NARA routinely performs these functions on its record collections, including those collections that are not subject to FOIA. For

instance, NARA engaged in extensive screening of the Nixon materials. *See generally* 36 C.F.R. § 1275.46; *Nixon*, 433 U.S. at 450-52 (discussing the screening process undertaken pursuant to the PRMPA). Yet the D.C. Circuit in *Ricchio* had no trouble concluding that the Nixon materials were not subject to FOIA. Thus, NARA’s screening of records cannot be sufficient to subject particular records to FOIA. Such a rule would render virtually all of NARA’s holdings—including presidential records, donated materials, and judicial records—subject to FOIA, which is clearly not the case.

At bottom, this factor only confirms NARA’s uniqueness as an executive agency responsible for preserving the nation’s permanently valuable records. *See* Mills Decl. at ¶ 7. NARA’s own operational files—those that govern and relate to how NARA itself makes decisions and conducts its business—are subject to FOIA. But at least some of NARA’s other collections—containing files that NARA does not rely upon as part of its own decisionmaking processes—are not subject to FOIA, such as the FCIC records at issue here.

3. Integration Into NARA’s Files.

The final *Burka* factor is whether the records have been integrated into the agency’s file systems. As Cause of Action notes, “[d]ocuments are not integrated if they are segregated for the purpose of FOIA exclusion.” Cause of Action’s Br. at 37.⁹ Here, the FCIC records are indisputably segregated from NARA’s other files.

For all of its record collections (both legislative and non-legislative), NARA practices the principles of provenance and original order, which are fundamental principles of the archival

⁹ Cause of Action’s citation for this proposition is actually to the dissenting opinion in *United We Stand*, 359 F.3d at 607 (Henderson, J., dissenting). The majority based its decision on other grounds, however, and thus NARA agrees with Cause of Action that this proposition is an accurate statement of the law.

profession. Mills Decl. at ¶ 25; *see* NARA's Opening Br. at 14-15. Together, these principles ensure that NARA duly segregates all of its various records collections.

With respect to the FCIC records, they are stored within the Center for Legislative Archives, which means they are segregated from other FOIA-accessible holdings at NARA. Mills Decl. at ¶ 23; Fulgham Decl. at ¶ 1. The FCIC records are then further segregated into a records group devoted solely to legislative commissions, with a sub-group devoted solely to the FCIC. *See* Mills Decl. at ¶ 30. Thus, the FCIC records are clearly segregated within NARA, and specifically segregated from other FOIA-accessible collections.

Cause of Action's response is to again rely on the provision of records to the House Oversight Committee. But again, Cause of Action's argument rests on a mistaken factual premise; NARA was not the entity that organized the documents into a searchable Concordance database. *See* Section I.D, above. And in any event, NARA's processing of the records for the House Oversight Committee is irrelevant to this fourth factor—whether NARA segregates the original FCIC records apart from NARA's other FOIA-accessible collections.

Cause of Action thus cannot satisfy any of the four factors established by the *Burka* decision. Even under Cause of Action's own framework, therefore, the FCIC records are legislative in character, and outside the reach of FOIA. Cause of Action's lawsuit—which is predicated entirely on violations of FOIA—must be dismissed.

IV. NARA'S MOTION IS FULLY COMPLIANT WITH THE LOCAL RULES, AND IS THE ONLY BASIS FOR ENTERING JUDGMENT IN THIS CASE.

A. NARA's Motion Complies with Local Civil Rule 7(h).

Cause of Action contends that NARA's motion to dismiss or in the alternative for summary judgment should be denied because it was not accompanied by a statement of material facts not in dispute. *See* Cause of Action's Br. at 12. This argument is meritless.

NARA's motion was styled as a motion to dismiss under Rule 12(b)(6), for failure to state a claim upon which relief can be granted. Nothing in the Federal Rules or Local Rules requires a statement of material facts in connection with such a motion. To be sure, NARA's motion also argued in the alternative for summary judgment. But that argument was presented solely in the alternative, and NARA's consistent position has been that this lawsuit should be resolved on a motion to dismiss. The Court should not require a party to file a statement of material facts before converting a motion to dismiss into a motion for summary judgment. *See* Fed. R. Civ. P. 12(d) (stating that if a motion under Rule 12(b)(6) presents material outside the pleadings, "the motion *must* be treated as one for summary judgment under Rule 56" (emphasis added)).

That is particularly true here, where there is no practical reason for requiring a statement of material facts. NARA's motion presents a threshold legal question about whether the lawsuit may proceed. No discovery has been taken, and all of the relevant facts are either in the Complaint, incorporated into the pleadings, or subject to judicial notice. A statement of material facts in connection with such a straightforward motion is plainly unnecessary and not required by either the Federal Rules or Local Rules.

Notwithstanding the lack of any obligation to do so, NARA hereby submits a statement of material facts in connection with this filing, in the event that the Court converts NARA's motion to dismiss into a motion for summary judgment. As a result, Cause of Action cannot claim any prejudice, particularly because NARA's opening brief also contained a detailed statement of the facts. *See* NARA's Opening Br. at 5-8; *Judicial Watch, Inc. v. Dep't of Homeland Sec.*, 857 F. Supp. 2d 129, 136-37 (D.D.C. 2012) (refusing to deny a motion for summary judgment based on the omission of a statement of material facts, because the plaintiff

did not suffer any prejudice). In short, there is no basis or rationale for denying NARA's motion based on Local Civil Rule 7(h).

B. Cause of Action's Cross-Motion for Summary Judgment is Premature and Must Be Denied.

NARA's motion to dismiss presents a threshold issue for the Court's resolution—*i.e.*, whether the records requested by Cause of Action are agency records subject to FOIA. Cause of Action both opposed this motion, and also cross-moved for summary judgment.

Cause of Action's cross-motion is obviously premature. If the Court agrees with NARA, Cause of Action's lawsuit should be dismissed. If the Court disagrees with NARA (and holds that the FCIC records are subject to FOIA), the case would then move on to document searches and processing pursuant to FOIA. Under no circumstances would Cause of Action be entitled to outright judgment before FOIA processing even begins. Regardless of how NARA's motion is resolved, therefore, the Court should deny Cause of Action's cross-motion as premature.

CONCLUSION

For the foregoing reasons, Cause of Action's cross-motion for summary judgment should be denied, and NARA's motion to dismiss for failure to state a claim, or in the alternative for summary judgment, should be granted.

Dated: January 11, 2013

Respectfully Submitted,

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Principal Deputy Assistant Attorney General

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Attorneys for Defendant

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

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

DEFENDANT’S STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

Defendant, National Archives and Records Administration (“NARA”) submits, in connection with its motion to dismiss or in the alternative for summary judgment (ECF No. 8), the following statement of material facts as to which NARA contends there is no genuine issue.

1. Plaintiff Cause of Action, Inc. seeks disclosure under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, of certain records of the Financial Crisis Inquiry Commission (“FCIC”). *See* Compl. at ¶¶ 43-49.

2. The FCIC was a temporary commission established within the legislative branch charged with “examin[ing] the causes, domestic and global, of the current financial and economic crisis in the United States.” *See* Fulgham Decl. at ¶13; *see also* Fraud and Enforcement Recovery Act of 2009, § 5(a), Pub. L. No. 111-21. To accomplish that mission, the FCIC was tasked with submitting a report to the President and Congress “containing the findings and conclusions of the Commission on the causes of the current financial and economic crisis in the United States.” *Id.* §5(h)(1). The FCIC submitted its report on January 27, 2011, and pursuant to statute the FCIC terminated on February 13, 2011. *See* Fulgham Decl. at ¶ 31.

3. Several days before the FCIC's scheduled termination, FCIC Chairman Phil Angelides wrote to the Archivist of the United States David Ferriero to inform NARA that the FCIC intended to restrict future access to some of its records. *Id.* at ¶ 31; *see also* Mills Decl. at ¶ 24.

4. The Archivist and NARA concurred with the FCIC Chairman's restrictions set forth in his letter, by signing the SF-258 on February 8, 2011. *See* Fulgham Decl. at ¶ 33.

5. The FCIC also signed the SF-258 on February 11, 2011. *See id.*; *see also* Compl., Exh. 2. At that point the records were legally transferred into NARA's custody, and were accessioned into the holdings of NARA's Center for Legislative Archives. *See* Fulgham Decl. at ¶ 13; *see also* Mills Decl. at ¶ 24.

6. On August 4, 2012, Cause of Action filed this lawsuit against NARA alleging that NARA violated FOIA by failing to disclose the requested FCIC documents and by failing to grant Cause of Action a fee waiver for its FOIA request. *See* Compl. at ¶¶ 43-49.

7. NARA is a unique executive agency because it serves as the repository for records from all three branches of government. *See* Mills Decl. at ¶ 7. Because the FCIC records originated with a legislative commission, the FCIC records are legislative in character, and thus not subject to FOIA. *See* Mills Decl. at ¶¶ 11, 24; Fulgham Decl. at ¶ 15.

**DEFENDANT'S RESPONSE TO PLAINTIFF'S STATEMENT OF
MATERIAL FACTS NOT IN DISPUTE**

1. Deny that the referenced memorandum was issued on March 19, 2012; and aver that the memorandum was instead issued on March 19, 2009. *See* Cause of Action's Br., Exh. 1 (ECF No. 11-1). Admit all other facts in this paragraph, but contend that all of the facts in this paragraph are immaterial to the present dispute.

2. Admit.

3. Admit.
4. Admit, but contend that the facts in this paragraph are immaterial to the present dispute.
5. Admit.
6. Admit.
7. Admit, but contend that the facts in this paragraph are immaterial to the present dispute.
8. Admit, but contend that the facts in this paragraph are immaterial to the present dispute.
9. Admit.
10. Admit.
11. Admit.
12. Deny, because this paragraph offers only a characterization of the Blank Standard Form 258, and the content of that document speaks for itself. Additionally, the facts in this paragraph are immaterial to the present dispute.
13. Admit that a line was drawn through a sentence in the SF-258, but deny that the record reflects who specifically drew the line through the sentence. *See* Fulgham Decl. at ¶ 33.
14. Admit.
15. Admit.
16. Admit.
17. Admit, but contend that the facts in this paragraph are immaterial to the present dispute.

18. Admit, but contend that the facts in this paragraph are immaterial to the present dispute.

19. Admit that NARA provided duplicate copies of FCIC electronic records to the Committees, but deny all other facts in this paragraph. *See* Supplemental Fulgham Declaration at ¶¶ 3-5. All of the facts in this paragraph are immaterial to the present dispute.

20. Admit.

21. Admit.

22. Admit.

23. Admit.

24. Admit that the minority staff of the House Oversight Committee released a report on July 13, 2011, but deny Cause of Action's characterization of that report as the report speaks for itself. The facts in this paragraph are immaterial to the present dispute.

25. Admit, but contend that the facts in this paragraph are immaterial to the present dispute.

26. Admit, but contend that the facts in this paragraph are immaterial to the present dispute.

27. Admit, but contend that the facts in this paragraph are immaterial to the present dispute.

28. Admit, but contend that the facts in this paragraph are immaterial to the present dispute.

29. Admit that Mr. Stern wrote Mr. Wallison a letter on April 18, 2012, but deny Cause of Action's characterization of that letter as the letter speaks for itself. The facts in this paragraph are immaterial to the present dispute.

30. Denied, because Defendant lacks knowledge and information sufficient to form a belief as to the nature, mission, methods, or motivations of Cause of Action.

Dated: January 11, 2013

Respectfully Submitted,

STUART F. DELERY
Principal Deputy Assistant Attorney General

RONALD C. MACHEN JR.
United States Attorney

ELIZABETH J. SHAPIRO
Deputy Branch Director

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**UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA**

CAUSE OF ACTION,)
)
 Plaintiff)
)
 v.) Civil Action No. 12-1342 (JEB)
)
 NATIONAL ARCHIVES AND)
 RECORDS ADMINISTRATION,)
)
 Defendant.)

SUPPLEMENTAL DECLARATION OF ROBERT MATTHEW FULGHAM, Jr.

I, Robert Matthew Fulgham, Jr., pursuant to 28 U.S.C. § 1746, do hereby declare and state:

1. My prior declaration was submitted in connection with to defendant’s motion to dismiss or in the alternative for summary judgment, dated October 31, 2012, and located at ECF No. 8-4. I have read plaintiff’s opposition to defendant’s motion and wish to provide this supplemental declaration to specifically respond to factual assertions made in the opposition brief and Exhibit 10 thereto, the Declaration of Daniel Z. Epstein.
2. I make this declaration based on personal knowledge and information supplied to me by my staff.
3. On February 18, 2011, the Archivist of the United States received an official request from the House of Representatives’ Committees on Oversight and Government Reform and Financial Services for selected electronic records of the Financial Crisis Inquiry Commission (FCIC). Center for Legislative Archives IT staff copied the requested FCIC electronic records exactly as they were transferred to our custody. The records housed in the FCIC’s Net Documents System were copied to portable drives and delivered to each committee on March 3 and 4, 2011. The FCIC’s email files, accessioned directly from

FCIC's vendor, were all copied to portable drives and supplied to the Committees on March 30, 2011. The Center did not supply any paper documents, only records the FCIC maintained in electronic format.

4. My understanding is that J.R. Deng, the Chief Information Officer to the Committee on Oversight and Government Reform, contacted Brien Beattie of the Committee's Majority Staff, informing him that the emails we supplied were not importing into the Committee's Concordance database properly. Mr. Beattie forwarded this email to T. Ashley Smoot, the former IT specialist in my office (the Center for Legislative Archives). Mr. Smoot recommended software and provided advice to Mr. Deng on how to open the e-mail files. Mr. Deng requested more assistance, so Mr. Smoot created another copy of the FCIC's email files, converted those files from .eml format to .pst format at the request of Mr. Deng, and supplied those converted email files to Mr. Deng on a separate portable drive in April 2011. These converted files were still exact duplicates of the underlying records the FCIC provided to NARA.
5. Aside from the electronic conversion of the email files from .eml format to .pst format, NARA did not perform any alteration or formatting of the FCIC records.
6. The actions that Mr. Smoot and other members of my office undertook to provide electronic duplicates and/or converted files does not represent systematic organization, indexing, or finding aid development, of the type described in my initial Declaration at ¶ 38. All of the burdensome archival functions, including line-by-line review of documents to determine what information should be deemed exempt from public release,

id. at ¶ 39, remain to be accomplished before public access may be provided in the future to this subcollection of FCIC records.

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

Executed this 11th day of January, 2013, in Washington, D.C.



ROBERT MATTHEW FULGHAM, JR.

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

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

**PLAINTIFF’S REPLY TO DEFENDANT’S OPPOSITION TO PLAINTIFF’S MOTION
 TO STRIKE THE DECLARATIONS OF ROBERT MATTHEW FULGHAM, JR. AND
 THOMAS E. MILLS OR IN THE ALTERNATIVE FOR LEAVE OF COURT TO TAKE
 LIMITED DISCOVERY**

Plaintiff, Cause of Action, Inc. (“CoA”), pursuant to Local Rule 7 and Federal Rule of Civil Procedure 56, submits this reply in support of its Motion to Strike the Declarations of Defendant National Archives and Records Administration’s (“NARA”) employees, Robert Matthew Fulgham, Jr. (“Fulgham Decl.”) and Thomas E. Mills (“Mills Decl.”), or, in the Alternative For Leave of Court to Take Limited Discovery in the form of a deposition of Mr. Fulgham, which would be restricted to the four corners of his declaration. Defendant filed its Opposition (“Def.’s Opp’n”) on January 7, 2013. Plaintiff’s Reply follows.

INTRODUCTION

This Court should deny defendant’s motion, because (1) CoA’s Motion to Strike is procedurally proper; (2) CoA’s Motion to Strike is relevant to defendant’s Motion for Summary Judgment; and (3) the Fulgham and the Mills declarations contain hearsay, conclusory statements of law, nonresponsive statements, and statements without foundation, which do not comport with the Federal Rules of Evidence and Federal Rule of Civil Procedure 56(c)(4).

Alternatively, this Court should grant Cause of Action limited discovery in the form of a deposition, because there is no other method by which CoA may ascertain the foundation and credibility of Mr. Fulgham's statements.

Defendant continues to assert that the deposit of legislative records with NARA does not, *per se nota*, change their legislative character. Not only does this assertion miss the point, it is indicative of defendant's failure to understand plaintiff's core argument. Cause of Action has never argued that the mere deposit of records with NARA results in their conversion from legislative records to agency records. Instead, Cause of Action argues that the legislative character of records is altered when certain conditions exist—namely, when NARA both possesses and controls the documents. *See e.g.*, Pl.'s Opp'n and Cross-Mot. for Summ. J. ("Pl.'s Cross-Mot.") at 2. Defendant argues that all records deposited with NARA retain their original character because NARA "possesses a wide variety of records collections, many of which are not subject to FOIA." Def.'s Opp'n at 7. Not only is this argument illogical, it fails to appreciate that when NARA asserts possession and control, the original character of documents deposited with NARA is changed. For these reasons alone, all statements by declarants referring or relating to the 'fact' that depositing records does not alter their original status must be struck as nonresponsive. *Jackson v. Beech*, 636 F.2d 831, 836 (D.D.C. 1980) ("when the adversary process has been halted because of an essentially unresponsive party . . . the diligent party must be protected lest he be faced with interminable delay and continued uncertainty as to his rights.").

Moreover, defendant's declarations include numerous hearsay statements, conclusory statements of law, and statements without foundation, by which defendant has attempted to create the appearance of a "straightforward [FOIA] lawsuit," Def.'s Opp'n at 1, not a lawsuit

pertaining to NARA's possession and control of the records. Because of the defects in the declarations submitted by Defendant, this Court should either strike the declarations or grant Cause of Action limited discovery in the form of a deposition of Mr. Fulgham.

ARGUMENT

I. CAUSE OF ACTION'S MOTION WAS PROCEDURALLY PROPER UNDER RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Defendant mischaracterizes CoA's Motion to Strike. As a matter of procedure, defendant argues that CoA's motion to strike was procedurally improper under Rules 7 and 12 of the Federal Rules of Civil Procedure ("FRCP").¹ However, FRCP 7 and FRCP 12 apply to the pleadings and are inapplicable to CoA's Motion to Strike. *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997) (when ruling on a 12(b)(6) motion the court "may consider *only* the facts alleged in the complaint, any documents either attached to or incorporated in the complaint and matters of which [the court] may take judicial notice.") (emphasis added). These rules are likewise inapplicable to the declarations, which are outside the pleadings and must be submitted in support of defendant's motion for summary judgment, not its motions to dismiss. *See* Fed. R. Civ. P. 12(d); *see also Dist. Contrs., Inc. v. N. Am. Specialty Ins. Co.*, 281 F. Supp. 2d 204, 206 (D.D.C. 2003) (where party attaches documents outside pleading to its memoranda for motion to dismiss or, alternatively, motion for summary judgment, the Court will treat motion as one for summary judgment); *Chavous v. D.C. Fin. Responsibility & Mgmt. Assistance Auth.*, 154 F. Supp. 2d 40, 48 (D.D.C. 2001) (court will treat filing as a motion for summary judgment where "matters outside of the pleading are presented to and not excluded by

¹ Defendant appears to confuse LCvR 7, governing any motion filed in the District of D.C., with FRCP 7, identifying the papers that are allowed as pleadings. *See* Def.'s Opp'n at 4 (asserting that the FRCP does not recognize a motion to strike a declaration, claiming CoA filed its Motion to Strike under Rules 7 or 12(f)). CoA filed its Motion to Strike under FRCP 56, not FRCP 12(f) or FRCP 7, which CoA clearly indicates in the opening paragraph of its Motion to Strike. Moreover, CoA incorporated the Motion to Strike into its opposition paper where it argued the defects of defendant's declarations. *See, e.g., Pl.'s Cross Mot.* at 1.

the court”).² Because defendant moved to dismiss and, in the alternative, for summary judgment, and because the facts it presented went beyond the pleadings, defendant’s declarations must either be excluded by this Court or defendant’s motion must be treated as one for summary judgment. Accordingly, CoA properly submitted its Motion to Strike the Declarations under FRCP 56.

Defendant also contends that CoA’s motion was untimely. CoA reiterates that it has filed the Motion to Strike the Declarations under FRCP 56(c), which—unlike FRCP 12(f)—does not state a timing requirement. *Compare* Fed. R. Civ. P. 12(f) *with* Fed. R. Civ. P. 56(c)(2) & (c)(4).

II. CAUSE OF ACTION’S MOTION IS RELEVANT TO DEFENDANT’S MOTION FOR SUMMARY JUDGMENT.

First, Defendant’s argument that CoA’s Motion to Strike the Declarations is moot fails as a matter of law. *See* Def.’s Opp’n at 1. As Cause of Action clearly argued in its Opposition and Cross-Motion, (“Pl.’s Cross-Mot.”), and reincorporates into this reply brief, defendant is neither entitled to dismissal of the lawsuit nor to summary judgment. Pl’s Cross-Mot at 2-12, 29-41.

Second, Defendant incorrectly claimed that this Court can take judicial notice of information in NARA’s declarations, citing *Hyson v. Architect of the Capitol*, 802 F. Supp. 2d 84, 91 n.4 (D.D.C. 2011). Def.’s Opp’n at 2. However, judicial notice should be taken only when the accuracy of the information received cannot reasonably be questioned. *Hyson*, 802 F. Supp. 2d at 91 n.4. As CoA clarifies below, NARA’s declarations include hearsay, conclusory statements of law, irrelevant statements, unresponsive statements, and statements without foundation. These statements, which are inextricably interwoven in the declarations, hardly qualify as “generally known” facts or facts that can be “accurately and readily determined”

² Under this line of cases, if this Court only considers defendant’s motion to dismiss, it may not consider the attached declarations which are outside the pleadings.

without question. Fed. R. Evid. 201(b). For the foregoing reasons, defendant has failed to show that CoA's Motion to Strike the Declarations should be denied as moot.

III. THE FULGHAM DECLARATION AND THE MILLS DECLARATION MUST BE STRICKEN FOR FAILURE TO COMPLY WITH RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

CoA incorporated the Motion to Strike into its opposition paper where it argued the defects of defendant's declarations. Pl.'s Cross-Mot. at 1, 24, 28, 34. Federal Rule of Civil Procedure 56(c)(4) requires that any declaration used to support a motion for summary judgment "be made on personal knowledge, [and] set out facts that would be admissible in evidence." As explained below and in Section IV, both Fulgham's and Mills's declarations make statements beyond their personal knowledge, and set out facts that are inadmissible in evidence. These deficiencies warrant substantive review, and CoA in no way attempted to gain a "second bite" by moving to strike defendant's declarations. *See* Def.'s Opp'n at 4.

The purpose of a declaration is not to make an argument; it is to establish facts based on personal knowledge. Fed. R. Civ. P. 56(e)(1); *Crawford v. Washington*, 541 U.S. 36, 51 (2004) (defining testimony as "solemn declaration or affirmation made for the purpose of establishing or proving *some fact*") (emphasis added). A declarant is not permitted to express legal opinions or conclusions in his testimony. *Van Winkle v. Crowell*, 146 U.S. 42, 49 (1892) (holding that the key issue the witness testified about was a "conclusion of law, to be drawn from the undisputed facts of the case; and the witness could not testify to such legal conclusion"). Such statements are beyond the scope of a witness' personal knowledge and are in the exclusive purview of the court. *See* Fed. R. Evid. 701; *Coles v. Perry*, 217 F.R.D. 1, 8 (D.D.C. 2003) (plaintiff prohibited from offering legal conclusions because lacks special knowledge and her lay opinion testimony would not be helpful); *United States v. Noel*, 581 F.3d 490, 496 (7th Cir. 2009) ("lay testimony

offering a legal conclusion is inadmissible because it is not helpful”); *Carter v. Ford Motor Co.*, 561 F.3d 562, 567 (6th Cir. 2009) (same); *United States v. Espino-Rangel*, 500 F.3d 398, 400 (5th Cir. 2007) (lay witness may not offer legal conclusions).

Defendant’s declarations improperly serve as a supplemental brief: they contain substantial statements of law and fact and draw both legal and policy conclusions upon the same. Unlike a supplemental brief—which is subject to the adversarial process—a sworn declaration submitted by the government receives a presumption of good faith and, unless controverted, is presumed to be true. *Walsh v. FBI*, No. 11-2214, 2012 U.S. Dist. LEXIS 166239, at *6 (D.D.C. Nov. 21, 2012). Messrs. Mills and Fulgham go well beyond describing their specific duties as agency employees, which involve the preservation of records. Instead, they offer interpretations of law. *See* Section IV *infra*. By incorporating legal conclusions into its declarations, NARA violates FRCP 56(c)(4) by asking this Court to accept defendant’s interpretation of law as true without subjecting that interpretation to the adversarial process.

As CoA describes in its Motion to Strike, the declarations of Messrs. Mills and Fulgham also include fact statements that are inadmissible in evidence: hearsay, nonresponsive and irrelevant statements, and conclusory statements without foundation. *See* Section IV *infra*; *American Broadcasting Cos., Inc. v. U.S. Info. Agency*, 599 F.Supp. 765, 769 (D.D.C. 1984).

On the substance, CoA moves to strike the Fulgham and Mills Declarations for their inclusion of (1) hearsay statements, (2) conclusory statements of law, (3) irrelevant statements, (4) nonresponsive statements, and (5) statements made without foundation. These statements, identified with specificity in Section IV, are so inextricably intertwined with the declarations that the declarations must be struck in their entirety.

IV. THE FOLLOWING STATEMENTS MUST BE STRICKEN FROM DEFENDANTS'S DECLARATIONS FOR VIOLATING THE FEDERAL RULES OF EVIDENCE.

Plaintiff identifies the following statements that must be stricken under the Federal Rules of Evidence. *See, e.g., American Broadcasting Cos., Inc. v. U.S. Info. Agency*, 599 F.Supp. 765, 769 (D.D.C. 1984).

I. Mills Declaration ¶¶ 6-9, 11-17, 19-24, 33-34

- a. Mills Decl., Paragraphs 6-9, 11-17, 19-24 on the ground of that they are irrelevant and non-responsive to the issues of this lawsuit; they contain statements of law and its application; they provide no factual support for Defendant's claim that the records in question are exempt from FOIA; and declarant is not qualified to make the assertions of law contained within these statements.³
- b. Mills, Decl., Paragraph 11 on the ground that it is a conclusory statement of law under Fed. R. Evid. 602, there is no foundation, and the declarant is not qualified to make a statement regarding "prevailing law" on the legal status of the records.
- c. Mills Decl., Paragraph 33 on the ground that it is a conclusory statement of law, there is no foundation, and the declarant is not qualified to make a statement regarding the interpretation of 44 U.S.C. § 2108(a).⁴

³ Mr. Mills repeatedly cites federal statutes relating to congressional, legislative, Presidential, judicial and donated records. CoA does not dispute these statutes. Rather, CoA argues that the FCIC documents become agency records subject to FOIA once they come under NARA's custody and control. CoA also points out that Mr. Mills' discussion of statutes and legal arguments is most properly asserted by counsel.

⁴ 44 U.S.C. § 2108(a) does not state that restrictions will remain in force when a commission is terminated and records are transferred into the custody and control of NARA, or "unless otherwise removed" as stated by declarant.

- d. Mills Decl., Paragraph 34 on the ground that it is hearsay, there is no foundation, and the declarant is not qualified to make a statement regarding what another individual “believed.”

II. Fulgham Declaration ¶¶ 5-13, 15-18, 29, 33-42

- a. Fulgham Decl., Paragraphs 5-13, 15-18, 29 on the ground of that they are irrelevant and non-responsive to the issues of this lawsuit; they provide no factual support for Defendant’s claim that the records in question are exempt from FOIA; and declarant is not qualified to make the assertions of law contained within these statements.⁵
- b. Fulgham Decl., Paragraph 18 on the ground that it is a conclusory statement of law, there is no foundation, and the declarant is not qualified to make a statement regarding whether NARA’s treatment of the records is “consistent” with the statutory scheme.
- c. Fulgham Decl., Paragraph 33 on the ground that it is hearsay, is a conclusory statement of law, there is no foundation, and the declarant is not qualified to make a statement regarding the “intent” of the FCIC in altering the SF-258.
- d. Fulgham Decl., Paragraph 34 on the ground that it is hearsay, there is no foundation, and the declarant is not qualified to make a statement regarding the “intent and desire” of another individual.
- e. Fulgham Decl., Paragraph 35 on the ground that it is hearsay, there is no foundation, and the declarant is not qualified to make a statement regarding the forethought of another individual.

⁵ Mr. Fulgham repeatedly cites federal statutes relating to congressional and legislative records. CoA has clearly stated in the pleadings that it does not contest NARA’s application of FOIA to these records. Instead, CoA contests NARA’s application of FOIA to records that have become agency records in the custody and control of NARA. Moreover, CoA points out that a discussion of statutory law and NARA’s legal arguments is most properly asserted by counsel, not by Mr. Fulgham.

- f. Fulgham Decl., Paragraph 36 on the ground that it is a conclusory statement of law, there is no foundation, and the declarant is not qualified to make a statement regarding whether the records are subject to FOIA.
- g. Fulgham Decl., Paragraphs 36-42 on the ground that the statements lack foundation, are irrelevant, and, alternatively, are not probative under Fed. R. Evid. 403.

V. CAUSE OF ACTION IS ENTITLED TO LIMITED DISCOVERY IN THE FORM OF A DEPOSITION OF MR. FULGHAM.

In the alternative, CoA moves to take limited discovery in the form of a deposition of Mr. Fulgham, which would be restricted to the four corners of his declaration. Paragraph 38 of the Fulgham Declaration is particularly concerning to CoA. Mr. Fulgham made the conclusory statement under oath that subjecting the records to FOIA would “interfere with the Center’s ability to orderly process the records...” and that the Center would be “unable to undertake systematic organization, indexing, or finding aid development...” Fulgham Decl., ¶ 38. This statement contradicts the Declaration of Daniel Epstein at Paragraph 7, in which he stated that NARA has produced all of the records in question to the House Oversight Committee in an electronic format on electronic disks. However, without the opportunity to depose the Mr. Fulgham, there is no method by which CoA may ascertain the foundation and credibility of his statements. Defendant has suggested that CoA moves for limited discovery in the “bare hope” of impugning the declarant’s statements. Def.’s Opp’n at 3 (quoting *Military Audit Project v. Casey*, 656 F.2d 724, 751-52 (D.C. Cir. 1981)). However, addressing this very issue, the D.C. Circuit has said, “‘Where an agency head possesses particular information necessary to the development or maintenance of the party’s case, which cannot be reasonably obtained by another discovery mechanism; the deposition should be allowed to proceed.’ See *Sykes v. Brown*, 90 F.R.D. 77, 78 (E.D. Pa. 1981).” *American Broadcasting Cos., Inc. v. U.S. Info. Agency*, 599

F.Supp. 765, 769 (D.D.C. 1984). For the foregoing reasons, CoA is entitled to limited discovery in the form of a deposition of Mr. Fulgham.

CONCLUSION

The Court should grant Cause of Action's Motion to Strike the Declarations of Robert Matthew Fulgham, Jr. and Thomas E. Mills or in the Alternative for Leave to Take Limited Discovery.

Dated: January 14, 2013

Respectfully submitted,

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

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

**PLAINTIFF’S REPLY IN SUPPORT OF
 PLAINTIFF’S CROSS-MOTION FOR SUMMARY JUDGMENT**

Plaintiff, Cause of Action, Inc. (“CoA” or “Plaintiff”), pursuant to Local Rule 7 and Federal Rule of Civil Procedure 56, submits this reply in support of its Cross-Motion for Summary Judgment. On December 19, 2012, plaintiff filed its Cross-Motion for Summary Judgment (“Pl.’s Cross-Mot.”). On January 11, 2013 defendant National Archives and Records Administration (“NARA”) filed its Opposition (“Def.’s Opp’n”). Plaintiff’s Reply follows.

INTRODUCTION

On October 3, 2011, CoA submitted a Freedom of Information Act (“FOIA”) request for specific records of the Financial Crisis Inquiry Commission (“FCIC” or “the Commission”) that were transferred into NARA’s custody. CoA asserts that, under the relevant tests for determining whether agency records are subject to FOIA, NARA both possessed and controlled the FCIC records at the time of CoA’s FOIA request. CoA disputes defendant’s arguments that its Motion for Summary Judgment was premature; that the FCIC records were legislative records wholly outside the reach of FOIA; and that NARA did not control the records at the time of the FOIA request. The FCIC records were in the possession and control of NARA, exposing them to

the disclosure regime of FOIA. On this basis, the Court should grant CoA's Cross-Motion for Summary Judgment.

ARGUMENT

I. CAUSE OF ACTION'S CROSS-MOTION FOR SUMMARY JUDGMENT WAS PROCEDURALLY PROPER.

Defendant argues that CoA's motion for summary judgment is "obviously premature" because the case would proceed to FOIA document production if the court held "that the FCIC records are subject to FOIA." Def.'s Opp'n at 25. Defendant presupposes that its dispositive motion allows the court to hold that the FCIC records *are* subject to FOIA. In making this argument, defendant has ignored an important procedural point. CoA must submit its dispositive cross-motion in order for the Court to conclude that the FCIC records are subject to FOIA. Under defendant's motion, the Court can decide in favor of defendant by holding that the records are *not* subject to FOIA, or it can decide against defendant by holding that at defendant has not satisfied the 12(b)(6) standard, there are material facts in dispute, or defendant is not entitled to judgment as a matter of law. Def.'s Mot. for Summ. J. ("Def.'s Mot.") at 1. If the Court decided against defendant, it would not hold that the FCIC records are subject to FOIA. Moreover, if defendant's Motion for Summary Judgment was alone denied, the parties would move into discovery, during which they would have the opportunity to depose witnesses and otherwise assess the accuracy of the facts presented. It is only CoA's cross-motion that gives the Court the opportunity to rule that records in question are subject to FOIA because they are in the possession and control of NARA.

Defendant also appears to misapprehend where the parties are in this litigation. Defendant argues that CoA does not appreciate the difference between providing unredacted copies to the House Oversight and Financial Services Committees versus processing the records

under FOIA exemptions. Def.’s Opp’n at 9 (stating that the latter is “obviously more burdensome”). CoA perfectly well understands this distinction, and CoA understands that the distinction is immaterial at this stage. The question presented to this Court is whether the FCIC records are subject to FOIA as a matter of law, not whether processing FOIA requests would be burdensome for NARA. As with all records subject to disclosure under FOIA, NARA would have the opportunity to contest disclosure, in whole or in part, under one or more of FOIA’s statutory exemptions.

NARA’s claim—that requiring its employees and officers to process the FCIC records would be greatly disruptive—is spurious. *See* Fulgham Decl. ¶ 38. NARA creates the appearance that it has only a few employees capable of processing the records, Fulgham Decl. ¶¶ 37-38 (stating it has only 6.5 full-time employees and subjecting the FCIC records to FOIA would “interfere with the Center’s ability to orderly process the records.”); however, these employees are dedicated exclusively to the Legislative Center. Defendant failed to mention that NARA has a separate FOIA processing unit, distinct from its other departments, as required by law. 5 U.S.C. §§ 552(j)-(l) (requiring executive agencies to designate a Chief FOIA Officer, FOIA Public Liaisons, and FOIA Request Center that receives all FOIA requests); *see also* NARA’s website, <http://www.archives.gov/foia/foia-guide.html>. NARA’s FOIA officers are presumptively capable of analyzing the FCIC records for FOIA exemptions, as they do with other FOIA requests. NARA has provided no evidence that its FOIA officers would be unable to evaluate the FCIC documents for FOIA exemptions. Nor has NARA made the case that its Legislative Center staff would be responsible for processing FOIA requests.¹ Defendant operates under that assumption without proving it.

¹ If the Legislative Center does not process FOIA requests for FCIC records, then Mr. Fulgham’s claim that his Center’s administrative scheme would be disrupted by such requests is problematic, at best. *See* Fulgham Decl. ¶¶ 30-42.

Furthermore, defendant's argument that CoA's request would undermine NARA's "systematic organization, indexing, or finding aid development" is unfounded. *See* Fugham Decl. ¶ 38; Mills Decl. ¶ 25. The application of FOIA to the FCIC records does not affect these processes. The FCIC records sought by CoA have already been formatted and provided to the House Oversight and Financial Services Committees. If CoA's request is granted, NARA would only be obligated under CoA's request to submit those records—in their current format—to be processed by the FOIA Request Center for FOIA exemptions.

Finally, defendant argues that because its motion for summary judgment is in the alternative, it is not required to supply a statement of material facts not in dispute under Local Rule 7(h) until after this Court converts the motion. To be sure, however, defendant supplied a statement of material facts as an addendum to its opposition and reply. Defendant's procedural claim is mistaken. When a party moves for summary judgment in the alternative but fails to provide a statement of material facts, the facts presented by the opposing party will be treated as true. *See, e.g., Sing v. Napolitano*, 710 F. Supp. 2d 123, 126 n.3 (D.D.C. 2010). Given this rule, CoA's statement of facts should be treated as true.

II. RECORDS IN NARA'S CUSTODY AND CONTROL ARE WITHIN THE REACH OF FOIA.

A. The D.C. Circuit's *Ricchio* Decision Is Not Applicable to the Present Lawsuit.

The Financial Crisis Inquiry Commission's ("FCIC" or the "Commission") records became agency records subject to the disclosure requirements of the FOIA when they entered into NARA's custody *and* control. Pl.'s Cross-Mot. at 9-12. Defendant attempts to subvert this argument by claiming that *Ricchio v. Kline* is dispositive. Def.'s Opp'n at 3 *citing Ricchio v. Kline*, 773 F.2d 1389 (D.C. Cir. 1985) (Presidential Recordings and Materials Preservation Act ("PRMPA") superseded FOIA as the only method for seeking disclosure of the Nixon

transcripts). Unlike the Presidential Recordings and Materials Preservation Act in *Ricchio*, which superseded and displaced FOIA, there is no basis to conclude that the FCIC records in NARA's custody and control exist wholly outside of FOIA's reach.

Defendant claims that, like in *Ricchio*, this Court should “decline to address the ‘agency records’ question.” Def.’s Opp’n at 4. In *Ricchio*, the D.C. Circuit declined to address whether the Nixon transcripts, then in the custody of NARA, were agency records subject to FOIA. 773 F.2d at 1391. The “‘agency records’ question” was irrelevant given the circumstances: Congress enacted the PRMPA to expressly supersede any application of FOIA to the Nixon transcripts. *Id.* at 1395. The *Ricchio* court explained that the PRMPA was comprehensive and carefully designed because the statute identified seven factors that NARA must incorporate into regulations governing public access to Nixon’s records. *Id.* at 1393. The seven factors of the PRMPA were more specific than those of FOIA and included “the need to provide the public with the full truth, at the earliest reasonable date, of the abuses of governmental power popularly identified under the generic term ‘Watergate’” and “the need to provide public access to those materials which have general historical significance.” *Id.* The *Ricchio* court narrowly tailored its holding to apply only in the context of a comprehensive and carefully designed disclosure regime, like the Presidential Recordings and Materials Preservation Act. *Id.* at 1395. The PRMPA satisfied this standard because it was “designed to protect both the interest of the public in obtaining disclosure of President Nixon’s papers and of President Nixon in protecting the confidentiality of Presidential conversations and deliberations.” *Id.* at 1395. By enacting such a comprehensive disclosure regime for the Nixon records in NARA’s possession, Congress superseded FOIA.

By claiming that the Federal Records Act (“FRA”) similarly supersedes FOIA, defendant fails to recognize *Ricchio*’s heightened burden of “comprehensiveness”—a burden that the FRA

does not meet. *See Church of Scientology of Cal. v. IRS*, 792 F.2d 146, 149 (D.C. Cir. 1986) (holding that a subsequent statute may not be held to supersede FOIA except to the extent that it does so expressly)²; *Julian v. U.S. Dep't of Justice*, 806 F.2d 1411, 1420 (9th Cir. 1986) (holding that neither Fed. R. Crim. P. 32 nor 18 U.S.C. § 4208 “approximate the specificity or particularity required to displace FOIA”).³ Unlike the Presidential Recordings and Materials Preservation Act, the FRA is not a sufficiently comprehensive, carefully tailored and detailed disclosure regime. Where the Presidential Recordings and Materials Preservation Act required NARA to issue new rules for public access to the Nixon records it possessed, the FRA has no such requirement; instead, the FRA merely established a framework for federal agencies to manage records.⁴ Defendant acknowledges as much when it states that under the FRA, “each agency head is given *certain* duties pertaining to the creation, management, and disposal of federal records.” Def.’s Mot. at 3 (emphasis added). FOIA, however, also imposes duties on executive agencies, requiring them to make records available to any person who properly requests them. Def.’s Mot. at 4-5. The requirements of the FRA and FOIA are coterminous, and not mutually exclusive as they were in *Ricchio*. This is made clear by NARA’s Standard Form 258, a form agreement that federal agencies execute to transfer records into NARA’s custody. Def.’s Mot. at 3-4. The Standard Form 258 explicitly states that records held by NARA are

² *See also* the court’s comparison of IRC § 6103 (“It would be another matter if § 6103 established some rules and procedures -- duplicating those of FOIA -- for individual members of the public to obtain access to IRS documents. But it does not.”) with IRC § 6110 (“Significantly, Congress did not leave us to speculate whether it was comprehensive enough to constitute an implicit pro tanto repeal of FOIA; the last subsection specifies that the prescribed civil remedy in the Claims Court shall be the exclusive means of obtaining disclosure.”).

³ *See also Essential Info. v. U.S. Info. Agency*, 134 F.3d 1165, 1172 (D.C. Cir. 1998) (Tatel, J., dissenting) (“In the thirteen years since *Ricchio*, we have not applied it to any other statute. We rejected reasoning similar to *Ricchio*'s in *Church of Scientology*.... The Ninth Circuit refused to apply *Ricchio* to Rule 32 of the Federal Rules of Criminal Procedure and 18 U.S.C. § 4208 *Ricchio* has no applicability here either.”)

⁴ *See Marie V. O’Connell*, “A Control Test for Determining ‘Agency Record’ Status Under the Freedom of Information Act,” 85 Colum. L. Rev. 611, 614 n.30 (Apr. 1986) (“Agency employees who process FOIA requests have been advised that ‘the Federal Records Act was passed for records management purposes, while FOIA was passed to strengthen the public’s right to know...’ U.S. Dep’t of Justice, FOIA Counselor: What Is An ‘Agency Record’?, FOIA Update, Fall 1980, at 5 (emphasis in original).”).

governed by the Federal Records Act (“FRA”) and by FOIA. Compl., Ex. 2; Pl.’s Cross-Mot., Ex. 4. Yet, defendant argues that the FRA supersedes FOIA, a position inapposite with the Standard Form 258—which NARA drafted—and with *Ricchio*. By creating the Standard Form 258, NARA recognizes that the FRA is coterminous with FOIA’s disclosure requirements. Accordingly, there is no basis for defendant’s argument that “the specific disclosure scheme of the Federal Records Act (and NARA’s administrative implementation of that Act) trump[s] the general disclosure scheme of FOIA.” Def.’s Opp’n at 4.

Defendant NARA has failed in its attempt to rely on the D.C. Circuit’s narrow holding in *Ricchio*. The FRA does not supersede FOIA. For this reason, the “agency records’ question” is properly before this Court.

B. Congressional and Executive Precedent Do Not Establish That Records Transferred into the Custody and Control of NARA Are Exempt From FOIA.

Defendant NARA refuses to acknowledge CoA’s argument that transferring the FCIC records into NARA’s control and custody presents a unique situation. *See* Def.’s Opp’n at 6. The FCIC was a temporary, investigative commission established within the legislative branch; as such, its records were *then* exempt from FOIA. Pl.’s Cross-Mot. at 21. However, the FCIC records were transferred into the custody of NARA immediately before its disbandment. Pl.’s Cross-Mot. at 33-34. The FCIC soon ceased to exist, and its records are not only in NARA’s custody, but are also under its control. Pl.’s Cross-Mot. at 21. CoA does not argue that all legislative records held by NARA are subject to FOIA—nor has CoA “ignored” NARA’s archival regime. *C.f.* Def.’s Opp’n at 6. CoA argues that the FCIC records became agency records subject to FOIA when they entered NARA’s custody and control. *See* Pl.’s Cross-Mot. at 30. On these bases, NARA’s “control” is the relevant question before this Court.

III. UNDER *BURKA*, NARA EXERCISED CONTROL OVER THE FCIC RECORDS.

The *Burka* analysis is a totality of the circumstances test, in which FOIA's presumption of disclosure remains in full effect. *Consumer Fed'n of Am. v. Dep't of Agric.*, 455 F.3d 283, 287 (D.C. Cir. 2006) (the term "agency records" shall "not be manipulated to avoid the basic structure of FOIA").

A. Chairman Angelides' Letter Is Neither Dispositive Nor Indicative of Congressional Intent Regarding Disposition of the FCIC Records.

Defendant argues that "the FCIC clearly intended to impose restrictions on future access" in the February 11, 2011 letter from Chairman Angelides to the National Archivist. Def.'s Opp'n. at 15. NARA argues that the terms of this letter and the modified Standard Form 258 are dispositive on the intent prong, because they demonstrate the FCIC's intent to retain future control of its records. *Id.* This argument fails for the reasons set forth below.

First, Congress expressed no intent to retain control over all legislative agency records, e.g., the FCIC records, when it enacted the Federal Records Act ("FRA"), *see* 44 U.S.C. § 2108(a); nor did Congress express its intent for the FCIC to retain control over its records upon the Commission's termination. *See* Fraud Enforcement and Recovery Act of 2009 ("FERA"), Pub. L. No. 111-21, 123 Stat. 1617 (2009), *et seq.* Without Congress clearly expressing intent to control the FCIC records, the Archivist's discretion and authority under the Federal Records Act ("FRA") is at issue. 44 U.S.C. § 2108(a).⁵ That section of the FRA provides in pertinent 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

⁵ Section 2108 is expressly referenced under the "Terms of Agreement" in Standard Form 258.

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). Accordingly, since the FCIC no longer exists and has no successor in function, NARA has discretion to determine what, if any, restrictions should be placed on disclosure of FCIC records, if the Archivist determines that such action is “in the public interest.” *Id.* The Archivist exercised his discretion under 44 U.S.C. § 2108(a) when he formatted and transferred the FCIC documents to the House Oversight and Financial Services Committees after February 18, 2011. *See* Epstein Decl. ¶¶ 7, 10-11; Fulgham Supp’l Decl. ¶ 4. NARA also exercised its discretion under 44 U.S.C. § 2108(a) when it prohibited former Commissioner Wallison from accessing the FCIC records with counsel. *See* Pl.’s Cross-Mot. at 29-33. Absent any indication by Congress that either Congress or the FCIC would retain control over the FCIC records after their deposit with the Archivist, the FRA governs. Under the FRA, NARA exercises exclusive control over the FCIC records.

Second, NARA ignores the nature of FCIC during and after it transferred its records to NARA.⁶ FCIC was a temporary commission created by FERA with a specific purpose and a specific expiration date—the Commission ceased to exist on February 13, 2012. Moreover, a non-existent legislative commission exercises control over nothing. The transfer of records by the FCIC on February 11, 2011 meant that, upon its expiration, the FCIC retained neither possession nor control of its records, notwithstanding any restrictions placed upon future access. In contrast, every entity analyzed under the first *Burka* factor is an extant agency. *See, e.g., CREW v. U.S. Dep’t of Homeland Security*, 527 F. Supp. 2d 76, 97 (D.D.C. 2007) (Department

⁶ An FCIC staff person executed Standard Form 258 on behalf of the Commission, and in so doing also altered a material term of the “Terms of Agreement” regarding restrictions placed on documents transferred to NARA in light of FOIA.

of Homeland Security); *Judicial Watch v. U.S. Secret Service*, 803 F. Supp. 2d 51, 57-61 (D.D.C. 2011) (Secret Service); *McKinley v. Board of Governors of Fed. Reserve System*, 849 F. Supp. 2d 47, 57-58 n.5 (D.D.C. 2012) (Federal Reserve). This important distinction supports the conclusion that the FCIC relinquished control over its records upon their transfer to NARA.

Third, the successive declarations put forward by NARA, to the extent they are deemed credible, indicate the extensive level of control NARA exercised in processing, formatting and reviewing the FCIC records. *See* Fulgham Decl. ¶¶ 30-42; Fulgham Supp’l Decl. ¶¶ 3-4. NARA produced no declaration, affidavit, or other statement from Chairman Angelides, any FCIC Commissioner, any staff member, or other individual connected with FCIC as to the nature and/or intent of the FCIC in depositing its records with NARA. Indeed this would be the best evidence of such intent. NARA’s declarations indicate exactly the opposite point, that it exercised full use and control over FCIC’s records when they were transferred to NARA’s possession.

B. NARA Uses and Disposes FCIC Records As It Sees Fit and with Unlimited Discretion

NARA has unlimited discretion to use and dispose of the FCIC records as it see fit, and accordingly satisfies the second *Burka* factor. PI’s Cross-Mot. at 33-35. NARA does not dispute its ability to use the FCIC records because the very nature of NARA’s mission requires it use the FCIC records when it reviews, indexes, catalogues, and otherwise formats them. *See, e.g.*, Fulgham Supp’l Decl. ¶¶ 3-6. NARA’s Opposition does not address its ability to “use” the FCIC records. That issue is therefore conceded and should be decided in CoA’s favor. *Williams v. Dodaro*, 806 F. Supp 2d. 246, 256 (D.D.C. 2011) (explaining that it is “well understood in this Circuit” when a party files an opposition to a dispositive motion and addresses only certain

arguments raised by the moving party, the court may treat the arguments that the opposing party “failed to address as conceded.”)

Nonetheless, NARA violated its own procedure for how and when government agents can access documents in its possession, thereby demonstrating its ability to use and dispose of the FCIC records as it sees fit. Exhibit 1, NARA Interim Guidance 1605-2, *Special Access by Government Officials to Classified and Unclassified, Closed Federal Records in NARA’s Legal Custody* (Mar. 21, 2006) (hereinafter “Directive”); *see also* Def.’s Opp’n at 11.⁷ This Directive requires that any congressional request to access records be made by the chairman of the committee making the request, and that such request *must* be sent to the General Counsel of NARA, specifying “the records being requested and the purpose of the request.” *Id.* ¶ 5 (emphasis added). Once a congressional request for records is properly submitted to NARA, the unit of NARA possessing the documents will arrange for the requestor to review the documents “in a non-public area.” *Id.* ¶ 7(a).

The February 18, 2011 letter from the Chairmen of the House Oversight and Financial Services Committees violated NARA’s own Directive. First, the February 18th letter was addressed to the National Archivist, not NARA’s General Counsel in violation of paragraph 5 of the Directive. There is no admissible evidence that NARA’s General Counsel ever saw the letter. There is no indication that NARA’s General Counsel determined that the letter was “from an appropriate official,” a violation of paragraphs 4(b) and 5. The employees of NARA’s Center for Legislative Activities (“CLA”) violated paragraph 7(a) of the Directive when they copied and formatted the FCIC records to send to the staff of the House Oversight and Financial Services

⁷ By its terms, the Directive applies to “accessioned Federal records” in NARA’s custody, “donated materials of the Office of Records Services”, but excludes “Presidential records and materials governed by the Presidential Records Act (PRA), the Presidential Recordings and Materials Preservation Act (PRMPA), or 44 U.S.C. § 2111 for donated presidential historical materials.” This compels the conclusion that the PRA and PRMPA are distinct statutes dealing with a discrete category of documents, records, and materials. Defendant’s conflation of presidential records with the FCIC records at issue here is erroneous.

Committees. *See* Fulgham Supp'l Decl. ¶¶ 3-6 (assuming his declaration to be true and credible). NARA provides no explanation for its disregard of its own protocol in producing voluminous FCIC records to the referenced House Committees.⁸ By disregarding its own procedure in disseminating the FCIC documents, NARA demonstrates its ability to use and dispose of the records as it sees fit.

Under section 7(b) of the Directive, the House Oversight and Financial Services Committees are free to publicly release the FCIC records, and accordingly are not bound by the restrictions in Chairman Angelides' letter. By allowing these House Committees to fully possess the FCIC documents in contravention of NARA's own Directive, NARA demonstrates its autonomy and unfettered discretion to use and dispose of the FCIC records.

NARA contends that it honors the intent of "donors" depositing records with NARA. Def.'s Opp'n at 19 (quoting Mills Decl. ¶ 35). The term "donor," however, has a particular meaning within the Federal Records Act ("FRA"), applying to past presidents or private parties who voluntarily deposit records with NARA for historical preservation under 44 U.S.C. §§ 2111 & 2112(c). *See, e.g., Nixon v. United States*, 782 F. Supp. 634, 639 (D.D.C. 1991) (discussing Kennedy records voluntarily donated); *Nixon v. Administrator of General Services*, 408 F. Supp. 321, 338 n.19 (D.D.C. 1976) ("donor-imposed access restrictions" used by Hoover, Eisenhower, Kennedy, and Johnson). NARA acknowledges this distinction. *See* Mills Decl. ¶ 19 (acknowledging that "donated records" come from private sources, not agency heads). The FCIC is neither a private source nor a former president, so NARA's claim that it has never "contravened the express intent of a donor of records" is irrelevant to FCIC's intent. Mills Decl. ¶ 35.

⁸ This is particularly curious given the Mills and Fulgham declarations regarding original order, provenance and NARA's administrative scheme for processing of and access to FCIC records.

C. NARA Used and Relied Upon the FCIC Documents in the Conduct of Its Official Duties, Satisfying the Third *Burka* Factor

NARA argues that its employees never “read or relied upon the FCIC records when conducting its *own* operations or agency decisionmaking,” and therefore does not satisfy the third *Burka* factor. Def.’s Opp’n at 20. This argument is factually inaccurate and does not follow District of Columbia Circuit precedent.

NARA has read at least a portion of the FCIC records in the “legitimate conduct of its official duties.” *U.S. Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 145 (1989). Mr. Fulgham admits as much when he states that NARA’s reading and review of the FCIC records is a “line-by-line review process” that “is extremely time-consuming.” Fulgham Decl. ¶ 39. It is difficult to conceive how NARA would perform any analysis or review of the FCIC records without, at a minimum, reading them. *Burka v. U.S. Dep’t of Health & Human Services*, 87 F.3d 508, 515 (D.C. Cir. 1996). It is also true that NARA has denied performing any “archival functions, including line-by-line review of documents to determine what information should be deemed exempt from public release” with regard to the FCIC records, having had control of the documents for two years. *See* Fulgham Supp’l Decl. ¶ 6. Defendant, however, does not specifically deny reading the documents.

Defendant argues that because the FCIC records were not part of NARA’s decisionmaking, the third *Burka* factor is not satisfied. Def.’s Opp’n at 21 (citing *Judicial Watch, Inc. v. Fed. Housing Finance Agency*, 646 F.3d 924, 927-28 (D.C. Cir. 2011)). However, *Judicial Watch* is distinguished because the documents in *Judicial Watch* were never touched by anyone at the agency: “no one at the [agency] had read [the records] and that until someone at the [agency] used the requested documents, they could not be agency records for purposes of FOIA.” *Id.* at 924. That is not the case here, where NARA admits its official duties include

“processing, preserving, and providing access to the FCIC records,” and NARA further admits that it has begun to undertake such actions. Def.’s Opp’n. at 20.

For these reasons, and the reasons discussed in CoA’s Cross-Motion, NARA has satisfied the third *Burka* factor.

D. FCIC’s Records Are Integrated Into NARA’s Computer System, Satisfying the Fourth *Burka* Factor.

NARA unpersuasively argues that the FCIC documents were not integrated into NARA’s computer system. Def.’s Opp’n at 22-23. NARA misinterprets integration and segregation of agency records, which under precedent in this jurisdiction, requires a case-by-case analysis of the facts to determine whether the fourth *Burka* factor is satisfied. *See, e.g., Judicial Watch, Inc. v. U.S. Secret Service*, 803 F. Supp. 2d 51, 60 (D.D.C. 2011); *CREW v. U.S. Dep’t of Homeland Sec.*, 527 F. Supp. 2d 76, 96 (D.D.C. 2007).

NARA revealed the great extent to which the FCIC records were integrated into its system when it allowed former Commissioner Wallison to review the records in December 2012. NARA took the FCIC records and made them “available on a computer” for former Commissioner Wallison to view in NARA’s controlled setting. Compl., Ex. 8, letter from Gary M. Stern to Peter J. Wallison (Apr. 18, 2012). NARA admits that the FCIC records were integrated into NARA’s computer system. *CREW*, 527 F. Supp. 2d at 96 (Integration is integration: “The length of time a record is saved skirts the salient issue of whether it was integrated into the agency’s record system in the first place.”).

NARA also reveals that the FCIC records were integrated into its computer system because NARA formatted, copied, re-formatted, and transferred the records in electronic format to the House Oversight and Financial Services Committees. *Judicial Watch*, 803 F. Supp. 2d at 60 (downloading records into an agency’s system, regardless of whether they are retained or

deleted at some future point, constitutes integration under *Burka*). Moreover, “[t]he fact that the records are transferred is not dispositive in determining whether the records are integrated.” *Id.* (citing *CREW*, 527 F. Supp. 2d at 96).

The FCIC records were accessed by NARA employees in the production to the House Oversight Committee, in the Wallison production, and going forward, as NARA has controlled the documents for two years and NARA has “begun to undertake” its official duties including “processing, preserving, and providing access to the FCIC records.” Def.’s Opp’n at 20. Indeed it is mystifying that NARA contests integration of the FCIC records into its database when doing so is a threshold step in reviewing and analyzing such records.

Defendant’s Opposition makes much of its “segregation” of the FCIC records by the Center for Legislative Archives. *See* Def.’s Opp’n at 22-23. For an agency to invoke this exception to the fourth *Burka* factor, it must segregate the records for FOIA purposes, not for agency purposes. *See CREW*, 527 F. Supp. 2d at 96 (citing *United We Stand v. IRS*, 359 F.3d 595, 607 (D.D.C. 2007)). The FCIC records have not been segregated for FOIA purposes as permitted under 5 U.S.C. §§ 552(j)-(l). Instead, to the extent the FCIC records have been segregated, they were done so for agency purposes: the records were transferred to the Legislative Center for processing and archival. *See* Fulgham Decl. ¶ 30; Pl.’s Cross-Mot at 37. Additionally, NARA’s recitation of successive segregations of the FCIC records by Mr. Fulgham’s staff is proof that NARA has integrated those records into its computer system by virtue of the performance of those functions.

IV. THE SUPPLEMENTAL FULGHMAN DECLARATION CONTAINS INADMISSIBLE MATTER THAT IS WITHOUT FOUNDATION, IS HEARSAY AND IS NOT BASED ON PERSONAL KNOWLEDGE.

The Supplemental Declaration of Robert Matthew Fulgham, Jr. (“Fulgham Supp’l Decl.”) suffers from the same defects as his first Declaration. *See* Plaintiff’s Corrected Motion

to Strike the Declarations of Robert Matthew Fulgham, Jr. and Thomas E. Mills or in the Alternative for Leave of Court to Take Limited Discovery.

Federal Rule of Civil Procedure 56(c)(4) requires that the facts set out in an affidavit in support of a motion for summary judgment be based on personal knowledge and admissible in evidence. Mr. Fulgham states that the facts set forth are made “based on personal knowledge and information supplied to me by my staff.” Fulgham Supp’l Decl. ¶ 2. Any delineation between the two sources of information is not identified in the remaining paragraphs of the Declaration. Paragraph Four of the Supplemental Declaration is based entirely on hearsay, lacks foundation and does not appear to be based on Mr. Fulgham’s personal knowledge. The paragraph begins, “My understanding is that . . . ,” and it goes on to specifically describe a cascade of events, interactions, and communications central to this litigation that occurred between J.R. Deng, Chief Information Officer to the Committee on Oversight and Reform; Brien Beattie, staff to House Oversight Majority; and T. Ashley Smoot, former IT specialist in Mr. Fulgham’s office. The basis of Mr. Fulgham’s knowledge or access to this information is not supplied. Electronic communications and oral discussions are indicated, but not independently supported as admissible facts. The formatting and conversion of the FCIC files “from .eml format to .pst format”, by Mr. Smoot at the request of Mr. Deng, appear overly simplistic. What is clear is that Mr. Smoot, as NARA’s IT representative, held all the cards regarding provision of and access to the FCIC records by the House Oversight Committee. Mr. Deng requested assistance several times from Mr. Smoot in successfully accessing the FCIC records. For the reasons stated above, the Mr. Fulgham’s supplemental declaration contains matter that is without foundation, is hearsay, and is not based on personal knowledge, and accordingly should be stricken from the record.

CONCLUSION

At the time of CoA's FOIA request, the FCIC records were in the possession and control of NARA, subjecting them to the disclosure regime of FOIA. The Court should grant Cause of Action's Motion for Summary Judgment.

Dated: January 22, 2013

Respectfully submitted,

/s/ Karen M. Groen

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/s/ Daniel Z. Epstein

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Counsel for Plaintiff

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

CAUSE OF ACTION,

Plaintiff,

v.

**NATIONAL ARCHIVES AND RECORDS
ADMINISTRATION,**

Defendant.

Civil Action No. 12-1342 (JEB)

ORDER

As set forth in the accompanying Memorandum Opinion, the Court ORDERS that:

1. Defendant's [8] Motion to Dismiss is GRANTED;
2. Plaintiff's [13] Cross-Motion for Summary Judgment is DENIED;
3. Plaintiff's [14] Motion to Strike is DENIED AS MOOT; and
4. The case is DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

/s/ James E. Boasberg
JAMES E. BOASBERG
United States District Judge

Date: March 1, 2013

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

CAUSE OF ACTION,

Plaintiff,

v.

**NATIONAL ARCHIVES AND RECORDS
ADMINISTRATION,**

Defendant.

Civil Action No. 12-1342 (JEB)

MEMORANDUM OPINION

In 2009, in the wake of the recent financial upheaval, Congress passed the Fraud Enforcement and Recovery Act, Pub. L. No. 111-21, 123 Stat. 1617 (2009). Among other things, FERA created the Financial Crisis Inquiry Commission, a temporary, 10-member, bipartisan body established within the legislative branch to “examine the causes, domestic and global, of the current financial and economic crisis in the United States.” *Id.*, § 5(a). The FCIC completed its investigatory work, submitted a report to Congress in early 2011, and terminated pursuant to the statute a few weeks later. Shortly after the Commission ceased to exist, its records were transferred to the National Archives and Records Administration, the Defendant in this case, for preservation and processing.

Plaintiff Cause of Action submitted a Freedom of Information Act request to NARA on October 3, 2011, seeking copies of the FCIC’s records. NARA denied this request, explaining that as the FCIC was a commission established within the legislative branch, its records were legislative records not subject to FOIA. After Cause of Action unsuccessfully appealed this

initial denial, it filed this suit on August 14, 2012, alleging that NARA's failure to disclose the requested records violated FOIA.

NARA has now brought the instant Motion to Dismiss or, in the alternative, for Summary Judgment, arguing again that the FCIC's records are legislative records beyond the scope of FOIA. Cause of Action has filed a Cross-Motion for Summary Judgment, as well as a Motion to Strike certain declarations filed as exhibits to NARA's Motion. Because the Court finds that the FCIC records are not agency records subject to FOIA, it will grant NARA's Motion to Dismiss and deny as moot Plaintiff's Cross-Motion for Summary Judgment, as well as its Motion to Strike the particular declarations.

I. Background

The Financial Crisis Inquiry Commission was created as a temporary body within the legislative branch. See FERA, § 5(a). According to the Complaint, the FCIC submitted its concluding report to Congress on January 27, 2011, and terminated by statute on February 13. See Compl., ¶¶ 13-14. Meanwhile, on February 10, Phil Angelides, Chairman of the Commission, wrote to David Ferriero, Archivist of the United States (the head of NARA), describing a number of restrictions the FCIC wished to impose on future access to its records, which were to be housed by NARA upon the Commission's termination. See id., ¶ 15 & Exh. 1 (Angelides Letter). The next day, the records were transferred to NARA, and that transfer was memorialized by the signing of a Standard Form Agreement between the FCIC and NARA. See id., ¶ 17 & Exh. 2 (Standard Form 258). Additional details about the restrictions and transfer are set forth in Section III.B, *infra*.

Plaintiff Cause of Action, a public interest organization, submitted the FOIA request that is the subject of this suit to NARA on October 3, 2011, seeking all FCIC records. See id., ¶ 31 &

Exh. 3 (FOIA Request). NARA denied Plaintiff's request, as well as the appeal of that denial. Plaintiff subsequently filed this suit on August 14, 2011. The Court now considers Defendant's Motion to Dismiss, Plaintiff's Cross-Motion for Summary Judgment, and Plaintiff's Motion to Strike NARA's declarations.

II. Legal Standard

Under Federal Rule of Civil Procedure 12(b)(6), a court must dismiss a suit when the complaint "fail[s] to state a claim upon which relief can be granted." In evaluating a motion to dismiss, the Court must "treat the complaint's factual allegations as true and must grant plaintiff the benefit of all inferences that can be derived from the facts alleged." Sparrow v. United Air Lines, Inc., 216 F.3d 1111, 1113 (D.C. Cir. 2000) (citation and internal quotation marks omitted); see also Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). A court need not accept as true, however, "a legal conclusion couched as a factual allegation," nor an inference unsupported by the facts set forth in the complaint. Trudeau v. FTC, 456 F.3d 178, 193 (D.C. Cir. 2006) (quoting Papasan v. Allain, 478 U.S. 265, 286 (1986)). Although "detailed factual allegations" are not necessary to withstand a Rule 12(b)(6) motion, Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007), "a complaint must contain sufficient factual matter, [if] accepted as true, to state a claim to relief that is plausible on its face." Iqbal, 556 U.S. at 678 (internal quotation omitted). Though a plaintiff may survive a Rule 12(b)(6) motion even if "recovery is very remote and unlikely," the facts alleged in the complaint "must be enough to raise a right to relief above the speculative level." Twombly, 550 U.S. at 555-56 (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

In evaluating the sufficiency of a complaint under Rule 12(b)(6), courts may consider "the facts alleged in the complaint, any documents either attached to or incorporated in the

complaint and matters of which [the court] may take judicial notice.” Equal Emp’t Opportunity Comm’n v. St. Francis Xavier Parochial Sch., 117 F.3d 621, 624 (D.C. Cir. 1997). “Documents that are referenced in, or are an integral part of, the complaint are deemed not ‘outside the pleadings’” for purposes of a motion to dismiss for failure to state a claim. Norris v. Salazar, --- F. Supp. ---, 2012 WL 3541710, at *3 n.9 (D.D.C. Aug. 17, 2012). Because the Court can grant Defendant’s Motion to Dismiss relying only on the Complaint and those documents referenced therein, it will not address the separate legal standards applicable to Plaintiff’s Cross-Motion for Summary Judgment or its Motion to Strike the declarations.

III. Analysis

FOIA requires that “each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules . . . , shall make the records promptly available to any person.” 5 U.S.C. § 552(a)(3)(A). A FOIA plaintiff states a claim where it properly alleges that “‘an agency has (1) improperly (2) withheld (3) agency records.’” United States Dep’t of Justice v. Tax Analysts, 492 U.S. 136, 142 (1989) (quoting Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 150 (1980)). For purposes of FOIA, however, the definition of an “agency” specifically excludes Congress, legislative agencies, and other entities within the legislative branch. See 5 U.S.C. §§ 551(1), 552(f); see also United We Stand Am., Inc. v. Internal Revenue Serv., 359 F.3d 595, 597 (D.C. Cir. 2004) (“The Freedom of Information Act does not cover congressional documents.”); Washington Legal Found. v. United States Sentencing Comm’n, 17 F.3d 1446, 1449 (D.C. Cir. 1994) (“[W]e have interpreted the . . . exemption for ‘the Congress’ to mean the entire legislative branch [including legislative agencies].”).

Neither party seriously disputes that at the time the records were created by the FCIC, a congressional entity “established in the legislative branch,” see FERA, § 5(a), they were congressional documents exempt from FOIA. This case, then, turns on whether the records, once transferred to NARA, became “agency records” subject to FOIA.

The parties here each answer this question using a different analytic framework. Defendant essentially argues for a *per se* rule that congressional records transferred to NARA retain their legislative character and thus remain exempt from FOIA; in other words, NARA’s current physical custody and control of the records does not make them agency records. See Mot. at 9. In contrast, Cause of Action maintains that NARA’s custody and control of the records is dispositive: since NARA is an “agency” subject to FOIA, records in its possession are, by definition, agency records. See Pl. Opp. and Cross-Mot. at 2-3. The Court, ultimately, need not rule on NARA’s proposal because, even under Plaintiff’s control-based framework, these particular records did not become “agency records” subject to FOIA when they were transferred to NARA for storage.

A. NARA’s Framework

Although NARA points to no binding authority specifically dictating that legislative records transferred to it retain their legislative character for FOIA purposes, it does cite legislative, judicial, and administrative sources supporting the more general proposition that the transfer of records to NARA does not change their FOIA status. First, in Ricchio v. Kline, 773 F.2d 1389 (D.C. Cir. 1985), the D.C. Circuit held that President Nixon’s records, which had been transferred to NARA’s legal custody under the Presidential Recordings and Materials Preservation Act (PRMPA), 44 U.S.C. § 2111, did not become subject to FOIA by virtue of their transfer. See id. Instead, the court held that “the proper method by which . . . [plaintiff] may

seek disclosure of the Watergate Force transcripts of the Nixon tapes is by proceeding under the [PRMPA] and that she cannot proceed under the Information Act.” 773 F.2d at 1395. Ricchio declined to address the specific question of whether the Nixon materials became “agency records” for FOIA purposes, but held instead that they were outside FOIA, and access to them was governed by the PRMPA. Id. The court thus acknowledged that some records held by NARA are not subject to FOIA, and that the transfer of such records to NARA’s physical and legal custody does not change this special status. See id. Although Ricchio concerned presidential rather than congressional materials, its core teaching – that NARA’s physical and legal custody of records does not control their FOIA eligibility – appears applicable here.

Likewise, the Presidential Records Act of 1978, 44 U.S.C. § 2201 *et seq.*, which governs the disposition of presidential records at the conclusion of each administration, codifies the same concept. Under the PRA, presidential records are transferred to NARA’s legal custody and control at the end of each administration, but most remain generally unavailable to the public for at least five years. See §§ 2202, 2203(f), 2204(a)-(b). After this preliminary exclusionary period, “Presidential records shall be administered in accordance with [FOIA], . . . and for the purposes of [FOIA] . . . [are] deemed to be records of the National Archives and Records Administration.” See § 2204(c)(1). PRA materials must not, accordingly, be “records of the National Archives and Records Administration” for FOIA purposes during the time between their transfer to NARA’s legal custody and the conclusion of this preliminary exclusionary period. See TRW, Inc. v. Andrews, 534 U.S. 19, 31 (2001) (it is “a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant”) (internal quotation marks omitted). While the PRA applies only to presidential records, it lends additional

support to the idea that not all records transferred to NARA's legal custody and control become subject to FOIA immediately upon transfer.

NARA's own regulations further support this distinction. When NARA revised its regulations interpreting FOIA and the Federal Records Act, it explicitly rejected the idea that "all records in the custody of [NARA] should be governed by FOIA . . . including the records of Congress and judicial branch records that have been deposited with NARA for preservation." See 66 Fed. Reg. 16374. NARA's final regulation, furthermore, made clear that NARA "believe[d] that 44 U.S.C. § 2107 allows [NARA] to accept for deposit Congressional and court records of historical value and that accepting these records does not make them records of the executive branch for purposes of FOIA." Id.

Together, these three sources of authority recognize that the transfer of records to NARA does not necessarily "make them records of the executive branch for purposes of FOIA." See id. This makes sense given NARA's unique nature. As the repository for federal records of all kinds – including ones from the judicial and legislative branches – NARA does not "possess" documents in the same manner as other executive agencies. See, e.g., Ann H. Wian, Note, The Definition of "Agency Records" under the Freedom of Information Act, 31 Stan. L. Rev. 1093, 1111 (1979) (generally proposing that "where an agency acts simply as a warehouse, and holds congressional, court, or presidential documents which it has made, and will make, no use of, it would be consistent with the purposes of the Act to deny disclosure on the grounds that such documents are not 'agency records'"); see also In re Estate of Martin Luther King, Jr., Inc. v. CBS, Inc., 184 F. Supp. 2d 1353, 1364 (N.D. Ga. 2002) (recognizing that "neither the transfer of documents to a federal storage facility nor their physical handling and review by public employees make such documents part of the public record") (citing Fund for Constitutional

Gov't v. Nat'l Archives and Records Serv., 656 F.2d 856 (D.C. Cir. 1981)). In addition, because NARA's exclusive function is to store and maintain records, its mere possession and processing of the documents would reveal nothing about its decisionmaking processes, a key objective of FOIA. See Berry v. Dep't of Justice, 733 F.2d 1343, 1349-50 (9th Cir. 1984) (discussing how FOIA's goal of "allow[ing] the public to determine how agencies reach decisions" is advanced where documents in question are used in agency decisionmaking process). To treat all records in NARA's custody as "agency" records would seem to ignore these critical distinctions.

The Court, nevertheless, need not endorse NARA's broad proposal in order to decide this case. Instead, it is able to rule for Defendant even under the commonly used control-based test.

B. Agency Records?

"To qualify as an 'agency record' subject to FOIA disclosure rules, 'the agency must either create or obtain the requested materials,' and 'the agency must be in control of [them] at the time the FOIA request is made.'" Burka v. Dep't of Health and Human Servs., 87 F.3d 508, 515 (D.C. Cir. 1996) (quoting Tax Analysts, 492 U.S. 136, 144 (1989)) (some internal quotation marks omitted; brackets in original). There is no dispute that NARA obtained the materials, which were directly transferred to it from the FCIC. The question is whether NARA was in control of them.

As a preliminary matter, "mere physical location of papers and materials" does not confer "agency-record" status. Kissinger, 445 U.S. at 157; see also Goland v. CIA, 607 F.2d 339, 345 (D.C. Cir. 1978) ("we reject plaintiffs' argument that an agency's possession of a document per se dictates that document's status as an 'agency record'") (footnote omitted). Instead,

this circuit has identified four factors relevant to a determination of whether an agency exercises sufficient control over a document to render it an "agency record": "(1) the intent of the document's creator to retain or relinquish control over the records; (2) the

ability of the agency to use and dispose of the record as it sees fit;
(3) the extent to which agency personnel have read or relied upon
the document; and (4) the degree to which the document was
integrated into the agency's record system or files."

Burka, 87 F.3d at 515 (quoting Tax Analysts v. Dep't of Justice, 845 F.2d 1060, 1069 (D.C. Cir. 1988), aff'd other grounds, 492 U.S. 136).

The first factor – the intent of the document's creator to retain control – clearly weighs in favor of a finding that the records are outside FOIA's scope. The FCIC here has "manifested its own intent to retain control" of the records. Paisley v. CIA, 712 F.2d 686, 693 (D.C. Cir. 1983), vacated in part on other grounds, 724 F.2d 201 (D.C. Cir. 1984). It has done so through "contemporaneous and specific instructions . . . limiting either the use or disclosure of the documents." Id. at 694; see also id. at 692 (in considering "Congress' continuing intent to control a document," one factor to consider is "the conditions under which it was transferred to the agency"). The letter sent from Chairman Angelides to NARA when the records were transferred specifically stated that "the FOIA will not apply to Commission records even after they are transferred to NARA," and recommended that "records not already publicly available should be made available to the public . . . consistent with the terms of this letter, beginning on February 13, 2016." See Angelides Letter at 1. Likewise, the letter imposed four specific restrictions beyond this initial period, including:

Records should not be disclosed immediately after February 13, 2016, if they contain (a) personal privacy information that the Commission agreed to protect from public disclosure for longer than 5 years; (b) confidential financial supervisory or regulatory information which remains sensitive at the time of release; (c) proprietary business information which remains confidential or contains trade secrets at the time of release, including any such information that the Commission has agreed will remain confidential for a longer period of time; or (d) information which is otherwise barred from public disclosure by law, as determined by [NARA].

Id. When the form transferring the documents was signed, it expressly incorporated the Angelides letter and, along with it, these restrictions on disclosure. See SF-258. The SF-258 also includes additional indicia of the FCIC’s intent to control future access to its records: it was hand annotated to remove the reference to FOIA, and the parties answered “no” to the question in Box 12 of the form, which asked whether the records transferred were to be fully available for public use. Id.

These specific, contemporaneous instructions restricting access to the FCIC records long after their transfer to NARA mean that the first factor clearly tips in favor of a finding that the records retain their legislative character.¹ Because of the importance of intent in the control-based framework, this factor carries even greater weight. See, e.g., United We Stand, 359 F.3d at 597 (“In this circuit, whether the [document] is subject to FOIA turns on whether Congress manifested a clear intent to control [it.]”); Paisley, 712 F.2d at 693 (if “Congress has manifested its own intent to retain control, then the agency – by definition – cannot lawfully ‘control’ the documents”).

The second factor – “the ability of the agency to use and dispose of the record as it sees fit” – benefits NARA largely for the reasons just articulated. NARA does not have wide discretion in its use and disposal of the FCIC records because of the specific limiting instructions placed on the records at the time they were transferred. Similarly, the third factor, which considers “the extent to which agency personnel have read or relied upon the document,” tilts the same way since NARA is merely a repository, and its personnel do not act in reliance on these

¹ While Plaintiff argues that because Chairman Angelides “is not a member of Congress . . . [he] cannot . . . express the will of Congress,” see Pl. Opp. and Cross-Mot. at 11, 31-32, the law of this Circuit is clear that actions by an agent of Congress – including a senior staff member of a Congressional Committee, or, here, a senior Congressional appointee of a legislative body – are sufficient. See United We Stand, 359 F.3d at 595.

types of documents. The Court may, for purposes of this Motion, presume that the final factor – namely, the records’ integration into NARA’s system – favors Plaintiff since the essential reasons for depositing records at NARA are categorization and safekeeping. To the extent that the records were integrated into NARA’s system, however, that system only serves the purpose of categorizing and preserving documents, rather than agency decisionmaking, and this fact thus carries little weight.

A weighing of the factors, therefore, tips decisively in favor of NARA and a conclusion that the FCIC’s documents are not “agency records” subject to FOIA. The Court will, accordingly, grant Defendant’s Motion to Dismiss.

C. Procedural Considerations

In addition to its substantive arguments, Plaintiff also raises several procedural points in opposing NARA’s Motion to Dismiss. First, Plaintiff moved to strike two declarations appended to the Motion or, in the alternative, for leave to take limited discovery prior to the Court’s consideration of Defendant’s Motion as one for summary judgment. See Pl. Mot. to Strike (ECF No. 14). Because the Court is able to resolve NARA’s Motion to Dismiss without resort to these declarations, the Court will deny Plaintiff’s Motion as moot. Likewise, Plaintiff also argues that because Defendant failed to submit a statement of undisputed material facts in support of its Motion, it must be denied for failure to comply with Local Rule 7(h). See Pl. Opp. and Cross-Mot. at 11-12. Since the Court dismisses the case without considering summary judgment, this argument is moot as well. No statement of facts need be appended to a motion to dismiss, so Defendant’s Motion suffers from no procedural shortcoming.

IV. Conclusion

For the aforementioned reasons, the Court will grant Defendant's Motion to Dismiss, deny Plaintiff's Cross-Motion for Summary Judgment, and deny as moot Plaintiff's Motion to Strike the declarations. A separate Order consistent with this Opinion will be issued this day.

/s/ James E. Boasberg
JAMES E. BOASBERG
United States District Judge

Date: March 1, 2013

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

333 Constitution Avenue, NW
Washington, DC 20001-2866
Phone: 202-216-7000 | Facsimile: 202-219-8530

Plaintiff: **Cause of Action**

vs.

Civil Action No. **12-cv-1342 (JEB)**

Defendant: **NARA**

CIVIL NOTICE OF APPEAL

Notice is hereby given this 29 day of April, 2013, that

Plaintiff, Cause of Action

hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the
judgement of this court entered on the 1 day of March, 2013, in

favor of Defendant, National Archives and Records Administration

against said Cause of Action

Daniel Z. Epstein

Attorney or Pro Se Litigant

(Pursuant to Rule 4(a) of the Federal Rules of Appellate Procedure a notice of appeal in a civil action must be filed within 30 days after the date of entry of judgment or 60 days if the United States or officer or agency is a party)

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 seven 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

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