ORAL ARGUMENT NOT YET SCHEDULED

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

No. 13 – 5127

Cause of Action,
Plaintiff-Appellant,

v.

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

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

Reply Brief of Appellant Cause of Action

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SUMMARY OF THE ARGUMENT

The Freedom of Information Act (FOIA) protects citizens' right to know what their government is up to. It mandates a strong disclosure presumption. Exemptions to disclosure must be given narrow compass.

The Financial Crisis Inquiry Commission (FCIC) terminated by statute on February 13, 2011. Two days prior to termination, the FCIC's chairman transferred the FCIC records to the National Archives and Records Administration (NARA) via a letter claiming complete FOIA-exemption. However, NARA retained discretion "to relax or remove restrictions on [FCIC] records transferred to its custody" notwithstanding this letter. NARA Br. 22.

Cause of Action sought FOIA disclosure of certain FCIC records. Indeed NARA had already disclosed these records to others as if FOIA applied. But we were unfairly denied similar treatment by NARA and refused disclosure. Therefore, we filed this action.

The court below dismissed our suit. Based on the Angelides transfer letter, the trial court concluded NARA lacked "control" over the FCIC records because they retained "legislative" character. Appendix at 396–99 [hereinafter "A___"]. Because the court below erred, for at a minimum, three important reasons, we filed this appeal.

First, Congress did not exempt the FCIC records from FOIA in FCIC's organic statute. As we established below, A204, A230–34, NARA disclosed the FCIC records to others without restriction, contrary to the Angelides transfer letter and as if FOIA applied. Therefore, NARA lacked both reason and authority to sweepingly deny our initial FOIA request.

Second, the trial court dismissed the case below by according full deference to the Angelides transfer letter. A396–99. However, in *Judicial Watch v. U.S. Secret Service*, 726 F.3d 208 (D.C. Cir. 2013), this Court held that a FOIA-exempt entity's legal assertions in a memorandum of understanding about custody and control should receive absolutely no deference. *Id.* at 231. Indeed, only because *Judicial Watch* was decided on summary judgment did the Court accept the memorandum's representations as to how the parties historically regarded and treated the documents. Therefore, by wrongly giving the transfer letter heightened deference in the context of a Rule 12(b)(6) motion to dismiss, the court below erroneously decided the instant matter.

Third, the court below wrongly relied upon NARA employee declarations to grant dismissal.

Additionally, NARA's unprecedented claim that the FCIC records are *per se* FOIA-exempt is contrary to long-standing authorities establishing both FOIA's broad disclosure presumption and narrow exemption construction. The court

below did not hold that the FCIC records forever retain "their legislative character" and are *per se* FOIA-exempt. NARA Br. 33. This Court should rule accordingly.

For these reasons, as well as those established in our opening brief, the decision of the court below granting NARA's Rule 12(b)(6) motion to dismiss should be reversed.

ARGUMENT

Congress did not restrict dissemination of the FCIC records in its organic statute. FCIC's focus, after all, was supposedly transparency. Yet that focus was lost and FCIC became—in and of itself—controversial. CoA Br. 7–8; A009 ¶¶ 24–28; A014-15. As early as July 27, 2010, the U.S. House of Representatives' Committee on Oversight and Government Reform (OGR) requested information directly from FCIC's chairman about high staff turnover, conflicts of interest, and budgetary problems. *Id.*; A014 n.1. FCIC ignored the request. CoA Br. 7-8; *see* A014-15. OGR again requested the FCIC records on January 25, 2011. *Id.* FCIC again refused to respond.

On February 18, 2011, OGR, through Chairman Darrell Issa, asked NARA for the FCIC records. A250–51. NARA processed and responded to this request *not* in accordance with its procedures for sending out congressional records, but as if the request had been made under FOIA. NARA disclosed the FCIC records to OGR (including minority staff) without restricting the records' use—contrary both

to the Angelides transfer letter and to NARA's own procedures for legislative branch records.

The court below never addressed these important facts. Instead, in granting NARA's Rule 12(b)(6) motion to dismiss, the trial court erroneously deemed the Angelides transfer letter's "magic words" concerning FOIA determinative. A396–99. Although NARA works hard to make it so, NARA Br. 25–34, this case *does not turn* upon an academic analysis of either: (1) whether a quasi-legislative independent commission's records are subject to FOIA during the term of that commission's existence; or (2) the determinative nature of the self-serving transfer letter itself. *See Judicial Watch*, 726 F.3d at 231. Rather, the issue here is whether NARA's actions in this case, when viewed through FOIA's broad disclosure presumption and narrow exemption construction prism, demonstrate that it had "control" of the FCIC records pursuant to *United States Dep't of Justice v. Tax Analysts*, 492 U.S. 136 (1989); *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007) (given FOIA's broad disclosure policy, "the Supreme Court has 'consistently stated that FOIA's exemptions are to be narrowly construed.'" (citing *U.S. Dep't of Justice v. Julian*, 486 U.S. 1, 8 (1988)).

Notwithstanding NARA's bevy of *post hoc* justifications for denying our disclosure request, the irreducible truth here is that when OGR Chairman Issa wrote asking for the FCIC records on February 18, 2011, NARA disregarded its

own well-established procedures for transmitting legislative branch documents to Congress. NARA ignored the Angelides transfer letter in its entirety. Consequently, the court below erred in granting NARA's motion to dismiss.

I. NARA Treated the FCIC Records As If They Were Subject to FOIA and Accordingly Cause of Action Should Not Be Denied Disclosure

As a threshold matter, the court below erroneously failed to account for NARA's unrestricted disclosure of the FCIC records to OGR and wrongfully ignored that, before our FOIA request, NARA treated the FCIC records as if they were subject to FOIA. NARA glosses over this by arguing that "providing legislative branch records to a congressional committee is not the equivalent of public disclosure." NARA Br. 49. However, had NARA truly believed the FCIC records to be legislative branch records, it would not have done what it did in this case. Instead, it selectively disregarded the transfer letter and wrongfully treated us differently than other FOIA requestors. *See U.S. Dep't of Justice v. Reporters Comm.*, 489 U.S. 749, 771 (1989) ("the identity of the requesting party has no bearing on the merits of his or her FOIA request"); *see also* U.S. Dep't of Justice, Office of Info. Policy, FOIA Update, No.10-2, Privacy Protection Under the Supreme Court's *Reporters Committee* Decision (1989) (except for protectable interests some requesters may have in their personal information, "'disclosure to one is disclosure to all'").

To begin with, NARA did not comply with its own directives for "legislative branch records" with respect to the FCIC records. NARA Directive 1701 governs Congress's requests for its own records.[1] The Directive names the Clerk of the House as the only agent authorized to borrow these records for the House. *Id.* at 1701.24(b). The Clerk must first provide NARA written permission to loan the records. *Id.* at 1701.25(a). To complete the lending process, NARA prepares Form NA 14014 to document the loan, the Clerk signs it, and the Clerk agrees to return the records by a date certain. *Id.* at 1701.25, 1701.23. NARA Directive 1701 does not govern FOIA requests, whether by a Congressperson or a congressional committee. To the contrary, FOIA requesters, congressional or otherwise, *never* return records they receive under FOIA, and do not sign borrower agreements.

Here, it is plain that NARA processed and responded to Chairman Issa's letter as a FOIA request. A009 ¶¶ 23–29. OGR, Chairman Issa, and every other

[1] In 2005, NARA's Office of the Inspector General (OIG) investigated whether NARA complied with Directive 1701 regarding legislative branch records and determined that it did not always do so. Nat'l Archives & Rec. Admin, Office of Inspector Gen., Audit Report No. 06-04, *Review of NARA's Internal Control Procedures for Loan Items* (Dec. 19, 2005). OIG recommended that NARA "insure all loans meet the documentation requirements of NARA 1701." *Id.* at 7. NARA management "concurred with the finding and recommendation." *Id.* So, to sustain the fiction that the FCIC records are legislative branch records and exempt from FOIA, NARA would have the Court hold that NARA disregarded its own Directive 1701 and ignored a nearly decade-old OIG report when disclosure of the FCIC records was made to OGR.

Member of Congress are each authorized to ask NARA for FOIA disclosure, 5 U.S.C. § 551(2); 36 C.F.R. § 1250.4, and a FOIA request need not clearly label itself as a FOIA request to be processed as one.[2] Here, the Clerk of the House did not request the FCIC records and NARA did not provide a Form NA 14014 to document a loan. Not one of the Members who received the FCIC records *ever* returned them and, significantly, NARA disclosed the FCIC records absent restriction. Among other things, NARA's unrestricted release permitted Rep. Elijah Cummings to disclose the very information that FCIC itself had repeatedly denied OGR before NARA controlled the FCIC records.[3]

In its brief, NARA openly relies on the Mills declaration to establish agency practice and prove NARA has *never* disregarded a depositor of records' intent

[2] Courts frequently evaluate the content of the request and will construe a letter as a FOIA request even if it does not explicitly identify itself that way. *See, e.g.*, *Newman v. Legal Servs. Corp.*, 628 F. Supp. 535, 543 (D.D.C. 1986) ("FOIA request" need not be titled as such and, absent a valid exemption, the Government must provide the requested documents).

[3] Rep. Cummings authored a July 13, 2011, OGR Minority Staff Report based on approximately 400,000 FCIC e-mails, memoranda, draft reports and other documents disclosed by NARA. A254. The Minority Report disclosed highly sensitive and personal information from the FCIC records, information FCIC had previously refused to give OGR, in no fewer than thirty-three direct citations. A252–88. These records included e-mail and other communications between FCIC Commissioners, between Commissioners and third parties, and between FCIC General Counsel and Commissioners. A256, A260–61, A264–69, A272, A274–80, A282–87.

regarding "the imposition of restrictions on access." NARA Br. 8–9.[4] But this cannot be. When NARA disclosed the FCIC records to OGR, after all, it disregarded the transfer letter, which NARA claims is "the expressed intent of a donor of records." *Id.*

In any event, given NARA's statutory authority to ignore access restrictions, "historical practice" is irrelevant. A082 (Mills declaration). NARA's regulations only memorialize its statutory authority to remove and relax the transfer letter's restrictions and require FOIA compliance. *See, e.g.*, 36 C.F.R. § 1235.32(a) ("If . . . there is no successor, the Archivist may relax, remove, or impose restrictions");[5] *see also* 36 C.F.R. § 1256.20(b) ("all agency[6]-specified restrictions must comply with the FOIA"). NARA did just that here.

NARA's disclosure of the FCIC records was consistent with FOIA but contradicted the terms of the transfer letter that NARA now asserts as a *per se* bar to our requested disclosure. NARA clearly did not then recognize the FCIC

[4] It is impossible to read NARA's filings below and on appeal without acknowledging the import of the Mills declaration and the two Fulgham declarations to NARA's position below and on appeal. NARA's briefs therefore primarily rely on evidence outside the record to support factual and legal conclusions. In critically relying on these declarations in granting NARA's motion to dismiss, the court below clearly erred.

[5] The Government cites 36 C.F.R. § 1235.32(b)(2) to argue that restrictions may exist for specific categories, but this provision applies only to records that are more than 30 years old. *See* NARA Br. 48.

[6] "Agency" here means an agency under the Federal Records Act, and includes the FCIC.

records to be those of the legislative branch.[7] Only when Cause of Action asked was the bar applied. However, NARA cannot pick and choose between requesters. 5 U.S.C. § 552(a)(3)(A) ("each agency . . . shall make the [requested] records promptly available to *any person*") (emphasis added); *see also Morley v. CIA*, 719 F.3d 689, 691 (D.C. Cir. 2013).[8] Therefore, NARA should not be heard now to selectively rely on the transfer letter to deny us the disclosure others were given, whether due to a lack of control, as the court below erroneously concluded, or for any other reason.

We are not required to prove the FCIC records given to OGR are subject to FOIA at any time, much less at the Rule 12(b)(6) motion stage. Rather, NARA

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[7] NARA's recent rule-making regarding the scope of records subject to FOIA is consistent with our claim that NARA recognized that the FCIC records were not FOIA-exempt legislative branch records. *Compare* 78 Fed. Reg. 47,247 (Aug. 5, 2013) (adding "legislative branch agencies" as a FOIA-excluded entity in addition to "Records of Congress") *with* 36 C.F.R. § 1250.6(c) (July 1, 2012) ("Records of Congress" only). Had NARA believed that FCIC and other commission records were FOIA-exempt legislative branch records, then there would have been no need to expand the regulatory definition of "Records of Congress" to include them.

[8] *Morley* concerned a FOIA attorney fee award, but the characterization of the statutory scheme in Judge Kavanaugh's concurrence is especially apt here:

> FOIA is an equal-opportunity disclosure statute. For disclosure purposes, FOIA treats all requests and requesters the same—no matter the identity of the requesters, the specific benefit that might be derived from the documents, or the requesters' overt or subtle motives. *See* 5 U.S.C. § 552(a)(3)(A) ("each agency . . . shall make the [requested] records promptly available to *any person*") (emphasis added).

Morley, 719 F.3d at 691.

must prove the FCIC records are FOIA-exempt. *Tax Analysts*, 492 U.S. at 142 n.3. Specifically, "the burden is on the agency to demonstrate, not the requester to disprove, that the materials sought are not 'agency records.'" *Id.* NARA has failed to carry its burden in this case, a burden that the court below *never considered*. A391–92. Therefore, the lower court committed reversible error in failing to consider the appropriate burden of proof.

II. The FCIC Records Contained "Agency Records" Which Are *Per Se* Subject to FOIA and Cause of Action Was Entitled To Their Disclosure

FCIC obtained most of the records it sent NARA from or in conjunction with other executive branch agencies that are undisputedly subject to FOIA, including the Federal Deposit Insurance Corporation, Department of Housing and Urban Development, Office of the Comptroller of the Currency (OCC), Office of Federal Housing Enterprise Oversight and its successor agency, Federal Housing Finance Agency (FHFA), Office of Thrift Supervision, Securities and Exchange Commission (SEC), and Department of the Treasury.[9] These other executive agency records were subject to FOIA then, and remain subject to FOIA today. *See United We Stand v. IRS*, 359 F.3d 595, 603 (D.C. Cir. 2004) ("absent 'clear' . . . expression of congressional intent to control the entire response, neither the

[9] *See* FCIC at Stanford Law, Hearings and Testimony, *available at* http://fcic.law.stanford.edu/hearings. The Minority Report uses information FCIC obtained from the Federal Reserve Board, FHFA, FHA, and OCC. A254, A264, A266, A269, A282.

[agency]'s own expectations nor its handling of the document can turn the entire agency-created record into a congressional document.") Therefore, NARA should have, at the very least, segregated these other executive agency records from the FCIC records and disclosed them to us, subject to applicable exemptions. *Judicial Watch*, 726 F.3d at 233–34 ("subject to any applicable exemptions, the Secret Service may not withhold WHACS records that reveal visitors to those offices within the White House Complex that are themselves subject to FOIA. *Those documents are 'agency records*.'") (emphasis added).

We alleged our entitlement to these records in our Complaint. A010 ¶ 36. To date, NARA has given no explanation for why it has withheld these "other agency" records. Therefore, the court below erred by not ordering their disclosure. *Judicial Watch*, 726 F.3d at 233–34 ("agency records" subject to FOIA within group of non-FOIA records must be disclosed); *Kimberlin v. U.S. Dep't of Justice*, 139 F.3d 944, 950 (D.C. Cir. 1998) (finding error in a district court simply approving the withholding of an entire set of documents without entering a finding on segregability, and remanding the case back for a determination of whether any of the withheld documents contained segregable and disclosable information).

III. The Court Below Correctly Refused NARA's Request for a *Per Se* FOIA Exemption But Wrongly Dismissed the Complaint and Denied Disclosure

A. The Court Below Correctly Refused To Create A *Per Se* FOIA Exemption For the FCIC Records

The trial court correctly refused to create a *per se* FOIA exemption for the FCIC records. A396–99. However, NARA again repeats its request for such a rule on appeal, and the Bipartisan Legal Advisory Group (BLAG) repeats the same mantra in its *amicus* brief. However, this Court refused to establish a *per se* rule in its recent *Judicial Watch* decision and the Court should again refuse to do so here for the very same reasons. *See Judicial Watch*, 726 F.3d at 233–34.

B. The Court Below Wrongly Dismissed The Complaint

The trial court erred in holding the FCIC records retained their legislative character in a "control-based framework" and improperly dismissed the complaint. A398–99.

The central issue in this case is whether, given NARA's unrestricted disclosure of the FCIC documents, NARA's disparate treatment of FOIA requestors should stand. To avoid engaging on this ground, NARA runs a misdirection play, first claiming "special factors" bar disclosure (grounds not cited by the court below) and then obscuring this central issue by belaboring the uncontested point that NARA's possession, alone, does not make the FCIC records

"agency records" under FOIA.[10] *Judicial Watch v. Fed. Hous. Fin. Agency*, 646 F.3d 924, 927 (D.C. Cir. 2011) ("our cases have never suggested that ownership means control"). Instead, the proper focus here is NARA's control and congressional intent. Upon review of these factors, it is evident that the court below erroneously granted NARA's Rule 12(b)(6) motion to dismiss.

1. The "modified control test" has no application here

NARA argues that special policy considerations warrant the application of the modified control test, prescribed by *Judicial Watch*. NARA Br. 21, 35. However, the "modified control test" does not apply here.

To begin with, NARA tosses around the term "special policy considerations" without defining it. NARA would have this Court hold that undifferentiated separation of powers concerns makes "special policy considerations" synonymous with "all FOIA-exempt entities." Essentially, NARA claims that any time a FOIA-exempt entity like Congress or the Office of the President creates records, separation of powers principles would demand that those records must *never* be subject to FOIA. In other words, NARA asks for a *per se* rule that would

[10] Although we never made such an argument, NARA posits this to obscure whether NARA sufficiently controlled the FCIC records given its unfettered release to OGR. We have repeatedly addressed this distraction. A198. ("[Legislative records] are transformed into agency records when an agency is in possession of and exercises control over the records in question"); CoA Br. 24 ("Whether records are subject to FOIA depends on a two-part test. First, an agency subject to FOIA, like NARA, must possess the subject documents. . . . Second, once possession is established, the agency must control the documents.").

eviscerate FOIA, contradict *Tax Analysts*, and forever hide government records from public access. NARA Br. 33, *contra Reporters Comm.*, 489 U.S. at 772–73 (1989). FOIA's basic purpose is to open government action to the light of public scrutiny, thereby furthering "the citizens' right to be informed about what their government is up to." *Id.*[11]

The holding of *Judicial Watch* is not entirely new and it does not reach nearly as far as NARA would like. *Judicial Watch* is built upon a line of cases recognizing that a discrete subset of *some* FOIA-exempt entities are subject to "special policy considerations." Since at least 1983, this Court has evaluated special policy considerations and the rule is that only "*sometimes* special policy considerations militate against a rule compelling disclosure" of a FOIA-exempt entity's records. *Bureau of Nat'l Affairs v. U.S. Dep't of Justice*, 742 F.2d 1484, 1491–92 (D.C. Cir. 1984) (quoting *McGehee v. CIA*, 697 F.2d 1095, 1107 (D.C. Cir. 1983) (emphasis added).

In truth, "special policy considerations" are a narrow carve-out that apply to the President in matters of safety and to Congress in matters of oversight that require secrecy. In *Judicial Watch*, the special policy consideration specific to the President was his Constitutional need for safety, which warranted secrecy in his

[11] Justice Douglas's dissent in *EPA v. Mink*, 410 U.S. 73, 105 (1973), effectively captures the notion that secrecy is incompatible with democracy, which relies upon an informed citizenry to effectively function. (*Reporters Comm.* at 795).

visitors log. Otherwise, a savvy FOIA requester could reconstruct his personal calendar and learn of the President's daily whereabouts, thereby posing a serious national security risk. *See Judicial Watch*, 726 F.3d at 231. In *Goland v. CIA*, 607 F.2d 339 (D.C. Cir. 1979), the special policy consideration was Congress's need for secrecy in its oversight role when operating a committee in executive session to evaluate the expenditures in the executive department. *Id.* at 343.

Here, FCIC merits neither of these special policy considerations and NARA does not even claim that it does. FCIC was not operating in secret executive congressional session, as was the House Committee on Expenditures in the Executive Department in *Goland*. Nor did FCIC or its members face the kind of national security threat that the President faced in *Judicial Watch*. Indeed, FCIC ceased its work years ago and it no longer exists as even a legal fiction.

Furthermore, NARA does not argue the FCIC records are secret and, given the contempt and disregard FCIC openly showed OGR, NARA cannot plausibly claim the FCIC records raise the kind of separation of powers concerns that could justify non-disclosure. There is no need to keep the FCIC records inaccessible by the public, and there are no separation of powers concerns that could justify their secrecy.

Even assuming for the sake of argument that the FCIC records contain sensitive information, such sensitive information is not secret information.[12] *Holy Spirit Ass'n v. CIA*, 636 F.2d 838, 841 (D.C. Cir. 1980). When Congress demands secrecy in an executive congressional session, Congress has clearly expressed its intent to prevent records from being subject to FOIA. *Goland*, 607 F.2d at 348. Here, Congress made no such demand.

Furthermore, if the FCIC records *do* contain sensitive information, that concern could surely be addressed at the FOIA exemption stage. At this juncture, the issue is whether the FCIC records are or became "agency records" under FOIA. NARA's wish here is the father of the thought because sensitive information does not preclude a record from being an "agency record" subject to FOIA. *Holy Spirit*, 636 F.2d at 841. Accordingly, "special policy considerations" are not relevant to this case.

2. The court below erroneously applied the "intent to control" test

The court below exclusively relied on the Angelides letter and his transmittal papers to show *Congress's* clear intent to keep the FCIC records from the public. A397–98. This is wrong. The Angelides transmittal letter carries no legal significance for three reasons: (1) Congress expressed no clear intent to restrict

[12] The Government argues that much of the FCIC records is "of a sensitive nature," but it fails to explain or demonstrate why. NARA Br. 42.

access to the FCIC records; (2) the letter carries less weight than a memorandum of understanding, to which this Court gave "no deference" in *Judicial Watch*; and, (3) a member of a permanent committee of Congress sent NARA a FOIA request letter for the FCIC records, indicating Congress's intent that the FCIC records were nothing more than "agency records," and are releasable under FOIA.

If Congress had wanted to exclude the FCIC records from FOIA, it should have and would have written an exemption into FCIC's organic statute. The Congressional Research Service (CRS), mentioned by BLAG in its *amicus*,[13] released a report this year analyzing temporary congressional commissions like FCIC. CRS says that because of the "temporary status of congressional commissions" like FCIC and "the short time period they are given to complete their work product," Congress should "craft statutes creating congressional commissions with care." Matthew Glassman & Jacob Straus, Cong. Research Serv., R40076, *Congressional Commissions: Overview, Structure, and Legislative*

[13] In its attempt to draw parallels between FCIC and entities such as the General Accounting Office (GAO), the Congressional Budget Office (CBO) and CRS, BLAG ignores any number of critical distinctions. BLAG Br. 8. The most important difference is that GAO, CBO and CRS are all *permanent, not temporary*, legislative branch agencies whose employees are paid federal workers tasked with ongoing projects from the legislative branch. The Capitol Police, the Government Printing Office and the U.S. Botanic Garden are also agencies that support Congress. However, even BLAG must say that the work of FCIC and the Botanic Garden are worlds apart. "Investigative commissions," like FCIC, are specifically "established for the purpose of reviewing specific events" and "are much less common" than either policy or commemorative commissions. CRS Report at 5–6.

Considerations 2 (2013) (CRS or CRS Report). CRS explains that "[l]egislators can tailor the composition, organization, and arrangements of a commission, based on particular goals." *Id.*

In *Judicial Watch*, this Court examined the *Goland* line of cases and reiterated that when Congress manifests a clear intent to control records, those records will not be subject to FOIA. *Judicial Watch*, 726 F.3d at 221–24 (analyzing *Goland*, 607 F.2d at 347; *Paisley v. CIA*, 712 F.2d 686, 694–95 (D.C. Cir. 1983); *Holy Spirit*, 636 F.2d at 842–43; *United We Stand*, 359 F.3d at 601–02). Only when Congress "*affirmatively expresse[s] its intent to control*" will this Court evaluate the "special policy considerations" supporting opacity and justifying non-disclosure. *Judicial Watch*, 726 F.3d at 221 (quoting *Paisley*, 712 F.2d at 693 n.30) (emphasis added).

Here, Congress expressed no statutory intention to control FCIC's records or exempt them from FOIA. In fact, FCIC's enabling statute required it to transparently report on the causes of the financial crisis. Consequently, "special policy considerations" do not come into play. And even if Congress had manifested a statutory intent to control, the "special policy considerations" determinative in *Judicial Watch* would have no power here. FOIA-disclosure of the FCIC records would *not* force Congress "either to surrender its constitutional

prerogative of maintaining secrecy, or to suffer an impairment of its oversight role." *Id.* (citing *Goland*, 607 F.2d at 348).

The law is that FOIA broadly presumes disclosure and narrowly construes exemptions. The court below justified a curtain of opacity around the FCIC records by reference to the Angelides letter and transmittal papers, and not FCIC's enabling statute. Consequently, the court below wrongly narrowed FOIA disclosure and broadened FOIA exemptions and improperly turned the law on its head.

3. The court below erroneously determined NARA lacked the ability to use and dispose of the FCIC records as it saw fit[14]

The court below erroneously concluded "NARA does not have wide discretion to use and dispose of the record[s] as it sees fit" because of the transfer letter. A398. But NARA's actions demonstrate that it had the "*ability* to use and dispose of the records *as it sees fit*" and Congress gave it this discretion. A006 ¶ 4, A009 ¶¶ 24–29; *accord Judicial Watch v. Fed. Hous. Fin. Agency*, 646 F.3d at 926, 927–28 (emphasis added) (holding that even though no agency employee "had ever read" the subject records, the agency nevertheless satisfied this factor); 44 U.S.C. § 2108(a); 36 C.F.R. § 1235.32(a) (clear language of the Federal Records Act and NARA's own regulations grant the Archivist this discretion).

[14] NARA raises nothing new with respect to the third and fourth control factors and we adopt and incorporate herein the arguments we raised in our opening brief.

Here, however, NARA erroneously conflates *ability* to use with *actual* use, and so misapplies the law. NARA Br. 23, 49–50. But the use and disposal factor is one of discretion and merely asks *whether* the FOIA-entity *can* use the records, not whether it *has* used them. *Tax Analysts v. U.S. Dep't of Justice*, 845 F.2d 1060, 1068 (D.C. Cir. 1988).

The court below erroneously failed to discuss or account for the FOIA-implications of the fact that NARA released the FCIC records to OGR without restrictions of any kind, contrary to the transfer letter and to its own Directive for handling requests from Congress for congressional records. In other words, NARA had the ability to, and actually did, disregard the transfer letter and use the FCIC records as it saw fit.

4. The court below erroneously afforded the transfer letter and documents determinative legal significance

The court below erroneously afforded the transfer letter and the SF-258 transmittal document determinative legal significance.[15] *Judicial Watch*, 726 F.3d at 233. In *Judicial Watch*, this Court said:

[15] The trial court also erred in not considering the SF-115. NARA truncates its assertions regarding arguments raised for the first time on appeal. NARA Br. 44. The correct term is "forfeiture," not "waiver," and the rule is "not absolute" because this Court has discretion to address the SF-115 argument here. *Flynn v. Comm'r of IRS*, 269 F.3d. 1064, 1068-69 (D.C. Cir. 2001) (citing *Hormel v. Helvering*, 312 U.S. 552, 555–59 (1941) (other citation omitted)). We assert that "exceptional circumstances" exist in this case warranting an exercise of that

> We reiterate that our disposition is narrower than that sought by the [Government] in two important respects. *We do not attach any legal significance, beyond its factual descriptions,* to the 2006 MOU between the Secret Service and the White House [*i.e.*, the transfer documents]. Further, we hold that, subject to any applicable exemptions, the [Government] may not withhold . . . records that . . . are themselves subject to FOIA. Those documents are 'agency records.'

Id. at 233–34 (emphasis added).

The court below dismissed the Complaint before *Judicial Watch* was decided. But in applying the *Tax Analysts* factors, it latched on to the words in the transfer documents and held that they govern the legal status of NARA's records forevermore. Decisive for the court below were the transfer letter's legal conclusions: (1) that "FOIA will not apply to Commission records even after they are transferred to NARA"; and (2) that the "records not already publicly available should be made available to the public . . . [only in a] consistent [manner] with the terms of this letter . . . ." A033. This Court firmly rejected such a wooden

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discretion for the following reasons: (1) there is uncertainty in this area of FOIA law; (2) this case presents novel, important, and recurring questions of federal law, as evidenced by BLAG's late entry into the case; (3) intervening change in the law has occurred under this Court's recent *Judicial Watch* decision; and (4) this is an extraordinary situation in which the American people have been kept in the dark regarding the workings of FCIC and the true causes of the 2008-2009 financial crisis, with the potential for miscarriages of justice if the full record available to the court below is not considered on appeal. *Flynn*, 269 F.3d at 1068–69. The SF-115 indeed illustrates FCIC's intent to make its records transparent, and does not change the determinative fact that NARA treated the FCIC records as "agency records" under FOIA.

application of the *Tax Analysts* test in *Judicial Watch*, and it should be rejected here as well.

As amply explained in *Judicial Watch*, transfer documents, whether they are created contemporaneously at the time of transfer or many years before in the context of a forward-looking memorandum of understanding, carry no legal effect, and they are only to be used by a trial court for factually descriptive purposes. *Judicial Watch*, 726 F.3d at 233. However, the court below effectively ruled that transfer documents determine for all perpetuity the legal status of government records, no matter what the agency that receives those records might do later. A398–99.

This rationale, in which the magic words "FOIA will not apply" are dispositive, led the court below to ignore the Complaint's allegations that NARA processed and released the FCIC records to OGR as if those records were subject to FOIA and that NARA imposed *no* restriction on the records' use. The court below never grappled with the FOIA implications of NARA's release or its selective enforcement of the transfer letter's terms.[16] Instead, the court below gave

[16] NARA's release included producing records to Ranking Member Elijah Cummings which resulted in sensitive FCIC communications, closed meeting minutes and other information being made public, to the detriment of FCIC generally and one FCIC commissioner in particular: Peter Wallison. A250–88. NARA restricted Mr. Wallison's access to the FCIC records in defiance of specific prescriptions allowing unfettered access to former FCIC commissioners. A289–

controlling weight to NARA's argument that the "contemporaneous and specific instructions" in the transfer letter and handwritten alterations on the SF-258 precluded NARA from ever controlling the FCIC records. A397–98.

The trial court also wrongly found that the conclusory statements in those documents, as well as NARA's declarations, were determinative, holding that the transfer letter manifested FCIC's control and that the SF-258 "include[d] additional indicia of FCIC's intent to control future access to its records." A398.[17] Although NARA labels concerns about the trial court's reliance on facts outside the pleadings as "mistaken," it fails to dispute that the trial court ignored facts that call into question FCIC Chairman Angelides' authority to bind FCIC through the transfer letter. NARA Br. 54–55. It does not deny that it was clearly unusual for an FCIC employee to strike out a concrete and essential term of the SF-258 agreement, given that the transfer letter was incorporated into the SF-258 by Item 14 on the form, which represented Mr. Angelides' wish to deny the public FOIA access. And, under 36 C.F.R. § 1235.20, a transferring agency must state the legal

92, 297–301. This proves NARA's control of the records and also proves its whimsical adherence to the transfer letter depending upon who is doing the asking.

[17] In the court's eyes, this paperwork trumped all other factors with respect to the FCIC records' FOIA status. But by stopping there, the court below wrongly disregarded 44 U.S.C. § 2108(a). A397–99.

basis for access restrictions and cite to a statute or FOIA exemption. FCIC did not do that.[18]

IV. The Court Below Was Bound by the Complaint's Allegations, Not NARA's Declarations

The Complaint alleged a substantive FOIA claim that would have prevailed *if* the trial court had properly applied the correct standard of review in deciding the motion to dismiss. CoA Br. 31–41; *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The court below wrongly failed to confine its review to the facts alleged in the complaint and the documents attached thereto. Instead, it impermissibly relied on NARA's declarations.

The decision below and NARA's brief on appeal make sense only by reference to the Mills declaration and the two Fulgham declarations. A393–99; NARA Br. 6–9, 14, 23, 44, 50–51 (declarations). By granting NARA's motion to dismiss without acknowledging that it was reaching beyond the pleadings to convert the motion to dismiss into a motion for summary judgment, the court below sped by the facts it deemed most inconvenient and leapt to the legal conclusion that this matter is essentially governed by a *per se* FOIA test.

[18] This bears on NARA's contemporaneous understanding of the transfer terms. NARA's Matthew Fulgham signed the SF-258 on February 8, 2011—two days before Mr. Angelides signed the transfer letter and three days before Sarah Zuckerman signed the altered SF-258. A033–36. Given this paper trail, the trial court's decision to grant NARA's Rule 12(b)(6) motion to dismiss on the grounds of intent and control appears a bit improvident.

Specifically, under the trial court's reasoning, once Mr. Angelides proclaimed in the transfer letter that the FCIC records were "FOIA will not apply" *no set of facts could ever have been alleged*, which could possibly lead to the release of the documents that we initially requested. The trial court's reasoning was in error.

By confining its focus to the initial *transfer* of records from the FCIC to NARA, and thereby ignoring the subsequent *release* that NARA made to the OGR, the court below ignored the crux of the parties' dispute. Our FOIA request asked for only those records NARA had previously released. But by focusing only on the paperwork that accompanied the delivery of the FCIC records to NARA, as well as NARA's own self-serving declarations to justify its actions in this case, the court below was able to avoid dealing with the consequences of NARA's conduct.

Although NARA claims now that it sits as an idle repository, the agency is more than a document warehouse. NARA certainly archives records, but it also lends records in its possession and regulates the retention and destruction of all federal records. NARA is also constantly meeting the needs of new deposits, responding to records requests and regulating public and government access to federal records in exercising its discretion to perform its mission. Here, for example, NARA did not simply check out the FCIC records to Congress, issue instructions on their use, and demand their return by a date certain. Instead, NARA released the FCIC records without any controls or redactions to

congressional staff, who in turn released many of these same records to the public. Additionally, our Complaint also alleges that NARA has discretion to regulate access to the FCIC records, A008–09 at ¶¶ 20, 22, and that NARA exercised and likely abused that discretion by restricting Mr. Wallison's access thereto. A011 at ¶¶ 37–41.

Yet the trial court ignored these allegations in favor of NARA's declarations and concluded that NARA was "merely a repository." *Compare* A398 *with* A053, A340, and A348 (relying upon declarations). The Government further relied upon these declarations to argue that "NARA is unique within the Federal government as its mission includes the preservation of records originating from all three branches of the government of the United States," A053 (citing Mills declaration ¶ 7), and as such NARA serves a unique role within federal government as a "repository for records." A340 (again citing Mills declaration ¶ 7).

Rather than accepting as true the facts pled in the Complaint, the court below wholly ignored them and instead relied upon the Government's mischaracterized declarations that "NARA's exclusive function is to store and maintain records." A395–96. The Government's mischaracterization led the trial court to its ultimate finding that "[a]s the repository for federal records of all kinds . . . NARA does not 'possess' documents in the same manner as other executive

agencies." A395; *accord* A399. That finding was erroneous, and should be reversed.

CONCLUSION

For the foregoing reasons, as well as those established in our opening brief, the opinion of the court below should be reversed and remanded.

December 4, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 4, 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. Four copies will be delivered to the Court by courier on December 5, 2013.

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PATRICK J. MASSARI

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CERTIFICATE OF COMPLIANCE

In compliance with Rule 32(a)(7)(C), I hereby certify that this brief was prepared using Microsoft Word 2010, Times New Roman proportionally spaced font, 14-point, and contains 6,502 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

Dated: December 4, 2013

/s/ Patrick J. Massari
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STATUTORY & REGULATORY

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STATUTES

44 U.S.C. § 2108(a)

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

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

5 U.S.C. § 551(2)

§ 551. Definitions

* * *

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency

5 U.S.C. § 552(a)(3)(A)

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

(a)(3)(A). Each agency shall make available to the public information as follows:

*** * ***

Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which

(i) reasonably describes such records and
(ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

REGULATORY AUTHORITY

36 C.F.R. § 1235.20

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

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

36 C.F.R. § 1235.32

§ 1235.32. How does NARA handle restrictions on transferred records?

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

(b) For records more than 30 years old.

> (1) After records are more than 30 years old, most statutory and other restrictions on transferred records expire. NARA, however, after consulting with the transferring agency, may keep the restrictions in force for a longer period.
>
> (2) See part 1256 of this chapter for restrictions on specific categories of records, including national security classified information and information that would invade the privacy of an individual that NARA restricts beyond 30 years.

36 C.F.R. § 1250.4

§ 1250.4. Who can file a FOIA request?

Any individual, partnership, corporation, association, or government regardless of nationality may file a FOIA request.

36 C.F.R. § 1250.6

§ 1250.6. Does FOIA cover all the records at NARA?

No, FOIA applies only to the records of the executive branch of the Federal government and certain Presidential records. Use the following chart to determine how to gain access:

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.

36 C.F.R. § 1256.20(b)

§ 1256.20. May I obtain access to Federal archival records?

* * *

(b) Some records are subject to restrictions prescribed by statute, Executive Order, or by restrictions specified in writing in accordance with 44 U.S.C. § 2108 by the agency that transferred the records to the National Archives of the United States. All agency-specified restrictions must comply with the FOIA. Even if the records are not national-security classified, we must screen some records for other information exempt from release under the FOIA.

78 Fed. Reg. 47,247–48 (Aug. 5, 2013)
Proposed Amendment to 36 C.F.R. § 1250.6.

Proposed Amendment § 1250.6. Does FOIA cover all the records at NARA?

No, FOIA applies only to the records of the executive branch of the Federal government and certain Presidential and Vice Presidential records. The following chart may help determine how to request access to NARA's 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 and legislative branch agencies	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.
(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.

NARA Directive 1701.23

§ 1703.23. Responsibilities

1701.23 Responsibilities

a. Holdings of the U.S. Congress -

(1) The Director, Center for Legislative Archives (NWL) ensures that a loan of U.S. Congress holdings is properly documented and returned on the established due date.

(2) NWL maintains a record of individual senators, representatives, and staff members authorized to borrow holdings.

NARA Directive 1701.24

§ 1701.24(b). Holdings of the U.S. House of Representatives.

Only the Clerk of the House of Representatives may borrow House holdings.

NARA Directive 1701.25

§ 1701.25. Procedures for processing a loan.

a. Whenever possible, NWL [NARA's Center for Legislative Archives] or NWCTB [the Supreme Court's Textual Archives Services Division] should obtain written permission from the Secretary of the Senate or the Clerk of the House, or the Office of the Clerk of the Supreme Court (as appropriate) before lending holdings to the Congress or the Supreme Court. This written request may be an email or a letter faxed to the lending custodial unit. When the need for holdings is so urgent that there is no time for a written request before lending the holdings, NWL or NWCTB must obtain a written request within 48 hours after the holdings are loaned.

b. NWL or NWCTB prepares an NA Form 14014 to document the loan.

c. NWL or NWCTB ensures that the borrower signs the NA Form 14014 and files a copy of the form in the appropriate tracking file.