

[NOT YET SCHEDULED FOR ORAL ARGUMENT]

No. 13-5127

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

CAUSE OF ACTION, INC.,
Plaintiff-Appellant,

v.

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION,
Defendant-Appellee.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

BRIEF FOR THE APPELLEE

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**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES
PURSUANT TO CIR. R. 28(a)(1)**

A. Parties and Amici

Cause of Action, Inc. (formerly Freedom Through Justice Foundation), was the plaintiff in the district court and is the appellant in this Court. The National Archives and Records Administration ("the National Archives") was the defendant below and is the appellee here. There were no intervenors or *amici* in the district court. The Bipartisan Legal Advisory Group of the U.S. House of Representatives has filed a notice indicating that it will file an *amicus* brief in support of affirmance of the district court's judgment. The members of the Group are the Honorable John A. Boehner, Speaker of the House; the Honorable Eric Cantor, Majority Leader; the Honorable Kevin McCarthy, Majority Whip; the Honorable Nancy Pelosi, Democratic Leader; and the Honorable Steny H. Hoyer, Democratic Whip.

B. Rulings Under Review

Appellant seeks review of the Memorandum Opinion and Order entered on March 1, 2013, by the Honorable District Court Judge James E. Boasberg, granting the National Archives' motion to dismiss and denying plaintiff's motion for summary judgment. The district court's opinion is published. See *Cause of Action v. Nat'l Archives & Records Admin.*, 926 F. Supp. 2d 182 (D.D.C. 2013).

C. Related Cases

This case was not previously before this Court or any court other than the district court. Counsel are aware of no related cases currently pending in this Court or in any other court within the meaning of Cir. R. 28(a)(1)(C).

s/ Christine N. Kohl

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GLOSSARY

9/11 Commission	National Commission on Terrorist Attacks upon the United States
APA	Administrative Procedure Act
Br.	Cause of Action's Brief
Commission	Financial Crisis Inquiry Commission
FERA	Fraud Enforcement and Recovery Act of 2009
FOIA	Freedom of Information Act
House Committee	Committee on Oversight and Government Reform of the U.S. House of Representatives
IRS	Internal Revenue Service
NARA Act	National Archives and Records Administration Act of 1984
National Archives	National Archives and Records Administration
PRA	Presidential Records Act
PRMPA	Presidential Recordings and Materials Preservation Act

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR THE APPELLEE

JURISDICTIONAL STATEMENT

Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, appellant Cause of Action submitted a request to the National Archives and Records Administration ("National Archives") in October 2011, seeking copies of certain records of the now-terminated Financial Crisis Inquiry Commission ("Commission"). The National Archives denied that request on the ground that the Commission's records are legislative branch records not subject to FOIA. Cause of Action filed an administrative appeal of that determination, which the National

Archives denied on February 6, 2012. A027-031.¹ Cause of Action filed this suit in district court on August 14, 2012, asserting jurisdiction under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331. A005.

On March 1, 2013, the district court entered final judgment for the National Archives, dismissing the case, denying Cause of Action's motion for summary judgment, and resolving all issues. A388. Cause of Action filed a timely notice of appeal on April 29, 2013. A401. See Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the Commission's records, after their transfer to the National Archives, retain their character as legislative branch records and thus are not "agency records" subject to FOIA.

2. Alternatively, whether the National Archives "controls" the Commission's records, so as to make them "agency records" subject to FOIA.

STATEMENT OF THE CASE

A. Nature Of The Case And Course Of Proceedings Below

In 2009, Congress established the Financial Crisis Inquiry Commission in the legislative branch to examine the causes of the financial crisis in the United States. As prescribed by law, and after completing its work and submitting a

¹ "A___" is a citation to the Appendix filed by appellant.

lengthy report to Congress, the Commission was terminated in February 2011. Many of the Commission's records, including its report to Congress, are publicly available on a university website. In accordance with the Federal Records Act and government practice, the Commission also transferred all of its permanent records to the National Archives and recommended that its nonpublic records not be made available to the public before February 13, 2016. The Commission further requested that, before releasing any nonpublic records after that date, the National Archives review such records to determine if they should remain confidential, in accordance with the Commission's additional instructions.

Cause of Action requested that the National Archives give it access to a substantial amount of the Commission's nonpublic records now, pursuant to FOIA. The National Archives denied that request on the ground that the Commission was a legislative entity, and, as such, its records are not subject to FOIA. At the same time, however, the National Archives advised Cause of Action that the records would eventually be made available to the public pursuant to the Federal Records Act and in accordance with the Commission's instructions. Cause of Action filed this suit under FOIA, and the district court dismissed the action, holding that, for purposes of FOIA, the National Archives does not have control over the Commission's records.

B. Statutory And Regulatory Background²

1. The Freedom Of Information Act

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 * * *, make the records promptly available to any person." 5 U.S.C. § 552(a)(3)(A). The term "agency," as used in FOIA, is defined in the Administrative Procedure Act ("APA"), *id.* § 551(1), and "does not include," among other entities, "the Congress" or "the courts of the United States." *Id.* §§ 552(f)(1), 551(1)(A), (B). If an agency denies a request for records pursuant to FOIA, a district court has jurisdiction to order the disclosure of "any agency records improperly withheld." *Id.* § 552(a)(4)(B).

2. The National Archives And The Federal Records Act

a. Congress established the National Archives in 1934 as the repository for "[a]ll records * * * belonging to the Government of the United States (legislative, executive, judicial, and other)." Act of June 19, 1934, ch. 668, § 3, 48 Stat. 1122. The National Archives was a component of the General Services Administration until 1984, when Congress made it an independent establishment within the executive branch of the government. National Archives and Records

² The statutes and regulations most pertinent to this appeal are contained in the Addendum to this brief.

Administration Act of 1984 ("NARA Act"), Pub. L. No. 98-497, § 101, 98 Stat. 2280 (codified as 44 U.S.C. § 2102).

The Federal Records Act authorizes the National Archives to "accept for deposit * * * the records of a Federal agency, the Congress, the Architect of the Capitol, or the Supreme Court determined by the Archivist to have sufficient historical or other value to warrant their continued preservation by the United States Government." 44 U.S.C. § 2107(1). "Federal agency" as defined by the Federal Records Act is much broader than the term "agency" for FOIA purposes. It includes "any executive agency or *any establishment in the legislative or judicial branch of the Government* (except the Supreme Court, the Senate, the House of Representatives, and the Architect of the Capitol and any activities under the direction of the Architect of the Capitol)." *Id.* § 2901(14) (emphasis added).

The Archivist's principal functions are to "provide for the preservation, arrangement, repair and rehabilitation, duplication and reproduction * * *, description, and exhibition of records or other documentary material transferred to him as may be needful or appropriate, including the preparation and publication of inventories, indexes, catalogs, and other finding aids or guides to facilitate their use." *Id.* § 2109. Hence, the mission of the National Archives is to safeguard,

preserve, and provide public access to important records from all three branches of the federal government.³

As pertinent here with regard to the legislative branch, at the close of every Congress, noncurrent records from the House of Representatives and the Senate are routinely transferred to the National Archives for preservation pursuant to the Federal Records Act, *id.* § 2118, but they remain the property of Congress. The National Archives also accepts records from longstanding legislative branch agencies, such as the Congressional Budget Office and Government Accountability Office, as well as from temporary legislative commissions and panels, such as the National Commission on Terrorist Attacks upon the United States (the "9/11 Commission") and the Abraham Lincoln Bicentennial Commission.

b. The Federal Records Act requires the head of each "Federal agency" to "make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency," *id.* § 3101, and to ensure the proper disposition of the agency's records in accordance with National Archives regulations, *id.* § 3303. When the National Archives receives records from an agency, it begins processing them by creating "finding aids" that generally describe and categorize the material. *Id.* § 2109. Finding aids are lists of folder titles for paper records and directories

³ See <http://www.archives.gov/about/info/mission.html>.

for electronic records. A129. These aids "are particularly important for collections that require extensive detailed subsequent screening for restricted materials," because they "aid * * * researchers in finding pertinent material to their research, while at the same time providing notice on restricted material that is not available for access." A129.

c. National Archives regulations state that "FOIA applies only to the records of the executive branch of the Federal government and certain Presidential records," and that "FOIA does not apply to * * * records [of Congress]." 36 C.F.R. § 1250.6. The agency has explained that, while the Archivist "accept[s] for deposit Congressional and court records of historical value[,] * * * accepting these records does not make them records of the executive branch for purposes of FOIA." 66 Fed. Reg. 16,374, 16,374 (Mar. 23, 2001). Access to Congressional and legislative branch records is governed instead by other laws, regulations, and practices. See, e.g., 36 C.F.R. § 1254.1(a), (b) (National Archives "preserves records of all three branches * * * of the Federal Government" and "make[s] them available to the public for research unless they have access restrictions" and are "exempt from release by law").

Thus, in accordance with longstanding practice, a Senate Resolution, and a Rule of the House of Representatives, the National Archives makes most Senate records available to the public 20 years after their creation, and most House

records 30 years after their creation, subject to various statutory and other exceptions (e.g., national security classified documents, tax returns, grand jury materials). See S. Res. 474, 96th Cong. (1980); H.R. Rule VII, § 3(b)(4), 113th Cong. (2013). Legislative branch records are made available to the public pursuant to the Federal Records Act and in accordance with any written restrictions specified by the agency head at the time the records are transferred to the National Archives. See 44 U.S.C. § 2108(a) ("[W]hen the head of a Federal agency states, in writing, restrictions * * * 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,, [*sic*] 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 * * *."). National Archives regulations, as well, advise that some records may be subject to restrictions. See 36 C.F.R. § 1256.20(b).

The Archivist may "relax, remove, or impose restrictions" on a defunct legislative entity's records within his custody, if "he determines that such action is in the public interest." 44 U.S.C. § 2108(a). However, the National Archives' consistent, longstanding practice is to honor restrictions imposed by the transferring agency. As Thomas E. Mills, the then National Archives Chief Operating Officer, stated, "[t]o the best of [his] knowledge, [he] know[s] 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." A082.

3. The Financial Crisis Inquiry Commission

In 2009, to improve enforcement against various types of financial fraud and to recover funds lost as a result of such fraudulent activities, Congress enacted the Fraud Enforcement and Recovery Act ("FERA"), Pub. L. No. 111-21, 123 Stat. 1617. Among other things, FERA established the Financial Crisis Inquiry Commission "in the legislative branch" and directed it "to examine the causes, domestic and global, of the current financial and economic crisis in the United States." *Id.* § 5(a), 123 Stat. 1625. The Commission was modeled on the 9/11 Commission. Compare FERA with Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306, Tit. VI, 116 Stat. 2383, 2408-13 (2002).

The Commission was composed of ten members appointed by the Senate and House of Representatives leadership, one of whom was designated as Chairman jointly by the Senate Majority Leader and the Speaker of the House. FERA, § 5(b)(1), (3), 123 Stat. 1625-26. FERA specified that Commission members must be prominent U.S. citizens with significant experience in fields such as banking, finance, economics, and consumer protection, and that no member

could be a member of Congress or an officer or employee of any government. *Id.* § 5(b)(2), 123 Stat. 1626.

FERA set forth in detail the particular areas that the Commission was to investigate and gave the Commission the authority to refer matters involving unlawful activity to the Attorney General and State attorneys general. *Id.* § 5(c)(1), (2), (4), 123 Stat. 1626-28. The Commission also was authorized to hold evidentiary hearings and to issue subpoenas. *Id.* § 5(d)(1), (2), 123 Stat. 1628. In accordance with the statute's direction, *id.* § 5(h), 123 Stat. 1630, the Commission submitted a lengthy public report to Congress on January 27, 2011, containing its findings and conclusions regarding the causes of the financial and economic crisis.⁴ The Commission was terminated, as prescribed by FERA, on February 13, 2011. *Id.* § 5(i), 123 Stat. 1630.

C. The Facts Of This Case

The facts pertinent to the issues on appeal are undisputed.⁵

⁴ See <http://fcic.law.stanford.edu/report>.

⁵ Cause of Action's Statement of Facts devotes a section to the request of former Commissioner Peter Wallison for access to his records. That request was not made pursuant to FOIA and is not part of this case, nor is former Commissioner Wallison a party to this suit. Moreover, he was given access to his records in accordance with the Commission's instructions. See A034, A301.

1. The Transfer Of The Commission's Records

On February 10, 2011, a few days before the Commission's termination, Chairman Phil Angelides submitted a letter to the Archivist of the United States, stating that the Commission's records would be transferred to the National Archives "for preservation and public access." A033. See 44 U.S.C. §§ 3301, 3303 (head of each agency is responsible for document preservation and submission to the National Archives). The letter "establishes criteria under which these records should be made available." A033. It explains that "[t]he 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." A033. To that end, the letter noted that the Commission's highly detailed final report was public, and that, through its website, it had released "many supplemental documents, including staff memoranda, documentary evidence, e-mails, witness statements, interviews, transcripts and summaries, audio and video files, and press releases." A033. After the Commission's termination, all of that material would continue to be made public on a website established at Stanford University. A033.⁶

The Chairman's letter noted that, "[b]ecause the Commission was established in the legislative branch, its records have not been subject to [FOIA],"

⁶ See <http://fcic.law.stanford.edu/about>.

and "*we* understand that the FOIA will not apply to Commission records even after they are transferred to [the National Archives]." A033. (emphasis added). However, the letter 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," including the material on the Stanford website. A033.

The Chairman's letter also addressed the Commission's nonpublic records. "*The Commission* recommend[ed]" that such 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" – i.e., five years after the Commission's termination. A033. (emphasis added).⁷ "The Commission" also encouraged the National Archives "to conduct a systematic review" of the nonpublic records, "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." A033. The Commission further instructed:

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

⁷ That five-year period is consistent with the period recommended by other legislative branch entities, such as the 9/11 Commission (almost five years), see A140, as well as the period prescribed by the Presidential Records Act, 44 U.S.C. § 2204(b)(2)(A). A five-year period gives the National Archives the opportunity to begin to process the documents entrusted to it. See *supra* pp. 6-7; see also A134-35.

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.

A033 (emphasis added).

The Commission's records were transferred to the National Archives soon thereafter, pursuant to Standard Form SF-258, "Agreement to Transfer Records to the National Archives of the United States." A036. SF-258 is used to transfer records from any "Federal agency" in the executive, legislative, or judicial branch, as defined by the Federal Records Act, 44 U.S.C. § 2901(14). See *supra* p. 5. To reflect the understanding of both the Commission and the National Archives that FOIA would not apply to the transferred Commission records, see A134, the following sentence on the form was stricken: "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." See A036. In addition, question 12 on SF-258 – "Are records fully available for public use?" – was answered "no," and, as indicated in item 14 on the form, the Chairman's "Access letter" was attached. A036. See 36 C.F.R. § 1235.20 ("When completing an SF 258, agencies must indicate restrictions on the use and examination of records and attach a written justification.").

The volume of Commission documents is massive, by any measure. In the district court, the Assistant Director of the Center for Legislative Archives, Robert Matthew Fulgham, Jr., estimated that there were approximately 293 cubic feet of paper records and 16 terabytes of electronic records. A126.⁸ The processing of the Commission's records has continued in the ensuing months, and it will continue for some time. Largely as a result of removing files from bulky binders and consolidating records, the National Archives now has a more accurate, and lower, estimate of the total amount of the Commission's records: approximately 234 cubic feet of paper documents,⁹ and 16 terabytes of records in electronic form.¹⁰

2. The House Committee's Request For Commission Records

On February 18, 2011, shortly after the Commission was terminated and its records were transferred to the National Archives, the Committee on Oversight and Government Reform of the U.S. House of Representatives (the "House Committee") asked the National Archives to provide it with "electronic copies" of

⁸ The Center for Legislative Archives is the component of the National Archives responsible for processing all legislative branch records, including the Commission's records.

⁹ The National Archives estimates that a cubic foot generally contains 2,000 to 3,000 pages.

¹⁰ By comparison, all of the data stored in "Watson," the IBM computer that won the "Jeopardy" challenge, constitute 4 terabytes. See Tami Deedrick, "It's Technical, Dear Watson," *IBM Systems Magazine* (Feb. 2011), <http://www.ibmssystemsmag.com/ibmi/trends/whatsnew/It%E2%80%99s-Technical,-Dear-Watson/>.

records containing "the internal work product of the [Commission], including e-mails, memoranda and financial accounting records." A250. The Center for Legislative Archives copied the requested electronic records onto portable drives and delivered them to the House Committee. When the House Committee was unable to import some of the records properly into its database, National Archives staff converted those files to a different format, compatible with the House Committee's software, and provided them to the House Committee on a separate portable drive. A358-59.

3. Cause Of Action's FOIA Request

In October 2011, Freedom Through Justice Foundation (Cause of Action's predecessor) submitted a FOIA request to the National Archives, seeking "all documents, including e-mail communications, memoranda, draft reports, and other relevant information and/or data contained in the records transfer of * * * Commission documents stored at [the National Archives] to the Committee on Oversight and Government Reform at the U.S. House of Representatives." A015. The National Archives denied Cause of Action's FOIA request, stating that the Commission "was established within the legislative branch," and "[a]s such, its records are not subject to [FOIA,] which only applies to executive branch agencies." A021. The National Archives explained that, "[w]hen federal agencies from the legislative and judicial branches accession their permanent federal records

into the National Archives * * *, those records do not become 'agency records' subject to the FOIA." A021. However, the National Archives explained further that the records "will become available for public access requests under the [Federal Records Act]," in accordance with the restrictions established by the Commission. A021.

Cause of Action administratively appealed that ruling. A023-26. The National Archives affirmed its decision denying Cause of Action's FOIA request. A027-31. Its decision on appeal explained that the Commission Chairman's letter transferring the records "evidenced legislative intent to maintain legislative control over the document[s] confidentiality," and, thus, the National Archives "does not consider that control has passed from the legislative branch sufficiently" so as "to treat these legislative branch records as being subject to FOIA." A029. The decision stated further that "courts have long recognized that there are types of archival records in [the National Archives'] legal custody where access restrictions are controlled by the terms of other statutes or by donor intent." A029.

4. This Lawsuit

Cause of Action filed suit, challenging the National Archives' decision denying it access to the Commission's records pursuant to FOIA. The National Archives moved to dismiss the case or, in the alternative, for summary judgment. A039. Cause of Action filed a cross-motion for summary judgment and moved to

strike declarations filed by the National Archives. A194, A302. The district court granted the National Archives' motion to dismiss and denied Cause of Action's motion for summary judgment. A388. The court also denied as moot Cause of Action's motion to strike. A388.

In its decision, the district court first noted that "[n]either party seriously disputes that at the time the records were created by the [Commission], a congressional entity 'established in the legislative branch,' *see* FERA, § 5(a), they were congressional documents exempt from FOIA." A393. The court found that, instead, the case "turns on whether the records, once transferred to [the National Archives], became 'agency records' subject to FOIA." A393. The court described the issues before it as whether "congressional records transferred to [the National Archives] retain their legislative character and thus remain exempt from FOIA," as the government argued, or whether "[the National Archives'] custody and control of the records is dispositive[,] since [the National Archives] is an 'agency' subject to FOIA, records in its possession are, by definition, agency records," as Cause of Action argued. A393.

The district court declined to rule on the government's principal argument, noting the lack of "binding authority" on that specific point. A393. The court nevertheless discussed Circuit precedent in analogous circumstances (e.g., the transfer of certain of President Nixon's records to the National Archives' custody),

which held "that [the National Archives'] physical and legal custody of records does not control their FOIA eligibility." A394. The district court concluded that that "core teaching * * * appears applicable here," A394, and is supported by National Archives regulations, A395. Moreover, the court explained, due to its "unique nature" as "the repository for federal records of all kinds – including ones from the judicial and legislative branches – [the National Archives] does not 'possess' documents in the same manner as other executive agencies." A395. The district court thus concluded that, "because [the National Archives'] exclusive function is to store and maintain records, its mere possession and processing of the [Commission's] documents would reveal nothing about its decisionmaking processes, a key objective of FOIA." A396. The court noted that, "[t]o treat all records in [the National Archives'] custody as 'agency' records would seem to ignore these critical distinctions." A396.

The district court then addressed Cause of Action's argument. The court held that the National Archives does not "control" the Commission's records, and, thus, they are not "agency records" subject to FOIA. A396-99. In reaching that decision, the court applied this Circuit's four-factor test for determining "whether an agency exercises sufficient control over a document to render it an 'agency record.'" A396 (quoting *Burka v. HHS*, 87 F.3d 508, 515 (D.C. Cir. 1996)) (some internal quotation marks omitted).

With respect to the first factor, "the intent of the document's creator to retain control," the district court concluded that the "specific, contemporaneous instructions restricting access to the [Commission] records long after their transfer to [the National Archives] mean that the first factor clearly tips in favor of a finding that the records retain their legislative character." A397, A398. The court found that the second factor – "the ability of the agency to use and dispose of its records as it sees fit" – also weighs in the National Archives' favor for essentially the same reason, i.e., "the specific limiting instructions placed on the records at the time they were transferred." A398. As for the third factor, "the extent to which agency personnel have read or relied upon the document," the district court likewise found that it "tilts the same way," because the National Archives "is merely a repository, and its personnel do not act in reliance on these types of documents." A398-99.

The district court presumed, solely for purposes of the government's motion to dismiss, that the fourth factor – the extent to which the records are integrated into the National Archives' system of records – favors Cause of Action, because "the essential reasons for depositing the records at [the National Archives] are categorization and safekeeping." A399. However, the court gave that factor little weight, because the National Archives does not use the Commission's records for its own decisionmaking. A399. Accordingly, the district court ruled that, on

balance, the four "control" factors identified by this Court weigh "decisively in favor of [the National Archives] and a conclusion that the [Commission's] documents are not 'agency records' subject to FOIA." A399.

Finally, the district court rejected Cause of Action's procedural challenges. It denied the motion to strike the National Archives' declarations as moot, because the court ruled on the government's motion to dismiss without relying on the declarations. Similarly, because it dismissed the case without considering either party's summary judgment motion, the district court concluded that Cause of Action's procedural objection to the government's summary judgment motion was moot. A399.

SUMMARY OF ARGUMENT

1. The National Archives properly denied Cause of Action's FOIA request for nonpublic Commission records. As the National Archives explained, FOIA does not apply to legislative branch entities such as the Commission. "Agency," as used in FOIA excludes "the Congress" and "the courts of the United States," and it is well established that those terms embrace the entire legislative and judicial branches, respectively. Moreover, in comparable circumstances, this Court has held that certain presidential records do not lose their status as exempt from FOIA when transferred to the National Archives for preservation.

The reasoning of those decisions applies in the circumstances here as well: the records of the Commission, an entity within the legislative branch, do not lose their character as FOIA-exempt legislative branch records upon their transfer to the National Archives. Instead, the Commission's nonpublic records will eventually be made available pursuant to the Commission's explicit access restrictions and in accordance with the Federal Records Act and National Archives regulations. Thus, it is not a matter of *whether* the requested records will be made publicly available, but rather *how* and *when*.

2.a. If the Court declines to rule that the Commission's records retain their legislative character and thus are simply not subject to FOIA, it should hold that the National Archives does not exercise sufficient control over the Commission's records so as to render them "agency records" subject to FOIA. Because the records were created by an entity exempt from FOIA, there are "special policy considerations" that warrant application of the Court's "modified control test." Under that test, (i) the intent of the records' creator to retain or relinquish control over the records, and (ii) the ability of the agency with custody of the records to use and dispose of them are dispositive. Both of those factors support the conclusion that the National Archives does not exercise control over the requested Commission records.

With respect to the Commission's intent, Chairman Angelides's letter to the National Archives expressly "establishes the criteria under which [the Commission's] records should be made available." A033. The letter also unequivocally makes clear that the Commission understood that its records would not be subject to FOIA even after their transfer to the National Archives. And with equivalent clarity, the letter sets forth timing and other restrictions on the disclosure of its nonpublic records. Cause of Action's various arguments suggesting that the letter has no effect and does not reflect the Commission's intent are without merit. The terms of the letter itself refute those arguments. Further, as the head of the Commission, Chairman Angelides was responsible under the Federal Records Act for advising the National Archives of the restrictions on access to the records stipulated by the Commission.

The Commission's contemporaneous and detailed instructions also limit the ability of the National Archives to use and dispose of the records. Although the National Archives has discretion to relax or remove restrictions on records transferred to its custody by a defunct federal agency, its consistent, longstanding policy – embodied in its regulations – is to honor restrictions imposed by the transferor. In any event, the focus of the second control factor is not whether the agency that has acquired the records may relax the restrictions on them, but rather whether that agency is free to use the records in the course of its own operations

and decisionmaking. The National Archives does not "use" the Commission's records for those purposes.

b. Assuming that the standard four-factor control test applies here, the third and fourth factors also weigh in the National Archives' favor. With respect to the third factor, although National Archives personnel are reviewing the Commission's records, they are doing so for the limited purpose of describing the documents and creating finding aids for them. Thus, disclosure of the Commission's records would reveal nothing about the *National Archives'* decisionmaking processes. As for the fourth factor, the Commission's records are, of course, included in the National Archives' collection of archival records: preservation of the federal government's records is the mission of the National Archives. But like the second and third factors of the control test, the fourth factor must be understood as relating to the agency's use of the records in its own decisionmaking. Here, the Commission's records play no role in that process at the National Archives and are maintained separately from the National Archives' operational records.

Thus, regardless of what test is applied to the circumstances here, the National Archives does not exercise control over the Commission's records so as to convert them into "agency records" subject to FOIA.

3. Cause of Action's remaining arguments are baseless and should be rejected. For instance, its contention that the district court failed to give proper consideration to the allegations in its complaint and that it ignored critical facts and case law are simply disagreements with the court's rulings. The district court need not mention alleged facts that are not relevant to the questions of law before it. Moreover, Cause of Action's claim that the district court considered evidence outside the pleadings in granting the government's motion to dismiss is not supported by the decision or the record.

STANDARD OF REVIEW

The Court reviews a grant of a motion to dismiss *de novo*. *Citizens for Responsibility & Ethics in Wash. v. Office of Admin.*, 566 F.3d 219, 221 (D.C. Cir. 2009).

ARGUMENT

In an action seeking the release of documents pursuant to FOIA, a court must determine whether the defendant agency has "improperly withheld" "agency records." 5 U.S.C. § 552(a)(4)(B). See *Consumer Fed'n of Am. v. Dep't of Agric.*, 455 F.3d 283, 286-87 (D.C. Cir. 2006). The principal issue in this case is whether the Commission's records are "agency records" within the meaning of FOIA. They are not "agency records" for either of two reasons. First, the Commission's records did not lose their character as legislative records, exempt from FOIA, upon their

transfer to the National Archives. Alternatively, the National Archives does not "control" the Commission's records under well established Circuit authority.

I. The Commission Records Transferred To The National Archives Retain Their Character As Legislative Branch Records And Are Therefore Not Subject To FOIA

A. Legislative Branch Entities Are Exempt From FOIA

1. As noted *supra* p. 4, FOIA does not apply to records of "the Congress" or "the courts of the United States" because those entities are explicitly excluded from the definition of "agency" as used in FOIA. FOIA is part of the APA, and it therefore adopts the APA's definition of "agency," 5 U.S.C. § 552(f)(1). That definition expressly *excludes* "the Congress" and "the courts of the United States." *Id.* § 551(1)(A), (B). FOIA specifies further that "agency" as used in that statute "includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." *Id.* § 552(f)(1).

The Supreme Court, this Court, and other circuits have broadly interpreted the "Congress" and "courts" exclusions from the APA definition of "agency." For example, in *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 145 (1980), the Supreme Court held that the Library of Congress is not an "agency" for purposes of FOIA. This Court similarly held that the Library of

Congress is not an "agency" under the same APA definition. *Ethnic Employees of the Library of Congress v. Boorstin*, 751 F.2d 1405, 1416 n.15 (D.C. Cir. 1985). And in *Mayo v. U.S. Gov't Printing Office*, 9 F.3d 1450, 1451 (9th Cir. 1993), the Ninth Circuit explained that "the entire legislative branch has been exempted from [FOIA]." It therefore held that, because the Government Printing Office is "a unit of Congress," it is exempt from FOIA. *Ibid.* Courts likewise have held that the APA's definition of "agency" excludes "the entire judicial branch." *Washington Legal Found. v. U.S. Sentencing Comm'n*, 17 F.3d 1446, 1449 (D.C. Cir. 1994) (and cases cited); see also *Andrade v. U.S. Sentencing Comm'n*, 989 F.2d 308, 309 (9th Cir. 1993) (Sentencing Commission is exempt from FOIA); *Banks v. Dep't of Justice*, 538 F. Supp. 2d 228, 231-32 (D.D.C. 2008) (United States Probation Office and Administrative Office of the United States Courts are exempt from FOIA).

2. The Commission was explicitly established "in the legislative branch." FERA, § 5(a), 123 Stat. 1625. Because of its status as a legislative branch entity, the Commission's records are accordingly not "agency records" within the meaning of FOIA. Thus, had Cause of Action filed its FOIA request for "all * * * e-mail communications, memoranda, draft reports, and other relevant information" of the Commission prior to its termination, A015, the Commission properly could have

denied the request, because, as the Chairman's letter explained, "its records have not been subject to [FOIA]," A033.¹¹

B. Preservation And Storage Of The Commission's Records At The National Archives Do Not Change Their Character As Legislative Branch Records

1. The Commission transferred its records to the National Archives for preservation and storage, just as other establishments of all three branches of the federal government do. When transferred, those records did not lose their character as records of a legislative branch entity that are exempt from FOIA. If Cause of Action's argument to the contrary were correct, then upon transfer to the National Archives, the records of every legislative and judicial branch entity would become "agency records" for purposes of FOIA and would lose their exemption from that statute. That argument, however, is inconsistent with well established judicial authority.

FOIA does not define the term "agency records," but case law provides some principles to delineate its scope. In *Reporters Comm.*, 445 U.S. at 157, the Supreme Court rejected the argument that "mere physical location of papers and

¹¹ The district court found that "[n]either party seriously disputes that at the time the records were created by the [Commission], * * * they were congressional documents exempt from FOIA." A393. Cause of Action now contends that the Commission "was not an arm of Congress." Br. 35. However, Cause of Action fails to acknowledge the well established authority discussed above, holding that, for purposes of FOIA, the exemption for "the Congress" includes the entire legislative branch.

materials could confer status as an 'agency record' * * * subject to disclosure under the FOIA." As this Court succinctly put it in a recent opinion, "not all documents in the possession of a FOIA-covered agency are 'agency records' for the purpose of that Act," and "not all records physically located at an agency are 'agency records.'" *Judicial Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 216 (D.C. Cir. 2013).

This Court's decision in *Ricchio v. Kline*, 773 F.2d 1389 (D.C. Cir. 1985), is also especially instructive. In that case, plaintiff sought transcripts of tape recorded conversations involving President Nixon while in the White House. The Watergate Special Prosecution Force had prepared the transcripts after receiving copies of the tapes pursuant to subpoena. When the Watergate Force disbanded, the Special Prosecutor transferred his office records, including the transcripts, to the National Archives (then part of the General Services Administration) for preservation. The National Archives provided most of the transcripts to plaintiff, but withheld other portions. *Id.* at 1390-91.

The Court held that the Presidential Recordings and Materials Preservation Act ("PRMPA"), Pub. L. No. 93-526, 88 Stat. 1695 (1974), provided "the sole basis upon which the transcripts may be disclosed," and, thus, plaintiff could not "obtain disclosure under [FOIA]." 773 F.2d at 1391. The Court declined to decide whether the transcripts were "agency records" under FOIA. *Ibid.* Nevertheless,

the decision is significant because it recognizes that the transfer of the transcripts from the disbanded Watergate Force to the National Archives' "complete possession and control," *id.* at 1393, did not change the status of the transcripts as presidential materials subject to PRMPA and beyond the reach of FOIA.

Similarly, in *Katz v. Nat'l Archives & Records Admin.*, 68 F.3d 1438, 1442 (D.C. Cir. 1995), the Court held that autopsy photographs and x-rays of President Kennedy, which were transferred to the National Archives in 1966, were not subject to disclosure under FOIA. The Court explained that those materials were "personal presidential materials when they were first created, and therefore at no time were they *ever* agency records." *Id.* at 1441. The Court also noted that Congress had implicitly recognized the status of the photographs and x-rays as personal presidential materials when it explicitly excluded them from disclosure under the President John F. Kennedy Assassination Records Collection Act of 1992, Pub. L. No. 102-526, § 3(2), 106 Stat. 3443, 3444. *Katz*, 68 F.3d at 1442.

Thus, in both *Ricchio* and *Katz*, this Court recognized that the transfer of materials to the National Archives for preservation and storage did not alter their pre-transfer character as presidential materials exempt from FOIA. Moreover, to the extent access to such materials was permitted, it was pursuant to other laws and restrictions. So, too, here: the transfer of the Commission's documents to the National Archives did not alter their character as legislative branch records, and,

thus, they are not subject to disclosure *under FOIA*. Rather, their disclosure must be in accordance with the restrictions imposed by the Commission when the records were transferred, as the Federal Records Act and National Archives regulations provide. See 44 U.S.C. § 2108(a); 36 C.F.R. §§ 1254.1(b), 1256.20(b).

The Presidential Records Act ("PRA"), 44 U.S.C. §§ 2201 *et seq.*, also shows that the transfer of records to the custody of the National Archives does not automatically transform them into "agency records" subject to FOIA. Under the PRA, at the conclusion of each President's last term in office, the Archivist "assume[s] responsibility for the custody, control, and preservation of, and access to, the Presidential records of that President." *Id.* § 2203(f)(1). However, in general, a President may restrict access to those records for up to 12 years for reasons specified in the PRA. *Id.* § 2204(a). Access to other records that do not contain restricted information is generally not available until five years after the records are transferred to the National Archives. *Id.* § 2204(b)(2)(A). Thereafter, "Presidential records shall be administered in accordance with [FOIA], * * * and for the purposes of [FOIA,] such records shall be deemed to be records of the National Archives." *Id.* § 2204(c)(1). If records transferred to the National Archives' custody became agency records subject to FOIA automatically upon their transfer, then there would have been no need for Congress to have included that provision in the PRA. See H.R. Rep. No. 95-1487, at 16 (1978), *reprinted in*

1978 U.S.C.C.A.N. 5732, 5747 ("While presidential records are not currently covered by [FOIA], they effectively become agency records for the purposes of this provision in applying FOIA requirements to them.").

Finally, the National Archives' FOIA regulations, 36 C.F.R. pt. 1250, make clear that FOIA does not cover all of the records within its custody. "FOIA applies only to the records of the executive branch of the Federal government and certain Presidential records." *Id.* § 1250.6. Thus, FOIA applies to the National Archives' own "operational records and archival records that are subject to FOIA." *Id.* § 1250.1.¹² However, access to the "[r]ecords of Congress" is governed instead by "[p]arts 1254 through 1260" of title 36 of the Code of Federal Regulations. *Ibid.* See also *id.* § 1250.2(e) ("*FOIA request* means a written request for access to records of the executive branch of the Federal Government held by [the National Archives], including [National Archives] operational records," and certain Presidential records).

During the rulemaking process in which those regulations were promulgated, Public Citizen submitted comments arguing that "all records in the custody of the Archivist[,] * * * including the records of Congress and judicial

¹² "Operational records" are "records that [the National Archives] creates or receives in carrying out its mission and responsibilities as an executive branch agency" and "does not include archival records." 36 C.F.R. § 1250.2(i). "Archival records" are those "transferred to the legal custody of the Archivist." *Id.* § 1250.2(a).

branch records that have been deposited with [the National Archives for preservation[,] are subject to the FOIA." 66 Fed. Reg. 16,374, 16,374 (Mar. 23, 2001). The National Archives, however, rejected that argument. Noting that "the courts have carved out court and Congressional records from the FOIA statute coverage," the National Archives explained that its acceptance of congressional and court records for deposit "does not make them records of the executive branch for purposes of FOIA." *Ibid.*¹³

2. After reviewing judicial authority, other statutes, and National Archives regulations, the district court concluded that "the transfer of records to [the National Archives] does not necessarily 'make them records of the executive branch for purposes of FOIA.'" A395. The court explained that that "makes sense given [the National Archives'] unique nature. As the repository for federal records of all kinds – including ones from the judicial and legislative branches – [the National Archives] does not 'possess' documents in the same manner as other executive agencies." A395. Moreover, "because [the National Archives'] exclusive function is to store and maintain records, its mere possession and processing of the documents would reveal nothing about *its* decisionmaking

¹³ The National Archives recently reaffirmed that position in a notice proposing revisions to its FOIA regulations. See 78 Fed. Reg. 47,245, 47,247 (Aug. 5, 2013) ("FOIA does not apply to" records of "legislative branch agencies").

processes, a key objective of FOIA." A396 (emphasis added). "To treat all records in [the National Archives'] custody as 'agency' records would seem to ignore these critical distinctions." A396.

Although the district court did not *hold* that legislative branch records transferred to the National Archives retain their legislative character for FOIA purposes, see A396, we urge this Court to do so. See *Polm Family Found., Inc. v. United States*, 644 F.3d 406, 408 (D.C. Cir. 2011) ("A prevailing party may 'defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court.'") (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38-39 (1989)). The district court's reasoning is sound and, as explained here, well supported. Moreover, a ruling that, in the absence of clearly contrary congressional intent, records transferred to the National Archives from legislative branch entities retain their character as legislative branch records and are therefore exempt from FOIA, would make sense, given the National Archives' unique function as the repository for records of all three branches of the federal government.

3. Cause of Action all but ignores the district court's discussion of whether the Commission's records are "agency records" for purposes of FOIA. Its principal response is that the National Archives "is more than merely a repository," because it provides guidance to federal agencies on proper records management

and disposition. Br. 16. See 44 U.S.C. § 2904.¹⁴ There is no dispute that the National Archives provides such guidance, but that fact has nothing to do with the character and content of the legislative branch records that the Commission created and transferred to the National Archives for preservation, and whether such transfer eliminates the exemption from FOIA that those records would otherwise enjoy.

In sum, Cause of Action's FOIA request seeks the Commission's internal work product, including e-mails, memoranda, and drafts. See A015, A250. Those records are legislative branch records that are not subject to FOIA. Their transfer to the National Archives for preservation and eventual public access pursuant to the Commission's restrictions and instructions set forth in the Chairman's letter, A033-34, does not alter that fact. The Court should therefore conclude that FOIA does not apply to the Commission records transferred to the National Archives.

II. The National Archives Does Not "Control" The Commission's Records So As To Make Them "Agency Records" Subject To FOIA

If the Court concludes (as we urge) that FOIA does not apply to the Commission records housed at the National Archives, it need not consider whether the National Archives "controls" the records. See *U.S. Dep't of Justice v. Tax*

¹⁴ Cause of Action quotes the 1950 version of 44 U.S.C. § 2904, which stated that the National Archives was to provide guidance to agencies on "records creation." Br. 16. Congress removed that phrase from the statute in 1984. See NARA Act, Pub. L. No. 98-497, § 107(b)(16), 98 Stat. 2288.

Analysts, 492 U.S. 136, 144, 145 (1989) (To qualify as an "agency record" for purposes of FOIA, "an agency must 'either create or obtain' the requested materials," *and* "the agency must be in control of the requested materials at the time the FOIA request is made."). Indeed, given the National Archives' unique mission to preserve records from all three branches of the federal government, the traditional inquiry into who controls the documents at issue is ill-suited for the circumstances here.

Nevertheless, if this Court, like the district court, declines to decide that the Commission's records are not subject to FOIA because they retain their legislative character after transfer to the National Archives, it should hold that the National Archives properly denied Cause of Action's FOIA request. While there is no dispute that the National Archives has obtained the Commission's records, it does not exercise sufficient "control of the requested materials" so as to render them "agency records" within the scope of FOIA. *Id.* at 144.

A. "Special Policy Considerations" Warrant Application Of The Court's Modified Control Test

1. In holding that the Commission's records are not "agency records" subject to FOIA, the district court applied this Court's standard four-factor test for determining "whether an agency exercises sufficient control over a document to render it an 'agency record.'" *Burka v. HHS*, 87 F.3d 508, 515 (D.C. Cir. 1996). Under that test, the Court considers

"(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."

Ibid. (quoting *Tax Analysts v. Dep't of Justice*, 845 F.2d 1060, 1069 (D.C. Cir. 1988), *aff'd on other grounds*, 492 U.S. 136 (1989)). As discussed above, the district court concluded that the first three factors weigh in the National Archives' favor. The court presumed, for purposes of the motion to dismiss, that the fourth factor favors Cause of Action, but found that it carries little weight. See A396-99. On balance, the district court therefore held that the factors "decisively" favor the National Archives and "a conclusion that the [Commission's] documents are not 'agency records' subject to FOIA." A399.

After the district court issued its ruling here on appeal, this Court rendered its decision in *Judicial Watch v. Secret Serv.* At issue in that case was a FOIA request for White House logs of visitors to the Office of the President, obtained and used by the Secret Service for the limited purposes of performing background checks on visitors and verifying visitors' admissibility at the time of their visits. 726 F.3d at 212. After applying its four-factor control test, the Court was "left with an uncertain result": one factor favored the government, one favored plaintiff, and the other two factors favored neither. *Id.* at 220.

The Court then pointed out that "the four-factor test is not the only test relevant to the FOIA request at issue[.] * * * [A] somewhat different control test applies when there are 'special policy considerations' at stake." *Id.* at 221. For example, special policy considerations exist when the requested documents were "obtained [by an agency] from, or prepared in response to a request from, a government entity not covered by FOIA: the United States Congress." *Ibid.* See also *Ryan v. Dep't of Justice*, 617 F.2d 781, 784-85 (D.C. Cir. 1980) ("[W]hen the requested documents are in the possession of an agency but were created by an entity not defined as an 'agency' under the FOIA[,] * * * FOIA does not specify a test for determining what is an agency record."). In that circumstance, "whether an agency's 'response is subject to FOIA turns on whether Congress manifested a clear intent to control the document.'" *Secret Serv.*, 726 F.3d at 221 (quoting *United We Stand Am., Inc. v. IRS*, 359 F.3d 595, 597 (D.C. Cir. 2004)). As a result, "the first two factors of the standard [control] test [are] effectively dispositive." *Ibid.*

Applying the "modified control test" to the requested White House visitor logs, the Court in *Secret Serv.* concluded that "records disclosing visitors to the Office of the President are not 'agency records,'" and thus are not subject to disclosure under FOIA. 726 F.3d at 231. The Office of the President "'manifested a clear intent to control' the documents" through a Memorandum of Understanding

with the Secret Service. *Id.* at 223; see *id.* at 218. In addition, the Secret Service was "not free to use and dispose of the documents as it sees fit." *Id.* at 223.

The Court emphasized repeatedly that the documents "were created in response to requests from, and information provided by, a governmental entity not covered by FOIA," i.e., the Office of the President. *Id.* at 222. "[W]here Congress has intentionally excluded a governmental entity from [FOIA], we have been unwilling to conclude that documents or information of that entity can be obtained indirectly, by filing a FOIA request with an entity that *is* covered under that statute." *Id.* at 225. The Court noted that it has rejected such "end runs" in cases seeking disclosure of information generated by Congress, to avoid the "separation-of-powers concerns that would arise were [the Court] to construe FOIA to cover such documents or information." *Id.* at 225-26. See also, e.g., *Goland v. CIA*, 607 F.2d 339, 346 (D.C. Cir. 1978) ("[W]e will not permit them to do indirectly what they cannot do directly because of the fortuity of the Transcript's location."), *cert. denied*, 445 U.S. 927 (1980).

Other cases within this Circuit have applied the modified control test where the documents at issue were created by an entity not covered by FOIA. In *United We Stand Am., Inc. v. IRS*, 359 F.3d 595, 597 (D.C. Cir. 2004), the Court focused on the first two factors identified in *Burka* in holding that portions of a document prepared by the Internal Revenue Service ("IRS") in response to the request of a

congressional committee were not agency records subject to FOIA. The Court found that Congress clearly intended to control those portions of the IRS's response that would reveal the committee's request. *Id.* at 600-01. Thus, the IRS could use and dispose of only the portions of its response that did not reveal the committee's request. *Id.* at 602. See also *Goland*, 607 F.2d at 343 (CIA copy of "secret" congressional hearing transcript was not "agency record" because Congress's intent to control document was clear).

2. As in *Secret Serv.*, "special policy considerations" apply here, where Cause of Action is pursuing an end run to obtain the records of a legislative branch entity, not subject to FOIA, via a FOIA request to the National Archives, where the records have been deposited for preservation. Thus, the modified, two-factor test is the appropriate standard for determining if the National Archives has sufficient control over the requested Commission records so as to bring them within FOIA's compass.¹⁵

With respect to the first factor, determining the intent of the Commission to retain or relinquish control over its records is based on (i) the circumstances surrounding the records' creation and (ii) the conditions under which the records

¹⁵ Cause of Action mentions *Secret Serv.* only briefly in a footnote and attempts to distinguish it on the ground that the Commission is "not Congress." Br. 25-26 n.7. That argument, however, overlooks the fact that, for purposes of FOIA, the exemption for "the Congress" includes the entire legislative branch. See *supra* pp. 25-26.

were transferred to the National Archives. *Paisley v. CIA*, 712 F.2d 686, 692 (D.C. Cir. 1983), *vacated in part on other grounds*, 724 F.2d 201 (1984). There can be no dispute about the circumstances of the creation of the records here at issue. Cause of Action seeks the Commission's internal work product, documents created in carrying out its congressionally delegated responsibilities under FERA. Moreover, the Commission's intent to restrict access to its nonpublic records is manifest in the "*contemporaneous and specific instructions*" it gave to the National Archives upon transfer of its records. *Id.* at 694.

Chairman Angelides's letter "establishes the criteria under which these records should be made available." A033. It explains that, "[b]ecause the Commission was established in the legislative branch, its records have not been subject to [FOIA]," and "*we understand that the FOIA will not apply to Commission records even after they are transferred to [the National Archives].*" A033 (emphasis added). "The Commission recommends" that its nonpublic 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." A033 (emphasis added). "The Commission" also encouraged the National Archives "to conduct a systematic review" of its nonpublic records, "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." A033. To that end, the

Commission instructed the National Archives to withhold records after that date if they contain information in four broad, protected categories – (i) personal privacy information; (ii) confidential and sensitive financial or regulatory information; (iii) proprietary business information; and (iv) other information protected under law, as determined by the National Archives. A033.

The standard Agreement that accompanied the transferred Commission records, SF-258, reinforces the Commission's intent that control of the transferred records would not pass to the National Archives. The following sentence on the form was stricken, indicating the inapplicability of FOIA to the transferred records: "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." A036. In addition, the form indicated that the records would not be "fully available for public use," and Chairman Angelides's "Access letter," containing the restrictions imposed by the Commission on the availability of the records, was attached, in accordance with National Archives regulations. A036; see 36 C.F.R. § 1235.20.

Chairman Angelides's letter and the SF-258 Agreement amply reflect the Commission's intent to retain control over its records. Compare *United We Stand*, 359 F.3d at 601-02 (committee letter prohibiting disclosure of that document without committee's prior approval); *Goland*, 607 F.2d at 347 ("Secret" notation on CIA copy of congressional hearing transcript).

As for the second factor, the district court correctly concluded that the National Archives "does not have wide discretion in its use and disposal of the [Commission] records because of the specific limiting instructions placed on the records at the time they were transferred." A398. The Commission's detailed instructions limit the National Archives' ability to use and dispose of the records as it sees fit. The letter makes clear that the Commission expects its nonpublic records to remain unavailable to the public at least until February 2016, and records "should not be disclosed" thereafter if they fall within specified, traditionally protected categories of information. A033.

And, as in *Secret Serv.*, 726 F.3d at 224, "separation-of-powers concerns * * * provide an additional – and more fundamental – reason" to conclude that the Commission's records are not "agency records" subject to FOIA. As explained *supra*, the Commission was a bipartisan entity established in the legislative branch that was given broad powers, including subpoena and hearing authority, to investigate the causes of the financial crisis in the last decade. It is well established that not only the Congress itself, but also the entire legislative branch, is exempt from FOIA. Thus, in developing a massive amount of information, much of it of a sensitive nature, and in conducting its investigations and deliberations, the Commission correctly assumed that its records were not subject to FOIA. See A033. Requiring disclosure of those records under FOIA because

they are now housed at the National Archives would create the very "separation-of-powers concerns that would arise were [the Court] to construe FOIA to cover such documents or information." *Secret Serv.*, 726 F.3d at 226. As in *Secret Serv.*, the Court should not countenance such an end run. *Id.* at 225.

3.a. Cause of Action contends that neither Congress nor the Commission intended that the Commission's records be subject to any public access restrictions. It makes several brief arguments in support of that claim: (i) neither FERA nor any other statute authorizes restrictions on access to the Commission's records; (ii) the Commission's Deputy General Counsel imposed no access restrictions on the documents as required by National Archives regulations and Standard Form SF-115, "Request for Records Disposition Authority"; and (iii) Chairman Angelides lacked authority to restrict access to the Commission's records. Br. 27-28; see also *id.* at 21-22. None of those arguments has merit.

First, Cause of Action cites no judicial authority to support its contention that the intent to restrict access to the Commission's records must be specifically authorized by FERA. In fact, the case law demonstrates just the opposite. In *Secret Serv.*, *United We Stand*, and *Goland*, this Court found sufficient indicia of intent in memoranda and other documentation. See *supra* pp. 37-39. But in any event, the Federal Records Act, 44 U.S.C. § 2108(a), generally authorizes federal

agency heads to prescribe restrictions on the use or examination of agency records transferred to the National Archives' custody.

Second, the Court should disregard all of Cause of Action's arguments concerning the SF-115 form. Cause of Action never even mentioned this form in the district court, let alone presented argument based on it. In fact, the SF-115 form was attached to the declaration of National Archives' Assistant Director Fulgham, see A122, A188-90, which Cause of Action moved to strike. Arguments that have not been presented to the district court are deemed waived and may not be made for the first time on appeal. *Baptist Mem. Hosp. v. Sebelius*, 603 F.3d 57, 63 (D.C. Cir. 2010).

Cause of Action's arguments are, in any event, meritless. As its title ("Request for Records Disposition Authority") indicates, the SF-115 form is used to identify an agency's temporary and permanent records and to establish the authority for their disposal or transfer to the National Archives, including the time of transfer. See A188-90. Under 36 C.F.R. § 1225.14(b)(2)(v), an SF-115 should include, *inter alia*, a "[s]tatement of restrictions on access under the FOIA if the records are proposed for immediate transfer." The form executed by the Commission does not include, and *was not required to include*, that statement, because the restrictions on access imposed by the Commission are not "under the FOIA." Rather, the restrictions were imposed pursuant to the Federal Records Act,

44 U.S.C. § 2108(a), through the use of the SF-258 Agreement and the accompanying letter of Chairman Angelides.

Third, Chairman Angelides's letter is in full accordance with the law. Under the Federal Records Act, it is the responsibility of "*the head of a Federal agency* [to] state[], 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." *Ibid.* (emphasis added). As Commission Chairman, it was thus his responsibility to provide the written restrictions on access to the Commission's records. The text of the letter also makes clear that he was speaking on behalf of "the Commission," see *supra* pp. 11-13, and it explains the Commission's "understand[ing] that the FOIA will not apply to Commission records even after they are transferred to [the National Archives]," because "the Commission was established in the legislative branch." A033. Finally, as required by 36 C.F.R. § 1235.20, the SF-258 Agreement indicated that there are restrictions on the use and examination of the Commission's records, and that the "Access letter" was attached. A036.¹⁶

¹⁶ Cause of Action claims that, because the SF-258 form and Chairman Angelides's letter did not cite the "[FOIA] exemption * * * that authorizes the restrictions," 36 C.F.R. § 1235.20, the Commission did not comply with National Archives regulations. Br. 21-22. However, because the Commission believed – correctly, in our view – that FOIA does not apply *at all* to its records, it follows that there was no need to invoke any of the exemptions from FOIA.

Cause of Action's contention that Chairman Angelides could not "express the will of Congress," Br. 35, is baseless. As the district court noted, A398 n.1, this Circuit has found "sufficient 'indicia of congressional intent'" to control documents in a letter written by a joint congressional committee's chief of staff. *United We Stand*, 359 F.3d at 605. Chairman Angelides was more than a congressional committee staffer; he was the head of the Commission, appointed jointly by the Senate Majority Leader and the Speaker of the House of Representatives. FERA, § 5(b)(3)(A), 123 Stat. 1626. Given Chairman Angelides's position and responsibility under the Federal Records Act, 44 U.S.C. § 2108(a), he was the proper official to explain the conditions imposed by the Commission in connection with its transfer of records to the National Archives.

It bears noting that the Commission expressed its intent at the time of the records transfer to continue to control access to those records after their transfer to the National Archives, in the same way that other temporary legislative branch entities have done so. For example, when the 9/11 Commission completed its work, its Chairman and Vice Chairman sent a letter to the National Archives that is strikingly similar to Chairman Angelides's letter:

This letter * * * establishes criteria under which these records will be made available. * * * Because the Commission was established in the legislative branch, its records have not been subject to [FOIA], and we understand that the FOIA will not apply to Commission

records even after they are transferred to [the National Archives].

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 [the National Archives] 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. Records should not be disclosed if they (a) contain information that continues to be classified; (b) disclose private information that the Commission agreed to protect from public disclosure; or (c) are otherwise barred from public disclosure by law, as determined by the Archivist.

A140-41;¹⁷ compare A033-34.

The intent of the 9/11 Commission to control access to its records is manifest in that letter, just as Chairman Angelides's letter reflects the Financial Crisis Inquiry Commission's clear intent respecting its records. Cause of Action's suggestion that the procedure followed here was unusual, ineffective, or unlawful is wide of the mark.

b. For similar reasons, Cause of Action's contention (Br. 29) that the National Archives has "complete discretion to use and dispose of the [Commission's] records" is baseless. It relies on the provision of the Federal

¹⁷ Also found at <http://www.archives.gov/research/9-11/letter-to-carlin.pdf>.

Records Act that gives the Archivist discretion "to relax, remove, or impose restrictions on [a defunct] agency's records when he determines that such action is in the public interest." 44 U.S.C. § 2108(a). However, as the National Archives' Chief Operating Officer explained, "[t]o the best of [his] knowledge, [he] know[s] 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." A082. Indeed, National Archives regulations codify that policy of respecting the intent of records donors. Archival records will be made "available to the public for research unless they have access restrictions." 36 C.F.R. § 1254.1(b). See also *id.* §§ 1235.32(b)(2) ("See part 1256 of this chapter for restrictions on specific categories of records * * *."), 1256.20(b) (access to archival records may be limited due to "restrictions specified in writing in accordance with 44 U.S.C. 2108 by the agency that transferred the records").

Cause of Action also argues that the fact that the National Archives "voluntarily * * * turned over electronic copies of [Commission] records" to the House Committee, without a subpoena and "in an organized, searchable format," "strongly supports" the National Archives' discretion respecting the use of the Commission's records. Br. 36. Cause of Action's argument falls of its own weight. If anything, providing the records of a *legislative branch entity* to a *congressional*

committee in response to the latter's request shows the absence of executive branch "control" of the Commission's records for purposes of FOIA. Indeed, the National Archives distinguishes between official governmental requests (from all three branches) and public access requests. Compare, e.g., PRA, 44 U.S.C. § 2205(2) with *id.* § 2204(c)(1). Moreover, providing legislative branch records to a congressional committee is not the equivalent of public disclosure. Cf. *Rockwell Int'l Corp. v. U.S. Dep't of Justice*, 235 F.3d 598, 604 (D.C. Cir. 2001) (rejecting argument that disclosure of documents to Congress is "disclosure to the whole world" and waives all privileges and exemptions); 5 U.S.C. § 552(d) ("This section is not authority to withhold information from Congress.").

Further, contrary to Cause of Action's suggestion, the National Archives "copied the requested [Commission] electronic records exactly as they were transferred to [its] custody" just a few weeks earlier and only converted the format of email files so that they could be accessed with the House Committee's software. A358-59. As this Court has explained, transcribing tapes, photocopying documents, and similar actions "merely * * * reproduc[e] information which originated elsewhere." *Ricchio*, 773 F.2d at 1393.

In any event, the focus of the second factor of the control test is an agency's own "use" and disposition of records, not whether it has authority to relax restrictions imposed by the records' creator. Thus, in addressing that factor in

United We Stand, the Court found it significant that the IRS had "created and maintains the document in the course of its official duties, i.e., responding to a congressional request for information." 359 F.3d at 602. The Court concluded that the IRS exercised control over portions of the IRS response that did not reveal the committee's request, and, accordingly, those portions were agency records subject to FOIA. *Id.* at 603. By contrast, the National Archives does not "use" the Commission's records in the way contemplated by the second control factor. See, e.g., *Reporters Comm.*, 445 U.S. at 157 (notes of Henry Kissinger's telephone conversations while he was an advisor to the President "were not used by the [State] Department for any purpose").

B. If The Remaining Factors Of The Standard Control Test Apply, They Also Favor The National Archives

Even if there were no special policy considerations here and the standard control test were to apply, the remaining two factors of that test weigh in the National Archives' favor.

The district court correctly concluded that the third factor – "the extent to which agency personnel have read or relied upon the document," *Burka*, 87 F.3d at 515 – tilts in favor of the National Archives because it "is merely a repository, and its personnel do not act in reliance on these types of documents." A398-99. It is true that National Archives staff are in the process of reviewing the Commission's records for the limited purpose of describing them and creating finding aids for

researchers. See A129, A132-33, A135. However, National Archives personnel are not reading or relying on the Commission's records for the purpose of conducting the National Archives' own operations and decisionmaking. Nor are they reading and relying on the Commission's records "in writing articles and developing agency policies." *Burka*, 87 F.3d at 515. Thus, "disclosure of the requested records would reveal nothing about decisionmaking at the [National Archives]," which is the focus of the third control factor, not to mention FOIA itself. *Judicial Watch, Inc. v. Fed. Hous. Fin. Agency*, 646 F.3d 924, 928 (D.C. Cir. 2011). See *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) (FOIA's purpose is "'to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny'").

The fourth factor, the extent to which the records are integrated into the agency's record system, *Burka*, 87 F.3d at 515, also weighs in the National Archives' favor. The Commission's records are, of course, included in the National Archives' collection of archival records: preservation of the records of all three branches of the federal government is the mission of the National Archives. But like the second and third control factors, the fourth factor must be understood as relating to an agency's use of the records in its own decisionmaking processes. See *Consumer Fed'n*, 455 F.3d at 289, 290 (fourth factor "goes both to control and to use" of the records, in the sense used in *Reporters Comm.*). The Commission's

records have no role to play in informing the National Archives' operations and function as conservator of the nation's historical documents, nor are the Commission's records integrated with the National Archives' operational records.

Thus, assuming that either control test is properly applied in the circumstances here, where the National Archives' function is simply to preserve records created solely by a legislative branch entity, consideration of all of the factors establishes that the National Archives does not have control over the Commission's records for purposes of FOIA.

III. The District Court Gave Proper Consideration To Cause Of Action's Allegations And Arguments In Granting The Motion To Dismiss

Cause of Action argues that the district court committed "reversible error" by failing to consider the allegations in its complaint in a light most favorable to Cause of Action. Br. 32. It claims that the court "ignored critical case law" and "critical, undisputed facts" that support Cause of Action. *Id.* at 33, 34. The arguments in section III of Cause of Action's brief, however, are simply disagreements with the district court's rulings and application of the case law.¹⁸ Moreover, the fact that the district court's decision does not mention every alleged "fact" that Cause of Action deems relevant to its case does not mean that the court

¹⁸ We have therefore addressed such arguments, e.g., those relating to Chairman Angelides's letter (Br. 37-38) and the National Archives' function as the repository for records of all three branches of the federal government (*id.* at 39-40), elsewhere in this brief.

ignored them; rather, they were not relevant to the district court's ruling on the issues of law presented by this case.¹⁹

Cause of Action complains further that the district court improperly identified the scope of its FOIA request. Br. 36-37. Although Cause of Action did not request "all" Commission records, as the district court stated, A390, Cause of Action sought "all documents, including e-mail communications, memoranda, draft reports, and other relevant information and/or data contained in the records transfer of * * * Commission documents stored at [the National Archives] to the Committee on Oversight and Government Reform at the U.S. House of Representatives." A015. In other words, Cause of Action requested the same information that the House Committee requested and received – the Commission's "internal work product." A250. That volume of material is substantial, and it is not "narrowly limited" by category, as Cause of Action claims (Br. 4). Cause of Action also fails to explain how it is possible that the district court "discounted evidence that favored Cause of Action" (*id.* at 36), when the court assumed that Cause of Action had requested *more* Commission records than was the case. In

¹⁹ Among the facts allegedly ignored by the district court are the location of the Commission's offices on Pennsylvania Avenue (rather than in the congressional complex), and the National Archives' response to the House Committee's request for the Commission's electronic records without being subpoenaed. Br. 34.

any event, the scope of Cause of Action's FOIA request has no bearing on the issues of law before this Court.

Cause of Action mistakenly contends (Br. 40) that the district court improperly "went beyond the pleadings" in granting the government's motion to dismiss. The district court expressly stated that it was unnecessary for it to consider the declarations appended to the National Archives' motion, which sought alternative relief – dismissal of Cause of Action's complaint or summary judgment. A392, A399; see A039. Cause of Action fails to show otherwise.

The "extraneous evidence" on which the district court improperly relied, according to Cause of Action, is Chairman Angelides's letter and the SF-258 Agreement. Br. 41. However, both of those documents were attached to Cause of Action's complaint, see A033-34, A036, and, thus, were properly considered by the district court in dismissing the case. *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997) ("In determining whether a complaint fails to state a claim, we may consider only the facts alleged in the complaint, any documents either attached to or incorporated in the complaint and matters of which we may take judicial notice.").

Cause of Action also points to the district court's statement that the National Archives is "the repository for federal records of all kinds * * * [and] does not 'possess' documents in the same manner as other executive agencies," A395, and

legal conclusion that, because the National Archives does not control the Commission's records, they are not "agency records" for FOIA purposes, A396, A399. Cause of Action claims that this shows that the district court relied on one of the National Archives' declarations. Br. 41. Cause of Action is again mistaken. Apart from the fact that the district court could surely take judicial notice of the National Archives' unique role, since its establishment in 1934, as the repository of the federal government's records, see *EEOC*, 117 F.3d at 624, the court cited a *Federal Register* notice, a law review article, and case law in support of the statements and conclusions to which Cause of Action objects. See A395-96. Nothing in the district court's decision suggests that the court considered evidentiary matters outside the pleadings. Thus, the court did not "effectively" grant the National Archives' motion for summary judgment, as Cause of Action claims (Br. 41).

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C), I certify that this brief was prepared using Microsoft Word 2010, Times New Roman proportional font, 14-point, and it contains 12,677 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

November 15, 2013

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CERTIFICATE OF SERVICE

I certify that on November 15, 2013, I filed and served the foregoing "Brief for the Appellee" through the Court's CM/ECF system.

s/ Christine N. Kohl
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**STATUTES and REGULATIONS
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Administrative Procedure Act
5 U.S.C. § 551(1)

§ 551. Definitions

For the purpose of this subchapter –

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include –

(A) the Congress; [or]

(B) the courts of the United States * * *.

**Federal Records Act
44 U.S.C. § 2107(1)**

§ 2107. Acceptance of records for historical preservation

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

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

Federal Records Act
44 U.S.C. § 2108(a)

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

(a) The Archivist shall be responsible for the custody, use, and withdrawal of records transferred to him. When records, the use of which is subject to statutory limitations and restrictions, are so transferred, permissive and restrictive statutory provisions with respect to the examination and use of records applicable to the head of the agency from which the records were transferred or to employees of that agency are applicable to the Archivist and to the employees of the National Archives and Records Administration, respectively. Except as provided in subsection (b) of this section, when the head of a Federal agency states, in writing, restrictions that appear to him to be necessary or desirable in the public interest with respect to the use or examination of records being considered for transfer from his custody to the Archivist, the Archivist shall, if he concurs,^[1] 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.

¹ So in original.

Federal Records Act
44 U.S.C. § 2109

§ 2109. Preservation, arrangement, duplication, exhibition of records

The Archivist shall provide for the preservation, arrangement, repair and rehabilitation, duplication and reproduction (including microcopy publications), description, and exhibition of records or other documentary material transferred to him as may be needful or appropriate, including the preparation and publication of inventories, indexes, catalogs, and other finding aids or guides to facilitate their use. He may also prepare guides and other finding aids to Federal records and, when approved by the National Historical Publications and Records Commission, publish such historical works and collections of sources as seem appropriate for printing or otherwise recording at the public expense.

**Federal Records Act
44 U.S.C. § 2901(14)**

§ 2901. Definitions

As used in this chapter, and chapters 21, 25, 31, and 33 of this title –

* * *

(14) the term "Federal agency" means 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) [.]

Fraud Enforcement and Recovery Act
Pub. L. No. 111-21, § 5, 123 Stat. 1625

SEC. 5. FINANCIAL CRISIS INQUIRY COMMISSION.

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

(b) COMPOSITION OF THE COMMISSION. –

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

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

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

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

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

(2) QUALIFICATIONS; LIMITATION. –

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

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

(3) CHAIRPERSON; VICE CHAIRPERSON. –

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

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

(4) MEETINGS, QUORUM; VACANCIES. –

(A) MEETINGS. –

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

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

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

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

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

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

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

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

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

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

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

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

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

(F) tax treatment of financial products and investments;

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

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

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

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

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

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

(M) compensation structures;

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

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

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

(Q) short-selling;

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

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

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

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

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

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

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

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

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

(d) POWERS OF THE COMMISSION. –

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

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

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

(2) SUBPOENAS. –

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

(B) ENFORCEMENT. –

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(8) POWERS OF SUBCOMMITTEES, MEMBERS, AND AGENTS. – Any subcommittee, member, or agent of the Commission may, if authorized by the

Commission, take any action which the Commission is authorized to take by this section.

(e) STAFF OF THE COMMISSION. –

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

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

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

(4) DETAILEES. – Any Federal Government employee may be detailed to the Commission without reimbursement from the Commission, and such detailee shall retain the rights, status, and privileges of his or her regular employment without interruption.

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

(f) COMPENSATION AND TRAVEL EXPENSES. –

(1) COMPENSATION. – Each member of the Commission may be compensated at a rate not to exceed the daily equivalent of the annual rate of basic pay in effect for a position at level IV of the Executive Schedule under section

5315 of title 5, United States Code, for each day during which that member is engaged in the actual performance of the duties of the Commission.

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

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

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

(1) REPORT. – On December 15, 2010, the Commission shall submit to the President and to the Congress a report containing the findings and conclusions of the Commission on the causes of the current financial and economic crisis in the United States.

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

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

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

(i) TERMINATION OF COMMISSION. –

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

(2) ADMINISTRATIVE ACTIVITIES BEFORE TERMINATION. – The Commission may use the 60-day period referred to in paragraph (1) for the purpose of concluding the activities of the Commission, including providing testimony to committees of the Congress concerning reports of the Commission and disseminating the final report submitted under subsection (h).

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

Freedom of Information Act
5 U.S.C. § 552(a)(3)(A)

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

* * *

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

Freedom of Information Act
5 U.S.C. § 552(a)(4)(B)

(4)(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

Freedom of Information Act
5 U.S.C. § 552(f)(1)

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

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

Presidential Records Act
44 U.S.C. 2204

§ 2204. Restrictions on access to Presidential records

(a) Prior to the conclusion of his term of office or last consecutive term of office, as the case may be, the President shall specify durations, not to exceed 12 years, for which access shall be restricted with respect to information, in a Presidential record, within one or more of the following categories:

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

(2) relating to appointments to Federal office;

(3) specifically exempted from disclosure by statute (other than sections 552 and 552b of title 5, United States Code, provided that such statute (A) requires that the material be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of material to be withheld;

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

(5) confidential communications requesting or submitting advice, between the President and his advisers, or between such advisers; or

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

(b)(1) Any Presidential record or reasonably segregable portion thereof containing information within a category restricted by the President under subsection (a) shall be so designated by the Archivist and access thereto shall be restricted until the earlier of –

(A)(i) the date on which the former President waives the restriction on disclosure of such record, or

(ii) the expiration of the duration specified under subsection (a) for the category of information on the basis of which access to such record has been restricted; or

(B) upon a determination by the Archivist that such record or reasonably segregable portion thereof, or of any significant element or aspect of the information contained in such record or reasonably segregable portion thereof, has been placed in the public domain through publication by the former President, or his agents.

(2) Any such record which does not contain information within a category restricted by the President under subsection (a), or contains information within such a category for which the duration of restricted access has expired, shall be exempt from the provisions of subsection (c) until the earlier of –

(A) the date which is 5 years after the date on which the Archivist obtains custody of such record pursuant to section 2203(d)(1); or

(B) the date on which the Archivist completes the processing and organization of such records or integral file segment thereof.

(3) During the period of restricted access specified pursuant to subsection (b)(1), the determination whether access to a Presidential record or reasonably segregable portion thereof shall be restricted shall be made by the Archivist, in his discretion, after consultation with the former President, and, during such period, such determinations shall not be subject to judicial review, except as provided in subsection (e) of this section. The Archivist shall establish procedures whereby any person denied access to a Presidential record because such record is restricted pursuant to a determination made under this paragraph, may file an administrative appeal of such determination. Such procedures shall provide for a written determination by the Archivist or his designee, within 30 working days after receipt of such an appeal, setting forth the basis for such determination.

(c)(1) 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. Access to such records shall be granted on nondiscriminatory terms.

(2) Nothing in this Act shall be construed to confirm, limit, or expand any constitutionally-based privilege which may be available to an incumbent or former President.

(d) Upon the death or disability of a President or former President, any discretion or authority the President or former President may have had under this chapter shall be exercised by the Archivist unless otherwise previously provided by the President or former President in a written notice to the Archivist.

(e) The United States District Court for the District of Columbia shall have jurisdiction over any action initiated by the former President asserting that a determination made by the Archivist violates the former President's rights or privileges.

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. § 1250.1

§ 1250.1 Scope of this part.

This part implements the provisions of the Freedom of Information Act (FOIA), 5 U.S.C. 552, as amended, for NARA operational records and archival records that are subject to FOIA. Other NARA regulations in 36 CFR parts 1254 through 1275 provide detailed guidance for conducting research at NARA.

36 C.F.R. § 1250.2**§ 1250.2 Definitions.**

The following definitions apply to this part:

(a) *Archival records* means permanently valuable records of the United States Government that have been transferred to the legal custody of the Archivist of the United States.

* * *

(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.

* * *

(i) *Operational records* means those records that NARA creates or receives in carrying out its mission and responsibilities as an executive branch agency. This does not include archival records as defined in paragraph (a) of this section.

* * *

36 C.F.R. § 1250.6

§ 1250.6 Does FOIA cover all of 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. § 1254.1

§ 1254.1 What kinds of archival materials may I use for research?

(a) The National Archives and Records Administration (NARA) preserves records of all three branches (Executive, Legislative, and Judicial) of the Federal Government in record groups that reflect how government agencies created and maintained them. Most of these records are of Executive Branch agencies. We also have individual documents and collections of donated historical materials that significantly supplement existing records in our custody or provide information not available elsewhere in our holdings. Descriptions of many of our records are available through our Web site, <http://www.archives.gov>.

(b) We provide information about records and we make them available to the public for research unless they have access restrictions. Some records may be exempt from release by law. Donors may apply restrictions on access to historical materials that they donate to NARA. Access restrictions are further explained in part 1256 of this chapter. We explain procedures for obtaining information about records in § 1254.2.

(c) In addition to traditional paper (textual) materials, our holdings also include special media materials such as microfilm, still pictures, motion pictures, sound and video recordings, cartographic and architectural records, and electronic records. The majority of these materials are housed at the National Archives at College Park, 8601 Adelphi Road, College Park, MD 20740–6001. Many of these types of materials also are represented in the holdings of our Presidential libraries and our regional archives facilities listed in part 1253 of this chapter.

(d) The majority of our archival materials are 30 years old or older.

(e) Records creating agencies hold the legal title and control access to records housed in NARA records centers. Our procedures to obtain access to these records are in § 1256.2.

36 C.F.R. § 1256.20**§ 1256.20 May I obtain access to Federal archival records?**

(a) Most Federal archival records are open for research without submitting a Freedom of Information Act (FOIA) request. Part 1254 specifies procedures for using unrestricted records in a NARA research room, submitting reference requests, and ordering copies of 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.