

ORAL ARGUMENT SCHEDULED FOR FEBRUARY 19, 2014

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Cause of Action,)	
)	
Appellant,)	
)	
v.)	Case No. 13-5127
)	
National Archives and Records)	
Administration,)	
)	
Appellee.)	
)	

**CAUSE OF ACTION'S OPPOSITION TO NATIONAL ARCHIVES AND
RECORD ADMINISTRATION'S MOTION TO STRIKE TWO
ARGUMENTS FROM THE REPLY BRIEF**

Pursuant to Federal Rule of Appellate Procedure 27 and Circuit Rule 27, Appellant Cause of Action opposes Appellee National Archives and Records Administration's (NARA's) motion to strike two arguments from Cause of Action's reply brief.

NARA claims that we have impermissibly raised two new arguments: (1) that we are entitled to executive agency records that are intermingled within the Financial Crisis Inquiry Commission (FCIC) records that NARA sent wholesale to the U.S. House Committees on Oversight and Government Reform and Financial

Services (Oversight and Financial Services Committees); and (2) that NARA treated the FCIC records as subject to the Freedom of Information Act (FOIA) by releasing them to eight members of Congress without restrictions.

NARA's motion should be denied for three reasons. First, NARA chose to appeal the *per se* argument that had been squarely rejected by the trial court. Cause of Action did not challenge the trial court on this issue in its appeal. Accordingly, Cause of Action submitted a proper reply. Second, NARA raised four new arguments contesting its control over the FCIC records and each is properly subject to response and rebuttal. Third, this Court has the jurisdiction and discretion needed to decide all of the issues now fully briefed.

I. NARA Raised the *Per Se* Argument That the Trial Court Rejected Below And Cause of Action Has Properly Responded.

NARA argues that Cause of Action is not entitled to the executive agency records contained within the FCIC records and given to the Oversight and Financial Services Committees because these executive agency records are *per se* exempt from FOIA and retain their legislative character. NARA asserts that we sought these records for the first time on reply. NARA Mot Strike 2–3; *but see*

contra A010 (Compl. ¶ 31); A015; A223; CoA Br. 9–10; CoA Reply 10–11.

NARA is wrong.¹

A. NARA’s Failure to Cross-Appeal Justifies Cause of Action’s Response.

NARA’s *per se* argument—that the FCIC records are exempt from FOIA because they are legislative in character—was raised below and rejected. A396 (the district court concluded that it “need not endorse NARA’s broad proposal in order to decide this case”). Cause of Action did not appeal this. And neither did NARA. *See* A052; A396; NARA Br. 33. Yet, NARA resurrected the *per se* rule as its primary argument before this Court without filing a cross-appeal. NARA Br. 2 (arguing “[w]hether 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.”); *accord id.* at 33. Indeed, in its appellate brief,

¹ In our complaint, we sought *all* the records that the NARA gave to the Oversight Committee. A010 (Compl. ¶ 31). In the district court, we sought “the same records provided to the Oversight Committee,” *e.g.*, A204 (CoA’s Opp’n to NARA’s Mot. Dismiss), and these records include all executive agency records that the FCIC collected and that NARA transmitted to Congress. We repeated this argument in our opening brief before this Court, where we explained that we had “submitted a FOIA request to NARA, requesting the exact FCIC records that NARA had previously provided to Congress.” CoA Br. 10. And we stated that a district court has jurisdiction to “order the production of any agency records improperly withheld from the complainant.” *Id.* at 11. Further, the House Oversight Committee’s Minority Report reveals that the FCIC records included records of at least nine executive agencies, and without clear evidence to the contrary these records remain subject to FOIA. A254, A264, A266, A269, A282.

NARA acknowledged that the district court decided against creating a new *per se* rule below, yet it urged “this Court to do so.” *Compare* NARA Br. 33 *with* A393.

NARA thus expanded the issues on appeal, and with the help of the Bipartisan Legislative Advisory Group (BLAG) as *amicus*, reargued what it lost below. Apart from seeking this Court’s intervention to reset the briefing schedule, our only opportunity to respond was our reply brief.² “[R]epley briefs *reply* to arguments made in the response brief,” and that is just what we did. *MBI Grp., Inc v. Credit Foncier du Cameroun*, 616 F.3d 568, 575 (D.C. Cir. 2010) (emphasis and alterations in original); *see* D.C. Cir. R. 28(c).³

² Although NARA’s reference to *Whac-a-Mole*® is a fetching analogy, it is wholly inapt. NARA Mot. Strike 3 n.1. NARA has played strategic hide and seek by filing a *de facto* cross-appeal on the issue of the “character” of the FCIC records to argue that the records are completely outside the boundaries of FOIA. That is, NARA is asking for a total bar to any type of FOIA consideration. In filing our appeal, we engaged NARA on the issues chosen by right and procedure as appellant. While the moles in the arcade game move up and down, they appear in stationary and expected places. Here, NARA surprised us, and this Court, by resurrecting an argument that the trial court rejected, and which we had not appealed. In its game of appellate hide and seek, NARA has been properly found out. The Court should not now allow NARA to raise the *per se* issue on appeal, only to run away from the consequences of that choice in the form of an effective, necessary response by Cause of Action.

³ NARA’s tactic of advancing an issue via a *de facto* cross-appeal should be considered in light of apposite authority. It is well established that

[A] party who does not appeal a final decree of the trial court cannot be heard in opposition thereto when a case is brought here the appeal of the adverse party. In other words, the appellee may not attack the decree with a view

NARA failed to file a formal cross-appeal, although it had the opportunity to do so. D.C. Cir. R. 28.1. Instead, it requested affirmative relief that required a response. And while this Court may well decide that NARA's tactics are acceptable,⁴ it is settled that a party cannot informally appeal an issue to enlarge its own right, *i.e.*, an expansive *per se* rule, or lessen the rights of another. *Mass. Mut.*, 426 U.S. at 480. NARA's opening brief asks this Court to do both. NARA seeks to broaden the precedent of this Circuit in its favor through a new *per se* rule while simultaneously seeking to eliminate not only Cause of Action's rights in response, but also the rights of any other FOIA requester who seeks executive

either to enlarging his own rights thereunder or of lessening the rights of his adversary.

Mass Mut. Life Ins. Co. v. Ludwig, 426 U.S. 479, 480 (1976); *see also Freeman v. B & B Assoc.*, 790 F.2d 145, 150 (D.C. Cir. 1986) (same). NARA acknowledges as much in its brief:

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)).

NARA Br. 33 (emphasis in original).

⁴ It is Cause of Action's position that all of the issues and arguments before the Court should be heard at the same time.

agency records that are initially held by a putative non-executive government body. *Freeman*, 790 F.2d at 150; *Granfinanciera*, 492 U.S. at 38–39.

Our reply brief illuminates the harm and impropriety of NARA's proposal. The *per se* rule, if adopted as the new precedent of this Court, would automatically exclude from FOIA those executive agency records that Congress intended to make publicly available in the first instance. *See* 5 U.S.C. § 551(1).⁵ Essentially, NARA is arguing that executive agencies should be allowed to exempt otherwise FOIA-able documents from production by dispatching them to the legislative branch. This clearly was not Congress's intent regarding the FCIC records at issue here.

B. Cause of Action Properly Responded to NARA's *Judicial Watch* Claim.

Cause of Action properly responded to NARA's *Judicial Watch* claim, raised for the first time in its response.⁶ Here, the record demonstrates that

⁵ NARA ignores the chaotic, disruptive, and unpredictable results such precedent would have on FOIA law in this Circuit. In addition to disrupting the spirit and letter of FOIA, the Court may well face a torrent of litigation exploring the issues surrounding a *per se* rule for any legislative branch agency's records when Congress has not addressed the disposition of that agency's records upon termination.

⁶ Timing is important. While *Judicial Watch* was decided in late August 2013, Cause of Action was not on notice that NARA would raise this issue until November 15, 2013 when NARA filed its opposition brief. In our reply, we simply responded to the *Judicial Watch* issue first raised by NARA on November 15 (and later reiterated by BLAG's *amicus* brief on November 22).

executive branch agency records are intermingled within the FCIC records and thus should be disclosed. *Judicial Watch v. Secret Service*, 726 F.3d 208, 232–34 (D.C. Cir. 2013); A250–88. In *Judicial Watch*, this Court held that when an agency subject to FOIA possesses the records of another agency that is itself “covered by FOIA, there are no such special considerations” for exempting that agency from FOIA’s reach. *Judicial Watch*, 726 F.3d at 232–34.

The executive agency records contained within the FCIC records that we seek fall under this rule. *Id.* at 234. Critically, NARA had admitted in writing that the FCIC records it gave the Oversight and Financial Services Committees contained executive agency documents, but NARA did not disclose this fact. During our drafting of this opposition, we unearthed a transmittal letter NARA sent to the Committees on March 2, 2011, regarding the FCIC records it delivered to Congress. Ex. 1 at 2. This letter was not publicly available until June 2013, when it was apparently published by the public information service MuckRock.⁷ NARA

⁷ MuckRock, *FOI Request, Responses to Congressional Committees (National Archives and Records Administration)*, <https://www.muckrock.com/foi/united-states-of-america-10/responses-to-congressional-committees-national-archives-and-records-administration-5520/> (last visited Jan. 23, 2014) Ex. 2. Given that NARA’s position has been that the records here were *only* legislative records, NARA Br. 25–34, its admission in the March 2, 2011 letter that it was also turning over administrative agency records to the Oversight and Financial Services Committees arguably should have been disclosed to us and to the Court long ago. NARA could have argued that its letter was ambiguous or legally inapposite for any number of reasons, and then tried to distinguish its terms or blunt its effect, but

admits in the letter that the FCIC records were intermingled with executive agency records and it demonstrates NARA's exclusive control over them.⁸ Accordingly, Cause of Action requests that the Court take judicial notice of the March 2, 2011 letter, a NARA document outside the administrative record that is not subject to factual dispute.⁹ *See, e.g., Aeronautical Radio, Inc. v. FCC*, 983 F.2d 275, 282 n.26 (D.C. Cir. 1993); *Conecuh-Monroe Cmty. Action Agency v. Bowen*, 852 F.2d 581, 588 (D.C. Cir. 1988).

this letter is certainly something that NARA should have known about and then disclosed. NARA's failure to disclose this not only arguably prejudiced us by denying us the opportunity to make a case based on the entire record, but also potentially compromised NARA's own counsel. *See Roeder v. Islamic Republic of Iran*, 195 F. Supp. 2d 140, 184 & n.23 (D.D.C. 2002) (discussing counsel's duty to disclose adverse facts and precedent).

⁸ NARA's letter says that the FCIC records contained documents from "federal agencies" and it was "highly likely that such information [would] be included" in the FCIC records that NARA sent to Congress because time constraints did not permit NARA to "separate out the non-responsive records." Ex. 1 at 2. NARA also instructed the Oversight and Financial Services Committees to "return" or "destroy" the FCIC records it received after the members of Congress concluded their use of the records. *Id.* These instructions demonstrate at least that NARA believed it had absolute control over the FCIC records and over all of the other agency records contained therein.

⁹ Contrary to the district court's finding that NARA is "merely a repository," A398, this March 2011 letter supports our contention that NARA does more than "store and maintain records." CoA Br. 39. As the letter suggests, NARA exercised its ability to use the FCIC records to create operational records, 36 C.F.R. § 1250.2(i), when it made copies of the FCIC records and sent them to Congress. This warrants remand for further fact-finding to determine whether NARA's actions contradict the district court's erroneous finding that NARA is "merely a repository."

Cutting off our reply right is inconsistent with controlling precedent and for this reason alone this Court should deny NARA's motion to strike. *See Mass. Mut.*, 426 U.S. at 480. But this Court may consider all of our arguments in any event. *See United States v. Coughlin*, 610 F.3d 89, 109 (D.C. Cir. 2010) (Court may exercise its discretion to entertain arguments, even if they were arguably not raised in earlier briefings); *Coleman v. Johnson*, 2014 U.S. Dist. LEXIS 4211, at *25–26 n.4 (D.D.C. Jan. 14, 2014) (“the Court may, in its discretion, entertain [an] argument in the interest of judicial efficiency”); *Alec L. v. Perciasepe*, 2013 U.S. Dist LEXIS 72301, at *13 (D.D.C. May 22, 2013) (reply brief did not contain a “newly minted argument” but rather “explained a position in the initial brief”). This Court should not be prevented from hearing argument on critical issues, or from efficiently and justly disposing of this case in light of *Judicial Watch*, 726 F.3d at 233–34.

II. NARA's Appellate Brief Advanced Four Arguments Regarding NARA's Absolute Use and Control of the FCIC Documents That Required Rebuttal in Cause of Action's Reply Brief.

NARA claims that we cannot argue that it treated the FCIC records as subject to FOIA when it decided to release copies of the FCIC records to eight

members of Congress¹⁰ without restrictions because we raised this argument for the first time in our reply. Again, NARA errs.¹¹

Cause of Action has consistently maintained throughout this litigation that, by exercising its control and dominion over the FCIC records, NARA subjected them to FOIA. We first pled this in our complaint and argued this in our briefs below and before this Court. In the district court as well as in our opening brief before this Court, we raised and applied the *Tax Analysts* factors to demonstrate that NARA treated the records it handed over¹² like a garden variety FOIA request. *Tax Analysts v. Dep't of Justice*, 845 F.2d 1060, 1069 (D.C. Cir. 1988); See A009 (Compl. ¶¶ 24–28); A203–04, (CoA's Opp'n); A222–23, A230–34 (CoA's Cross Mot. Summ. J.); CoA Br. 36. Before the district court, NARA even addressed the manner in which it released the FCIC records, arguing that “providing records to

¹⁰ NARA sent records to Congressmen Darrell Issa, Elijah Cummings, Patrick McHenry, Mike Quigley, Randy Neugebauer, Spencer Bachus, Barney Frank, and Michael Capuana.

¹¹ For example, we pointed out that NARA processed the Oversight and Financial Services Committee letter as if it were a FOIA request and explained why the records were therefore subject to FOIA. CoA Reply 5–10. In so doing, our analysis fell squarely within the points established in our opening brief regarding the control test of *Tax Analysts*, 845 F.2d at 1068. Specifically, NARA used and disposed of the FCIC records as it saw fit, which is a crucial factor under *Tax Analysts* and which this Court has relied heavily upon in determining whether non-executive agency records are subject to FOIA. *United We Stand v. IRS*, 359 F.3d 595, 600 (D.C. Cir. 2004).

¹² By all indications, NARA produced as many as eight sets of copies of the FCIC records to the Congressmen named in NARA's transmittal letter.

Congress should not affect a court's analysis" to support the *per se* argument it has resurrected here. A337 (NARA's Resp. and Reply); *accord* A049–050 (NARA's Mot. Dismiss); A336–37, A345–49 (NARA's Resp. & Reply).¹³

Simply put, NARA's use and control of the FCIC records has always been a central issue in this case. By treating the letter from the Oversight and Financial Services Committees as a FOIA request and releasing the FCIC records wholesale to eight members of Congress without legal compulsion, NARA subjected the FCIC records to FOIA. A250–51. NARA's opening brief simply repeats the same tired mantra: NARA does not "control" the FCIC records "so as to make them agency records subject to FOIA." NARA Br. 34. Thus, our reply arguments are not "new." Rather we responded under *Tax Analysts* and its progeny to the arguments raised by NARA in its opposition brief.

More importantly, and ostensibly in light of *Judicial Watch*, NARA raised a contradictory quartet of arguments regarding its use and control of the FCIC records, and these arguments properly required rebuttal. NARA Br. 34–50. First, NARA argued that it had *never* contravened a depositor's intent. *Id.* at 48. Second, NARA argued that the FCIC records did not lose their legislative

¹³ In this Court, we argued that the manner in which NARA released the records in response to letter from the Oversight and Financial Services Committees "strongly supports the use and integration factors" of *Tax Analysts*. CoA Br. 36. NARA, in turn, devoted an entire section of its brief to describing the request from the Committees for the FCIC records. NARA Br. 14–15.

character, regardless of what it did with them. NARA Br. 17–19. Third, NARA alleged that the use and disposal element of the *Tax Analysts* test focuses on “an agency’s own ‘use’ and disposition of the records, [and] not whether it ha[d the] authority to relax restrictions.” NARA Br. 49. Fourth, and most remarkably, NARA argued that the scope of Cause of Action’s request “has no bearing on the issues of law before this Court.” *Id.* at 54.

Cause of Action properly exercised its right of rebuttal by addressing each of these arguments in our reply.

A. By Arguing in Its Opening Brief That NARA Has *Never* Contravened Donor Intent, NARA Invited a Rebuttal in Cause of Action’s Reply Brief and Demonstrated the District Court’s Error.

In arguing its case on appeal, as it did below, NARA relied upon evidence outside the pleadings to support its claim that it has never, since 1934, contravened a depositor’s intent to restrict access to its records. This justified rebuttal.

NARA argues that Mr. Angelides expressed his intent to restrict access to the FCIC records, albeit by ignoring statutory and regulatory requirements, and that this justifies restricting access. NARA Br. 40. However, NARA also seemingly disregarded Mr. Angelides’ intent by releasing wholesale the FCIC records to eight members of Congress and their staff without requiring members and staff to return those records after a specified time period. These Members and their staff were free to disclose these records to the public in any way they saw fit

and, in fact, they did so. *See* A251. Clearly, NARA's claim that it never contravened a depositor's intent must be wrong.¹⁴

B. By Arguing in Its Opening Brief That the FCIC Records Did Not Lose Their Legislative Character, NARA Invited Cause of Action's Rebuttal.

In its opening brief, NARA argued that the FCIC records could not become "agency records" under FOIA because they never lost their legislative character. NARA Br. 25–34.¹⁵ To rebut NARA's claim, we established exactly how NARA caused the FCIC records to lose their legislative character. CoA Reply 5–10. Specifically, NARA released the records wholesale to Congress and then NARA restricted our access treating us differently than another requester. The focus of our analysis was not on whether the Oversight and Financial Services Committees were proper FOIA requesters, but on *how* NARA treated the documents once it received the request from the Committees. CoA Reply 5 (indicating that NARA "selectively disregarded the transfer letter," and not discussing whether the

¹⁴The Oversight Committee's Minority Report authored by Ranking Member Elijah Cummings disclosed FCIC records received from NARA, including potentially confidential information. A252. This Minority Report also confirmed the existence and substance of executive agency records within the FCIC records that NARA gave to the Oversight and Financial Services Committees.

¹⁵ In its motion to strike, NARA wholly ignores existing precedent in this Court that whenever an executive agency possesses and controls records, those records become subject to FOIA regardless of the original source. *Compare* NARA Mot Strike 7–11 *with Tax Analysts*, 845 F.2d at 1069.

Oversight and Financial Services Committee members were proper FOIA requesters).

C. NARA's Contention that *Tax Analysts* Focuses on "an Agency's Own 'Use' and Disposition of the Records, [and] Not Whether It Has Authority to Relax Restrictions" Justifies Rebuttal.

NARA argued that "the focus of the second factor of the [*Tax Analysts*] control test is an agency's own 'use' and disposition of the records, not whether it has authority to relax restrictions." NARA Br. 49; *accord id.* 22. This invited our rebuttal, for NARA mischaracterized the law. The second factor is whether an agency has "*the ability to use and dispose as it sees fit*" and not whether it "*actually uses and disposes*" of the records. *See id.* at 49. We did just that by explaining how NARA acted when releasing the FCIC records to eight members of Congress in contravention of Mr. Angelides' stated intent, demonstrating NARA's full and unfettered ability to use the records as well as its actual use of them. CoA Reply 5–10, 20.

D. NARA's Argument That the Scope of Cause of Action's Request "Has No Bearing on The Issues of Law Before This Court" Required Cause of Action's Rebuttal.

By claiming that the scope of Cause of Action's FOIA request "has no bearing on the issues of law before this Court," NARA invited us to explain exactly why the scope of our request does matter.

As we established in both our opening brief and our trial court briefs, we sought *all* the records that NARA disclosed to the Oversight and Financial Services Committees. A010 (Compl. ¶ 31); A204 (CoA Opp'n to NARA Mot. Dismiss); CoA Br. 10. These records contain other executive agency records, as the Minority Report shows, and not only the internal work product of the FCIC, as NARA suggests. *See* NARA Mot Strike 8.

III. Alternatively, This Court Possesses the Discretion Necessary to Decide the Matters As Briefed.

Even assuming *arguendo* that the two arguments NARA seeks to strike are new, this Court should exercise its discretion and decide the matters as they have been briefed. *Flynn v. Comm'r*, 269 F.3d 1064, 1069 (D.C. Cir. 2001); *Forman v. Korean Airlines Co.*, 84 F.3d 446, 448 (D.C. Cir. 1996).

First, there is notable uncertainty in this area of FOIA law. Based on our review of the applicable precedent, no case has ever been before this Court that addressed the “when and how” regarding NARA’s use and control of arguably non-executive agency documents, given the unique facts in this case.

Second, this case presents novel, important, and recurring questions of federal law, as evidenced by BLAG’s unexpected, late, and hurried entrance into this appeal as *amicus*, and by NARA’s March 2, 2011 letter which suggests that NARA created operational records subject to FOIA under 36 C.F.R. § 1250.2(i)

when it copied the FCIC records and produced them to Congress. *See also* NARA Br. 31–32 (explaining that FOIA applies to NARA’s operational records). This case warrants remand to determine whether NARA, by copying these FCIC records and sending them to Congress, created operational records subject to FOIA.

Third, an intervening change in the law has occurred under this Court’s recent *Judicial Watch* decision, meriting further elucidation by the Court. This is particularly true with respect to the issue of executive agency records subsumed within the FCIC records transferred to NARA.

Fourth, this is an extraordinary situation in which the American people have been kept in the dark regarding the workings and conclusions of the FCIC, including the true causes of the 2008-2009 financial crisis, with the potential for miscarriages of justice because the full factual and legal record was not developed below. *Flynn*, 269 F.3d at 1068–69.

CONCLUSION

For the foregoing reasons, as well as those stated in our formal briefs, we respectfully request that this Court deny NARA's motion to strike in its entirety.

January 24, 2014

Respectfully submitted,

/s/ Patrick J. Massari

PATRICK J. MASSARI

DANIEL Z. EPSTEIN

CAUSE OF ACTION

1919 Pennsylvania Ave., N.W.

Suite 650

Washington, D.C. 20006

(202) 499-4232

REED D. RUBINSTEIN

Dinsmore & Shohl, L.L.P.

801 Pennsylvania Ave., N.W.

Suite 610

Washington, D.C. 20004

(202) 372-9120

Counsel for Cause of Action

CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. Four copies will be sent via courier to the Clerk of Court on January 27, 2014 in accordance with D.C. Circuit Rule 27(b).

/s/ Patrick J. Massari
PATRICK J. MASSARI

Exhibit 1



NATIONAL
ARCHIVES

March 2, 2011

Honorable Darrell E. Issa
Chairman, Committee on Oversight and Government Reform
The Honorable Patrick McHenry
Chairman, Subcommittee on TARP, Financial Services, and Bailouts of Public and Private Programs
The Honorable Randy Neugebauer
Chairman, Subcommittee on Oversight and Investigations
2157 Rayburn House Office Building
Washington, DC 20515-6143

The Honorable Spencer Bachus
Chairman, Committee on Financial Services
2129 Rayburn House Office Building
Washington, DC 20515

Re: Request for FCIC Records

Dear Chairmen Issa, Bachus, McHenry and Neugebauer:

I write in response to your February 18, 2011, letter to David Ferriero, Archivist of the United States, requesting from the National Archives and Records Administration (NARA) copies of certain records of the Financial Crisis Inquiry Commission (FCIC) that were transferred into the National Archives of the United States.

You have requested records relating to the “internal work product of the FCIC, including e-mails, memoranda and financial and accounting records.” As your staff is aware, because NARA has only recently received the FCIC records, we have not yet been able to obtain direct access to the electronic records in order to provide you the specific records relating to the internal work product of the FCIC that you are requesting. For that reason, you have requested that “NARA produce to the Committees identical copies of the internal work product of the FCIC that was provided to NARA.” The two systems that we understand to contain these records are the FCIC’s external online document management system (known as NetDocs) and the separately hosted email system. (We are not clear as to whether either of these systems contain financial accounting records of the FCIC.) At this point in time, we are only able to

NATIONAL ARCHIVES *and*
RECORDS ADMINISTRATION

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

provide you with a copy of the NetDocs system; we have informed Mr. Brien Beattie that we will need additional time to provide a copy of the email system.

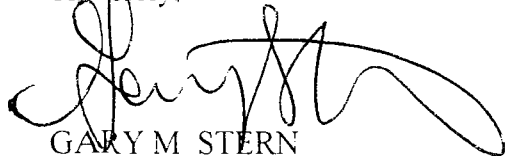
Your staff has advised us that the Committees are not interested in records or information that was provided to the FCIC by federal agencies and private financial institutions. However, it is our understanding that these two systems are likely to contain such non-responsive records. Because there is no possible way for NARA to separate out the non-responsive records in the time period of your request, it is highly likely that such information will be included in the enclosed electronic media.

Please be advised that the records being provided are likely to include highly confidential and sensitive information that was provided to the FCIC by federal agencies and private financial institutions, including, but not limited to, the following: information concerning active federal law enforcement agency investigations and examinations, public disclosure of which could potentially harm ongoing civil and criminal law enforcement efforts; confidential and sensitive proprietary information obtained by federal regulatory officials from private parties, public disclosure of which could potentially harm current and future regulatory efforts; confidential commercial information provided by financial institutions, which may also be protected by the Trade Secrets Act; sensitive personnel and other personal privacy information, such as the identities of federal agents and analysts involved in financial crimes enforcement; unedited, rough drafts of selective interview notes, some of which may be inaccurate and out of context; information reflecting confidential deliberations of federal agencies. This same information in the possession of the agencies would be exempt from public disclosure under FOIA and also may be protected by various privileges.

Accordingly, because of the sensitive nature of these records, we are providing the Committees with an encrypted disk, and will provide the key under separate cover. We request that the Committees make every effort to protect from public disclosure the sensitive information described above, and return to NARA or destroy such information, along with any other non-responsive information, when the Committees have concluded their use of these records.

If you have any questions you or your staff may contact me directly by phone at 301-837-0583 or by e-mail at garym.stern@nara.gov.

Sincerely,



GARY M STERN
General Counsel

Cc: The Honorable Elijah Cummings, Ranking Minority Member, Committee on Oversight and Government Reform
The Honorable Barney Frank, Ranking Minority Member, Committee on Financial Services
The Honorable Mike Quigley, Ranking Minority Member, Subcommittee on TARP, Financial Services, and Bailouts of Public and Private Programs
The Honorable Michael Capuana, Subcommittee on Oversight and Investigations
The Honorable David Ferriero, Archivist of the United States

Enc.

FCIC Record Delivery List

House Committee	Room	Contact	Delivered
Oversight and Government Reform (Majority)	Rayburn B-377	Brien A Beattie, (202) 226-6122 (direct) (202) 225-2465 (cell)	<input checked="" type="checkbox"/>
Oversight and Government Reform (Minority)	Rayburn 2471	Carla Hultberg, 225-5051	<input checked="" type="checkbox"/>
House Financial Services (Majority)	Rayburn 2129	Anna Bartlett Wright, 226-4871	<input type="checkbox"/>
House Financial Services (Minority)	Rayburn B-301 C	Patty Lord, 225-4247	<input type="checkbox"/>

FCIC Record Delivery List

House Committee	Room	Contact	Delivered
Oversight and Government Reform (Majority)	Rayburn B-377	Brien A Beattie, (202) 226-6122 (direct) (202) 225-2465 (cell)	<input type="checkbox"/>
Oversight and Government Reform (Minority)	Rayburn 2471	Carla Hultberg, 225-5051	<input type="checkbox"/>
House Financial Services (Majority)	Rayburn 2129	Anna Bartlett Wnght, 226-4871	<input checked="" type="checkbox"/>
House Financial Services (Minority)	Rayburn B-301 C	Patty Lord, 225-4247	<input checked="" type="checkbox"/>



National Archives and Records Administration

700 Pennsylvania Avenue, NW
Washington, DC 20408-0001
<http://archives.gov>

RECORDS TRANSFER RECEIPT

TRANSFER OF
FINANCIAL CRISIS INQUIRY COMMISSION
ELECTRONIC RECORDS

March 30, 2011

This is an acknowledgement for the transfer and receipt of **Financial Crisis Inquiry Commission (FCIC)** electronic records from the **National Archives and Records Administration Center for Legislative Archives** to the House Oversight and Government Reform Committee (Minority). The transfer consists of:

One 2TB portable hardrive containing approximately 72 GB of FCIC electronic records.

COMMITTEE RECIPIENT:

BRIEN BEATTIE

Printed Name

[Signature]

Signature

[Signature]

Shannon Niou
National Archives and Records Administration



National Archives and Records Administration

700 Pennsylvania Avenue, NW
Washington, DC 20408-0001
<http://archives.gov>

RECORDS TRANSFER RECEIPT

TRANSFER OF
FINANCIAL CRISIS INQUIRY COMMISSION
ELECTRONIC RECORDS

March 30, 2011

This is an acknowledgement for the transfer and receipt of **Financial Crisis Inquiry Commission (FCIC)** electronic records from the **National Archives and Records Administration Center for Legislative Archives** to the **House Oversight and Government Reform Committee (Majority)**. The transfer consists of:

One 2TB portable harddrive containing approximately 72 GB of FCIC electronic records.

COMMITTEE RECIPIENT:

Carla Hultberg

Printed Name

Carla Hultberg

Signature

Shannon Niou

Shannon Niou
National Archives and Records Administration



National Archives and Records Administration

700 Pennsylvania Avenue, NW,
Washington, DC 20408-0001
http://archives.gov

RECORDS TRANSFER RECEIPT

TRANSFER OF
FINANCIAL CRISIS INQUIRY COMMISSION
ELECTRONIC RECORDS

March 30, 2011

This is an acknowledgement for the transfer and receipt of Financial Crisis Inquiry Commission (FCIC) electronic records from the National Archives and Records Administration Center for Legislative Archives to the House Financial Services Committee (Majority). The transfer consists of:

One 2TB portable hardrive containing approximately 72 GB of FCIC electronic records.

COMMITTEE RECIPIENT:

Signature of Saw Mike

Printed Name

Signature

Signature of T. Ashley Smoot

T. Ashley Smoot
National Archives and Records Administration



National Archives and Records Administration

700 Pennsylvania Avenue, NW
Washington, DC 20408-0001
<http://archives.gov>

RECORDS TRANSFER RECEIPT

TRANSFER OF FINANCIAL CRISIS INQUIRY COMMISSION ELECTRONIC RECORDS

March 30, 2011

This is an acknowledgement for the transfer and receipt of **Financial Crisis Inquiry Commission (FCIC)** electronic records from the **National Archives and Records Administration Center for Legislative Archives** to the House Financial Services Committee (Minority). The transfer consists of:

One 2TB portable harddrive containing approximately 72 GB of FCIC electronic records.

COMMITTEE RECIPIENT:

P. LORO

Printed Name

[Signature]

Signature

[Signature]

T. Ashley Smoot
National Archives and Records Administration

Exhibit 2

FOI Request

Responses to Congressional Committees (National Archives and Records Administration)

Requested by [morisy](#) on May 6, 2013 for the [National Archives and Records Administration](#) of [United States of America](#) and fulfilled on June 5, 2013

Status: **Completed**

Tags: None

Request

Documents

From Michael Morisy to National Archives and Records

Administration on May 6, 2013:

To Whom It May Concern:

This is a request under the Freedom of Information Act. I hereby request the following records:

A copy of all responses sent to Congressional committees between Jan.1, 2008 and the date that this request is processed. These communications are stored together and should be easily accessible.

I also request that, if appropriate, fees be waived as I believe this request is in the public interest. The requested documents will be made available to the general public free of charge as part of the public information service at [MuckRock.com](#), processed by a representative of the news media/press and is made in the process of news gathering and not for commercial usage.

In the event that fees cannot be waived, I would be grateful if you would inform me of the total charges in advance of fulfilling my request. I would prefer the request filled electronically, by e-mail attachment if available or CD-ROM if not.

Thank you in advance for your anticipated cooperation in this matter. I look forward to receiving your response to this request within 20 business days, as the statute requires.

Sincerely,

Michael Morisy

From Jay Olin to Michael Morisy on May 22, 2013:

Mr. Morisy,

We need some guidance on what it is you are exactly looking for in this request. With today's digital age, much of the communication is by e-mail. Examples include setting up meetings on the Hill and visits of staffers to NARA. If you have something specific you are looking for, that will enable us to eliminate these routine e-mails from the scope.

Sincerely,

Jay Olin

From Jay Olin to Michael Morisy on May 30, 2013:

Mr. Morisy,

On May 22, 2013, we requested a clarification of the scope of your request. The body of the e-mail read as follows:

"We need some guidance on what it is you are exactly looking for in this request. With today's digital age, much of the communication is by e-mail. Examples include setting up meetings on the Hill and visits of staffers to NARA. If you have something specific you are looking for, that will enable us to eliminate these routine e-mails from the scope."

As of this date, May 30, we have not received a response back and are tolling the clock. If we do not receive a response by June 7, 2013, your request will be administratively closed. To discuss your request, I may be reached at (301) 837-2025.

Sincerely,

Jay Olin
NARA Deputy FOIA Officer

From Michael Morisy to National Archives and Records Administration on May 30, 2013:

Hi Jay,

Called and left a message, but wanted to follow up in an attempt to narrow this request.

I would like to limit the request to substantive responsive agency/program related letters to NARA's Oversight Committee in the Senate, and NARA's Oversight Committee and Subcommittee in the House as described here.

<http://www.archives.gov/congress/committees.html>

This includes the Senate Committee on Homeland Security and Governmental Affairs, the office of Senator Thomas R. Carper, the House Committee on Oversight and Government Reform, the office of Rep. Darryl Issa, and the House Subcommittee on Government Operations, and the office of Rep. John Mica.

Let me know if you'd like further clarification or further narrowing.

From Jay Olin to Michael Morisy on May 31, 2013:

Mr. Morisy,

This e-mail satisfies our request for narrowing the scope of your request. I will let the Congressional Affairs Office and OGIS know what they need to search for in response to this request.

From Jay Olin to Michael Morisy on June 5, 2013:

June 5, 2013

Michael Morisy
MuckRock News

DEPT MR 5520

P.O. Box 55819

Boston, MA 02205-5819

Re: Freedom of Information Act Request NGC13-148

* *

Dear Mr. Morisy:

This is in response to your Freedom of Information Act (FOIA) request of May 6, 2013. Your request, received in this office on that date, and assigned tracking number NGC13-148, requested a copy of all responses sent to Congressional committees between January 1, 2008 and present. A separate request for the same records was sent to the Office of Government Information Services (OGIS). Since OGIS is part of the National Archives and Records Administration (NARA), all FOIA requests for their records are answered by the Office of General Counsel. Therefore, we have combined these requests together for purposes of this FOIA request.

We conducted a search of the Congressional Affairs Staff, Office of the Archivist, Center for Legislative Archives, and OGIS. We located a total of 20 documents responsive to your request. After reviewing these records, I am releasing them in full.

OGIS has posted their Congressional correspondence on their website here:

<https://ogis.archives.gov/about-ogis/ogis-reports.htm>

One letter from Director Nisbet has not been posted at this time. It has been included in the 20 documents referenced above. This concludes the processing of your request.

If you consider this response a denial of your FOIA request, you may appeal by writing to the Deputy Archivist (ND), National Archives and Records Administration, College Park, MD 20740 within 35 calendar days and explain why you feel our response did not meet the standards of the FOIA. Both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal." Please include the tracking number NGC13-148 in your appeal letter.

Sincerely,

JAY OLIN

NARA Deputy FOIA Officer

Office of General Counsel

Attachments



[View](#) | [Download](#)

Scan 8



[View](#) | [Download](#)

Scan 7



[View](#) | [Download](#)

Scan 6



[View](#) | [Download](#)

n1-029-10-005_sf115



[View](#) | [Download](#)

n1-029-00-001_sf115



[View](#) | [Download](#)

Scan 13



[View](#) | [Download](#)

Scan 12



[View](#) | [Download](#)

TARP



[View](#) | [Download](#)

Memorandum of



[View](#) | [Download](#)



[View](#) | [Download](#)



[View](#) | [Download](#)

Follow up letter House Committee 23March11



[View](#) | [Download](#)

FCIC_2



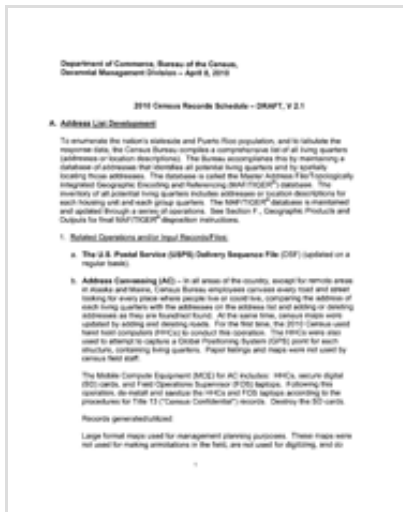
[View](#) | [Download](#)

FCIC

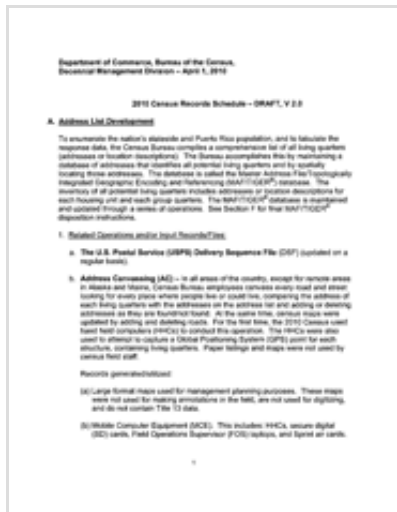


[View](#) | [Download](#)

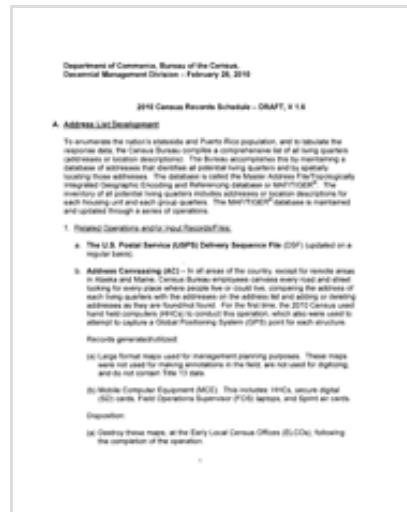
Department of Commerce, Bureau of the Census, Decennial Management Div



Department of Commerce, Bureau of the Census, Decennial Management Div



Department of Commerce, Bureau of the Census, Decennial Management Div

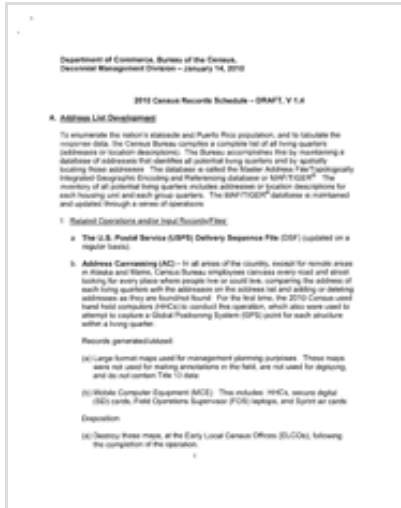


[View](#) | [Download](#)

[View](#) | [Download](#)

[View](#) | [Download](#)

2010 Census Records Schedule-Draft V 1-4



[View](#) | [Download](#)

2010 Census - Congressional Document Production Request



[View](#) | [Download](#)

From Jay Olin to Michael Morisy on June 6, 2013:
Mr. Morisy,

I just want to verify that all 20 attachments came through.

Sincerely,

Jay Olin

From Michael Morisy to National Archives and Records Administration on June 6, 2013:

Hello,

Yes, all 20 came through. Thank you for your help!