ORAL ARGUMENT NOT YET SCHEDULED

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

No. 20-5182

Cause of Action Institute,
Plaintiff-Appellant,

v.

United States Department of Justice,
Defendant-Appellee.

On Appeal from the United States District Court for the District of Columbia
Civil Action No. 18-2373 (Hon. Amy Berman Jackson)

OPENING BRIEF OF APPELLANT CAUSE OF ACTION INSTITUTE

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October 30, 2020

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Appellant Cause of Action Institute states the following:

I. Parties and *Amici*

Cause of Action Institute is the Appellant in this case and was the Plaintiff below. The United States Department of Justice is the Appellee and was the Defendant below. There were no *amici curiae* in the district court, and there are no *amici curiae* before this Court. There are no intervenors.

II. Ruling Under Review

The ruling under review is the Order and Memorandum Opinion by Judge Amy Berman Jackson in the United States District Court for the District of Columbia, dated April 6, 2020, which granted in part and denied in part Appellee's motion for summary judgment and Appellant's cross-motion for summary judgment. The Court also dismissed *sua sponte* the second claim of Appellant's Complaint for lack of standing. The Court entered final judgment, at the request of the parties, by Minute Order, dated May 6, 2020.

The April 6, 2020 Order and Memorandum Opinion can be found in the Joint Appendix beginning at A171. The Memorandum Opinion is published as *Cause of Action Institute v. Department of Justice*, 453 F. Supp. 3d 368 (D.D.C. 2020).

III. Related Cases

This case has not been before the Court. Appellant is unaware of any pending related cases in this Court or any other court.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Appellant Cause of Action Institute is a 501(c)(3) nonprofit corporation. It has no parent companies, subsidiaries, or affiliates that issue shares or debt securities to the public.

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GLOSSARY

APA	Administrative Procedure Act
COA	Cause of Action Institute
DOJ	United States Department of Justice
FOIA	Freedom of Information Act
IRS	Internal Revenue Service
JCT	Joint Committee on Taxation
OIP	Office of Information Policy
PRA	Presidential Records Act
QFR	“Question(s) for the Record”

JURISDICTIONAL STATEMENT

Appellant Cause of Action Institute properly exhausted its administrative remedies before suing in district court. *See Oglesby v. Dep't of the Army*, 920 F.2d 57, 61 (D.C. Cir. 1990); *see also* 5 U.S.C. § 552(a)(6)(C). The district court had subject-matter jurisdiction under 28 U.S.C. § 1331 (federal question) and 5 U.S.C. § 552(a)(4)(B) (Freedom of Information Act).

On April 6, 2020, Judge Amy Berman Jackson issued an order granting summary judgment in part for each party and *sua sponte* dismissing the second claim of Appellant's Complaint. *See* A169–70 (Order); A171–89 (Memorandum Opinion). Judge Jackson subsequently entered final judgment at the request of the parties, *see* A190–91, by Minute Order, dated May 6, 2020. *See* A004. Appellant timely filed a notice of appeal on June 23, 2020, in compliance with Federal Rule of Appellate Procedure 4(a)(1)(B). *See* A194.

This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. The Freedom of Information Act ("FOIA") defines a "record" as any information that would be an agency record when maintained by an agency in any format, including an electronic format. But the Department of Justice's ("DOJ") Office Information Policy ("OIP") has issued guidance instructing agencies to ignore FOIA's objective definition and instead to apply part of the Privacy Act's definition of a "record" on a case-by-case subjective basis that changes based on the subject-matter of a request. Is OIP's guidance unlawful because it conflicts with FOIA, and did the district court err by refusing to acknowledge as much?

2. Its statutory definition and plain meaning both require that a "record" be a single, unified item (*e.g.*, a document) that pre-exists a FOIA request. The district court held DOJ's collected responses to congressional "Questions for the Record" could be segmented and artificially separated so that each paired question and response constituted a separate "record." Yet DOJ maintains these questions and responses in single documents with unified titles and consecutive pagination. Did the district court err by allowing DOJ to segment these records?

3. Under this Circuit's decision in *Payne Enterprises, Inc. v. United States*, a FOIA lawsuit is not moot if (1) an agency maintains an ongoing policy or practice that (2) violates FOIA and (3) will cause continuing injury to the requester. Here, the district court dismissed Cause of Action Institute's policy-or-practice

claim because it held (1) DOJ did not improperly withhold information based on the agency's definition of a record, and (2) the district court did not rely on the challenged guidance to support its decision. Did the district court err because it did, in fact, rely on the OIP's guidance and that guidance is both unlawful and likely to be used again to improperly segment records?

PERTINENT STATUTORY PROVISION

5 U.S.C. § 552(f)(2)

For purposes of this section, the term . . . "record" and any other term used in this section in reference to information includes—

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

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

STATEMENT OF THE CASE

This case involves a deceptively simple question: What is a "record"? The implications of that question for the proper administration of the Freedom of Information Act ("FOIA") are far-reaching. But the question has never been definitively answered. This case provides an opportunity for the Court to address the matter in a conclusive way. Consistent with the statutory text, its plain meaning, relevant Supreme Court precedent, and other well-established legal principles, a "record" under FOIA must be (1) any informational material, (2) created or obtained by an agency, (3) in the control of an agency, and (4) in the format maintained by the agency at the time of a request.

In reaction to this Circuit's decision in *American Immigration Lawyers Ass'n v. Executive Office for Immigration Review*, 830 F.3d 667 (D.C. Cir. 2016) [hereinafter *AILA*], the United States Department of Justice's ("DOJ") Office of Information Policy ("OIP") issued guidance purporting to implement *AILA*. The guidance directs agencies to apply part of the Privacy Act's definition of a "record" when processing FOIA requests. It also advises agencies to define records on a case-by-case basis depending on the subject-matter of an individual FOIA request. That sort of subjective understanding of a "record," which leads to divergent treatment of the same informational material, is severely deficient. Here, DOJ relied on OIP's

guidance to segment and withhold portions of records responsive to a FOIA request filed by Cause of Action Institute ("COA").

The district court erred by holding it was permissible for DOJ to treat portions of those responsive documents—namely, letters between DOJ officials and members of Congress that enclosed and incorporated by reference "Questions for the Record" ("QFRs")—as discrete non-responsive "records." The district court also erred when it concluded it lacked jurisdiction to adjudicate COA's "policy-or-practice" claim, which challenged the substance of OIP's guidance, and not only its application in this case. COA's arguments on both points went unaddressed by the court below.

I. The D.C. Circuit's *AILA* Decision

Like many agencies, DOJ has a long history of devising creative ways to withhold information it considers "non-responsive" to a FOIA request. It previously withheld such information by excising potions of records and applying exemption-like redactions labeled "non-responsive." *See, e.g.*, A155–60. This Circuit put an end to that practice several years ago when it correctly held FOIA "does not provide for . . . redacting nonexempt information within responsive records." *AILA*, 830 F.3d at 677. FOIA instead "compels disclosure of the responsive record—i.e., as a unit—except insofar as the agency may redact information falling within a statutory exemption." *Id.*

Although *AILA* established that "non-responsive" is an impermissible pseudo-exemption, it left unresolved the "antecedent question of what constitutes a distinct 'record' for FOIA purposes[.]" *Id.* at 678. Because the parties in *AILA* had not raised the matter, the court had "no cause to examine" it and merely relied on the defendant agency's "understanding of what constitutes a responsive 'record[.]'" *Id.* Nevertheless, in dicta, the court opined that "agencies . . . in effect define a 'record' when they undertake the process of identifying records that are responsive to a request." *Id.* That phrase has caused much grief for requesters and courts alike.

Although the meaning of a "record" may have depended on the agency's process of identifying responsive material under the facts of *AILA*, that approach is untenable when applied in all FOIA cases. The *AILA* court recognized the danger of its dicta, as it limited its reach by stating it would be "difficult to believe that any reasonable understanding of a 'record' would permit withholding an individual sentence within a paragraph within an email on the ground that the sentence alone could be conceived of as a distinct, nonresponsive 'record.'" *Id.* at 679.

District courts' reception of *AILA*'s dicta has been mixed. At times, district courts have tolerated segmentation of otherwise responsive records into smaller units. *See Citizens for Responsibility & Ethics in Wash. v. Dep't of Justice*, No. 18-0007, 2020 WL 2735570, at *3–5 (D.D.C. May 26, 2020); *Gellman v. Dep't of*

Homeland Sec., No. 16-0635, 2020 WL 1323896, at *3–4 (D.D.C. Mar. 20, 2020); *Shapiro v. Cent. Intelligence Agency*, 247 F. Supp. 3d 53, 74–75 (D.D.C. 2017).

In most cases, district courts have recognized the need to limit the practice. *See Am. Oversight v. Dep't of Health & Human Servs.*, 380 F. Supp. 3d 45, 50–51 (D.D.C. 2019) (refusing to allow agency to segment an email chain into multiple records); *Judge Rotenberng Educ. Ctr., Inc. v. Food & Drug Admin.*, 376 F. Supp. 3d 47, 60–61 (D.D.C. 2019) (refusing to allow agency "midway through litigation" to redefine "collections of information that had been treated as one agency record as multiple agency records"); *Parker v. Dep't of Justice*, 278 F. Supp. 3d 446, 451–52 (D.D.C. 2017) (refusing to allow agency to segment a letter from its attachment); *Gatore v. Dep't of Homeland Sec.*, No. 15-0459, 2017 WL 10777326, at *2 (D.D.C. June 27, 2017) (finding "specious the [agency's] assertion that [its] entire FOIA Processing Guide it not itself 'a single discrete record'").

At the least, the confusion arising from *AILA* highlights the need for clarification from this Court. What is the definition of a "record" under FOIA? What is that "unit"? *AILA*, 830 F.3d at 678.

II. OIP's Guidance on Defining a "Record"

In the wake of *AILA*, OIP issued government-wide guidance interpreting this Court's decision and directing agencies to apply part of the Privacy Act's definition of a "record" when processing FOIA requests. *See* A064–66; *see also* A148–50.

The Privacy Act contains a lengthy definition of a "record." 5 U.S.C. § 552a(a)(4). OIP extracted six words from that definition—"item, collection, or grouping of information"—and contends a FOIA record can be "an entire document, a single page of a multipage document, or an individual paragraph of a document." A065.

OIP's guidance also instructs agencies that "[t]he nature of a FOIA 'record' is defined by both the content of a document *and* the subject of the request." A065. For example, "based on the subject of a particular FOIA request, an entire string of emails, a single email within a string of emails, or a paragraph within a single email could potentially constitute a 'record[.]'" A065. The district court acknowledged OIP's guidance relies on the Privacy Act and not FOIA. *See* A173–74.

III. COA's FOIA Request

In December 2013, COA sent a FOIA request to DOJ seeking records related to Executive Order 13457, as well as communications between government officials concerning decisions to obligate or expend funds. *See* A017–20. After DOJ acknowledged receipt of COA's request, A021, it issued multiple responses, by and through OIP, on behalf of various agency components. *See* A084–85.

In January 2018, OIP issued a final determination on the portion of COA's request that had been directed to DOJ's Office of Legislative Affairs. A023–24. DOJ and COA agreed the scope of this portion of the request would cover any "communications between a [DOJ] political appointee and Members of Congress,

their staff, or employees of the White House relating to grants of the Office of Justice Programs, Office on Violence Against Women, and Community Oriented Policing Services," as well as "records relating to Executive Order 13457." A023.

OIP's January 2018 determination letter indicated DOJ had "located 143 pages that contain records that are responsive to [COA's] request." A023. These records included, among other things, QFRs.[1] *See, e.g.*, A176. Although DOJ claimed it was releasing thirty-two pages "without excisions," eleven pages bore redactions labeled "Non-Responsive Record," and the agency withheld a significant amount of content. A032, A035–36, A039, A043, A048–49, A052–53, A056–57.[2]

Interestingly, DOJ referred to the volume of its release in terms of *pages* rather than *records*.[3] Close examination of the materials produced, however, reveals that DOJ released portions of four records. *See infra* at pp. 39–41. DOJ also explicitly averred that it had applied OIP's guidance for defining a "record" when processing COA's request. *See* A087; *see also* Def.'s Statement of Undisputed Materials Facts

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[1] QFRs, or "Questions for the Record," are "written questions from members of Congress which are typically directed to an individual or a component within [an agency] for a response." A181.

[2] DOJ withheld at least seventy-one pages in full under Exemption 5, referred thirty-nine pages, and redacted information under Exemption 6. *See* A023–24.

[3] OIP's guidance addresses "practical considerations" concerning the manner of referring to the volume of materials responsive to a request when records have been segmented into smaller units. *See* A066.

in Supp. of its Mot. for Summ. J. ⁋ 21, ECF No. 19 [hereinafter Def.'s SUMF] ("OIP applied the OIP Guidance in processing Plaintiff's FOIA request.").

COA filed an administrative appeal challenging DOJ's withholding of portions of records as discrete units that could be treated as "non-responsive." *See* A058–061. OIP denied the appeal. *See* A062–63.

IV. Proceedings in the District Court

COA filed its complaint in October 2018. *See* A005–16. It raised two claims: *First*, that DOJ improperly segmented responsive records into what it claimed were multiple smaller "records" and, in doing so, improperly withheld information. *See* A012–13. *Second*, that OIP's guidance on defining a "record" violates FOIA and reliance on the guidance constitutes an unlawful policy or practice. *See* A013–15.

DOJ moved for summary judgment; COA opposed the motion and filed its own cross-motion for summary judgment. *See* A177. In April 2020, the district court issued an order granting and denying in part each motion. A169–70. With respect to COA's first claim—that DOJ improperly segmented letters and QFRs—the district court held that COA's position, "which would require disclosure of questions and responses that are wholly unrelated to plaintiff's FOIA request, [was] too broad." A181. At the same time, DOJ's "decision to treat a sub-question as distinct from the overall question of which it was a part of [was] too narrow[.]" A181. The district court claimed to base its ruling "upon the nature of the QFRs, the

structure of the documents, the D.C. Circuit's decision in *AILA*, and how records have been defined by other courts in this district." A181. It did not address DOJ's admitted application of OIP's guidance, nor did it evaluate COA's arguments concerning the statutory text and plain meaning of Section 552(f)(2)(A).

The district court dismissed COA's second claim because it believed COA "ha[d] not alleged facts to demonstrate that it will suffer an injury-in-fact" arising from continued application of OIP's guidance. A187; *see* A188 ("Any possibility that OIP's Guidance . . . might result in the unlawful withholding of information in future FOIA requests that plaintiff has submitted is speculative given the fact-specific nature of the inquiry."). The district court also surmised DOJ "appropriately withheld information as non-responsive records" and then claimed that because it reached its opinion "without reference or application of OIP's Guidance," ruling on the "lawfulness of the policy as a general matter" would amount to "issuing an advisory opinion about the relationship of the Privacy Act to [FOIA]." A188–89.

The district court directed the parties to confer about further proceedings, *see* A185,[4] and to file a joint status report. A169. The parties notified the district court that "further proceedings [were not] necessary" and requested entry of final

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[4] The district court ordered DOJ to "produce . . . any portions of records consisting of subparts of questions and their answers which were withheld as nonresponse." A185. No such production was necessary, however, as DOJ re-released records concurrent with its motion for summary judgment. *See* A085; *see also* A193.

judgment. A190–91. The district court entered final judgment on May 6, 2020. A004. COA timely filed a notice of appeal on June 23, 2020. A194.

SUMMARY OF ARGUMENT

FOIA provides requesters with access to *records*, "not information in the abstract." *Forsham v. Harris*, 445 U.S. 169, 185 (1980); *see AILA*, 830 F.3d at 677. More precisely, FOIA grants access to "agency records." *See Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144–45 (1989). This case presents the unresolved question of the definition of a "record."

Before *AILA*, many agencies—including DOJ—believed they could redact material within a record if they deemed the subject-matter of that information "non-responsive" to a FOIA request. This Court has foreclosed that practice. *See AILA*, 830 F.3d at 677. Yet, as shown by DOJ's treatment of the records at issue, and as memorialized in OIP's post-*AILA* guidance defining a "record," the government now believes it can evade *AILA* altogether by treating *portions* of records as separate and distinct. But withholding these supposedly discrete "records" as "non-responsive" makes a mockery of *AILA*.

OIP's guidance, and DOJ's position here, is entirely incompatible with the statutory definition of a "record," and that term's plain meaning. Moreover, well-established principles of FOIA law—such as the rule that a "record" pre-exist any given request—demand an objective definition at odds with OIP's guidance.

Simply stated, OIP's guidance is unlawful and "fail[s] to abide by the terms of the FOIA." *Payne Enters., Inc. v. United States*, 837 F.2d 486, 491 (D.C. Cir. 1988). The district court erred by refusing to consider the legality of that guidance, both as applied here and generally, and it incorrectly dismissed COA's policy-or-practice claim. The district court further erred by holding DOJ properly segmented unified records to frustrate disclosure. This Court should reverse the district court's judgment, declare OIP's guidance unlawful, and direct DOJ to re-release the records at issue in their entirety, subject only to applicable statutory exemptions.

STANDARD OF REVIEW

This Court "review[s] *de novo* the district court's grant of summary judgment[.]" *Inst. for Justice v. Internal Revenue Serv.*, 941 F.3d 567, 569 (D.C. Cir. 2019) (citation omitted). Summary judgment should be granted only when a "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

Under FOIA, "the agency bears the burden of showing that there is no genuine issue of material fact, even when the underlying facts are viewed in the light most favorable to the requester." *Weisberg v. Dep't of Justice*, 705 F.2d 1344, 1350 (D.C. Cir. 1983); *see* 5 U.S.C. § 552(a)(4)(B). As for whether a record is subject to disclosure, "[t]he burden is on the agency to demonstrate, not the requester to disprove, that the materials sought are not 'agency records[.]'" *Tax Analysts*, 492

U.S. at 142 n.3. Finally, "FOIA imposes no limits on courts' equitable powers in enforcing its terms." *Payne Enters.*, 837 F.2d at 494. Those equitable powers extend to resolving policy-or-practice claims alleging ongoing "failure to abide by the terms of the FOIA." *Id.* at 491.

ARGUMENT

I. The district court erred by refusing to address COA's arguments about the substance of OIP's guidance defining a "record," which is unlawful and conflicts with FOIA.

The district court refused to address the substance of OIP's guidance defining a "record," as well as COA's arguments about the inconsistency of that guidance with FOIA. The court instead claimed to have "resolved the controversy pending before it without reference or application of OIP's Guidance," A188, and only "based upon the nature of the QFRs, the structure of [those] documents, the D.C. Circuit's decision in *AILA*, and how records have been defined by other courts in this district." A181. Yet the district court was not at liberty to ignore COA's arguments. DOJ *admitted* it relied on OIP's guidance when processing COA's request. *See* A087; *see also* Def.'s SUMF ⁋ 21. And the application of OIP's guidance cannot be divorced from the specific context of the records at issue.[5]

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[5] Indeed, the district court, at one point, described its decision as having "largely upheld [DOJ's] application of [OIP's] policy." A187.

Contrary to DOJ's position and the district court's opinion, the term "record" is statutorily defined in FOIA. That definition is supported by Supreme Court precedent. And the plain meaning of a "record" also points to an objective definition at odds with OIP's guidance. Finally, OIP's guidance is untenable because a FOIA "record" must pre-exist any given request.

A. The Court owes no deference to DOJ's definition of a "record."

It is important to note at the outset that this Court should review DOJ's definition of a "record"—whether as found in OIP's guidance or as applied during the informal adjudication of COA's FOIA request—*de novo* because Congress has not entrusted the administration of FOIA to any single agency. The district court's opinion raises some concern as to whether it improperly deferred to DOJ. *See* A184 ("[T]he Court of Appeals expressly contemplated that agencies may define a record in response to a FOIA request[.]").

Courts typically defer to an agency's reasonable interpretation of an ambiguous term in a statute entrusted to the agency's administration, so long as the agency provides that interpretation with the force of law. *See generally Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). But courts "owe no particular deference to an agency's interpretation of FOIA," *Cause of Action v. Fed. Trade Comm'n*, 799 F.3d 1108, 1115 (D.C. Cir. 2015) (cleaned up), "precisely

because FOIA's terms apply government-wide[.]" *Al-Fayed v. Cent. Intelligence Agency*, 254 F.3d 300, 307 (D.C. Cir. 2001).

"[T]he primary interpretive responsibilities [for FOIA] rest on the judiciary, [whose] institutional interests are not in conflict with [FOIA's] statutory purpose." *Reporters Comm. for Freedom of the Press v. Dep't of Justice*, 816 F.2d 730, 734 (D.C. Cir. 1987), *rev'd on other grounds*, 489 U.S. 749 (1989). By maintaining uniform interpretations of statutory terms, the judiciary ensures the "meaning of FOIA [is] the same no matter which agency is asked to produce its records." *Tax Analysts v. Internal Revenue Serv.*, 117 F.3d 607, 613 (D.C. Cir. 1997). Courts therefore refuse to defer to agency interpretations of various FOIA terms. *See Cause of Action*, 799 F.3d at 1115 (no deference to agency interpretation of fee provisions); *Al-Fayed*, 254 F.3d at 307 (same, "compelling need"); *Reporters Comm.*, 816 F.2d at 734 (same, exemption).[6]

Unfortunately, *AILA*'s dicta on the definition of a "record" has created confusion. Some district courts have improperly afforded what appears to be deference to agency interpretations of the term "record." For example, in *Lipton v.*

[6] The refusal to defer to interpretations of statutory terms can be contrasted with the deference that FOIA demands for the application of some exemptions. *See* 5 U.S.C. § 552(a)(4)(B); *Campbell v. Dep't of Justice*, 164 F.3d 20, 32 (D.C. Cir. 1998). Courts also defer to interpretations of regulatory provisions that are not grounded in FOIA-defined terms but "promulgated in response to . . . an express delegation of authority[.]" *Al-Fayed*, 254 F.3d at 307 n.7.

Environmental Protection Agency, the district court mistakenly read *AILA* as stating that courts "will not adhere to agencies' definitions if they fall outside any *reasonable understanding* of a 'record[.]'" 316 F. Supp. 3d 245, 255 (D.D.C. 2018) (emphasis added and cleaned up). So too in *Shapiro v. Central Intelligence Agency*, the district court deferred to an agency interpretation when it wrote that the agency must "justify its actions when singling out a responsive record from a greater compilation of documents" and that its "explanation will merit a *presumption of good faith*." 247 F. Supp. 3d at 75 (emphasis added). These deferential reviews of agency interpretations of the statutory term "record" sound a troubling echo to *Chevron* Step Two. *See* 467 U.S. at 843 (considering "whether the agency's answer is based on a *permissible construction* of the statute" (emphasis added)).

Courts should not afford agency interpretation of FOIA's statutory terms *any* deference. *Cause of Action*, 799 F.3d at 1115. This Court should remind district courts as much when it reviews the definition of a "record" found in OIP's guidance and applied by DOJ in processing COA's FOIA request.

B. The term "record" is statutorily defined and that definition is complemented by Supreme Court precedent.

FOIA is codified with the Administrative Procedure Act ("APA") in Title 5. Although the APA does not define the term "record," *see* 5 U.S.C. § 551, FOIA does. To wit: A "record," for purposes of FOIA, "includes . . . any information that would be an agency record subject to the requirements of this section when

maintained by an agency in any format, including an electronic format[.]" *Id.* § 552(f)(2)(A).[7] Overall, the definitions in Section 552 (FOIA) provide greater clarity and are more specific than those found in Section 551 (APA). *Compare id.* § 551(1) (defining "agency"), *with id.* § 552(f)(1) (expanding on the APA definition of an "agency" for FOIA purposes). The definition of a "record" is no exception.

Congress added a definition of "record" to FOIA with the Electronic Freedom of Information Act Amendments of 1996. *See generally* Pub. L. No. 104-231, § 3, 110 Stat. 3048, 3049. To be sure, Congress's primary motivation was to ensure *electronic* materials, as well as paper documents or other tangible objects, were subject to disclosure. *See* H.R. Rep. No. 104-795, 18 (1996) ("Records which are subject to the FOIA shall be made available under the FOIA when the records are maintained in electronic format. This clarifies existing practice by making the statute explicit on this point."); *see also id.* at 11 ("FOIA's efficient operation requires that its provisions make clear that the form or format of an agency record constitutes no impediment to public accessibility."). But that commentary in the legislative history cannot distract from the fact that Congress *did* statutorily define the term and thereby delimit agency or judicial interpretation. *See id.* at 19 ("The

[7] The definition goes on to include "any information described under [Section 552(f)(2)(A)] that is maintained for an agency by an entity under Government contract, for the purposes of records management." 5 U.S.C. § 552(f)(2)(B). This paragraph does less to expand the meaning of a "record" than to clarify when agency control extends to records not in an agency's physical possession.

bill defines 'record[.]'"); *cf. id.* at 20 (noting rejected alternative "definition[s]"). "'Statutory definitions control the meaning of statutory words . . . in the usual case.'" *Burgess v. United States*, 553 U.S. 124, 129 (2008) (citation omitted); *see Stenberg v. Carhart*, 530 U.S. 914, 942 (2000) ("When a statute includes an explicit definition, we must follow that definition[.]").

Congress's use of the word "includes" supports COA's interpretation. Section 552(f) provides that a "'record . . . *includes* . . . any information that would be an agency record, [*etc.*]." 5 U.S.C. § 552(f)(2)(A) (emphasis added). This is a standard method of defining a statutory term, and the construction mirrors that of many other definitions found elsewhere in the APA. For example, a "'person' *includes* an individual, partnership, [*etc.*]," *id.* § 551(2) (emphasis added); a "'party' *includes* a person or agency, [*etc.*]," *id.* § 551(3) (emphasis added); and a "'license' *includes* the whole or a part of an agency permit, [*etc.*]." *Id.* § 551(8) (emphasis added). Congress has repeatedly employed this approach when defining terms throughout the APA, and it did so in FOIA as well.

The *AILA* court appears to have missed—or at least understated—the importance of Congress's inclusion of a statutory definition of "record" in FOIA. It claimed that, although "FOIA includes a definitions section . . . [,] that section provides no definition of the term 'record.'" 830 F.3d at 678 (citing 5 U.S.C. § 551). Of course, aside from the mistaken citation to the APA's definitions section, this is

demonstrably untrue. *See* 5 U.S.C. § 552(f)(2). The *AILA* court also inexplicably suggested that FOIA only "*describes* the term 'record'" and "provides little help in understanding what is a 'record,'" as compared to the analogous definitions in the Privacy Act or other records management laws. *AILA*, 830 F.3d at 678 (emphasis added). The design and content of Section 552(f)(2) undercuts that observation.

Contrary to the opinion expressed in *AILA*, this Court should conduct its analysis—and evaluate the district court's opinion—in light of the statutory text, which contains two clauses that establish a workable definition of the term "record." *See Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) ("The starting point in discerning congressional intent . . . is the existing statutory text[.]").

The first clause of FOIA's definition of "record"—"any information that would be an agency record subject to the requirements of this section"—describes the *type* of material that qualifies as a record. It incorporates the concept of an "agency record" as defined by the Supreme Court's decision in *Tax Analysts*, which requires that an agency (1) "create or obtain the requested materials" and (2) "be in control of the requested materials at the time the FOIA request is made." 492 U.S. at 144–45. It also clarifies that FOIA covers all informational material—not just documents. *See, e.g.*, *N.Y. Times Co. v. Nat'l Aeronautics & Space Admin.*, 920 F.2d 1002, 1005 (D.C. Cir. 1990) (finding audiotapes covered).

The second clause of the definition—"when maintained by an agency in any format, including an electronic format"—describes the physical *status* of informational material in an agency's hands before a requester submits a request. Again, Congress added a definition of "record" to FOIA to ensure that electronic records were covered. *See* S. Rep. No. 104-272, 27 (1996) (FOIA "requires that Federal agencies provide records to requesters in *any form or format in which the agency maintains those records*[.]" (emphasis added)). Thus, Congress allowed access to informational materials in the form or format *currently* maintained.

This focus is important because a requester cannot ask an agency to create or manipulate an existing record in response to a FOIA request. An "agency is not required to reorganize its files[.]" *Goland v. Cent. Intelligence Agency*, 607 F.2d 339, 353 (D.C. Cir. 1978) (citation and internal parenthetical marks omitted). That is because FOIA "does not obligate agencies to create . . . documents; it only obligates them to provide access to those which it in fact has created and retained." *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 152 (1980). As a corollary, courts should interpret FOIA so that an agency must process and disclose informational material responsive to a request in the "form or format in which [it currently] maintains those records." S. Rep. No. 104-272, at 27. This approach necessarily prohibits an agency from dividing an existing record (*e.g.*, a

document maintained as a unit) into multiple "records" to withhold information, as contemplated by OIP's guidance and as done here.

The statutory definition of a "record," set out above, is irreconcilable with OIP's guidance because the former presumes that records exist *objectively* and are not created or re-defined based on the intent of a requester, let alone a FOIA officer's interpretation of that intent. If an agency maintains a report as one cohesive document or computer file (*e.g.*, a PDF file), then the entire report is *one* "record" for purposes of FOIA. The district court's opinion in *Gatore v. Department of Homeland Security* is instructive. In that case, the court reached precisely this result when it analyzed an agency's FOIA Processing Guide and determined that it "is a cohesive record, complete with separately and continuously numbered sections and appendices . . . [,] [and] it defies common sense to conclude that [the Guide], in toto, does not constitute a 'record' subject to disclosure[.]" 2017 WL 10777326, at *2.

C. OIP's guidance offends the plain meaning of the word "record."

Even if FOIA did not define a "record," the plain meaning of that word in its ordinary context would still conflict with the alternative definition in OIP's guidance. If "terms used in a statute are undefined, [courts and agencies] give them their ordinary meaning." *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995); *see Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 407 (2011).

Agencies are not free to make up their own definitions or to borrow six words from a different statute.

A "record" is "something that recalls or relates past events" or that collects "related items of information . . . treated as a unit." *Record*, Merriam-Webster's Dictionary, *available at* https://bit.ly/35lyxR1. In the legal context, a "record" is a "documentary account of past events, [usually] designed to memorialize those events," or "[i]nformation that is inscribed on a tangible medium or that, having been stored in an electronic or other medium, is retrievable in a perceivable form." *Record*, Black's Law Dictionary (9th ed. 2009). In other words, a "record" is something that exists in an objective sense, that documents something for future reference, and that cannot change its shape depending on context, such as when an agency processes a FOIA request.

Some courts have considered this quotidian meaning of "record" when adjudicating FOIA cases. In *Lipton*, for example, the court confirmed "the ordinary understanding has long been that a 'record' is an existing document or other permanent, preserved account of past events." 316 F. Supp. 3d at 250. "This was equally so in 1966, when FOIA itself became law, and in 1996 and 2016, when FOIA was amended[.]" *Id.* (citing several dictionaries contemporary to each amendment); *accord Save the Dolphins v. Dep't of Commerce*, 404 F. Supp. 407, 411 (N.D. Cal.

1975) (In "common parlance ['record'] includes various means of storing information for future reference," including video recordings.).[8]

OIP's guidance, by contrast, directs agencies to adopt a subjective "content-based approach" that conditions both the meaning *and* existence of a FOIA record on the wording of a request, the agency's interpretation of that request's subject-matter scope, and the agency's evaluation of the feasibility of breaking an existing record into "discrete units" so as to narrow the volume of material that needs to be processed for disclosure. A065–66. That approach is unreasonable, as evidenced by the facts of this case—where DOJ divided-up numbered QFRs that were compiled into consecutively paginated documents with single headings.

Once an agency creates or obtains a record, it remains a single "record"—a unit—in the form or format in which it is maintained, and it cannot be segmented into multiple transitory "records" for the sole purpose of processing a FOIA request. It would defy common sense and ordinary usage to hold otherwise. If the statutory definition were not the death knell of OIP's guidance, the plain meaning of "record" lurks in the background as another executioner.

[8] The *Lipton* court turned to the dictionary meaning of "record" because it believed the statutory definition was "tautological." 316 F. Supp. 3d at 250. COA disagrees about the logic of Section 552(f)(2) and the force of that statutory definition. But the *Lipton* court's analysis is still helpful because it reminds that if the statute does not resolve the issue, the common definition of the term is used.

D. The Privacy Act's definition of a "record" is inapt.

According to OIP's guidance, which DOJ applied in this case, "[a]gencies can use the definition of record found in the Privacy Act to guide their decisions as to what is a record for purposes of the FOIA." A065. "Thus, each 'item, collection, or grouping of information' on the topic of the request can be considered a distinct 'record." A065. This importation of language from the Privacy Act is deeply problematic and another example of why OIP's guidance is unlawful.

Revealingly, the six words referenced by OIP's guidance are not, in fact, a full reproduction of the Privacy Act's definition of a "record," which reads:

> [T]he term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or photograph[.]

5 U.S.C. § 552a(a)(4).

That definition contains at least two elements that make it incompatible with FOIA. *First*, the definition requires that information be "about an individual[.]" *Id.* *Second*, it requires that information contain an individual's "name, or the identifying number, symbol, or other identifying particular assigned to an individual[.]" *Id.* An identifying marker is required because the Privacy Act protects information stored

in a "system of records," which is a group of records from which information is retrieved by use of a name or identifier. *Id.* § 552a(a)(5).

Neither of these elements applies in the FOIA context and that is likely why OIP had to pick and choose which words to borrow. FOIA grants access to more than just information about an individual or information containing an identifying marker. *See Fisher v. Nat'l Insts. of Health*, 934 F. Supp. 464, 469 (D.D.C. 1996) (The "term 'record' has a different meaning under FOIA than it does under the Privacy Act. . . . The FOIA definition . . . is broader[.]").

Moreover, this Court has *never* endorsed the Privacy Act's definition of a "record" as appropriate for use with FOIA. Admittedly, the *AILA* court did make a passing reference to the Privacy Act. But after acknowledging that the parties had not addressed the issue and it had no cause to examine it, the Court merely opined that Section 552(f)

> provides little help in understanding what is a "record" in the first place. *Compare, e.g.*, [5 U.S.C.] § 552a(a)(4) (defining "record" under the Privacy Act as "any item, collection, or grouping of information"); 44 U.S.C. § 2201(2) (defining "Presidential records" as "documentary materials, or any reasonably segregable portion thereof," meeting certain criteria); *id.* § 3301 (defining "records" under the Federal Records Act as "all recorded information, regardless of form or characteristics," meeting certain criteria).

AILA, 830 F.3d at 678. This is the sole mention of the Privacy Act in *AILA*.

As the quote reveals, this Court never endorsed using the Privacy Act's definition of a record—or any portion of that definition—with FOIA. It merely

contrasted FOIA with the Privacy Act and two other government information statutes—the Presidential Records Act ("PRA") and the Federal Records Act. Neither the Privacy Act nor these other statutes contain any sort of practical criteria for delineating between "records." All three statutes concern records *management*. They were not designed to determine where one "record" ends and another begins. It would make little sense in the Federal Records Act context, for example, for a records officer to parse a unified document against a disposition schedule to figure out whether individual paragraphs of a document are "separate records" that an agency would need to preserve for archival purposes.

OIP wrested six words out of the Privacy Act definition to apply them to FOIA, and it did so without any legal or logical justification. Yet statutory text is not a buffet from which an agency can pick and choose the words that it prefers.

E. A "record" must pre-exist a FOIA request.

OIP's guidance states that the "nature of a FOIA 'record' is defined by both the content of a document *and* the subject of the request." A065. In other words, OIP maintains that a FOIA record is not defined, and in a sense does not exist, until an agency receives, interprets, and processes a request. That offends well-

established principles of FOIA law. A record must pre-exist a request.[9] This is so for at least six reasons:

(1) Requesting Only Extant Records: OIP's guidance clashes with the rule that requesters may only access records that exist at the time of their request. *See Judicial Watch, Inc. v. Dep't of Commerce*, 583 F.3d 871, 874 (D.C. Cir. 2009) ("FOIA . . . applies only to existing records[.]") (citation omitted). If a record does not exist until the moment an agency "defines" it during its search and review process, how can there be an "existing" record at the time of submission?[10]

District court interpretation of *AILA* has already created tension with this longstanding rule. In *Shapiro*, for example, the district court found that when an agency "located the responsive pages related to Shapiro's FOIA request . . . [t]his set of documents (*i.e.*, pages) *became* the responsive record[.]" 247 F. Supp. 3d at 75 (emphasis added). But if the pages "became" a record only after the agency

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[9] DOJ may respond that the only thing that needs to pre-exist a request is a "document" and not a "record." *See* A064–66 ("document" used thirty-two times). But that substitution of terms offends statutory interpretation. The term "document" only appears in FOIA six times and, in all cases, it refers to fees that agencies may charge for document processing and reproduction. The term "record," by contrast, appears nearly one hundred times and in all the operative subsections discussing search and disclosure. *See, e.g.*, 5 U.S.C. § 552(a)(2)(D) (requiring proactive disclosure of "copies of records"); *id* § 552(a)(3)(A) (agencies must disclose upon "request for records"); *id*. (requesters must "reasonably describe[] such records").

[10] *Cf.* Aristotle, *Metaphysics* IV.3 (It "is impossible for anyone to believe the same thing to be and not to be" because "it is impossible that contrary attributes should belong at the same time to the same subject[.]").

located them during its search, what were those pages before Mr. Shapiro submitted his request? And if they were not yet a "record," how could Mr. Shapiro have sought disclosure of something that did not exist? *See Become*, Merriam-Webster's Dictionary ("to come into existence"), *available at* http://bit.ly/2Uiw1DN.

(2) Uniformity: The "meaning of FOIA should be the same no matter which agency is asked to produce its records." *Tax Analysts v. Internal Revenue Serv.*, 117 F.3d at 613. OIP's guidance conflicts with this fundamental principle. If every agency were to create its own interpretation of a "record," which could change dynamically depending on the wording and interpretation of a FOIA request, then there would never be uniformity across the Executive Branch. Consider if one agency decided to treat an email chain as a single record, while another agency decided to segment the same email chain into multiple records. Such inconsistency could also arise *within* an agency, insofar as it has decentralized FOIA processing and individual components that are responsible for processing their own records.

This Court has repeatedly reaffirmed its commitment to uniformity in the interpretation of FOIA. In *Al-Fayed v. Central Intelligence Agency*, it wrote that, if it did not insist on uniformity, district courts "would have to affirm disparate (albeit, reasonable) decisions reached by different agencies regarding the same request" or, by extension, the same records. 254 F.3d at 306–07. But "Congress did not contemplate such a result. Indeed, it is precisely because FOIA's terms apply

government-wide that [courts] generally decline to accord deference to agency interpretations of the statute[.]" *Id.* (citing *Chevron*, 467 U.S. at 837 and *Tax Analysts*, 117 F.3d at 613); *cf. supra* at pp. 16–18. Allowing agencies to hide behind OIP's guidance and create diverse interpretations of a "record" has put lower courts in the exact position this Court feared in *Al-Fayed*.

(3) Surplusage: OIP's guidance create surplusage in FOIA's venue-selection provision, which provides that venue is proper, among other places, in the district "in which the agency records are situated[.]" 5 U.S.C. § 552(a)(4)(B). Under OIP's guidance, when a requester sues based on delay and before an agency has conducted its search, the agency would not yet have defined any "records." If OIP's position were correct, those yet-to-be-defined "records" could not be "situated" anywhere—they would not even exist—and the requester's venue option would be nullified.

Elementary canons of statutory construction counsel against this result. The canon against surplusage, for example, teaches that courts should construe terms "to give effect, if possible, to every clause and word of a statute[.]" *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (cleaned up). Courts should also "interpret [a] statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole[.]" *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (cleaned up). Here, the Court should reject OIP's guidance lest it read the actual text of FOIA's venue provision out of the statute.

(4) The DOJ Annual FOIA Report: DOJ's own behavior outside the FOIA processing context contradicts its position that records are defined in relation to a request. FOIA requires that an agency report its FOIA activities every fiscal year. *See* 5 U.S.C. § 552(e). Among the items an agency must report is "the number of *records* that were made available for public inspection in an electronic format under [the proactive disclosure requirements of] subsection (a)(2)." *Id.* § 552(e)(1)(Q) (emphasis added). Those records include (1) final opinions and orders made in the adjudication of cases; (2) statements of policy and interpretations adopted by the agency but not published in the *Federal Register*; (3) administrative staff manuals that affect the public; and (4) agency records that have been requested three or more times or are likely to be the subject of frequent requests. *Id.* § 552(a)(2)(A)–(D).

DOJ provides guidance in a handbook for agencies creating annual FOIA reports. *See* A162–64. In that handbook, DOJ advises agencies to report when they proactively release "certain categories of *records* without waiting for a specific request to be received." A163 (emphasis added). This reporting includes the "first three categories of subsection (a)(2) *records*, [which] concern the operational documents of the agency[.]" A164 (emphasis added). Agencies report the number of records proactively released by both their FOIA and program offices. A163.

In DOJ's 2018 report, the agency reported that it proactively released more than 5,700 "records." *See* A166–68. Although a small portion of these records were

released because they were "frequently requested," *see* 5 U.S.C. § 552(a)(2)(D)(ii), the majority were released under Section 552(a)(2)'s first three categories—namely, opinions and orders, policy statements, and staff manuals—and without DOJ having received a FOIA request. This is so because more than 4,700 records that DOJ reported as released under subsection (a)(2) were released by program offices, not the FOIA offices that would have handled "frequent" requests. *See* A167–68.

Because records released under the first three categories of subsection (a)(2) were released "without waiting for a specific request to be received," A163, it must be that those records were defined, identified, and counted *without* regard to a particular FOIA request. DOJ thus recognizes that records exist objectively and independent of a request.

OIP's guidance fails to reflect the reality of its own FOIA administration. There is no justification for the term "record" to have one meaning for purposes of an agency's affirmative disclosure obligations in (a)(2) and another for responding to FOIA requests in (a)(3).

(5) Agency Control: FOIA applies only to "agency records," not congressional, personal, or presidential records. A record is an "agency record" if it was created or obtained by the agency and is within its control at the time of a request. *Tax Analysts*, 492 U.S. at 144. When considering "control," courts often apply the four-factor *Burka* test, which examines "'(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 [is] integrated into the agency's record systems or files.'" *Burka v. Dep't of Health & Human Servs*., 87 F.3d 508, 515 (D.C. Cir. 1996) (citation omitted).[11]

Each of these factors focuses on how an agency treated a record *before* receiving a FOIA request. To illustrate: when evaluating whether a record is a "congressional record," a court aims to "safeguard Congress' long recognized prerogative to maintain the confidentiality of its own records" and focuses its inquiry on Congress's intent "to control the requested records." *United We Stand Am., Inc. v. Internal Revenue Serv.*, 359 F.3d 595, 600 (D.C. Cir. 2004) (citation omitted). Congress must affirmatively express the requisite intent "contemporaneous[ly] and specific[ly]" with the transfer of the record to an agency, *Paisley v. Cent. Intelligence Agency*, 712 F.2d 686, 694 (D.C. Cir. 1983), or before the agency creates the record at congressional direction. *See Am. Civil Liberties Union v. Cent. Intelligence Agency*, 823 F.3d 655, 666–67 (D.C. Cir. 2016).

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[11] With purported personal records, courts may apply a "totality of the circumstances" test that examines various aspects of how a record was created, maintained, or used. *Bureau of Nat'l Affairs, Inc. v. Dep't of Justice*, 742 F.2d 1484, 1492–93 (D.C. Cir. 1984). Similarly, with congressional or presidential records, the first two *Burka* factors are typically dispositive under the so-called "modified control test." *Judicial Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 221–24 (D.C. Cir. 2013). The differences between these tests are inconsequential to issues at bar.

The determination that a document or other informational material is a "congressional record" necessarily means that it is a "record" independent of a FOIA request. Because Congress's intent to retain control occurs at the moment of a record's transfer, or when setting out the conditions for its creation, *the existence of the record must precede the submission of any FOIA request*. The agency already needs to know what constitutes a "record" before processing it and applying the relevant agency-control test. A "record" does not become "congressional" based on its responsiveness to a FOIA request.

The Internal Revenue Service ("IRS") manual provides a helpful illustration. The IRS manual directs that when the Joint Committee on Taxation ("JCT") "corresponds with the IRS under its general oversight authority, it generally includes a legend . . . that restricts the dissemination and use of both the inquiry and responsive *records*." Internal Rev. Manual § 11.3.13.3.5 (emphasis added). That legend currently states: "This document is a *record* of the [JCT] . . . and is entrusted to the Department of the Treasury for your use only in handling this matter." *Id.* (emphasis added). Congressional control extends not just to JCT's incoming letters but to IRS responses as well, which "are *records* of the [JCT] and shall be segregated from agency *records* and remain subject to the control of the [JCT]." *Id.* (emphasis added). These arrangements only make sense if the IRS and JCT are discussing

either records that already exist at the time JCT expresses its intent to retain control, or records that will be created in response to a JCT inquiry or oversight request.

Congress cannot intend to control records that will only be defined and come into existence on an *ad hoc* basis according to an agency's interpretation of a yet-to-be-submitted FOIA request. *Cf. Paisley*, 712 F.2d at 692–93 ("In the absence of any manifest indications that Congress intended to exert control over documents in an agency's possession," the records should be considered subject to FOIA.). OIP's guidance scrambles the analytic framework of the entire agency-control inquiry.

(6) The Presidential Records Act: Yet another reason why OIP's guidance is deficient is that the PRA relies on the pre-existence of records for its operation. The PRA lists the types of "documentary materials" that are appropriate for special treatment as "presidential records." 44 U.S.C. § 2201(1), (2). It expressly excludes "documentary materials that are official *records* of an agency," as defined under FOIA. *Id*. § 2201(2)(B) (emphasis added). A "record" is either an "agency record" or "presidential record." It cannot be both. *See Armstrong v. Exec. Office of the President*, 1 F.3d 1274, 1292 (D.C. Cir. 1993).

OIP's guidance would prevent the White House or an agency from determining whether a particular document is subject to the PRA or whether it could be excluded as an "agency record." Agencies undertake that determination independent of any FOIA request, particularly when evaluating their preservation

obligations. If a "record" cannot be defined absent a FOIA request, as envisioned by OIP's guidance, then an agency cannot navigate the interplay between the PRA and FOIA. *See Fed. Bureau of Investigation v. Abramson*, 456 U.S. 615, 626 n.8 (1982) (The "definition of 'records' in the Records Disposal Act and the [PRA] . . . [are] helpful . . . in determining that an agency must create or obtain a record before . . . [it] can be considered an 'agency record[.]'").

A "record" cannot be excluded from the PRA until *after* it has been found to be disclosable under FOIA, and that exclusion depends on an initial determination of what the "record" is. This process must be able to operate independent of a FOIA request. OIP's guidance throws that process into disarray.

COA's interpretation of the term "record" solves all six of these problems because a statutory or plain meaning of the term recognizes that records exist objectively independent of FOIA requests and thus preexist any particular request.

* * *

To summarize: The district court erred by refusing to rule on the legality of OIP's guidance or its consistency with FOIA. DOJ admitted that it applied the guidance when processing COA's FOIA request, and the substance of the guidance cannot be divorced from the context of its application.

OIP's guidance must be unlawful for at least four reasons. *First*, the text of FOIA, as clarified by the Supreme Court, adequately defines a FOIA "record." That

four-part definition encompasses (1) any information material, (2) created or obtained by an agency, (3) within an agency's control when a request is submitted, and (4) in the format maintained by an agency at the time of a request. The definition logically follows from two statutory clauses at Section 552(f)(2)(A). The first clause—"any information that would be an agency record subject to the requirements of this section"—describes the *type* of material that qualifies as a "record." The second clause—"when maintained by an agency in any formation, including an electronic format"—describes the *status* of information material in the agency's hands before the submission of a FOIA request.

Second, the statutory definition is complemented by the ordinary meaning of the word "record," which refers to "[i]nformation that is inscribed on a tangible medium or that, having been stored in an electronic or other medium, is retrievable in a perceivable form," and which commonly memorializes the past. *Record*, Black's Law Dictionary (9th ed. 2009). OIP's guidance does not reflect the common usage of "record."

Third, the Privacy Act's definition is unique, limited to that statute, and cannot be imported into FOIA. In any case, OIP's guidance improperly omits the entirety of the Privacy Act's definition and cherry-picks only six words.

Fourth, a subjective, case-by-case definition of a "record" that depends on the subject-matter of a FOIA request cannot be reconciled with the well-established

principle that a "record" must pre-exist a FOIA request. There are numerous examples of how OIP's approach would throw FOIA administration into disarray.

II. The district court erred by allowing DOJ to segment the records at issue.

In addition to refusing to consider the legality of OIP's guidance, the district court erred when it determined QFRs could be segmented into distinct "records." DOJ's application of OIP's guidance to the records at issue here was unlawful.

A. DOJ produced four records to COA.

DOJ released four records responsive to COA's FOIA request.

Record 1: A May 16, 2011 email from Rita Aguilar to Faith Burton, *et al.*, discussing QFRs regarding appropriations. A025–29. DOJ neither segmented nor withheld information from this record, it was not implicated in the district court, and it is not at issue before this Court.

Record 2: A January 4, 2011 letter from Assistant Attorney General Weich to House Committee on the Judiciary Chairman John Conyers. A030–43; A119–32; *see* A179. The letter referenced and included an attachment: a single, consecutively paginated document containing responses to QFRs arising from an appearance of Attorney General Holder before the committee. Within the consecutively paginated attachment, the QFRs and responses from DOJ were consecutively numbered, and the attachment contained a single, overarching title formatted as follows:

Questions for the Record
Attorney General Eric H. Holder, Jr.
U.S. House Committee on the Judiciary
May 13, 2010

A031. DOJ withheld significant information within this record by applying redactions labeled "Non-Responsive Record" and by excising many pages.

Record 3: A September 14, 2010 letter from Assistant Attorney General Weich to Senate Committee on the Judiciary Chairman Patrick Leahy. A044–50; A133–39; *see* A179–80. As with the previous record, this letter referenced and attached a single, consecutively paginated document that contained responses to QFRs arising from an appearance of Director Carbon of the Office of Violence Against Women before the committee. The QFRs and agency responses were consecutively numbered, and the attachment included a single, overarching title:

Questions for Director Carbon on
"The Increased Importance of the Violence Against Women Act in a Time of Economic Crisis" from Senator Sessions

A045. DOJ withheld significant information within this record by applying redactions labeled "Non-Responsive Record."

Record 4: An April 21, 2010 letter from Senate Committee on the Judiciary Chairman Patrick Leahy to Attorney General Holder. A051–57; A140–46; *see* A180. The letter referenced and attached two documents, both of which consisted of consecutively numbered QFRs submitted by committee members, including a consecutively paginated four-page document comprising a set of questions from

Senator Coburn, and a two-page document, without page numbers, comprising a set of questions from Senator Feingold. Both attachments contained titles, which were formatted, respectively:

Written Questions of Senator Tom Coburn, M.D.
Attorney General Eric Holder
Hearing: Oversight of the Department of Justice
U.S. Senate Committee on the Judiciary
April 21, 2010

Senate Judiciary Committee Hearing
"Oversight of the U.S. Department of Justice"
Wednesday, April 14, 2010
Questions Submitted by U.S. Senator Russell D. Feingold
to Attorney General Eric H. Holder Jr.

A052; A056. DOJ withheld significant information within this record by applying redactions labeled "Non-Responsive Record."

B. Each letter and attached set of QFRs is a distinct "record" that cannot be further segmented.

As set forth above, the definition of a "record" under FOIA is (1) any informational material, (2) created or obtained by an agency, (3) within an agency's control when a request is submitted, and (4) in the format it is maintained by an agency at the time of a request. *See supra* at pp. 18–23. Applying this definition to the documents at issue, each letter and set of QFRs must be produced as a *unified whole*. The four records released to COA cannot be further segmented.

In the proceedings below, DOJ never denied that the letters and QFRs were (1) informational material, (2) created or obtained by the agency, and (3) within its

control at the time of CoA Institute's request. The only dispute before the district court concerned the *form* and *format* in which DOJ maintained the materials at the time of COA's request. Yet DOJ *did* reveal that form and format when it responded to COA's FOIA request. Specifically, the agency produced three cover letters, each of which referenced an attachment. Those attachments, in turn, constitute discrete units—or "records"—as evidenced by their uninterrupted pagination, consecutive numbering of items within the document (*i.e.*, questions and responses), and titles—single, overarching identifying descriptions that apply to the entire document.

The *Gatore* court reached the same conclusion when it relied on common sense and normal parlance to rule that an agency's "FOIA Processing Guide" was "a cohesive record, complete with separately and continuously numbered sections and appendices[.]" 2017 WL 10777326, at *2. QFRs are no different. Yet the district court rejected *Gatore* as inapt. It reasoned that the agency there had "treated the guide as a cohesive record in its affidavits, and it admitted that each section in the guide related to 'FOIA-related topics.'" A182. By contrast, the district court here found DOJ did not "treat[] each document containing hundreds of questions as one record, and the questions in the document are not related to one topic." A182. But the district court's conclusion is contradicted by the record.

DOJ's declarant averred the QFRs at issue were "all within a single, compiled document" that Congress sent to the agency; DOJ recompiled those questions, with

its responses, into another single record when it replied to Congress. A090. DOJ only segmented the QFRs *after the fact* when it processed COA's FOIA request. But there is no legal basis for redefining a record to avoid processing content that is, on the agency's view, "wholly irrelevant in the context of [a] FOIA request." A090. And it is likewise unjustifiable to claim, for the sake of "efficiency," that "each question from an individual member of Congress . . . is not automatically part of a larger responsive 'record,'" despite the fact that the QFRs were transmitted to and from DOJ in a unified format. A090.

The three cover letters and attached QFRs also comprise unified records because the letters referenced and incorporated their attachments. *See Parker*, 278 F. Supp. 3d at 451–52 (finding a letter and attachment were "one indivisible whole . . . [because the letter] touches on the subject matter of the attachment and refers the recipient to examine its contents"); *Judge Rotenberng Educ. Ctr.*, 376 F. Supp. 3d at 61–62 (collecting cases). Consider Records 2 and 3: "Enclosed please find responses to questions for the record[.]" A030; A044. And Record 4: "Attached are written questions from Committee members. We look forward to including your answers to these questions[.]" A051. The unitary nature of the records is confirmed as the attachments contain a consecutively numbered list within a single, consecutively paginated document.

DOJ's declarant offered support for the unitary nature of the records at issue, which the district court ignored. Specifically, the declarant detailed how DOJ created or obtained and maintained the letters and QFRs as a unit: "QFRs are normally first received by [the Office of Legislative Affairs], who then divides the questions by subject-matter and assigns individual questions to various individuals or components to prepare responses based on expertise." A089. The declarant also recognized that incoming QFRs could "be sent in multiple files, divided by Senator or Representative, *or they may be compiled into one large file*." A089–90 (emphasis added). And, again, the declarant made clear "OIP understood the Congressional creators' predominant purpose in compiling these disparate questions into *one document* to be efficiency" and that DOJ "compile[d] these disparate QFRs into *one 'document.'*" A090 (emphasis added); *see* A090 ("QFRs provide an opportunity for multiple members of Congress to each ask multiple questions all within a single, compiled document."). The district court ignored *all* these statements.

Further, it is irrelevant how DOJ divided and distributed QFRs internally for the purpose of collecting responses from different agency staff. What is paramount is that, after it did that, it complied its responses into one unified, collectively titled, and consecutively numbered response document for Congress. *That* is the record at issue, as it was maintained by DOJ when DOJ received COA's FOIA request.

In the proceedings below, DOJ also sought to inject the intent of the record creator, as well as its own discretion in interpreting the intent of a FOIA requestor, as another reason why each set of QFRs should not be treated as a unified "record." *See* A090 ("original purpose for compiling QFRs is efficiency"); *see also* A087–88 ("individual who created a given document may have had a particular purpose"); A088 ("document is no longer serving or furthering that purpose in the context of a FOIA review"). But neither the intent of a record creator, nor an agency's interpretation of that intent, should be relevant to the definition of a "record." What matters for FOIA purposes is (1) whether a record was in fact created—regardless of the intent of the creator—or obtained, and (2) how that record is maintained in the agency's systems or files. If an agency compiles information into a single document and maintains the document as such, that document is a unified "record" that cannot be segmented when processed for disclosure.

Various district court opinions have concluded as much with email chains. In *American Oversight v. Department of Health & Human Services*, for example, the district court explained that an email reply "incorporates what came before, and the two [messages] form a unified exchange." 380 F. Supp. 3d at 51. "Whether that was a conscious or subconscious choice is irrelevant; what matters is that the emails sent by agency personnel *did in fact* contain the prior exchanges with Congressional staff." *Id.* (emphasis added). The same is true here. It does not matter whether the

person who compiled the letters and QFRs intended that they be treated as one record or many. What matters is that new, unified records were created. DOJ must produce those records "as a unit." *AILA*, 830 F.3d at 677.

Common sense and normal usage bolster this point. In *Gatore*, the court found an agency revealed that its FOIA Processing Guide was "a cohesive record" by "making multiple references" to it as one thing—as one *unit*. 2017 WL 10777326, at *2. The fact that the "FOIA Processing Guide [was] hundreds of pages long and consist[ed] of separate and discrete sections relating to any number of different FOIA-related topics" was ultimately irrelevant. *Id*.

The *American Oversight* court likewise noted that "it is commonly understood" that "the day-to-day reality of electronic communication" meant an email chain could not be segmented into several records. 380 F. Supp. 3d at 51. So too, here, common sense counsels that QFRs, together with an accompanying cover letter (whose only purpose is to transmit the questions and responses), are *one thing*. They comprise one "cohesive" document.

The district court erred by rejecting this reasoning. On its view, "[e]ach QFR is essentially a separate communication, although several may be bundled together for transmission to streamline the question and answer process." A183. Thus, *individual questions* and DOJ's *responses* are the relevant "unified exchange." At the same time, the district court held that sub-parts of QFRs could *not* be distinct

"records." A184 ("If the umbrella question was disclosed, then logically any sub-questions and their corresponding answers should also be disclosed.").

None of this logically follows. Although the subject-matter of various QFRs may be "distinct" at some level, they were all transmitted to DOJ as part of a *single document*, and DOJ recompiled them into a single document when they were sent to Congress. DOJ only "divid[ed] [them] up . . . into their constituent parts"—whatever that means—as part of its "own internal practice[.]" A090.[12] Thus, individual QFRs and agency responses cannot possibly comprise a "unified exchange."

In *American Oversight*, the "reality of electronic communication" counseled the court to treat an email chain as a "unified exchange" precisely because of the *form* and *format* of that medium of communication. 380 F. Supp. 3d at 51 ("[T]he Court finds that the FOIA request covers the redacted information so long as it was included as in-line text in the agencies' sent emails, regardless of whether the agency authored each email in the chain."). It was irrelevant whether individual emails within the chain happened to pertain to the same subject matter, although that may have been the case. *See id.* ("[I]n many instances, a reply email . . . simply cannot

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[12] The "constituent" parts of the QFRs distributed to different components could also be "records." For example, if the Office of Legislative Affairs forwarded several QFRs to the Office of Legal Counsel, those QFRs—in the form and format transmitted or received by either component—would be a discrete record. But DOJ did not identify *those* kinds of records when processing COA's request. It instead located the *collected* QFRs and cover letters that were transmitted to Congress. That document with the collected QFRs is the record at issue here.

be understood without reference to the previous message."). Here, the district court misread *American Oversight*—and tacitly relied on OIP's guidance—to insert an impermissible "subject-matter" criterion into the definition of a "record" inquiry.

The district court also failed to provide any limiting principle for its understanding of a "record." It is unclear why sub-parts of QFRs, for example, should not qualify as distinct "records," at least insofar as they are intelligible standing apart from the rest of an "umbrella" question. Depending on an agency's level of abstraction in its description of such "records," it could even reasonably aver that sub-parts of QFRs are sufficiently distinct in terms of subject matter. This was the case in *Gatore*, where the agency described its "FOIA Processing Guide" as "consist[ing] of separate and discrete sections relating to any number of different FOIA-related topics," but the court nevertheless treated it a "cohesive record." 2017 WL 10777326, at *2.

Ultimately, this highlights an important aspect of the district court's error and the infirmity of OIP's guidance. Allowing an agency to define a "record" based on "responsiveness," that is, whether a purported "record" corresponds to the subject-matter of a FOIA request, introduces a whole new layer of indeterminacy into the FOIA process. That ambiguity could be avoided by sticking to the statutory text and

plain meaning.[13] An objective definition of "record" avoids putting the cart before the horse. A responsiveness inquiry should only take place *after* potentially responsive records have been collected for processing.

III. The district court improperly dismissed COA's policy-or-practice claim.

This Court has been clear that, when "a party . . . obtain[s] relief as to a *specific request* under the FOIA, this will not moot a [second] claim that an agency *policy or practice* will impair the party's lawful access to information in the future." *Payne Enters.*, 837 F.2d at 491. When an agency "follow[s] an 'impermissible practice' in evaluating FOIA requests," and a requester "will suffer 'continuing injury due to [that] practice,'" a claim challenging the practice survives. *Id.*

In the proceedings below, COA argued that OIP's guidance evinces a policy or practice inconsistent with FOIA. DOJ explained that OIP issued that guidance "in order to assist federal agencies in determining whether it is appropriate to divide a document into discrete 'records,'" A086–87, and it admitted it had applied the guidance to COA's FOIA request. A087. COA further argued that because it had "additional FOIA requests" pending with DOJ at various stages of the administrative

[13] Contrary to the district court's claim, the *AILA* court never "expressly contemplated that . . . documents that encompass a number of different topics may be divided into discrete 'records.'" A184. On the contrary, this Court made clear that it "ha[d] no occasion . . . to consider the range of possible ways in which an agency might conceive of a 'record,'" and merely referenced inapposite guidance on determining the subject-matter scope of a FOIA request. 830 F.3d at 678.

process, it was "at risk of receiving the same improper treatment in the future" by application of the guidance. A014. DOJ never disputed that COA had raised a cognizable policy-or-practice claim. Yet the district court dismissed COA's claim for lack of standing.

The district court justified its decision on four grounds. *First*, it reasoned that, "in *Payne*, it was beyond dispute that the plaintiff had suffered a concrete injury," but here the court had "largely upheld the [DOJ's] application of its own policy" and "took issue with just one specific aspect of the agency's subdivision of documents into records." A187. *Second*, the district court concluded COA had "not alleged facts to demonstrate that it will suffer an injury-in-fact" in the future because application of OIP's guidance to prospective FOIA requests "is speculative given the fact-specific nature of the inquiry." A187–88. *Third*, it determined that COA had "not demonstrated that [DOJ] has been withholding information that it should be disclosing *because of OIP's Guidance*[.]" A188 (emphasis added). *Fourth*, it suggested it had "resolved the controversy pending before it without reference or application of OIP's Guidance." A188. The district court erred on each point.

Although the court below "largely upheld" DOJ's segmentation of the QFRs, it *explicitly rejected* DOJ's proposed definition of a "record" as "too narrow." A184. And DOJ's "too narrow" definition was based entirely on OIP's guidance. *See* A087. DOJ's initial misapplication of OIP's guidance to withhold sub-parts of the

QFRs was enough to establish concrete injury. "Largely upheld" is not the same thing as "upheld." Regardless, requiring any further *judicial determination* as to the legal deficiency of OIP's guidance would have been unwarranted.

This Court's decision in *Judicial Watch, Inc. v. Department of Homeland Security* is instructive. 895 F.3d 770 (D.C. Cir. 2018). There, the court explained that a requester had raised a valid claim alleging that an agency regularly refused to issue timely determinations in response to FOIA requests until being sued by the requester. *Id.* at 779. But in a standard FOIA lawsuit, no court would ever issue a judgment on an agency's failure to abide by the statute's pre-litigation requirements. This is because the requester would obtain adequate relief upon issuance of the agency's determination during the course of litigation. A plausible allegation of the inconsistency of a policy or practice with FOIA is enough to establish standing. The district court's suggestion, here, that it would have needed to repudiate OIP's guidance *in toto*, either facially or as applied, for COA's claim to proceed is baseless.

Similarly, COA alleged adequate facts to establish it was likely to suffer future injury from continued application of OIP's guidance. As described in the Complaint, COA has multiple requests pending at DOJ "or . . . the subject of ongoing litigation." A011; *see* A014. Moreover, COA later explained it has purposefully adjusted its FOIA operations by adding special instructions to its frequently filed requests "in an effort to combat agency attempts to segment email chains into more than one

record." A153; *see* A006; *see also Newport Aeronautical Sales v. Dep't of the Air Force*, 684 F.3d 160, 164 (D.C. Cir. 2012) (holding a requester demonstrated "continuing injury" based on its "business . . . [of] continually requesting and receiving documents [under FOIA]). This establishes a likelihood of future injury.[14]

The district court also erred when it suggested COA had not adequately demonstrated *past application* of OIP's guidance. In fact, COA's Complaint detailed how DOJ applied the same policy and practice of segmenting and withholding "non-responsive records" to multiple COA FOIA requests, even though at the time DOJ's policy had not been "finalized and publicized . . . in guidance-document form." A014. That DOJ had not yet *published* its guidance is a distinction without a difference. Policy-and-practice claims are regularly predicated on "informal" procedures. *Payne Enters.*, 837 F.2d at 491; *see Judicial Watch, Inc.*, 895 F.3d at 777–78. To wit: it used to be a practice and now it is a policy.

Finally, insofar as the district court claimed it had "resolved the controversy pending before it without reference or application of OIP's Guidance," that is

[14] The district court's suggestion that future application of OIP's guidance was too "speculative given the fact-specific nature of the inquiry" is without moment. A188. COA's policy-or-practice claim attacked the substance of OIP's guidance and the improper definition of a "record." That the guidance instructs agencies to define records in light of an individual request's subject-matter cannot defeat standing, otherwise the guidance would *always* evade judicial review, except in piecemeal fashion as requesters challenged its application in discrete instances. But the purpose of a policy-or-practice claim is to avoid that outcome.

contradicted both by the court's own opinion—which indicated it had "largely upheld the agency's application *of its own policy*," A187 (emphasis added)—and its reasoning, which tacitly relied on OIP's definition of a "record." *See supra* at p. 48 ("[T]he district court . . . tacitly relied on OIP's guidance . . . to insert an impermissible "subject-matter" criterion into the definition of a "record" inquiry."). Application of OIP's guidance cannot magically be divorced from its substance. The district court's sleight-of-hand was a poor attempt to evade addressing COA's compelling arguments about the inconsistency of OIP's guidance with the text of FOIA, its plain meaning, and other well-established legal principles.

CONCLUSION

For these reasons, Appellant Cause of Action Institute respectfully requests that this Court (1) reverse the decision of the district court, (2) declare unlawful and enjoin further application of OIP's guidance on the definition of a "record," (3) provide a workable interpretation of the statutory term "record" to ensure consistent application across the Executive Branch, and (4) direct Appellee Department of Justice to produce the records at issue in their entirety, subject only to applicable statutory exemptions.

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Dated: October 30, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains 12,624 words, as counted by the word-processing system used to prepare the document and excluding those parts exempted by Federal Rule of Appellate Procedure 32(f).

I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in 14-point Times New Roman font.

Dated: October 30, 2020

/s/ Ryan P. Mulvey
Ryan P. Mulvey

Counsel for Cause of Action Institute

CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2020, I filed the foregoing Opening Brief of Appellant Cause of Action Institute in the United States Court of Appeals for the District of Columbia Circuit using the Appellate CM/ECF system. Service will be accomplished by the Appellate CM/ECF System. As required by Circuit Rule 31(b), I will also cause to be filed eight paper copies of the brief with the Court.

/s/ Ryan P. Mulvey
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