

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

_____)	
JUDICIAL WATCH, INC.,)	
)	
Plaintiff,)	
)	
v.)	Case No. 1:09-cv-02312
)	
UNITED STATES SECRET SERVICE,)	
)	
Defendant.)	
_____)	

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT’S
CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO
PLAINTIFF’S MOTION FOR PARTIAL SUMMARY JUDGMENT**

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INTRODUCTION

Plaintiff Judicial Watch, Inc. (“Judicial Watch”) has filed an unprecedented Freedom of Information Act (“FOIA”) request, seeking White House visitor records known as “WAVES” and “ACR” records for all visitors to the White House “from January 20, 2009 to present.” Rather than seek WAVES and ACR records reflecting visits to the White House by a specific individual or individuals, Judicial Watch asks the United States Secret Service (“USSS” or “Secret Service”)—or in reality the White House—to produce *all* of the Obama Administration’s WAVES and ACR visitor records. The relief that plaintiff requests is all the more striking in light of the White House’s recent announcement of an historic voluntary disclosure policy for White House visitor records. Pursuant to that policy (which was announced on September 4, 2009, prior to Judicial Watch’s filing of this lawsuit), the White House has been releasing WAVES visitor records (which include relevant parts of ACR visitor records), subject to a few narrow exceptions explained below, since September 2009. As for records created between January 20, 2009 and September 15, 2009, which includes the period of time covered by Judicial Watch’s FOIA request, the White House has created a website where the public can make requests for specific visitor records. Pursuant to requests made via that website, the White House has already released thousands of visitor records for the pre-September 15 time period.

Judicial Watch, like any member of the public, is welcome to request specific pre-September 15 visitor records through the White House’s website. It has explicitly been invited by the White House to do so, and the White House remains willing to process a request by Judicial Watch for visitor records relating to a list of names that Judicial Watch may choose to provide. As a matter of law, however, Judicial Watch is not entitled under FOIA to *compel*

production of White House visitor records for several reasons.

First, WAVES and ACR records are not agency (Secret Service) records subject to FOIA. White House officials and staff provide information on anticipated visitors to the White House Complex to the Secret Service only on a temporary and confidential basis and only for the purpose of allowing the Secret Service to perform its statutory function to protect the President and the place where he lives and works. This accommodation of the Secret Service's statutory protective function does not divest the President and Vice President of control over White House visitor records, which remain Presidential records under the Presidential Records Act rather than agency records under FOIA. The district court cases on which plaintiff relies for a contrary conclusion were incorrectly decided for the reasons established below, including the fact that subjecting White House visitor records to FOIA would give rise to significant separation of powers concerns contrary to Congress' intent when enacting FOIA. The Court should therefore avoid a constitutional issue by holding that visitor records are Presidential records, particularly given the fact that the White House is voluntarily disclosing the records to the public.

Second, even if WAVES and ACR records were subject to FOIA, the records should be exempted from release due to national security concerns. The unprecedented breadth of Judicial Watch's FOIA request renders the request virtually impossible to process without creating the unacceptable risk that sensitive records implicating national security concerns would be inappropriately released. Literally hundreds of thousands of records are implicated by Judicial Watch's request, a certain number of which reflect visits that, if disclosed, could have dire national security consequences for the reasons set forth below and in the classified declaration accompanying defendant's motion. Prior to September 15, 2009, the WAVES system was not

designed to flag the sensitive nature of meetings. As a result, to determine now whether a particular pre-September 15, 2009 visit implicates national security, all visitor records created by the White House National Security Staff (“NSS”) would have to be reviewed by the particular White House visatee or the individual who entered the visitor information into the WAVES database. It would be virtually impossible to conduct such a review with the necessary degree of accuracy, in part, because the NSS is primarily staffed with detailees from other executive agencies who return to those agencies or sometimes leave government entirely at the conclusion of their details. Furthermore, to assure accuracy, pre-September 15, 2009 NSS appointments would also have to be reviewed by the President’s senior national security advisors, which would compromise the ability of NSS leadership to conduct national security business and give rise to significant separation of powers concerns. Finally, because several non-NSS offices within the White House also participate in and schedule national security meetings, a national security review would necessarily require a high-level review of non-NSS visitor records by senior White House officials outside the NSS, which would require significant time and attention and inhibit their ability to perform their functions.

For the foregoing reasons, and as set forth in greater detail below, this Court should deny plaintiff’s motion for partial summary judgment and grant defendant’s cross-motion for summary judgment.

BACKGROUND

FACTUAL BACKGROUND

1. Records Regarding Visitors To The White House Complex

Because the safety of the President and Vice President implicates national security and other governmental interests of the highest order, Congress has directed that both of these constitutional officers receive protection from the United States Secret Service. See 18 U.S.C. §§ 3056(a), 3056A(a). No other official (except the President-elect and Vice President-elect) is required by law to accept such protection. The Secret Service's protection extends not only to the physical persons of the President and Vice President, but also to the places where they live and work, including the White House Complex,¹ which contains the offices of the President and his staff and offices for the Vice President and his staff. See id. § 3056A(a)(1), (2), (4), (6). See Declaration of Donald E. White ("White Decl.") ¶ 2.

As part of its statutorily mandated function to provide security for the White House Complex, the Secret Service clears proposed visitors for entry, and controls the entry and exit of visitors. To enable the Secret Service to perform this protective function, authorized personnel, including, but not limited to, Presidential and/or Vice Presidential staff, provide identifying information regarding proposed visitors to the Secret Service. Declaration of Philip C. Droege ("Droege Decl.") ¶ 5; White Decl. ¶ 7. This information is provided by the White House to the Secret Service confidentially and on a temporary basis, solely for the purpose of allowing the

¹ The "White House Complex," for purposes of access as secured by the Secret Service, includes the White House itself along with the Eisenhower Executive Office Building, the New Executive Office Building, and the grounds encompassing the White House and the Eisenhower Executive Office Building. See Declaration of Donald E. White ("White Decl.") ¶ 4.

Secret Service to conduct background checks to determine whether, and/or under what conditions, a visitor should be admitted, and to allow the Secret Service to verify the visitor's admissibility at the time of the visit. Droege Decl. ¶ 5; White Decl. ¶ 7.

Authorized pass holders at the White House Complex usually provide the Secret Service with information on anticipated visitors to the White House Complex by entering the information into a computer, which automatically transmits it to the Secret Service. See Droege Decl. ¶ 6. A Secret Service employee then verifies that the requestor is authorized to make appointments for the location requested, adds or changes any other information that may be necessary, and conducts background checks; the information is ultimately transmitted to the White House Access Control System ("WHACS"), which includes the Worker and Visitor Entrance System ("WAVES"). See White Decl. ¶¶ 6, 7. The information provided to the Secret Service by the authorized White House pass holder includes information such as the proposed visitor's name, date of birth, Social Security number, the date, time and location of the planned visit, the name of the official or employee submitting the request, the name of the person to be visited, and the date of the request. Droege Decl. ¶ 5. The Secret Service uses the information it is provided to determine whether there is any protective concern with admitting the proposed visitor to the White House Complex, as well as to verify the visitor's admissibility at the time of the visit. Id.; White Decl. ¶ 7. Moreover, some WAVES records are annotated by Secret Service personnel, in note and description fields, with limited information as a result of background checks or instructions, including coded instructions to Secret Service officers. White Decl. ¶ 8.

Once an individual is cleared into the White House Complex, the visitor usually receives a pass, which is swiped over one of the pass readers at entrances to and exits from the Complex.

Swiping a pass automatically creates a record in the Access Control Records System ("ACR"). Droege Decl. ¶ 7; White Decl. ¶ 9. An ACR record includes information such as the visitor's name and badge number, the time and date of the swipe, and the post at which the swipe was recorded. Droege Decl. ¶ 7; White Decl. ¶ 9. Once a visit takes place, WAVES records are typically updated electronically with information showing the time and place of the visitor's entry into and exit from the White House Complex. Droege Decl. ¶ 8; White Decl. ¶ 10.

2. The White House Retains Custody And Control Over White House Visitor Information

Both the Secret Service and the White House recognize that the President and Vice President exercise exclusive legal control over WAVES and ACR records. Droege Decl. ¶¶ 12-14; White Decl. ¶ 11. After a visit is complete, the Secret Service has no continuing interest sufficient to justify its own preservation or retention of WAVES or ACR records. White Decl. ¶ 11. The President and Vice President, by contrast, have a continuing interest in such records for their operational and historical value. Droege Decl. ¶¶ 9, 13.

It has been the practice of the Secret Service, since at least 2001, to transfer newly-generated WAVES records on CD-ROM to the White House Office of Records Management ("WHORM"), generally every 30 to 60 days. See Droege Decl. ¶ 10; White Decl. ¶ 11.² The intent of the Secret Service is to delete WAVES records from its computer system once they are transferred to the WHORM. White Decl. ¶ 11. Similarly with respect to ACR records, the Secret Service and the White House, at least as early as 2001, and upon revisiting the issue in 2004, recognized and agreed that they should be treated in a manner generally consistent

² The note and description fields from prior to 2006 were not initially transferred to the WHORM; those fields from 2004 to 2006 were subsequently transferred to the WHORM in 2006. Droege Decl. ¶ 10; White Decl. ¶ 11.

with the treatment of WAVES records. Droege Decl. ¶ 11; White Decl. ¶ 13. Thus, the Secret Service and the White House determined that ACR records should be transferred to the WHORM and deleted from the Secret Service's computers, like WAVES records. White Decl. ¶ 13. In May 2006, the Secret Service transferred ACR records covering the period from January 2001 to April 2006 to the WHORM. Droege Decl. ¶ 11; White Decl. ¶ 13. Since that time, the Secret Service has continued to transfer ACR records to the WHORM. See Droege Decl. ¶ 11; White Decl. ¶ 13.³

In May 2006 (more than three years before the plaintiff submitted its FOIA request), the Secret Service Records Management Program and the WHORM entered into a Memorandum of Understanding ("MOU"), which both documents past practice and interests as understood at the time regarding WAVES and ACR records, and "confirm[s] the legal status of [these] records" and WHORM's management and custody of them. See Droege Decl. ¶ 12 & Attachment thereto; White Decl. ¶ 12 & Attachment thereto. The MOU provides, among other things, that the White House has a continuing interest in WAVES and ACR records, and that the White House continues to use the information contained in such records for various historical and informational purposes. Droege Decl. ¶ 13 & Attachment thereto (MOU ¶ 20). The MOU reflects that the White House "at all times asserts, and the Secret Service disclaims, all legal control over any and all [WAVES and ACR] Records." Attachment to Droege and White Declarations (MOU ¶ 24). The Secret Service acknowledges in the MOU that its temporary retention of such records after an individual's visit to the White House Complex is solely for the purpose of facilitating an

³ Although the Secret Service has retained copies of WAVES and ACR data due to, among other things, then-pending litigation, it is in the process of determining the appropriate disposition of those data. Droege Decl. ¶¶ 10, 11; White Decl. ¶¶ 11, 13.

orderly and efficient transfer of the records to the WHORM. Droege Decl. ¶ 14 & Attachment thereto (MOU ¶ 22).

3. The White House Voluntary Disclosure Policy

On September 4, 2009, the White House announced its new policy to voluntarily disclose White House records reflecting visitor appointments as “another important step toward a more open and transparent government.” Ex. A (Opening the people’s house). Pursuant to that policy, effective for visitor records created after September 15, 2009, the White House makes available online WAVES visitor records (including those parts of ACR records that are incorporated into WAVES records after a visit) from 90 - 120 days prior. See Ex. B (White House Voluntary Disclosure Policy Visitor Access Records). However, there are a few narrow, but important, exceptions to that policy. Specifically, the White House will not release portions of records that contain particularly sensitive and private information (*e.g.*, dates of birth, social security numbers, and contact phone numbers, or the USSS-entered instructions in the description field); records that implicate the personal safety of White House Complex pass holders (their daily arrival and departure); records whose release would threaten national security interests; records relating to purely personal guests of the First Family and the Vice President and his family (*i.e.*, visits that do not involve official or political business); or records related to a small group of particularly sensitive meetings (*e.g.*, visits of potential Supreme Court nominees). See Ex. B. As for pre-September 15 records, anyone can request—subject to the exceptions outlined above—the release of visitor records relating to specific individuals through the White House’s website. See Ex. B; Ex. C (Request White House Visitor Access Records). To date, more than 2,500 pre-September 15 and more than 250,000 post-September 15 WAVES visitor records have

been released pursuant to this policy. See Droege Decl. ¶¶ 17, 18.

In order to account properly for the exceptions to the voluntary disclosure policy, the ability to designate sensitive records was added to the WAVES system. For all post-September 15 appointments, White House Complex staff submitting an access request can designate whether the public release of the visitor record would implicate national security concerns. See Declaration of Nathan D. Tibbits (“Tibbits Decl.”) ¶¶ 14-15.⁴ The ability of the National Security Staff (“NSS”) to flag sensitive visits in real time allows the White House to disclose non-exempt post-September 15 WAVES visitor records, given the very large number of individuals who visit the White House each month.⁵ But even with this ability, the NSS double checks all NSS visitor records that were not initially designated for withholding in order to ensure that no national security sensitive records are released. See Tibbits Decl. ¶¶ 23-26.⁶ Even

⁴ To demonstrate the importance of this enhancement, the capacity to submit WAVES requests was discontinued for White House staff until training occurred regarding the new functionality of the WAVES system. See Tibbits Decl. ¶ 15.

⁵ NSS is the primary office through which the most sensitive national security information is transmitted from the Intelligence Community to the President and through which national security policy is made. Tibbits Decl. ¶ 2. Owing to this fact, the majority of work conducted by NSS is classified or impacts highly sensitive national security matters. Id.

⁶ To accomplish this task each month, the NSS sorts NSS visitor records by visatee name and sends to each visatee a list of their visitors, along with the date and time of arrival and other information that may aid the visatee in making the exemption determination. Tibbits Decl. ¶ 23. The list is also sent to the individual who entered the appointment, if different from the visatee. Id. The visatee must review and validate that the visit need not be exempted for national security reasons. Id. If the visatee is no longer on staff, then the person who entered the request must review it. Id. If a determination is still uncertain, senior leadership will look at the information that is available and cross check, to the extent possible, against other meetings on that day to determine if the visitor was part of an exempted meeting or visit. Id. Ultimately, in the interest of national security, if the nature of the visit cannot be determined, the default position is to exempt the record. Id.

after this review, records that are designated for public disclosure are reviewed for a third time by the Director for Counterintelligence and the Senior Director for Administration before they are released. Tibbits Decl. ¶ 24.

Other units within the Executive Office of the President (“EOP”)—which all designate sensitive records at the time of creation—also audit their own records prior to release. See Tibbits Decl. ¶ 22. That is because other EOP components, such as the President’s Intelligence Advisory Board and the Office of the Vice President (including the Vice President’s national security staff) regularly schedule national security meetings. See Tibbits Decl. ¶ 36. In addition, senior White House officials regularly attend meetings on national security, and will often schedule national security meetings that may involve participants from various components within the White House. See Tibbits Decl. ¶ 36. An authorized White House pass holder may also designate for withholding visitor records that, if released, would expose sensitive, high-level Executive Branch deliberations (such as the afore-mentioned visits of potential Supreme Court nominees). Tibbits Decl. ¶¶ 14-16.⁷

4. Judicial Watch’s FOIA Request.

Judicial Watch sent a FOIA request dated August 10, 2009 to the Secret Service. That request sought “[a]ll official visitor logs and/or other records concerning visits made to the White House from January 20, 2009 to present.” Ex. D (Judicial Watch FOIA Request). The Secret Service responded by letter dated October 8, 2009 by stating that it interpreted Judicial Watch’s FOIA request “to encompass Access Control Records System (ACR) records, and/or Workers

⁷ To date, no such “non-national security highly sensitive” records have been withheld pursuant to the voluntary disclosure policy. See Tibbits Decl. ¶ 16.

and Visitors Entry System (WAVES) records.” Ex. E (USSS Response to FOIA Request). The Secret Service then stated that the records “are not agency records subject to the FOIA,” but instead “are records governed by the Presidential Records Act . . . and remain under the exclusive legal custody and control of the White House Office and the Office of the Vice President.” *Id.* (internal citation omitted). On that basis, the Secret Service referred Judicial Watch’s FOIA request to the White House for consideration pursuant to the White House’s recently-announced voluntary disclosure policy. *Id.*

Judicial Watch filed an administrative appeal by letter dated November 3, 2009. In its letter, Judicial Watch asserted that the Secret Service’s claim that the requested records are not agency records subject to the FOIA has previously been litigated and rejected. Ex. F (Judicial Watch Appeal).⁸ The Secret Service denied that appeal by letter dated December 3, 2009, Ex. G (USSS Response to Appeal), and Judicial Watch filed this lawsuit on December 7, 2009.

STATUTORY BACKGROUND

Both the FOIA, which applies to federal agency records, and the Presidential Records Act (“PRA”), which applies to Presidential and Vice Presidential records, provide for the disclosure of Executive Branch records, but the timing and circumstances of disclosure differ under the two statutes. The FOIA provides for the disclosure, subject to certain exemptions, of records of an

⁸ Judicial Watch did not appeal the Secret Service’s interpretation of Judicial Watch’s FOIA request as one for WAVES and ACR records. *See* Exs. E, F. Moreover, Judicial Watch has framed its summary judgment motion as one seeking the release of “visitor logs,” which it characterizes as WAVES and ACR records. *See* Pl. Br. at 1 (referring to “Secret Service visitor logs”); *id.* at 3 (same); *id.* at 4 (“[t]he requested records are generated by two electronic systems the Secret Service uses to monitor visitors to the White House – the Worker and Visitor Entrance System (“WAVES”) and the Access Control Records System (“ACR”).”); *id.* at 6 (referring to WAVES and ACR records). Accordingly, the parties are in agreement that plaintiff’s FOIA request, as well as this litigation, involve only WAVES and ACR records.

“agency.” 5 U.S.C. § 552(a). Generally, an agency must respond to a request for records under FOIA within twenty working days, and must “make a determination with respect to any appeal within twenty [working] days,” id. § 552(a)(6)(A)(ii), although these time limitations may, in “unusual circumstances,” be extended. Id. § 552(a)(6)(B)(I).

The Supreme Court has made clear, however, that the term "agency" under the FOIA does not encompass “the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President.” Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 156 (1980) (quoting H.R. Conf. Rep. No. 93-1380, at 15 (1974)) (records of telephone calls made by Assistant to the President for Natural Security Affairs are not subject to FOIA); see Armstrong v. Executive Office of the President, 90 F.3d 553, 558 (D.C. Cir. 1996) (records of National Security Council ("NSC") are not subject to FOIA, because NSC is “more . . . like the White House Staff, which solely advises and assists the President" than "an agency to which substantial independent authority has been delegated”). Owing in part to the Vice President's role as a close presidential advisor, the Vice President and his staff also are not subject to FOIA. See Armstrong v. Bush, 924 F.2d 282, 286 n.2 (D.C. Cir. 1991) (distinguishing Office of the Vice President from agencies that create "federal records"); Schwarz v. U.S. Dep't of the Treasury, 131 F. Supp. 2d 142, 147-48 (D.D.C. 2000) (Office of the Vice President not subject to the FOIA), aff'd, 2001 WL 674636 (D.C. Cir. 2001).

While FOIA governs the disclosure of agency records, the Presidential Records Act sets forth a different scheme for the preservation, disclosure, and disposal of Presidential and Vice Presidential records. Under the PRA, records reflecting “the activities, deliberations, decisions, and policies" of the Presidency or Vice Presidency are "maintained as Presidential [or Vice

Presidential] records.” 44 U.S.C. § 2203(a); see id. § 2207 (“Vice-Presidential records shall be subject to the provisions of this chapter in the same manner as Presidential records.”). As the D.C. Circuit has recognized, records subject to the PRA do not include “agency records” as that term is used in the FOIA. See Armstrong v. Executive Office of the President, 90 F.3d at 556.

Under the terms of the PRA, while in office, a President or Vice President may not dispose of even “Presidential [or Vice Presidential] records that no longer have administrative, historical, informational, or evidentiary value,” without obtaining the written views of the Archivist of the United States, which includes giving the Archivist an opportunity to consult with Congress on the proposed disposition. 44 U.S.C. § 2203(c), (d), (e).⁹ When a President or Vice President leaves office, the Archivist “assume[s] responsibility for the custody, control, and preservation of, and access to” the Presidential or Vice Presidential records of the departing administration. Id. § 2203(f)(1).

The PRA imposes upon the Archivist “an affirmative duty to make [Presidential and Vice Presidential] records available to the public as rapidly and completely as possible,” subject to the conditions set forth in the statute. Id. Absent specific action by the President or Vice President, the Archivist must generally make records covered by the PRA available under the FOIA five years after the President or Vice President leaves office. Id. § 2204(b)(2), (c)(1). However, the President or Vice President may, before leaving office, “specify durations, not to exceed 12 years, for which access shall be restricted with respect to information” in specified categories of PRA records, such as “confidential communications requesting or submitting advice, between

⁹ If the Archivist reports the proposed disposal to Congress, the President must then submit a schedule for the disposal to Congress at least sixty days before the “proposed disposal date.” 44 U.S.C. § 2203(d).

the President and his advisers, or between such advisers.” Id. § 2204(a); see Armstrong v. Executive Office of the President, 90 F.3d at 556 (PRA records “are to be made publicly available five years after [the President or Vice President] leaves office, except that national defense and certain other information is to be made available no later than 12 years after the end of a [P]resident's [or Vice President's] term.”). Thus, all Presidential and Vice Presidential records become subject to potential disclosure no later than twelve years after the officeholder leaves office.

The legislative history of the PRA explains the rationale behind the delayed disclosure of Presidential and Vice Presidential records as opposed to agency records under the FOIA. In passing the bill that became the PRA, Congress recognized that “premature disclosure” of Presidential or Vice Presidential records could have a “chilling effect on presidents and the frankness of advice they could expect from their staffs.” See H.R. Rep. No. 95-1487, at 8 (1978), reprinted in 1978 U.S.C.C.A.N. 5732, 5739. Indeed, Congress recognized that seeking to require premature disclosure “might eventually diminish the completeness of the written record created and left by chief executives.” Id. And Congress acknowledged the need to consider “the expectation of confidentiality of executive communications to avoid the prospect of a constitutional infirmity.” Id. The PRA thus reflects an attempt to balance these important considerations against the desire for “ready availability” of Presidential and Vice Presidential records. Id.; see id. at 15, reprinted in 1978 U.S.C.C.A.N. at 5746 (noting that Congress sought to balance “the objectives of assuring early availability with the concern that the premature disclosure of sensitive presidential records will eventually result in less candid advice being placed on paper and a depleted historical record”).

As set forth in detail below, WAVES and ACR records fit the definition of Presidential records. They are historically significant and document the activities of the President and Vice President. Treating these records as Presidential records ensures their long-term preservation; at the same time, the White House's voluntary disclosure policy permits their near-immediate disclosure, thus furthering the goal of transparency in government.

ARGUMENT

I. WAVES AND ACR RECORDS ARE PRESIDENTIAL RECORDS, NOT AGENCY RECORDS SUBJECT TO FOIA.

The plaintiff seeks records of visitors to the White House Complex that are derived from information obtained from the President's and Vice President's advisers and staff. The Secret Service uses such records, for a brief time, in fulfillment of its statutory duties to protect the President and the place where he lives and works. Accommodating the Secret Service's statutory protective function does not divest the President of control over these records—neither as a matter of fact nor as a matter of law under the FOIA—and the records remain Presidential records under the Presidential Records Act rather than agency records under FOIA.

The Supreme Court has held that documents constitute “agency records” subject to FOIA if they (1) are created or obtained by an agency, and (2) in the agency's control. See U.S. Dep't of Justice v. Tax Analysts, 492 U.S. 136, 144-46 (1989). Ordinarily, the requisite “control” exists when the records “have come into the agency's possession in the legitimate conduct of its official duties.” Id. at 145. As the D.C. Circuit has stressed, however, where a non-FOIA entity such as the President exerts control over documents in an agency's hands, the inquiry “is not so simple.” United We Stand, Am., Inc. v. IRS, 359 F.3d 595, 598-99 (D.C. Cir. 2004).

In such cases, the Court’s inquiry focuses on the non-FOIA entity’s “intent to control” and on “the agency’s ability to control” the records at issue. Id. at 600. In this regard, the D.C. Circuit uses a four-factor analysis to determine whether an agency exercises “sufficient control” over a record to render it an “agency record” under the FOIA:

[1] the intent of the document’s creator to retain or relinquish control over the records; [2] the ability of the agency to use and dispose of the record as it sees fit; [3] the extent to which agency personnel have read or relied upon the document; and [4] the degree to which the document was integrated into the agency’s record system or files.

Tax Analysts v. U.S. Dep’t of Justice, 845 F.2d 1060, 1069 (D.C. Cir. 1988) (quoting Lindsey v. U.S. Bureau of Prisons, 736 F.2d 1462, 1465 (11th Cir. 1984), vacated, 469 U.S. 1082 (1984)), aff’d on other grounds, 492 U.S. 136 (1989). Applying these factors reveals that WAVES and ACR records are Presidential records and not Secret Service records.

A. The Secret Service’s Intent And Actions Indicate It Does Not Control WAVES And ACR Records.

The most important factor is the first—that is, what entity exercises “control” over a particular record. For example, when a document is transferred from a non-agency (such as Congress, the President, or the Vice President) to an agency, it becomes an agency record only if “under all the facts of the case the document has passed from the control of [the non-agency] and become property subject to the free disposition of the agency with which the document resides.” Goland v. CIA, 607 F.2d 339, 347 (D.C. Cir. 1978), vacated in part on other grounds, 607 F.2d 367 (D.C. Cir. 1979) (per curiam). A similar analysis applies with respect to records originally created by an agency, but over which a non-FOIA entity (that is, Congress, the President, or Vice President) asserts control. See Paisley v. CIA, 712 F.2d 686, 695-96 (D.C. Cir. 1983) (applying

the legal standard set out in Goland to records created by an agency in connection with a congressional investigation), vacated in part on other grounds, 724 F.2d 201 (D.C. Cir. 1984) (per curiam).

In United We Stand America, Inc. v. IRS, the D.C. Circuit explained that the non-FOIA entity's "intent to control" and "the agency's ability to control 'fit together in standing for the general proposition that the agency to whom the FOIA request is directed must have *exclusive* control of the disputed documents . . .'" in order for the records to be considered agency records subject to FOIA. 359 F.3d 595, 600 (D.C. Cir. 2004) (quoting Paisley, 712 F.2d at 693). In that case, the court was required to determine whether documents prepared by the IRS in response to a congressional inquiry were agency records or congressional records. The court stressed that "resolution of this dispute turns on whether the IRS has control of the documents," 359 F.3d at 598, concluding that if "Congress has manifested its own intent to retain control, then the agency – by definition – cannot lawfully 'control' the documents." Id. at 600 (quoting Paisley, 712 F.2d at 693). Accordingly, the court barred the plaintiff from recovering under the FOIA any part of the records at issue over which the Court found "sufficient indicia of congressional intent to control." Id.

The D.C. Circuit's reasoning in United We Stand applies with at least equal force here. The President could hardly have provided more "sufficient indicia" of his "intent to control," as well as his actual control over, the records at issue. As the Director of the White House Office of Records Management explains: "Throughout the presidency of Barack Obama, it has been the policy and practice of the White House Office . . . to retain and maintain legal control over Presidential Records This includes, but is not limited to, [WAVES and ACR records]."

Droege Decl. ¶ 3. Nor is there any doubt that the Secret Service itself “recognizes that such records are under the exclusive legal control of the President and Vice President.” White Decl. ¶ 11. This mutual understanding between the White House and the Secret Service was memorialized in a formal Memorandum of Understanding, which provides the clearest possible evidence that it is the White House, and not the Secret Service, that has “exclusive control of the disputed documents.” United We Stand, 359 F.3d at 600 (quoting Paisley, 712 F.2d at 693).

The White House’s control over WAVES and ACR records is reflected not only in the MOU, but in the nature of the records themselves. Visitor information submitted by Presidential and Vice Presidential staff is provided on a confidential basis, and only to permit the Secret Service to protect the President and Vice President and the places where they live and work. Droege Decl. ¶ 5; White Decl. ¶¶ 2, 4, 7. And it is of course the White House, and not the Secret Service, that has implemented a voluntary disclosure policy for these WAVES records reflecting visitor appointments to the White House Complex, thus further evidencing the White House’s control over them.¹⁰ This case, then, presents the antithesis of the “exclusive control” by the “agency” that the D.C. Circuit has held is necessary to find that a document is an “agency record” subject to FOIA. See United We Stand Am., Inc., 359 F.3d at 600; see also Katz v. NARA, 68 F.3d 1438 (D.C. Cir. 1995) (holding that autopsy records in Archivist’s possession were not agency records as they were controlled by President Kennedy’s estate); Goland, 607 F.2d at 347

¹⁰ Plaintiff argues that the fact that the Secret Service has previously produced WAVES and ACR records evidences the agency’s control over those records. See Pl. Br. at 6-7. However, in the two FOIA lawsuits that plaintiff cites, authorization was obtained from the White House prior to the release of WAVES and ACR records. See White Decl. ¶ 14; see also Ex. H (cover letters for production of WAVES and ACR records to Judicial Watch noting that the government, in producing the records, does not concede that the records constitute agency records subject to FOIA).

(noting that CIA held a congressional document as a “trustee” for Congress and therefore the document was exempt from disclosure under FOIA).

Finally, and even assuming the Secret Service could be considered the “creator” of the WAVES and ACR records—a dubious assumption since the information they contain is provided primarily by authorized White House Complex pass holders—the Secret Service’s obvious “intent” is to “relinquish” to the President any “control” over the records that it ever has had. See Tax Analysts, 845 F.2d at 1069. Droege Decl. ¶¶ 9-14; White Decl. ¶¶ 11-13.

B. The Secret Service Lacks Disposal Authority Over WAVES And ACR Records.

Pursuant to the second factor of Tax Analysts, the Secret Service’s conduct reflects the agency’s intent to relinquish whatever control it might have temporarily had over these records, as well as its inability to “dispose of the record[s] as it sees fit.” See Tax Analysts, 845 F.2d at 1069. Since at least 2001, the Secret Service’s practice has been to transfer newly-generated WAVES records to the White House Office of Records Management, generally every 30 to 60 days. The intent of the Secret Service is to erase WAVES records from its computer system after transfer; the servers purge and overwrite active WAVES data after they are older than 60 days. See Droege Decl. ¶ 10; White Decl. ¶ 11.¹¹ ACR records, reflecting entry into and exit from the White House Complex, are treated in a similar manner. See Droege Decl. ¶ 11; White Decl. ¶ 13. The legal status of WAVES and ACR records and WHORM’s management and custody of them under the PRA was confirmed in the May 2006 MOU between WHORM and USSS. See Droege Decl. ¶¶ 12-14; White Decl. ¶ 12. Thus, because the President and Vice President retain

¹¹ The Secret Service has, however, retained copies of some data. See n.3, supra.

control of WAVES and ACR records (as set forth in the MOU), the Secret Service lacks disposal authority over those records.

C. The Secret Service's Use Of WAVES And ACR Records Is Limited.

The limited extent to which—and the limited purpose for which—the Secret Service relies on WAVES and ACR records also demonstrates their Presidential status. See Tax Analysts, 845 F.2d at 1069. The mere fact that an agency has used a record “is not dispositive,” see Bureau of National Affairs, Inc. v. U.S. Dep’t of Justice, 742 F.2d 1484, 1492 (D.C. Cir. 1984), and the Supreme Court has held that a record’s temporary physical location within a federal agency does not itself render it an “agency record” subject to FOIA. See Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 157 (1980) (“We simply decline to hold that the physical location of the notes of telephone conversations renders them ‘agency records.’ The papers were not in the control of the State Department at any time.”).

The information in question is quintessentially Presidential. The President and his advisors and staff necessarily carry out much of the President’s constitutional responsibilities by meeting and consulting with visitors. Congress did not and could not require the President to make his appointment calendars available for immediate public inspection under the FOIA. Presidential and Vice Presidential staff only share this information with the Secret Service so that the Secret Service can perform this protective function. See Droege Decl. ¶ 5; White Decl. ¶ 7. After a visitor leaves the White House, the Secret Service has no continuing interest in the WAVES and ACR records sufficient to justify its own preservation of them. See generally Droege Decl. ¶¶ 9-14; White Decl. ¶¶ 11-13. The Secret Service recognizes, by contrast, that the President has a continuing interest, both operationally and historically, in records reflecting who

has visited the White House Complex. See Attachment to Droege and White Declarations (MOU ¶ 20) (agreement that White House has continuing interest in WHACS records). Thus, “the extent to which agency personnel have read or relied upon” the subject visit records is highly limited both in time and in purpose. See Tax Analysts, 845 F.2d at 1069; see also United We Stand Am., Inc., 359 F.3d at 600 (evaluating the “indicia of . . . intent to control” based upon “the circumstances surrounding the [agency]’s creation and possession of the documents”); Goland, 607 F.2d at 347 (concluding that the requested document was not an agency record based “both on the circumstances attending the documents’ generation and the conditions attached to its possession by the [agency]”). The Secret Service’s limited use of WAVES and ACR records does not convert this quintessentially Presidential information into an agency record.

D. WAVES And ACR Records Are Not Integrated Into The Secret Service’s Record Systems.

Finally, under the fourth Tax Analysts factor, the D.C. Circuit considers “the degree to which the document was integrated into the agency’s record system or files.” Tax Analysts, 845 F.2d at 1069. WAVES and ACR records do reside on the Secret Service’s servers as part of the WHACS data system. However, those data fields reflecting WAVES and ACR records are downloaded from the WHACS data set and burned onto CDs for transfer to the WHORM generally every 30 to 60 days. See White Decl. ¶ 11. Moreover, it is the intent of the Secret Service to delete WAVES and ACR records after they are transferred to the White House; indeed, the Memorandum of Understanding requires the Secret Service to do so. See Droege Decl. ¶ 10; White Decl. ¶¶ 11, 13; Attachment to Droege and White Declarations (MOU ¶ 22).

And while the Secret Service has retained copies of WAVES and ACR data, as well as WHACS data, due to, among other things, then-pending litigation, it is now in the process of determining the appropriate disposition of those data. See Droege Decl. ¶¶ 10, 11; White Decl. ¶¶ 11, 13.

The key point is that the WAVES and ACR data fields can be, and are regularly, downloaded from the Secret Service's servers for delivery to the WHORM.

E. Prior District Court Decisions Regarding WAVES And ACR Records Were Incorrectly Decided.

Judicial Watch asserts that “every court that has considered the issue has concluded that Secret Service visitor logs are agency records under FOIA.” Pl. Br. at 3. The two “CREW” cases that plaintiff cites for this proposition were decided by the same District Court judge, and the other decision that plaintiff refers to with an accord citation—Washington Post v. U.S. Dep't of Homeland Sec., 459 F. Supp. 2d 61, 72 (D.D.C. 2006) (Urbina, J.)—was subsequently vacated on appeal. See Ex. I (vacatur of opinion).

In any event, it is respectfully submitted that each of those cases was incorrectly decided. As an initial matter, even Judge Urbina in Washington Post held that three of the four Tax Analyst factors supported a determination that the records were not “agency records.” See Washington Post, 459 F. Supp. 2d at 70-71. As for the court's singular reliance on the Secret Service's (very limited) use of White House visit records to reach the opposite conclusion, see id., the court's analysis misapplied the D.C. Circuit's precedents. The court of appeals has stressed that the determinative inquiry is whether a non-FOIA entity—such as the President, the Vice President, or Congress—has clearly manifested its intent to control the records and has circumscribed their use by the agency. The court has never suggested that records should be

deemed agency records merely because they are used by the agency in some limited respect. Rather, as noted above, the court has expressly held that “[u]se alone . . . is not dispositive.” Bureau of Nat’l Affairs, Inc., 742 F.2d at 1492.

The Court in Washington Post also erred in concluding that the “use” factor was determinative because “the very purpose of the WAVES records is limited.” 459 F. Supp. 2d at 70-71. In other words, the court believed that the Secret Service’s use of the records was determinative because the records are “generated solely for their use by the Secret Service in protecting the [White House Complex].” Id. at 71. But that holding ignored precisely what prompts the creation of these records: the scheduling of meetings with the President, the Vice President, and their staffs, the record of which has important historical value. The Secret Service transfers White House visit records to the WHORM after the visits to which they pertain because the President has a continuing interest in the records, both operationally and historically. See Attachment to Droege and White Declarations (MOU ¶ 20). Thus, it is incorrect to conclude that the records cannot be used for any other purpose than that for which the Secret Service briefly uses them. (Again, the White House’s voluntary disclosure of these visitor records belies that assertion.)

As for Judge Lamberth’s decisions in the CREW cases, even he found that the “intent” factor weighed in the government’s favor. See CREW v. U.S. Dep’t of Homeland Sec., 527 F. Supp. 2d 76, 93 (D.D.C. 2007). The second and third factors—the agency’s ability to “use or dispose of the document as it sees fit,” and the extent to which the agency relied on the document—are resolved by the shared intent of the White House and the Secret Service. The Secret Service uses the records as contemplated by the MOU, and it is obligated to dispose of

them as contemplated in that agreement. Indeed, the MOU merely memorializes what was then understood to be past practice. The Secret Service uses the information submitted to provide the security that is mandated by statute so that the President and Vice President may safely discharge their constitutional responsibilities. And finally, “the degree to which the document was integrated into the agency’s record system or files” similarly negates the implication of Secret Service control. The MOU provides for the systematic transfer of WAVES and ACR records back to the WHORM for preservation pursuant to the Presidential Records Act. For all of these reasons, WAVES and ACR records are Presidential records subject to the Presidential Records Act and are not agency records subject to FOIA.

F. Alternatively, FOIA Must Be Construed As Not Reaching Visitor Records In Order To Avoid Serious Questions As To Its Constitutionality.

If there is any doubt regarding the proper status of WAVES and ACR records, the doctrine of constitutional avoidance would require a construction of the FOIA term “agency records” that avoided a substantial intrusion on the confidentiality necessary for the President and Vice President to discharge their constitutional duties. See, e.g., INS v. St. Cyr, 533 U.S. 289, 299-300 (2001); Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988). A court’s “reluctance to decide constitutional issues is especially great where, as here, they concern the relative powers” of other officers of the government. Public Citizen v. Dep’t of Justice, 491 U.S. 440, 466 (1989).

Congress’s exclusion of the President and Vice President from the FOIA’s definition of “agency” was compelled by appropriate respect for the separation of powers. See Armstrong v. Executive Office of the President, 1 F.3d 1274, 1292 (D.C. Cir. 1993). Reviewing the

interrelationship of the FOIA and the Presidential Records Act, the D.C. Circuit observed in Armstrong that Congress was “keenly aware of the separation of powers concerns that were implicated by legislation regulating the conduct of the President’s daily operations,” and thus sought ““to minimize outside interference with the day-to-day operations of the President and his closest advisors and to ensure executive branch control over presidential records during the President’s term of office.”” 1 F.3d at 1292 (citation omitted).

A court cannot properly engage in a mechanistic application of the FOIA that loses sight of the congressional purpose reflected in FOIA and, in particular, Congress’s concern to avoid intrusions inconsistent with the separation of powers. “[S]pecial considerations control” when a ruling implicates the interests of the Presidency or Vice Presidency “in maintaining the autonomy of its office and safeguarding the confidentiality of its communications, are implicated.” Cheney v. U.S. District Court, 542 U.S. 367, 385 (2004); see also Judicial Watch v. Dep’t of Energy, 412 F.3d 125, 132 (D.C. Cir. 2005) (holding that routine White House practice of detailing employees from agencies does not transform those detailees’ documents into agency records, observing that “it is not for a court to burden that practice when not under statutory compulsion”). The requested records provide no insight into the workings of the Secret Service, and do not provide the public with knowledge of what the agency is “up to.” Dep’t of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989). The Court is, instead, confronted with an overt effort to use the FOIA to investigate what the President and Vice President are “up to.” Plaintiff’s request, moreover, intrudes into the privacy of the President and his family in his home. For these reasons, coercing disclosure of WAVES records would infringe upon Presidential activities, which could potentially have a cooling effect on the advice

the President receives. The Court should therefore avoid construing FOIA to reach these records.¹²

While this Administration has chosen to voluntarily make post-visit WAVES records available, it has done so in the exercise of its own discretion in furtherance of government transparency. Whether or not this Administration voluntarily discloses visitor records says nothing about whether Congress intended to compel disclosures of these records under the FOIA. In addition, for the reasons set forth in Part II immediately below, requiring the White House to disclose pre-September 15 visitor records will impose an enormous burden on senior White House officials, only amplifying the separation of powers concerns raised by Judicial Watch's FOIA request.¹³

¹² The courts in both Washington Post and CREW rejected defendant's constitutional avoidance argument on the ground the FOIA statute is unambiguous. Washington Post, 459 F. Supp. 2d at 72; CREW, 527 F. Supp. 2d at 98-99. But Congress did not define the term "agency records." Although FOIA defines the separate terms "agency" and "record," the statute does not specify when "records" are properly deemed to belong to a FOIA "agency." See 5 U.S.C. § 552(f)(1), (2). As explained above, Congress excluded the President and Vice President from FOIA precisely because it was concerned that the statute would otherwise violate the constitutional separation of powers. See Armstrong v. Executive Office of the President, 1 F.3d 1274, 1292 (D.C. Cir. 1993). Thus, to the extent there is any ambiguity as to whether the records at issue are "agency records" under the Tax Analysts factors, those factors should be applied in a manner consistent with Congress's intent to avoid separation of powers concerns. Defendant has submitted a detailed declaration describing how the broad-based disclosure of White House visitor records will raise national security concerns and place significant burdens on senior White House officials.

¹³ The White House's disclosure of WAVES records is premised on its control of those records under the PRA. That allows the White House to provide for the near-immediate disclosure of the vast majority of WAVES records reflecting visits to the White House Complex. By contrast, FOIA would impose numerous requirements prior to the Secret Service's disclosure of WAVES records. For example, DHS regulations require the submission of written authorizations prior to the release of third-party records, such as the WAVES records sought here. See 6 C.F.R. § 5.3. These regulatory requirements are incorporated by the FOIA statute, which requires that an agency process a FOIA request only if such request "is made in

II. EVEN IF WAVES AND ACR RECORDS WERE SUBJECT TO FOIA, IT IS VIRTUALLY IMPOSSIBLE TO PROCESS PLAINTIFF'S RECORD REQUEST WITHOUT POTENTIALLY COMPROMISING NATIONAL SECURITY INTERESTS AND IMPLICATING SEPARATION OF POWERS CONCERNS.

Even if White House visitor records were in fact agency records subject to FOIA, a subset of these records would unquestionably be exempt from release pursuant to various FOIA exemptions, including Exemption 5. That exemption protects against the disclosure of information that is “normally privileged in the civil discovery context,” NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975), including information that is subject to the President’s executive privilege as it applies to national security and foreign policy information. E.g., United States v. Nixon, 418 U.S. 683, 710 (1974) (utmost deference is owing to the President’s need to protect national security, military, or diplomatic secrets); United States v. Reynolds, 345 U.S. 1 (1953) (privilege exists to protect against the disclosure of national security and military information).

WAVES and ACR records include information relating to highly sensitive meetings with national security implications. Tibbits Decl. ¶ 14. As demonstrated in the declaration submitted in support of defendant’s motion by the Executive Secretary of the President’s National Security

accordance with published rules stating the . . . procedures to be followed.” 5 U.S.C. § 552(a)(3)(A). If not, it is a failure to exhaust administrative remedies. See also Pusa v. FBI, No. 99-04603, slip op. at 5 (C.D. Cal. Aug. 3, 1999) (holding that plaintiff who failed to submit third party’s privacy waiver “has failed to exhaust administrative remedies under the FOIA by failing to comply with the agency’s published procedures for obtaining third-party information”) (attached hereto as Ex. J). Moreover, the disclosure of WAVES records may be subject to FOIA privacy exemptions such as Exemption (b)(6). See 5 U.S.C. § 552(b)(6) (protecting from disclosure information contained in “personnel and medical files and similar files”); United States Dep’t of State v. Washington Post Co., 456 U.S. 595, 602 (1982) (information that “applies to a particular individual” meets the threshold requirement for Exemption 6 protection).

Staff, although WAVES and ACR records are not classified, a broad-based disclosure of WAVES records could have serious consequences for United States national security interests. See Tibbits Decl. ¶ 29.¹⁴ Cf. CIA v. Sims, 471 U.S. 159, 178 (1985) (“[w]hat may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context”) (citation omitted); Edmonds v. DOJ, 405 F. Supp. 2d 23, 33 (D.D.C. 2005) (when combined with other information, “the five government-withheld documents could prove useful for identifying information gathering methods and activities . . . though each piece existing in its discrete informational orbit would lack valence”); ACLU v. DOJ, 321 F. Supp. 2d 24, 37 (D.D.C. 2004) (affirming that “this Circuit has embraced the government’s ‘mosaic’ argument in the context of FOIA requests that implicate national security concerns” in context of FOIA request regarding DOJ’s use of the Patriot Act).

While there is undeniably a critical need to withhold national security information contained in the WAVES database, it would be virtually impossible for the White House, in response to plaintiff’s unprecedentedly broad FOIA request for White House visitor records dating back to the beginning of the current Administration, to identify and segregate such information from other visitor information that can be publicly released pursuant to the President’s voluntary disclosure policy. That was precisely the situation presented in Los Angeles Times v. U.S. Department of Labor, in which the Department of Labor was unable to determine which records in two databases would be exempt from disclosure under FOIA, because those databases “do not contain any information” necessary to make that determination.

¹⁴ The classified version of that declaration describes the national security implications of WAVES records, including the harms that may occur if sensitive WAVES records are disclosed.

483 F. Supp. 2d 975, 986 (C.D. Cal. 2007) (citation omitted); compare Tibbits Decl. ¶ 27 (“Prior to September 15, 2009, the WAVES system was not designed to include data regarding the sensitive nature or classification of meetings or to indicate the sensitivity of a visitor’s affiliation.”). On that basis, the court held that, “[b]ecause there is no way for the Department of Labor to segregate out [exempt information in the database], the DOL properly withheld all the information requested.” Id. at 987. See generally Juarez v. Dep’t of Justice, 518 F.3d 54, 61 (D.C. Cir. 2008) (a court may rely on government declarations that show with reasonable specificity why documents withheld pursuant to valid exemptions cannot reasonably be segregated from non-exempt information); Swope v. Dep’t of Justice, 439 F. Supp. 2d 1, 7 (D.D.C. 2006) (the DEA justifiably withheld from release non-exempt portions of the records at issue upon its showing that exempt and non-exempt information could not reasonably be segregated); 5 U.S.C. § 552(b).

Here, the only way to determine whether a NSS appointment entered prior to September 15, 2009 implicates national security concerns is to have each NSS appointment be reviewed by the visatee or staff member who entered the visit information into the WAVES database. See Tibbits Decl. ¶ 27. This is because, as a general matter, the visatee or staff member who entered the visitor information is in the best position to determine whether a particular appointment implicates national security concerns. Id. However, even setting aside the fact that the passage of time results in the fading of memories, the NSS is primarily staffed with detailees from other executive agencies and departments who return to their home agencies—or sometimes leave government service entirely—after their White House detail has ended. Tibbits Decl. ¶ 31. Indeed, 106 employees—who are in the best position to determine whether an appointment they

entered or attended raises national security concerns—departed the National Security Staff between January and September of 2009. Tibbits Decl. ¶ 33. Departed staff members who have returned to their agencies or departments, or who no longer may be employed by the government, may no longer have security clearances and would be unable to access classified White House records to review and determine whether specific appointments implicate national security concerns. Tibbits Decl. ¶ 31. Due to the high turnover among the National Security Staff and the difficulty—if not impossibility—of contacting all prior National Security Staff members, it is not feasible to re-accumulate the necessary information to determine which appointments between January 20, 2009 and September 15, 2009 could harm our Nation’s national security interests if publicly disclosed. Tibbits Decl. ¶ 33.

As a result, to ensure that pre-September 15 visits that come within the national security exemption to the President’s voluntary disclosure policy are not disclosed, senior national security advisors would have to review NSS-generated WAVES records, of which there are tens-of-thousands. Tibbits Decl. ¶¶ 27, 35. This, too, would be a virtually impossible task which could not, in any event, guarantee that all national security records would be identified because NSS senior leadership may not have the necessary information on which to determine the sensitivity of any particular WAVES record. Tibbits Decl. ¶ 35.

Further, the review of WAVES records would not end with those generated by the NSS. Although the NSS generates the majority of appointments related to national security, other EOP components regularly schedule national security meetings. See Tibbits Decl. ¶ 36. Each of those components would need to try to piece together, after-the-fact, their records in order to determine whether they raise national security concerns. See Tibbits Decl. ¶ 37. And just as with the NSS,

any such effort would not guarantee that all sensitive records are identified and exempted.

Tibbits Decl. ¶ 37. What is certain is that such a review would require a substantial amount of time and attention from the most senior White House officials, severely impacting their ability to conduct government business. Tibbits Decl. ¶ 37. And equally certain is that the inadvertent release of even a few WAVES records that contain highly sensitive information could have significant negative consequences for our national security interests. Tibbits Decl. ¶ 29. For all these reasons, WAVES and ACR records are exempt from disclosure under FOIA.

Moreover, the imposition of such a burden on the President's top national security advisors and other senior White House officials would unquestionably give rise to significant separation of powers concerns. See Part I.F., supra. In CREW v. U.S. Department of Homeland Security, 532 F.3d 860 (D.C. Cir. 2008), the appellate court determined whether an interlocutory district court order, requiring the Secret Service to process a very limited FOIA request for visitor records relating to nine specifically identified individuals, constituted an appealable interlocutory injunction. The D.C. Circuit concluded that it did not, and concluded further that interlocutory appeal was also not available under the collateral order doctrine based on the argument that it was unacceptable to impose a burden on the White House to review WAVES records in relation to nine individuals in response to a FOIA request. In rejecting that separation of powers argument with respect to the specific case before it, the D.C. Circuit made observations that weigh very much the other way in regard to this case:

CREW has not made a massive, wide-ranging, “overly broad . . . [FOIA] request[]” that would require the President, Vice President, or their staffs to sort through mountains of files for responsive documents while “critiquing the unacceptable . . . [FOIA] requests line by line.” Rather, CREW’s request “‘precisely identified’ and ‘specific[ally] . . . enumerated’ the relevant materials,”

focusing on very specific records, all containing the same basic information: names, dates, and other visitor data. *Critically for our purposes, moreover, this particular FOIA request is narrowly drawn, targeting nine specific individuals.* Accordingly, the burden on the White House or Office of the Vice President to decide whether to claim Exemption 5 over any responsive records should prove minimal

532 F.3d at 867 (emphasis added) (internal citations omitted). Here, by contrast, Judicial Watch has made a massively expansive FOIA request, seeking all visitor WAVES and ACR records from January 20, 2009 forward.¹⁵ That request would require NSS staff and senior advisors to the President to review hundreds-of-thousands of visitor records, entry-by-entry, to determine whether it is necessary to exclude specific records of particular visits from disclosure. See, e.g., Tibbits Decl. ¶¶ 27, 35, 37; Droege Decl. ¶ 16 (noting that nearly 500,000 WAVES visitor records were created between January and September of 2009). Such a request very much gives rise to significant separation of powers concerns. For this reason and the additional reasons discussed above, the White House cannot be required to process plaintiff's FOIA request, even assuming *arguendo* that WAVES and ACR records are subject to FOIA, which they are not.

¹⁵ As plaintiff notes in its own press release, representatives from the White House met with representatives from Judicial Watch to discuss Judicial Watch's FOIA request. See Ex. K (Judicial Watch Files Lawsuit against Obama Administration to Obtain White House Visitor Logs); Ex. L (Nov. 30, 2009 letter from Norman L. Eisen, Special Counsel to the President, to Tegan Millspaw, Judicial Watch). During that meeting, the White House explained that it "cannot make a broad retroactive release of White House visitor records without raising profound national security concerns," and instead asked Judicial Watch "to focus and narrow" its request so as to "allow [the White House] to identify relevant records and release them to the public without endangering national security interests." Ex. L. Judicial Watch rejected these overtures, choosing instead to file this lawsuit.

CONCLUSION

For the foregoing reasons, this Court should grant summary judgment to defendant and deny summary judgment to plaintiff.

Dated: April 21, 2010

Respectfully submitted,

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

_____)	
JUDICIAL WATCH, INC.,)	
)	
Plaintiff,)	
)	
v.)	Case No. 1:09-cv-02312
)	
UNITED STATES SECRET SERVICE,)	
)	
Defendant.)	
_____)	

**DEFENDANT’S RESPONSE TO
PLAINTIFF’S STATEMENT OF MATERIAL FACTS NOT IN DISPUTE AND
DEFENDANT’S STATEMENT OF MATERIAL FACTS NOT IN DISPUTE**

Pursuant to LCvR 7(h), defendant United States Secret Service (“Secret Service” or “USSS”) hereby responds to plaintiff’s statement of material facts not in dispute and provides defendant’s statement of material facts not in dispute.

Defendant’s Response to Plaintiff’s Statement of Material Facts Not In Dispute

1. No dispute.
2. No dispute subject to the clarification that plaintiff’s Freedom of Information Act request, dated August 10, 2009, was received by the Secret Service on August 20, 2009, and sought “[a]ll official visitors logs and/or other records concerning visits made to the White House from January 20, 2009 to present.” See Ex. D.
3. No dispute subject to the clarification that the Secret Service responded to Judicial Watch’s FOIA request by letter dated October 8, 2009, stating that it interpreted that request “to encompass Access Control Records System (ACR) records, and/or Workers and Visitors Entry

System (WAVES) records” and that it is not just the Secret Service’s position, but the government’s position, that the requested records are not agency records subject to the FOIA but instead are records governed by the Presidential Records Act and remain under the exclusive legal custody and control of the White House Office and the Office of the Vice President.

Defendant refers to Exhibit E for its full and complete contents. See Ex. E.

4. Dispute. Judicial Watch’s administrative appeal only identified the Secret Service’s assertion that White House visitor records are not agency records subject to FOIA as a basis for its appeal. See Ex. F. Moreover, while defendant does not dispute that Judicial Watch’s administrative appeal identified prior litigation regarding WAVES and ACR records, defendant disputes that those matters have been fully litigated and that those decisions provide precedential value. No dispute that the Secret Service subsequently denied Judicial Watch’s administrative appeal, or that this lawsuit was filed on December 7, 2009.

5. No dispute subject to the clarification that WAVES and ACR data/records were provided to Judicial Watch in response to its January 20, 2006 FOIA request only after obtaining express authorization from the White House. See Declaration of Donald E. White (“White Decl.”) ¶ 14.

6. Disputed as plaintiff’s assertion is not a material fact. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (“As to materiality, the substantive law will identify which facts are material.”). The production of documents pursuant to a subpoena issued twelve years ago has no relevance to the question of whether the Obama Administration maintains control over WAVES and ACR records such that they are subject to the Presidential Records Act and not the Freedom of Information Act.

Defendant's Statement of Material Facts Not In Dispute

1. The United States Secret Service provides security for the White House Complex, and monitors and controls access to the Complex. See Declaration of Donald E. White ("White Decl.") ¶¶ 2, 5.

2. There are two interrelated electronic systems — collectively termed the White House Access Control System ("WHACS") — for controlling and monitoring access to the White House Complex: the Worker and Visitor Entrance System ("WAVES") and the Access Control Records System ("ACR"). Declaration of Philip C. Droege ("Droege Decl.") ¶ 4; White Decl. ¶ 6.

3. Throughout the presidency of Barack Obama, it has been the policy and practice of the White House, in accordance with the Presidential Records Act, to retain and maintain legal control over Presidential Records as defined in that Act, including, but not limited to, WAVES records and ACR records. Droege Decl. ¶ 3.

4. The process for entry of a proposed visitor into the White House Complex begins when an authorized White House Complex pass holder (such as a member of the President's or Vice President's staff) provides visit information to the Secret Service. Droege Decl. ¶ 5; White Decl. ¶ 7.

5. Authorized White House Complex pass holders provide visitor information to the Secret Service electronically by providing information such as the proposed visitor's identifying information (name, date of birth, and Social Security number), the date, time and location of the planned visit, the name of the staff member submitting the request, the name of the person to be visited, and the date of the request. Droege Decl. ¶ 5. An authorized White House Complex

pass holder enters this information into a computer that automatically forwards it to the Secret Service for processing. Droege Decl. ¶ 6.

6. WAVES records consist primarily of information that an authorized White House Complex pass holder has provided to the Secret Service. Droege Decl. ¶ 5; White Decl. ¶ 8.

7. The information identified in paragraph 5 is provided by authorized White House Complex pass holders on a confidential and temporary basis to the Secret Service for two limited purposes: (1) to enable the Secret Service to perform background checks to determine the existence of any protective concern; and (2) to enable the Secret Service to verify the visitor's admissibility at the time of visit. Droege Decl. ¶ 5; see also White Decl. ¶ 7.

8. When an authorized White House Complex pass holder provides visit information to the Secret Service, a Secret Service employee at the WAVES Center verifies that the requestor is authorized to make appointments for the specific location requested and fills in any additional information (or makes any changes, generally with the consent of the requestor) that may be necessary, conducts background checks, and then transmits the information electronically to the WHACS server. White Decl. ¶ 7.

9. Once an individual is cleared into the White House Complex, the visitor is generally issued a badge. An ACR record is generated whenever a pass is swiped over one of the electronic pass readers located at entrances to and exits from the White House Complex. Droege Decl. ¶ 7; White Decl. ¶ 9.

10. ACR records include information such as the visitor's name and badge number, the date and time of the swipe, and the post at which the swipe was recorded. Droege Decl. ¶ 7; White Decl. ¶ 9.

11. Once a visit takes place, WAVES records are typically updated electronically with information showing the time and place of entry into and exit from the White House Complex. The information is ACR information, although the time of arrival may differ slightly between the WAVES and ACR records. White Decl. ¶ 10.

12. The White House and the Secret Service have operated with the understanding that WAVES and ACR records are subject to the Presidential Records Act, and are not agency records. Droege Decl. ¶ 9.

13. Once a visit to the White House Complex is complete, the Secret Service has no continuing interest sufficient to justify its own preservation of WAVES or ACR records. White Decl. ¶ 11.

14. The Secret Service recognizes that WAVES and ACR records are under the exclusive legal control of the President and Vice President. White Decl. ¶ 11.

15. Since at least 2001, it has been the practice of the Secret Service to transfer newly-generated WAVES records on CD-ROM to the White House Office of Records Management (“WHORM”) generally every 30 to 60 days. Droege Decl. ¶ 10; White Decl. ¶ 11.

16. At least as early as 2001 (at the end of the Clinton administration), and upon revisiting the issue in 2004, the Secret Service and the White House recognized and agreed that ACR records should be treated in a manner generally consistent with WAVES records. Droege Decl. ¶ 11; White Decl. ¶ 13.

17. In May 2006, the Secret Service transferred to the WHORM ACR records covering the period from January 20, 2001 to April 30, 2006. Droege Decl. ¶ 11; White Decl. ¶ 13.

18. Since at least 2006, the Secret Service's typical practice has been to transfer ACR records to the WHORM every 30 to 60 days. Droege Decl. ¶ 11; White Decl. ¶ 13.

19. In May 2006, the WHORM entered into a Memorandum of Understanding ("MOU") with the Secret Service Records Management Program that both documented what was then understood to be past practice and interests regarding WAVES and ACR records, and confirmed the legal status of those records and the WHORM's management and custody of them under the Presidential Records Act. Droege Decl. ¶ 12; White Decl. ¶ 12.

20. The MOU provides, among other things, that the White House has a continuing interest in WAVES and ACR records, and that the White House continues to use the information contained in such records for various historical and informational purposes. Droege Decl. ¶ 13 & Attachment thereto (MOU ¶ 20).

21. The MOU reflects that the White House "at all times asserts, and the Secret Service disclaims, all legal control over any and all [WAVES and ACR] Records." Droege Decl. Attachment (MOU ¶ 24).

22. The Secret Service acknowledges in the MOU that its temporary retention of WAVES and ACR records after an individual's visit to the White House Complex is solely for the purpose of facilitating an orderly and efficient transfer of the records to the WHORM. Droege Decl. Attachment (MOU ¶ 22).

23. WAVES and ACR records are maintained as records subject to the Presidential Records Act. Droege Decl. ¶ 13.

24. On September 4, 2009, the White House announced a new policy to voluntarily disclose White House visitor records as "another important step toward a more open and

transparent government.” Ex. A.

25. The White House’s voluntary disclosure policy was made effective for WAVES visitor records (including those parts of ACR records that are incorporated after a visit) created after September 15, 2009. Ex. B.

26. The White House’s voluntary disclosure policy excludes WAVES records (including those parts of ACR records that are incorporated after a visit) that would threaten national security interests. Ex. B.

27. Anyone can request White House WAVES records (including those parts of ACR records that are incorporated after a visit) from this Administration to the extent those records were created on or prior to September 15, 2009. Ex. B; Ex. C.

28. Between January 20, 2009 and September 15, 2009, nearly 500,000 WAVES visitor records were created. Droege Decl. ¶ 16.

29. Since the announcement of the voluntary disclosure policy, the White House has made publicly available more than 2,500 WAVES visitor records created between January 20, 2009 and September 15, 2009, in response to individual requests from members of the public. Droege Decl. ¶ 17.

30. The White House has made publicly available more than 250,000 WAVES visitor records created after September 15, 2009, since the announcement of the voluntary disclosure policy. Droege Decl. ¶ 18.

31. The National Security Staff (“NSS”) is the primary office through which our Nation’s most sensitive national security information is transmitted from the Intelligence Community to the President and through which national security policy is made. Declaration of

Nathan D. Tibbits (“Tibbits Decl.”) ¶ 2.

32. The bulk of work conducted by the NSS is classified or impacts highly sensitive national security matters. Tibbits Decl. ¶ 2.

33. The WAVES system was enhanced in September 2009 to allow authorized WAVES users to designate an appointment scheduled after September 15, 2009, as highly sensitive due to either national security or non-national security concerns. Tibbits Decl. ¶ 15.

34. WAVES authorization was discontinued until training regarding the new functionality of the WAVES system was conducted. Tibbits Decl. ¶ 15.

35. A WAVES record would qualify for the non-national security highly sensitive designation and for exemption under the White House’s voluntary disclosure policy if the meeting does not relate to national security but its release would expose sensitive, high-level Executive branch deliberations. Tibbits Decl. ¶ 16.

36. Each month the USSS transfers WAVES records (including those parts of ACR records that are incorporated after a visit) to the WHORM. On a monthly basis, offices and units within the Executive Office of the President (“EOP”) receive the WAVES data for the appointments entered by that office or unit for auditing prior to disclosure. The purpose of the audit is to ensure that records scheduled for public disclosure are, in fact, appropriate for release. Tibbits Decl. ¶ 22.

37. NSS double checks all WAVES visitor records entered by NSS personnel (“NSS visitor records”) that were not initially designated as national security sensitive in order to ensure that no sensitive information will be inadvertently released. Tibbits Decl. ¶ 23.

38. Each month, the NSS sorts the NSS visitor records by visatee name and sends to

each visatee a list of their visitors, along with date and time of arrival and other pertinent information that may aide the visatee in making an exemption determination. The list is also sent to the individual who entered the appointment, if different from the visatee. The visatee must review and validate that the visit need not be exempted for national security reasons. Tibbits Decl. ¶ 23.

39. If the visatee referenced in paragraph 38 is no longer on staff, then the person who entered the request must review it. Tibbits Decl. ¶ 23.

40. If a visatee or person who entered a WAVES request is unable to confirm that a WAVES record need not be excluded from disclosure, then senior NSS leadership will look at the information available and cross-check that information, to the extent possible, against other meetings on that day, at that time, and in that location to determine if the visitor was part of an exempted meeting or visit. Tibbits Decl. ¶ 23.

41. After review by the visatee, or pertinent person, WAVES records are color coded, and records designated for public disclosure are reviewed for a third time by the Director for Counterintelligence and the Senior Director for Administration, before they are released. Tibbits Decl. ¶ 24.

42. As a general matter, the visatee and the WAVES user who enters an appointment are in the best position to determine whether a particular appointment implicates national security concerns. Tibbits Decl. ¶ 27.

43. Prior to September 15, 2009, the WAVES system did not include data regarding the sensitive nature of meetings. Tibbits Decl. ¶ 27.

44. The only way to now determine whether an NSS WAVES appointment entered

prior to September 15, 2009 implicates national security concerns is to have each NSS WAVES appointment be reviewed by the visatee and/or the individual who entered the information in the system. Tibbits Decl. ¶ 27.

45. Tens-of-thousands of NSS WAVES visitor records would need to be reviewed in order to comply with Judicial Watch's FOIA request. Tibbits Decl. ¶ 27.

46. The inadvertent release of even a few WAVES records that contain highly sensitive information could have significant negative consequences for our national security interests. Tibbits Decl. ¶ 29.

47. The NSS is primarily staffed with detailees from other executive agencies and departments who return to their home agencies or sometimes leave government service after their detail has ended. Tibbits Decl. ¶ 31.

48. Of the 310 current NSS members, 240 are detailees. Tibbits Decl. ¶ 31.

49. Departed staff members who have returned to their agencies or departments or obtained positions in the private sector may no longer have security clearances and would be unable to access classified White House records to review and determine whether the visitors were here for classified meetings. Tibbits Decl. ¶ 31.

50. Approximately 106 NSS employees departed the NSS between January and September of 2009. Tibbits Decl. ¶ 33.

51. Due to personnel turnover, there is no way for the NSS to re-accumulate the necessary information to determine which appointments between January 20, 2009 and September 15, 2009 could harm our Nation's national security interests if publicly disclosed. Tibbits Decl. ¶ 33.

52. To attempt to determine if visits from January to September 2009 need to be withheld due to national security concerns, high-ranking officials of the NSS would have to review WAVES records. Tibbits Decl. ¶ 35.

53. The review described in paragraph 52 would not guarantee that all records with national security implications are identified and exempted from public disclosure, because the NSS senior leadership may not have the necessary information to make an appropriate determination on the sensitivity of any particular WAVES record. Tibbits Decl. ¶ 35.

54. Review of historical WAVES records as described in paragraph 52 would create an inordinate burden on the time of NSS senior leadership and compromise their ability to conduct national security business. Tibbits Decl. ¶ 35.

55. EOP components other than the NSS regularly schedule national security-related meetings. Tibbits Decl. ¶ 36.

56. Senior White House officials regularly attend meetings on national security. Tibbits Decl. ¶ 36.

57. EOP components, including the President's Intelligence Advisory Board and the Office of the Vice President (including the Vice President's national security staff), regularly schedule national security-related meetings. Tibbits Decl. ¶ 36.

58. Hundreds of thousands of WAVES visitor records created prior to September 15, 2009 would need to be reviewed to determine the national security sensitivity of meetings reflected in those records. Tibbits Decl. ¶ 37.

59. A review of records as described in paragraph 58 would not guarantee that all sensitive records are identified and exempted. Tibbits Decl. ¶ 37.

60. A review of records as described in paragraph 58 would require a substantial amount of time and attention from the most senior White House officials and would severely impact their ability to conduct government business. Tibbits Decl. ¶ 37.

Dated: April 21, 2010

Respectfully submitted,

TONY WEST
Assistant Attorney General

JOHN R. TYLER
Assistant Branch Director

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UNITED STATES SECRET SERVICE

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

_____)	
JUDICIAL WATCH, INC.,)	
)	
	Plaintiff,)	
)	
	v.)	Case No. 1:09-cv-02312
)	
UNITED STATES SECRET SERVICE,)	
)	
	Defendant.)	
_____)	

DECLARATION OF PHILIP C. DROEGE

I, Philip C. Droege, hereby declare as follows:

1. I am the Director of the White House Office of Records Management (“WHORM”). In this capacity, I am responsible for managing, preserving, and forwarding to the National Archives and Records Administration (“NARA”) at the appropriate time records reflecting the business of the Presidency and Vice Presidency in accordance with the Presidential Records Act. I have held this position since July 2004, and have been an employee of the White House Office since July 1990. The statements made herein are based on my personal knowledge and on information made available to me in my official capacity.

I. The White House and Presidential Records

2. The United States Secret Service provides security for and monitors and controls access to the White House Complex, which includes the White House, the Eisenhower Executive Office Building (“EEOB”), the grounds encompassing the EEOB and the White House, and the New Executive Office Building. The White House Complex includes office space for the

President and his closest advisors and staff in the White House Office, as well as office space for the Vice President and his closest advisors and staff in the Office of the Vice President.

3. Throughout the presidency of Barack Obama, it has been the policy and practice of the White House Office, in accordance with the Presidential Records Act, 44 U.S.C. §§ 2201, *et seq.*, to retain and maintain legal control over Presidential Records as defined in that Act. This includes, but is not limited to, records generated by the Worker and Visitor Entrance System (“WAVES”) and the Access Control Records System (“ACR”).

II. Records Regarding the White House Complex

4. The Secret Service utilizes two interrelated computer systems — collectively termed the White House Access Control System (“WHACS”) — for controlling and monitoring access to the White House Complex: the WAVES and the ACR.

a. WAVES Records

5. Authorized White House Complex pass holders arrange entry for a visit to the White House Complex by providing the Secret Service with information, including the proposed entrant's identifying information (name, date of birth, and Social Security number); the date, time and location of the planned visit; the name of the staff member submitting the request; the name of the person to be visited; and the date of the request. This identifying information regarding proposed visitors is provided by authorized White House Complex pass holders to the Secret Service on a confidential and temporary basis for two limited purposes: (1) to enable the Secret Service to perform background checks to determine the existence of any protective concern, that is, whether, and/or under what conditions, a visitor may be temporarily admitted to the Complex, and (2) to enable the Secret Service to verify the admissibility at the time of visit. WAVES

records therefore consist primarily of information that an authorized White House Complex pass holder has provided to the Secret Service.

6. Ordinarily, this identifying information is provided to the Secret Service electronically. An authorized White House Complex pass holder enters the information into a computer that automatically forwards it to the Secret Service for processing. The information may also be provided to the Secret Service in other ways. These other ways are by e-mail, facsimile, telephone or physical delivery of a list. In these instances, Secret Service personnel may enter the information into the WAVES system.

b. ACR Records

7. Once an individual is cleared into the White House Complex, s/he is generally issued an appropriate badge (although passes are often not issued for public tours or large group events). Barring technical difficulties, an ACR record is generated whenever a badge is swiped over one of the electronic pass readers located at entrances to and exits from the White House Complex. ACR records include information such as the entrant's name and badge number, the date and time of the swipe, and the post at which the swipe was recorded.

8. Once a visit takes place, WAVES records are typically updated electronically with ACR information showing the time and place of the entry into and exit from the White House Complex. Secret Service officers may also manually update WAVES records, such as by entering a time of arrival for large groups.

III. Treatment of WAVES/ACR Records

9. The White House and the Secret Service have operated with the understanding that the WAVES and ACR records, which contain information relating to visitors entering the

White House Complex to conduct Presidential and Vice Presidential business, are subject to the Presidential Records Act, and are not agency records.

10. Since at least 2001, it has been the practice of the Secret Service to transfer newly-generated WAVES records to the WHORM on CD-ROM, generally every 30 to 60 days. (The note and description fields from prior to 2006 were not initially transferred to the WHORM; those fields from 2004 to 2006 were subsequently transferred to the WHORM in 2006.) The WHORM understands that the Secret Service's regular procedure is to electronically delete the active WAVES data from Secret Service servers after transfer to the WHORM. The Secret Service has, however, retained copies of WAVES data, as well as various other WHACS data, due to, among other things, then-pending litigation. I understand the Secret Service is in the process of determining the appropriate disposition of those data.

11. At least as early as 2001 (at the end of the Clinton Administration), and upon revisiting the issue in 2004, the Secret Service and the White House recognized and agreed that ACR records should be treated in a manner generally consistent with WAVES records. Since at least 2006, the Secret Service has been transferring ACR records to the WHORM generally every 30 to 60 days, similar to the transfer of WAVES records. (ACR records from 2001 to 2006 were transferred from the Secret Service to the WHORM in 2006.) The Secret Service has, however, retained copies of ACR data, as well as various other WHACS data, due to, among other things, then-pending litigation. I understand the Secret Service is in the process of determining the appropriate disposition of those data.

12. In May 2006, the WHORM entered into a Memorandum of Understanding ("MOU") (attached hereto) with the Secret Service Records Management Program that

documented what was then understood to be past practice and interests regarding WAVES and ACR records. The MOU also confirmed the legal status of those records and WHORM's management and custody of them under the Presidential Records Act.

13. The MOU expressly acknowledges the "White House . . . has a continuing interest in [the WAVES and ACR] Records" in connection with visitors to the White House Complex. Attachment at ¶ 20. This is true because such records reflect the activities and official functions of the Presidency and Vice Presidency and the White House continues to use the information contained in such records for various historical and informational purposes. Accordingly, WAVES and ACR records, like other records that reflect the activities of the Presidency and Vice Presidency, are maintained as records subject to the Presidential Records Act.

14. By contrast, the USSS has expressly disclaimed "all legal control over any and all WHACS Records subject to [the MOU]." Attachment at ¶ 24. Indeed, the MOU acknowledges that the Secret Service's temporary retention of such records after an individual's visit to the White House Complex is solely for the purpose of facilitating an orderly and efficient transfer of the records to the WHORM.

15. At the conclusion of a Presidential Administration, it is the practice of the WHORM to transfer to NARA all WAVES and ACR records the WHORM has received during the course of that Administration.

IV. White House Voluntary Disclosure Policy

16. Between January 20, 2009 and September 15, 2009, nearly 500,000 WAVES visitor records were created.

17. Since the announcement of the voluntary disclosure policy, the White House has made publicly available more than 2,500 WAVES visitor records created between January 20, 2009 and September 15, 2009, in response to individual requests from members of the public.

18. In addition, the White House has also made publicly available more than 250,000 WAVES visitor records created after September 15, 2009, since the announcement of the voluntary disclosure policy.

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

Executed on April 21, 2010.

A handwritten signature in black ink, appearing to read "Philip Droege", with a long horizontal line extending to the right.

PHILIP C. DROEGE, DIRECTOR
WHITE HOUSE OFFICE OF RECORDS
MANAGEMENT

MEMORANDUM OF UNDERSTANDING
Between the White House Office of Records Management and
the United States Secret Service Records Management Program
Governing Records Generated By the White House Access Control System

INTRODUCTION

1. This MEMORANDUM OF UNDERSTANDING between the White House Office of Records Management ("White House") and the United States Secret Service Records Management Program ("the Secret Service") (collectively, "The Parties") memorializes and confirms the agreement governing the status and handling of records generated through the White House Access Control System.

DEFINITIONS

2. The White House Access Control System ("WHACS") includes two interrelated systems used by the Secret Service for controlling and monitoring access to the White House Complex:
 - a. The Worker and Visitor Entrance System ("WAVES");
 - b. The Access Control Records System ("ACR").
3. "WHACS Records" include "WAVES Records" and "ACR Records."
4. "WAVES Records" consist of records generated when an authorized White House pass holder submits to the Secret Service information about visitors (and workers) whose business requires their presence at the White House Complex.
 - a. WAVES Records include the following information submitted by the pass holder: the visitor's name; the visitor's date of birth; the visitor's Social Security Number; the time and location of the planned visit; the name of the pass holder submitting the request; the date of the request.
 - b. Once a visit takes place, WAVES Records are typically updated electronically with information showing the actual time and place of the visitor's entry into and exit from the White House Complex.
5. "ACR Records" consist of records generated when a White House pass holder, worker, or visitor swipes his or her permanent or temporary pass over one of the electronic pass readers located at entrances to and exits from the White House Complex.

- a. ACR Records include the following information: the pass holder's name and badge number; the time and date of the swipe; and the post at which the swipe was recorded.
6. "Federal Records" mean documentary materials subject to the Federal Records Act (44 U.S.C. § 3301 et seq.).
7. "Presidential Records" mean documentary materials subject to the Presidential Records Act (44 U.S.C. § 2201 et seq.).
8. "The White House Complex" means the White House and the Eisenhower Executive Office Building, and the secured grounds encompassing them, and the New Executive Office Building.
9. The "White House Office of Records Management" ("WHORM") means the office in the White House responsible for preserving Presidential Records.

BACKGROUND

10. WHACS is operated by the Secret Service in order to control and monitor the entry and exit of persons into and out of the White House Complex.
11. The information contained in WHACS Records originates with White House pass holders, visitors, and workers as a result of White House business.
 - a. Such information reflects the conduct of the President's business by providing details about the comings and goings of staff, workers, and visitors to the White House.
12. The authorized White House pass holders provide information contained in WAVES Records to the Secret Service temporarily for two limited purposes:
 - a. To allow the Secret Service to perform background checks to determine whether, and under what conditions, to authorize the visitor's temporary admittance to the White House Complex;
 - b. To allow the Secret Service to verify the visitor's admissibility at the time of the visit.
13. Once the visit ends, the information contained in WAVES Records and ACR Records has no continuing usefulness to the Secret Service.
14. It has been the longstanding practice of the Secret Service to transfer WAVES Records on CD-ROM to WHORM every 30 to 60 days. Except as noted in paragraph 16 below, once the Secret Service transferred the WAVES Records, the Secret Service ensured that those records were erased from its computer system.

- a. Under this practice, the Secret Service has retained WAVES Records for completed visits for only a brief period, and solely for the purpose of facilitating an orderly and efficient transfer of those records to WHORM.
15. The Secret Service historically has retained ACR Records in its computer system without transferring those records to WHORM. In 2004, however, the Secret Service and the White House recognized and agreed that ACR Records should be treated in a manner consistent with the treatment of WAVES Records, and concluded that ACR Records should be transferred to WHORM and eliminated from the Secret Service's files. The Secret Service has continued to maintain ACR Records pending a legal determination of their status as Presidential Records.
 16. In October 2004, at the request of the National Archives and Records Administration ("NARA"), the Secret Service began retaining its own copy of the WAVES Records that it transferred to the White House.
 - a. The Secret Service agreed to NARA's request on the understanding that it would be a temporary practice maintained until a legal determination was made confirming the propriety of handling WHACS Records as Presidential Records.

UNDERSTANDING AND AGREEMENT

17. The purpose of this Memorandum of Understanding is to express and embody The Parties' understanding and agreement that WHACS Records whenever created:
 - a. are at all times Presidential Records;
 - b. are not Federal Records; and
 - c. are not the records of an "agency" subject to the Freedom of Information Act (5 U.S.C. § 552).
18. The Parties understand and agree that all WHACS Records are at all times under the exclusive legal custody and control of the White House.
 - a. Although the Secret Service may at times have physical possession of WHACS Records, such temporary physical possession does not alter the legal status of those records, and does not operate in any way to divest the White House of complete and exclusive legal control.
19. The Parties understand and agree that any information provided to the Secret Service for the creation, or in the form, of WHACS Records is provided under an express reservation of White House control.

20. The Parties understand and agree that the White House, but not the Secret Service, has a continuing interest in WHACS Records and that the White House continues to use the information contained in such records for various purposes. Specifically:
 - a. WAVES Records have historical and other informational value to the White House as evidence of who has been invited and/or granted admission to the White House to meet with the President or members of his staff.
 - b. ACR Records have historical or other informational value to the White House, as evidence of the comings and goings of staff, visitors, and workers at the White House Complex in the conduct of White House business.
21. The Parties understand and agree that, once a visitor's visit to the White House Complex is complete, the Secret Service has no continuing interest in preserving or retaining WAVES Records. The Parties also understand and agree that the Secret Service has no interest whatsoever in preserving or retaining ACR Records.
 - a. WHACS Records are therefore not appropriate for preservation by the Secret Service either as evidence of the Secret Service's activities or for their informational value.
22. The Secret Service understands and agrees that it will regularly transfer all WHACS Records in its possession to WHORM, and that it will not retain its own copies of any WHACS Records except as is necessary to facilitate the transfer of those records to WHORM.
 - a. Any temporary retention of WHACS Records by the Secret Service after the visit, entrance, or exit memorialized by those records is solely for the purpose of facilitating an orderly and efficient transfer of those records, and does not operate in any way to divest the White House of complete and exclusive legal control.
23. The understandings and agreements expressed herein apply to:
 - a. Any and all WHACS Records currently in the possession or custody of the Secret Service;
 - b. Any and all WHACS Records that may be generated at any time subsequent to the execution of this Memorandum of Understanding.
24. It is specifically intended by The Parties that the understandings and agreements set forth herein serve as evidence that the White House at all times asserts, and the Secret Service disclaims, all legal control over any and all WHACS Records subject to this Memorandum of Understanding.

- a. The foregoing is not intended, and should not be construed, to suggest that WHACS Records in the possession or custody of the Secret Service before the execution of this Memorandum of Understanding were under the legal control of the Secret Service.



Director, White House Office
of Records Management



Chief Records Officer,
United States Secret Service

Dated: 5-17, 2006

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
JUDICIAL WATCH, INC.,)	
	Plaintiff,)	
)	
v.)	Case No. 1:09-cv-02312
)	
UNITED STATES SECRET SERVICE,)	
	Defendant.)	
_____)	

DECLARATION OF DONALD E. WHITE
DEPUTY ASSISTANT DIRECTOR
UNITED STATES SECRET SERVICE

I, Donald E. White, hereby declare as follows:

1. I am a Deputy Assistant Director of the Office of Protective Operations for the United States Secret Service ("Secret Service"), which is a component of the Department of Homeland Security ("DHS"). I have held this position since February 2009. The statements made herein are based on my personal knowledge or on information made available to me in my official capacity.

Functions of the Secret Service

2. The Secret Service is a protective and law enforcement agency operating under the provisions of Title 18 of the United States Code, Sections 3056 and 3056A. Pursuant to Section 3056, the Secret Service is charged with the protection of the President and Vice President of the United States and their immediate families; major candidates for President and Vice President of the United States and their spouses; the President-elect and Vice President-elect and their immediate families; former Presidents and Vice Presidents of the United States,

their spouses, and minor children; visiting foreign heads of state and heads of government; and certain other individuals as directed by the President of the United States. By statute, the Secret Service's protection of the President and Vice President (as well as the President-elect and Vice President-elect) is mandatory. Additionally, the Secret Service is authorized to provide security for the White House Complex and the Vice President's official residence; foreign diplomatic missions in the Washington, D.C., area, and certain other locations within the United States; designated events of national significance; as well as other locations.

3. The Office of Protective Operations ("OPO") is one of eight directorates in the Secret Service that manage various operational and support functions. The OPO is responsible for establishing policies related to the Secret Service's protective mission and for overseeing the operational divisions that protect the persons, places, and events that the Secret Service is authorized to protect. In my capacity as a Deputy Assistant Director of the OPO, the representations made in this declaration are made on behalf of the Secret Service as an agency and not solely on behalf of the OPO.

4. The "White House Complex" (also "Complex"), for purposes of access as secured by the Secret Service, includes the White House; the Eisenhower Executive Office Building ("EEOB"), which is also known as the "Old Executive Office Building"; the grounds encompassing the EEOB and the White House; and the New Executive Office Building ("NEOB"). Housed in the White House, the EEOB, and the NEOB are the offices of various staff of the Executive Office of the President and Vice President.

5. As part of its function to provide security for the White House Complex, the Secret Service monitors and controls access to the Complex.

Records Regarding the White House Complex

A. Record Types

6. There are two interrelated electronic systems – collectively termed the White House Access Control System ("WHACS") – for controlling and monitoring access to the White House Complex: the Worker and Visitor Entrance System ("WAVES") and the Access Control Records System ("ACR").

7. When an authorized White House Complex pass holder¹ (including, but not limited to, members of the President's and Vice President's staffs) provides visit information to the Secret Service, a Secret Service employee at the WAVES Center verifies that the requestor is authorized to make appointments for the specific location requested, fills in any additional necessary information (or makes any changes, generally with the consent of the requestor), conducts background checks, and transmits the information electronically to the WHACS server. The Secret Service uses the information provided to perform background checks to determine whether, and/or under what conditions, a visitor may be temporarily admitted to the Complex, and to allow the Secret Service to verify the visitor's admissibility at the time of the visit.

8. WAVES records contain various fields, the majority of which contain information an authorized White House Complex pass holder has provided to the Secret Service. Among those fields is a description field, which may contain comments provided by the authorized White House Complex pass holder. The note field and the description field may be annotated by Secret Service personnel with limited information as a result of background checks performed by the Secret Service and/or with instructions, including coded instructions, to Secret Service

¹Not all White House Complex pass holders are authorized to submit WAVES requests.

officers (such as security information, the name and/or initials of Secret Service personnel, or notes reflecting the circumstances pursuant to which an individual is to be admitted).

9. Once an individual is cleared into the White House Complex, s/he is generally issued an appropriate badge (although passes are often not issued for large groups). Barring technical difficulties, an ACR record is generated whenever a badge is swiped over one of the electronic pass readers located at entrances to and exits from the White House Complex. ACR records include information such as the entrant's name and badge number, the date and time of the swipe, and the post at which the swipe was recorded.

10. Once a visit takes place, WAVES records are typically updated electronically² with ACR information showing the time and place of the entry into and exit from the White House Complex. (The time of arrival may differ slightly, however, between the WAVES and ACR records.) The after-visit records that combine WAVES and parts of ACR information are still commonly referred to as WAVES records, though they may also occasionally be referred to as WHACS records.

B. White House and Office of the Vice President Control over White House Access Records and the Maintenance of these Records

11. Once a visit to the White House Complex is complete, the Secret Service has no continuing interest sufficient to justify its own preservation or retention of WAVES or ACR records, and the Secret Service recognizes that such records are under the exclusive legal control of the President and Vice President. Since at least 2001, it has been the practice of the Secret Service to transfer newly-generated WAVES records on CD-ROM to the White House Office of

²Secret Service officers may also manually update WAVES records, such as by entering a time of arrival for large groups.

Records Management ("WHORM"), generally every 30 to 60 days. (The note and description fields from prior to 2006 were not initially transferred to the WHORM; those fields from 2004 to 2006 were subsequently transferred to the WHORM in 2006.) It is the intent of the Secret Service that, once transferred, the WAVES records are to be erased from its computer system. I have been informed that active WAVES data on the servers older than 60 days are purged daily and overwritten on the servers. The Secret Service has, however, retained copies of WAVES and ACR data, as well as various other WHACS data, due to, among other things, then-pending litigation. The Secret Service is in the process of determining the appropriate disposition of those data.

12. In May 2006, the Secret Service Records Management Program entered into a Memorandum of Understanding ("MOU") with the WHORM that documented what was then understood to be past practice and interests regarding WAVES and ACR records. The MOU also confirmed the legal status of those records and WHORM's management and custody of them under the Presidential Records Act. A true and correct copy of the MOU is attached hereto.

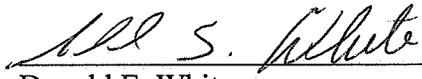
13. At least as early as 2001 (at the end of the Clinton Administration), and upon revisiting the issue in 2004, the Secret Service and the White House recognized and agreed that ACR records should be treated in a manner generally consistent with the treatment of WAVES records. The White House and the Secret Service have determined that ACR records should be transferred to the WHORM and deleted from the Secret Service's computers like WAVES records. In May 2006, the Secret Service transferred to the WHORM ACR records covering the period from 12:00 p.m. on January 20, 2001, to April 30, 2006. (The Secret Service has also transferred, to the National Archives and Records Administration, ACR records covering the

period from 12:00 p.m. on January 20, 1993, to 12:00 p.m. on January 20, 2001.) The ACR records in these transfers are believed to be those from the known or primary database of ACR records. Since then, the Secret Service's typical practice has been to transfer ACR records to the WHORM, similar to the transfer of WAVES records. The Secret Service has, however, retained copies of WAVES and ACR data, as well as various other WHACS data, due to, among other things, then-pending litigation. The Secret Service is in the process of determining the appropriate disposition of those data.

14. I have been advised that WAVES and ACR data/records were released in Judicial Watch v. United States Secret Service, No. 06-310 (D.D.C.) and Citizens for Responsibility and Ethics in Washington v. United States Department of Homeland Security, No. 06-883 (D.D.C.), only after the White House expressly authorized these releases.

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

Executed on April 20, 2010.



Donald E. White
Deputy Assistant Director
United States Secret Service

MEMORANDUM OF UNDERSTANDING
Between the White House Office of Records Management and
the United States Secret Service Records Management Program
Governing Records Generated By the White House Access Control System

INTRODUCTION

1. This MEMORANDUM OF UNDERSTANDING between the White House Office of Records Management ("White House") and the United States Secret Service Records Management Program ("the Secret Service") (collectively, "The Parties") memorializes and confirms the agreement governing the status and handling of records generated through the White House Access Control System.

DEFINITIONS

2. The White House Access Control System ("WHACS") includes two interrelated systems used by the Secret Service for controlling and monitoring access to the White House Complex:
 - a. The Worker and Visitor Entrance System ("WAVES");
 - b. The Access Control Records System ("ACR").
3. "WHACS Records" include "WAVES Records" and "ACR Records."
4. "WAVES Records" consist of records generated when an authorized White House pass holder submits to the Secret Service information about visitors (and workers) whose business requires their presence at the White House Complex.
 - a. WAVES Records include the following information submitted by the pass holder: the visitor's name; the visitor's date of birth; the visitor's Social Security Number; the time and location of the planned visit; the name of the pass holder submitting the request; the date of the request.
 - b. Once a visit takes place, WAVES Records are typically updated electronically with information showing the actual time and place of the visitor's entry into and exit from the White House Complex.
5. "ACR Records" consist of records generated when a White House pass holder, worker, or visitor swipes his or her permanent or temporary pass over one of the electronic pass readers located at entrances to and exits from the White House Complex.

- a. ACR Records include the following information: the pass holder's name and badge number; the time and date of the swipe; and the post at which the swipe was recorded.
6. "Federal Records" mean documentary materials subject to the Federal Records Act (44 U.S.C. § 3301 et seq.).
7. "Presidential Records" mean documentary materials subject to the Presidential Records Act (44 U.S.C. § 2201 et seq.).
8. "The White House Complex" means the White House and the Eisenhower Executive Office Building, and the secured grounds encompassing them, and the New Executive Office Building.
9. The "White House Office of Records Management" ("WHORM") means the office in the White House responsible for preserving Presidential Records.

BACKGROUND

10. WHACS is operated by the Secret Service in order to control and monitor the entry and exit of persons into and out of the White House Complex.
11. The information contained in WHACS Records originates with White House pass holders, visitors, and workers as a result of White House business.
 - a. Such information reflects the conduct of the President's business by providing details about the comings and goings of staff, workers, and visitors to the White House.
12. The authorized White House pass holders provide information contained in WAVES Records to the Secret Service temporarily for two limited purposes:
 - a. To allow the Secret Service to perform background checks to determine whether, and under what conditions, to authorize the visitor's temporary admittance to the White House Complex;
 - b. To allow the Secret Service to verify the visitor's admissibility at the time of the visit.
13. Once the visit ends, the information contained in WAVES Records and ACR Records has no continuing usefulness to the Secret Service.
14. It has been the longstanding practice of the Secret Service to transfer WAVES Records on CD-ROM to WHORM every 30 to 60 days. Except as noted in paragraph 16 below, once the Secret Service transferred the WAVES Records, the Secret Service ensured that those records were erased from its computer system.

- a. Under this practice, the Secret Service has retained WAVES Records for completed visits for only a brief period, and solely for the purpose of facilitating an orderly and efficient transfer of those records to WHORM.
15. The Secret Service historically has retained ACR Records in its computer system without transferring those records to WHORM. In 2004, however, the Secret Service and the White House recognized and agreed that ACR Records should be treated in a manner consistent with the treatment of WAVES Records, and concluded that ACR Records should be transferred to WHORM and eliminated from the Secret Service's files. The Secret Service has continued to maintain ACR Records pending a legal determination of their status as Presidential Records.
 16. In October 2004, at the request of the National Archives and Records Administration ("NARA"), the Secret Service began retaining its own copy of the WAVES Records that it transferred to the White House.
 - a. The Secret Service agreed to NARA's request on the understanding that it would be a temporary practice maintained until a legal determination was made confirming the propriety of handling WHACS Records as Presidential Records.

UNDERSTANDING AND AGREEMENT

17. The purpose of this Memorandum of Understanding is to express and embody The Parties' understanding and agreement that WHACS Records whenever created:
 - a. are at all times Presidential Records;
 - b. are not Federal Records; and
 - c. are not the records of an "agency" subject to the Freedom of Information Act (5 U.S.C. § 552).
18. The Parties understand and agree that all WHACS Records are at all times under the exclusive legal custody and control of the White House.
 - a. Although the Secret Service may at times have physical possession of WHACS Records, such temporary physical possession does not alter the legal status of those records, and does not operate in any way to divest the White House of complete and exclusive legal control.
19. The Parties understand and agree that any information provided to the Secret Service for the creation, or in the form, of WHACS Records is provided under an express reservation of White House control.

20. The Parties understand and agree that the White House, but not the Secret Service, has a continuing interest in WHACS Records and that the White House continues to use the information contained in such records for various purposes. Specifically:
 - a. WAVES Records have historical and other informational value to the White House as evidence of who has been invited and/or granted admission to the White House to meet with the President or members of his staff.
 - b. ACR Records have historical or other informational value to the White House, as evidence of the comings and goings of staff, visitors, and workers at the White House Complex in the conduct of White House business.
21. The Parties understand and agree that, once a visitor's visit to the White House Complex is complete, the Secret Service has no continuing interest in preserving or retaining WAVES Records. The Parties also understand and agree that the Secret Service has no interest whatsoever in preserving or retaining ACR Records.
 - a. WHACS Records are therefore not appropriate for preservation by the Secret Service either as evidence of the Secret Service's activities or for their informational value.
22. The Secret Service understands and agrees that it will regularly transfer all WHACS Records in its possession to WHORM, and that it will not retain its own copies of any WHACS Records except as is necessary to facilitate the transfer of those records to WHORM.
 - a. Any temporary retention of WHACS Records by the Secret Service after the visit, entrance, or exit memorialized by those records is solely for the purpose of facilitating an orderly and efficient transfer of those records, and does not operate in any way to divest the White House of complete and exclusive legal control.
23. The understandings and agreements expressed herein apply to:
 - a. Any and all WHACS Records currently in the possession or custody of the Secret Service;
 - b. Any and all WHACS Records that may be generated at any time subsequent to the execution of this Memorandum of Understanding.
24. It is specifically intended by The Parties that the understandings and agreements set forth herein serve as evidence that the White House at all times asserts, and the Secret Service disclaims, all legal control over any and all WHACS Records subject to this Memorandum of Understanding.

- a. The foregoing is not intended, and should not be construed, to suggest that WHACS Records in the possession or custody of the Secret Service before the execution of this Memorandum of Understanding were under the legal control of the Secret Service.



Director, White House Office
of Records Management



Chief Records Officer,
United States Secret Service

Dated: 5-17, 2006

REDACTED

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

JUDICIAL WATCH, INC.,)

Plaintiff,)

v.)

UNITED STATES SECRET SERVICE,)

Defendant.)

Case No. 1:09-cv-02312

DECLARATION OF NATHAN D. TIBBITS

I, Nathan D. Tibbits, hereby declare as follows:

1. (U) I am the Executive Secretary of the National Security Staff ("NSS"). In this capacity, I serve as the chief operating officer for the National Security Council and the Homeland Security Council¹ and a principal point of contact between the NSS and other units within the Executive Office of the President, as well as other government agencies. As part of these responsibilities, I assist in directing the activities of the NSS on a broad range of defense, intelligence and foreign policy matters impacting national security. I have been the Executive Secretary of the NSS since October 2009. The statements made herein are based on my personal knowledge and on information made available to me in my official capacity.

¹ (U) For the purposes of the declaration, the National Security Council (NSC); the Homeland Security Council (HSC), and the National Security Staff (NSS) which supports them, are referred to collectively as the NSS.

REDACTED

Counterintelligence Overview

2. (U) The NSS is the primary office through which our most sensitive national security information is transmitted from the Intelligence Community to the President and through which national security policy is made. Necessarily, the bulk of the work conducted by the NSS is classified or impacts highly sensitive national security matters. National Security work, by its very nature, must be secretive.²

3. [REDACTED]

4. [REDACTED]

² (U) Portions of this declaration are marked SECRET/NOFORN because they reveal counterintelligence methods that could harm national security. While some information in this declaration may appear innocuous on its face, read as a whole, it would provide a road map to some foreign intelligence services on how to mine publicly disclosed WAVES data for sensitive information relating to United States national security activities.

REDACTED

[REDACTED]

5. [REDACTED]

6. [REDACTED]

7. [REDACTED]

REDACTED

[REDACTED]

8. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

9. [REDACTED]

[REDACTED]

[REDACTED]

REDACTED

[REDACTED]

10. [REDACTED]

11. [REDACTED]

12. [REDACTED]

REDACTED

[REDACTED]

13. [REDACTED]

[REDACTED]

14. (U) As demonstrated above, the WAVES system contains very sensitive information. It is not classified, however, in part because, prior to September 2009, it was an internal system not intended for public disclosure. In order to protect this sensitive information from inadvertent public disclosure after the voluntary disclosure policy was announced in September 2009, the White House enhanced the WAVES system, as described below, to allow highly sensitive meetings, including those with national security implications, to be flagged at the outset. In addition, NSS instituted an extensive auditing procedure which relies heavily on the expertise of the NSS staff to determine the sensitivity of the record at the time of entry, making segregation of these records feasible prior to disclosure.

Enhancement of the WAVES System

15. (U) In September 2009, the WAVES system was enhanced to allow authorized WAVES users to designate an appointment as highly sensitive (and therefore not appropriate for

REDACTED

public disclosure). If a WAVES user designates an appointment as highly sensitive, s/he is also required to select whether the particular sensitivity of a meeting is derived from national security or non-national security matters. This function became operable for appointments scheduled after September 15, 2009. To ensure that WAVES users understood the new requirements, WAVES authorization was discontinued until training regarding the new functionality of the WAVES system was conducted.

Non-National Security

16. (U) As noted above, a WAVES user can designate a meeting as highly sensitive and therefore exempt the WAVES record from public disclosure for non-national security reasons. A record would qualify for this non-national security highly sensitive exemption under the voluntary disclosure program if the meeting does not relate to national security but its release would expose sensitive, high-level Executive branch deliberations, such as the possible selection of a Supreme Court nominee. When announcing the voluntary disclosure program, the White House stated it would also disclose the number of non-national security highly sensitive meetings withheld each month. Since the voluntary disclosure policy took effect in mid-September to date, no visitor records have been withheld due to non-national security sensitivity.

National Security

17. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

REDACTED

- [REDACTED]
- [REDACTED]
18. [REDACTED]
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19. [REDACTED]
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20. [REDACTED]
- [REDACTED]
21. [REDACTED]
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- [REDACTED]
- [REDACTED]

REDACTED

22. (U) Each month the United States Secret Service transfers WAVES records to the White House Office of Records Management. On a monthly basis, all offices and units within the Executive Office of the President (such as the Office of the Vice President and NSS, among others) receive the WAVES data for appointments entered by that office or unit for auditing prior to disclosure. The purpose of the audit is to ensure that records scheduled for public disclosure (i.e., records that were not initially designated as highly sensitive) are, in fact, appropriate for release. This "double check" process is described immediately below.

NSS WAVES Review Process Under the Voluntary Disclosure Policy

23. (U) Given the sensitive nature of WAVES information and the potential for damage to our national security interests, NSS double checks all of the visitor records entered by NSS personnel ("NSS visitor records") that were not initially designated as national security sensitive to ensure that no sensitive information will be inadvertently released. To accomplish this task, each month, the NSS sorts the NSS visitor records by visatee name and sends to each visatee a list of their visitors, along with date and time of arrival and other pertinent information that may aide the visatee in making the exemption determination. The list is also sent to the individual who entered the appointment, if different from the visatee. The visatee must review and validate that the visit need not be exempted for national security reasons. If the visatee is no longer on staff, then the person who entered the request must review it. If a determination is still uncertain, senior leadership will look at the information available and cross check, to the extent possible, against other meetings on that day, at that time, and in that location to determine if the visitor was a part of an exempted meeting or visit. In the interest of national security and

REDACTED

given the nature of the NSS work, and barring a reasonable explanation, the default position for national security-related appointments is to exempt the record from disclosure.

24. (U) After review by the visatee, or pertinent person, the records are color coded, and records designated for public disclosure are reviewed for a third time by the Director for Counterintelligence and the Senior Director for Administration, before they are released.
25. (U) To further assist employees with the review process and ensure that employees focus on visits that potentially require the exemption designation, the NSS has also developed an automated process that pre-sorts a select number of NSS visits that are appropriate for public disclosure, including tours and Marine One arrivals and departures.
26. (U) Although a majority of NSS visitor records have been correctly designated in the first instance by the WAVES user since the voluntary disclosure policy went into effect, during the first 3 months of the program, from October 2009 through the end of the year, approximately 39% of the NSS visitor records initially designated for public disclosure were ultimately withheld for national security reasons as a result of this auditing process. As individuals become more comfortable with the process and as additional enhancements are made to the WAVES system that require the requester to consider national security sensitivities, we expect that more appointments will be correctly designated in the first instance and this error rate will decline.

Ramifications of Releasing WAVES Records Created Prior to September 15, 2009

27. (U) As a general matter, the visatee and the WAVES user who entered the appointment are in the best position to determine whether a particular appointment implicates national security concerns. Prior to September 15, 2009, the WAVES system was not designed to

REDACTED

include data regarding the sensitive nature or classification of meetings or to indicate the sensitivity of a visitor's affiliation. As a result, the only way to now determine whether an NSS appointment entered prior to September 15, 2009 implicates national security concerns is to have each NSS appointment reviewed by the visatee and/or the individual who entered the information in the system. Tens-of-thousands of WAVES records generated by NSS would need to be reviewed.

28. [REDACTED]

29. (U) The inadvertent release of even a few WAVES records that contain highly sensitive information could have significant negative consequences for our national security interests.

30. [REDACTED]

31. (U) NSS is primarily staffed with detailees from other executive agencies and departments who return to their home agencies or sometimes leave government service after their detail has ended. Specifically, of the 310 NSS members, 240, or 75% are detailees. Departed staff members who have returned to their Agencies or Departments

REDACTED

or obtained positions in the private sector may no longer have security clearances and would be unable to access classified White House records to review and determine whether the visitors were here for classified meetings.

32. [REDACTED]

33. (U) Due to this high rate of personnel turnover (approximately 106 employees departed between January and September 2009), there is no way to re-accumulate the necessary information to determine which appointments between January 20, 2009 and September 15, 2009 could harm our national security interests if publicly disclosed.

34. [REDACTED]

35. (U) As a result, to accurately determine if previous visits fall under the national security exemption, high-ranking officials of the NSS would have to review records as well. Even this high-level review would not guarantee that all records with national security implications are identified and exempted from public disclosure, because the NSS senior leadership may not have the necessary information to make an appropriate determination on the sensitivity of any particular WAVES record. Review of historical WAVES

REDACTED

records for the period prior to September 15, 2009 would also create an inordinate burden on the time of NSS senior leadership and compromise their ability to conduct national security business.

36. (U) Although the NSS generates the majority of appointments related to national security, additional EOP components, including for example, the President's Intelligence Advisory Board and the Office of the Vice President (including the Vice President's national security staff), also regularly schedule national security-related meetings. In addition, senior White House officials regularly attend meetings on national security. Where expediency or convenience dictates their respective offices do so, they will schedule national security meetings that can involve participants from different components of the White House.

37. (U) As a result, these offices currently conduct an audit of WAVES records prior to disclosure similar to the NSS. For the same reasons, a review of WAVES records created prior to September 15, 2009 to identify appointments with national security implications could not be limited to records created just by NSS. Instead, because each of the offices and components discussed above regularly participates, schedules and attends national security meetings, the vast majority of all WAVES records created prior to September 15, 2009 – hundreds of thousands of records – would need to be reviewed to determine the sensitivity of meetings. Again, such a review would not guarantee that all sensitive records were identified and exempted. It would also require a substantial amount of time and attention from the most senior White House officials and would severely impact their ability to conduct government business.

REDACTED

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

Executed on April 19, 2010.



NATHAN D. TIBBITS
EXECUTIVE SECRETARY
NATIONAL SECURITY STAFF

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Posted by Norm Eisen on September 04, 2009 at 09:05 AM EDT

Today, the President took another important step toward a more open and transparent government by announcing a historic new policy to voluntarily disclose White House visitor access records. Each month, records of visitors from the previous 90-120 days will be made available online.

In his statement released earlier today, the President sums up this historic step:

For the first time in history, records of White House visitors will be made available to the public on an ongoing basis. We will achieve our goal of making this administration the most open and transparent administration in history not only by opening the doors of the White House to more Americans, but by shining a light on the business conducted inside it. Americans have a right to know whose voices are being heard in the policymaking process.

Aside from a small group of appointments that cannot be disclosed because of national security imperatives or their necessarily confidential nature (such as a visit by a possible Supreme Court nominee), the record of every visitor who comes to the White House for an appointment, a tour, or to conduct business will be released. [Read the full policy here.](#)

The Administration has also agreed with Citizens for Responsibility and Ethics (CREW) to settle four pending cases requesting specific White House visitor access records, including those dating from the Bush administration ([read the transmittal letter here](#)). We have provided CREW with the records relating to their requests, which are here:

Bush Administration

- WHO: [\[PDF part 1\]](#), [\[PDF part 2\]](#)
- OVP: [\[PDF\]](#)

Obama Administration

WHO: [\[csv\]](#)

The Administration also thanks CREW for their participation in the development of [the new voluntary disclosure policy](#).

Norm Eisen is Special Counsel to the President for Ethics and Government Reform

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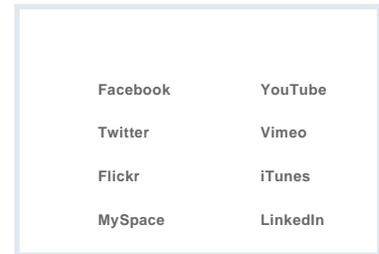
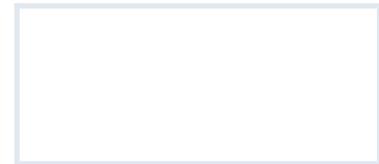
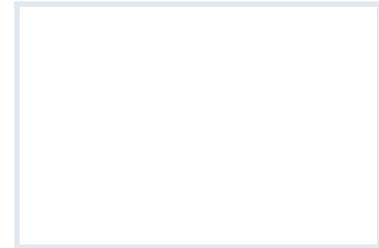
The President has decided to increase governmental transparency by implementing a voluntary disclosure policy governing White House visitor access records. The White House will release, on a monthly basis, all previously unreleased WAVES and ACR access records that are 90 to 120 days old. For example, records created in January 2010 will be released at the end of April 2010. The short time lag will allow the White House to continue to conduct business, while still providing the American people with an unprecedented amount of information about their government. No previous White House has ever adopted such a policy.

The voluntary disclosure policy will apply to records created after September 15, 2009, and the first release of records (covering the month of September) will occur at the end of the year, on or about December 31, 2009. We expect that each monthly release will include tens of thousands of electronic records. Since the White House considers these records to be subject to the Presidential Records Act, it will continue to preserve them accordingly.

The White House voluntary disclosure policy will be subject to the following exceptions:

1. The White House will not release fields within the access records that implicate personal privacy or law enforcement concerns (e.g., dates of birth, social security numbers, and contact phone numbers); records that implicate the personal safety of EOP staff (their daily arrival and departure); or records whose release would threaten national security interests.
2. The White House will not release access records related to purely personal guests of the first and second families (i.e., visits that do not involve any official or political business).
3. The White House will not release access records related to a small group of particularly sensitive meetings (e.g., visits of potential Supreme Court nominees). The White House will disclose each month the number of records withheld on this basis, and it will release such records once they are no longer sensitive.
4. Visitor information for the Vice President and his staff at the White House Complex will be disclosed pursuant to the policy outlined above. It is not possible, however, to release visitor information for the Vice President's Residence in an identical format to the White House Complex at this time because the Residence is not equipped with the WAVES and ACR systems that are in place at the White House Complex. The Office of the Vice President will, instead, release the guest lists for official events at the Residence and will also review the Vice President's and Dr. Biden's daily schedules and release the names and dates of visitors to the Residence who appear on those schedules. The Vice President's staff is working with the Secret Service to upgrade the visitor records system at the Residence. When the electronic update is complete, visitor information for the White House Complex and the Residence will be released in a common format.

WAVES and ACR records created between January 20 and September 15, 2009 will not be subject to the voluntary disclosure policy. Instead, the White House will respond voluntarily to individual requests submitted to the Counsel's Office that seek records during that time period, but only if the requests are reasonable, narrow, and specific (e.g., requests that list specific possible visitors). Responses to reasonable requests will be subject to the four exceptions described above.



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Request White House Visitor Access Records

Per the ['White House Voluntary Disclosure Policy, Visitor Access Records'](#), President Barack Obama has "decided to increase governmental transparency by implementing a voluntary disclosure policy governing White House visitor access records." As outlined in the policy, for records between January 20 and September 15, 2009, White House Counsel will respond voluntarily to individual requests submitted to the Counsel's Office that are reasonable, narrow, and specific (e.g., requests that list specific possible visitors). To request such visitor access records, please complete the form below.

Your Information

Your Email:

An email will be sent to this address informing you when your request has been processed.

Your First Name:

Your Last Name:

For all record requests, please include the first and last name of the visitor, as well as the date range of their visit.

Visitor 1 Information

Visitor Access Record Request - Last Name, First Name, Middle Initial:

From: Year Month Day

To: Year Month Day

[Visitor 2 Information](#)

[Visitor 3 Information](#)

[Visitor 4 Information](#)

[Visitor 5 Information](#)

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**Judicial
Watch™**

*Because no one
is above the law!*

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2009 AUG 20 P 3:36

FREEDOM OF INFORMATION
PRIVACY ACTS OFFICER

August 10, 2009

VIA CERTIFIED MAIL

United States Secret Service
Communications Center (FOI/PA)
245 Murray Lane
Building T-5
Washington, D.C. 20223

Re: Freedom of Information Act Request

Dear Freedom of Information Officer:

Pursuant to the provisions of the Freedom of Information Act (FOIA), 5 U.S.C. § 552, Judicial Watch, Inc. hereby requests that the United States Secret Service produce any and all agency records concerning the following subjects within twenty (20) business days:

- 1) All official visitors logs and/or other records concerning visits made to the White House from January 20, 2009 to present.

For purposes of this request, the term "White House" includes any office or space on White House grounds.

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

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA... The presumption of disclosure should be applied to all decisions involving FOIA.¹

President Obama adds that "The Freedom of Information Act should be administered with a clear presumption: In the case of doubt, openness prevails." Nevertheless, if any responsive record or portion thereof is claimed to be exempt from production under

¹ President Barack Obama, "Memorandum for the Heads of Executive Departments and Agencies, Subject: Freedom of Information Act," January 21, 2009; <http://www.whitehouse.gov/the_press_office/FreedomofInformationAct>

U.S. Secret Service

August 10, 2009

Page 2 of 4

FOIA, please provide sufficient identifying information with respect to each allegedly exempt record or portion thereof to allow us to assess the propriety of the claimed exemption. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). In addition, any reasonably segregable portion of a responsive record must be provided, after redaction of any allegedly exempt material. 5 U.S.C. § 552(b).

For purpose of this request, the term "record" shall mean: (1) any written, printed, or typed material of any kind, including without limitation all correspondence, memoranda, notes, messages, letters, cards, telegrams, teletypes, facsimiles, papers, forms, records, telephone messages, diaries, schedules, calendars, chronological data, minutes, books, reports, charts, lists, ledgers, invoices, worksheets, receipts, returns, computer printouts, printed matter, prospectuses, statements, checks, statistics, surveys, affidavits, contracts, agreements, transcripts, magazine or newspaper articles, or press releases; (2) any electronically, magnetically, or mechanically stored material of any kind, including without limitation all electronic mail or e-mail, meaning any electronically transmitted text or graphic communication created upon and transmitted or received by any computer or other electronic device, and all materials stored on compact disk, computer disk, diskette, hard drive, server, or tape; (3) any audio, aural, visual, or video records, recordings, or representations of any kind, including without limitation all cassette tapes, compact disks, digital video disks, microfiche, microfilm, motion pictures, pictures, photographs, or videotapes; (4) any graphic materials and data compilations from which information can be obtained; (5) any materials using other means of preserving thought or expression; and (6) any tangible things from which data or information can be obtained, processed, recorded, or transcribed. The term "record" also shall mean any drafts, alterations, amendments, changes, or modifications of or to any of the foregoing.

Judicial Watch also hereby requests a waiver of both search and duplication fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 5 U.S.C. § 552(a)(4)(A)(iii). Judicial Watch is entitled to a waiver of search fees under 5 U.S.C. § 552(a)(4)(A)(ii)(II) because it is a member of the news media. See *National Security Archive v. U.S. Department of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989). In fact, Judicial Watch has been recognized as a member of the news media in other FOIA litigation. See *Judicial Watch, Inc. v. U.S. Department of Justice*, 133 F. Supp.2d 52 (D.D.C. 2000); and, *Judicial Watch, Inc. v. Dep't of Defense*, 2006 U.S. Dist. LEXIS 44003, *1 (D.D.C. June 28, 2006). Judicial Watch, Inc. regularly obtains information about the operations and activities of government through FOIA and other means, uses its editorial skills to turn this information into distinct works, and publishes and disseminates these works to the public. It intends to do likewise with the records it receives in response to this request.

U.S. Secret Service

August 10, 2009

Page 3 of 4

Judicial Watch also is entitled to a complete waiver of both search fees and duplication fees pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). Under this provision, records:

shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii).

In addition, if records are not produced within twenty (20) business days, Judicial Watch is entitled to a complete waiver of search and duplication fees under the OPEN Government Act of 2007, Section 6(b).

Judicial Watch is a 501(c)(3), not-for-profit, educational organization, and, by definition, it has no commercial purpose. Judicial Watch exists to educate the public about the operations and activities of government, as well as to increase public understanding about the importance of ethics and the rule of law in government. The particular records requested herein are sought as part of Judicial Watch's ongoing efforts to document the operations and activities of the federal government and to educate the public about these operations and activities. Once Judicial Watch obtains the requested records, it intends to analyze them and disseminate the results of its analysis, as well as the records themselves, as a special written report. Judicial Watch will also educate the public via radio programs, Judicial Watch's website, and/or newsletter, among other outlets. It also will make the records available to other members of the media or researchers upon request. Judicial Watch has a proven ability to disseminate information obtained through FOIA to the public, as demonstrated by its long-standing and continuing public outreach efforts, including radio and television programs, website, newsletter, periodic published reports, public appearances, and other educational undertakings.

Given these circumstances, Judicial Watch is entitled to a public interest fee waiver of both search costs and duplication costs. Nonetheless, in the event our request for a waiver of search and/or duplication costs is denied, Judicial Watch is willing to pay up to \$350.00 in search and/or duplication costs. Judicial Watch requests that it be contacted before any such costs are incurred, in order to prioritize search and duplication efforts.

In an effort to facilitate record production within the statutory time limit, Judicial Watch is willing to accept documents in electronic format (e.g. e-mail, .pdfs). When necessary, Judicial Watch will also accept the "rolling production" of documents.

U.S. Secret Service

August 10, 2009

Page 4 of 4

If you do not understand this request or any portion thereof, or if you feel you require clarification of this request or any portion thereof, please contact us immediately at 202-646-5172 or tmillspaw@judicialwatch.org. We look forward to receiving the requested documents and a waiver of both search and duplication costs within twenty (20) business days. Thank you for your cooperation.

Sincerely,

A handwritten signature in black ink, appearing to read "Tegan Millspaw". The signature is fluid and cursive, with the first name "Tegan" and last name "Millspaw" clearly distinguishable.

Tegan Millspaw
Judicial Watch



DEPARTMENT OF HOMELAND SECURITY
UNITED STATES SECRET SERVICE
WASHINGTON, D.C. 20223

Freedom of Information and Privacy Acts Branch
Communications Center
245 Murray Lane, S.W.
Building T-5
Washington, D.C. 20223

OCT -8 2009

Tegan Millspaw
Judicial Watch
501 School Street, S.W.
5th Floor
Washington, D.C. 20024

File Number: 20090685

Dear Ms. Millspaw:

Reference is made to your Freedom of Information Act (FOIA) request, dated August 10, 2009, received by the United States Secret Service (Secret Service) on August 20, 2009, for "any and all agency records concerning. . .[a]ll official visitors logs and/or other records concerning visits made to the White House from January 20, 2009 to present."

Please note that we are interpreting your request to encompass Access Control Records System (ACR) records, and/or Workers and Visitors Entry System (WAVES) records.

It is the government's position that the categories of records that you requested are not agency records subject to the FOIA. Rather, these records are records governed by the Presidential Records Act, 44 U.S.C. § 2201 et seq., and remain under the exclusive legal custody and control of the White House Office and the Office of the Vice President.

The White House and the Office of the Vice President retain authority to direct the discretionary release of the White House visitor records, and have announced a policy for discretionary releases. Therefore, your request is being referred to White House Counsel's office for consideration pursuant to this policy.

Sincerely,

A handwritten signature in black ink, appearing to read "Craig W. Ulmer", written over the typed name.

Craig W. Ulmer
Special Agent in Charge
Freedom of Information and
Privacy Acts Officer



Judicial Watch

Because no one is above the law!

VIA CERTIFIED U.S. MAIL and E-MAIL

November 3, 2009

United States Secret Service (MNO)
ATTN: Information Quality Officer
245 Murray Drive, Bldg. 410
Washington, DC 20223
E-mail: IQO@secretservice.gov
(Art. No.: 70083230000326080725)

**Re: FREEDOM OF INFORMATION ACT APPEAL,
FOIA Request #20090685**

Dear Sir/Madam:

On August 10, 2009, Judicial Watch, Inc. sent a Freedom of Information Act (FOIA) request to the U.S. Secret Service seeking access to the following public records:

- 1) All official visitors logs and/or other records concerning visits made to the White House from January 20, 2009 to present.

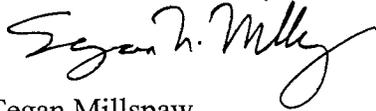
In a response dated October 8, 2009, Craig W. Ulmer, Special Agent in Charge, advised Judicial Watch, Inc. that had determined the requested records were not subject to FOIA and that the request would not be processed as a result. *See* October 8, 2009 Letter, attached.

This letter appeals the determination of Mr. Ulmer. The assertion that White House visitor logs are not agency records subject to FOIA has been litigated and rejected repeatedly. *Citizens for Responsibility and Ethics in Washington v. U.S. Dep't of Homeland Security*, 527 F. Supp.2d 76, 89 (D.D.C. 2007) ("To the contrary, the Court concludes that these visitor records at the White House Complex and Vice-President's Residence are created (or obtained) and controlled by the Secret Service and are therefore 'agency records' under our circuit's case law"); *see also* *Citizens for Responsibility and Ethics in Washington v. U.S. Dep't of Homeland Security*, 592 F. Supp.2d 111, 124 (D.D.C. 2009); *Washington Post v. U.S. Dep't of Homeland Security*, 459 F. Supp.2d 61, 71-12 (D.D.C. 2006).

Judicial Watch, Inc. thus respectfully appeals Mr. Ulmer's denial of the request and asks that the requested records be processed and produced pursuant to FOIA without further delay.

Sincerely,

JUDICIAL WATCH, INC.

A handwritten signature in black ink, appearing to read "Tegan H. Millspaw". The signature is written in a cursive style with a large, looping initial "T".

Tegan Millspaw

Enclosure



DEPARTMENT OF HOMELAND SECURITY
UNITED STATES SECRET SERVICE
WASHINGTON, D.C. 20223

Freedom of Information and Privacy Acts Branch
Communications Center
245 Murray Lane, S.W.
Building T-5
Washington, D.C. 20223

OCT -8 2009

Tegan Millspaw
Judicial Watch
501 School Street, S.W.
5th Floor
Washington, D.C. 20024

File Number: 20090685

Dear Ms. Millspaw:

Reference is made to your Freedom of Information Act (FOIA) request, dated August 10, 2009, received by the United States Secret Service (Secret Service) on August 20, 2009, for "any and all agency records concerning. . .[a]ll official visitors logs and/or other records concerning visits made to the White House from January 20, 2009 to present."

Please note that we are interpreting your request to encompass Access Control Records System (ACR) records, and/or Workers and Visitors Entry System (WAVES) records.

It is the government's position that the categories of records that you requested are not agency records subject to the FOIA. Rather, these records are records governed by the Presidential Records Act, 44 U.S.C. § 2201 et seq., and remain under the exclusive legal custody and control of the White House Office and the Office of the Vice President.

The White House and the Office of the Vice President retain authority to direct the discretionary release of the White House visitor records, and have announced a policy for discretionary releases. Therefore, your request is being referred to White House Counsel's office for consideration pursuant to this policy.

Sincerely,

A handwritten signature in black ink, appearing to read "Craig W. Ulmer".

Craig W. Ulmer
Special Agent in Charge
Freedom of Information and
Privacy Acts Officer



U.S. Department of Homeland Security
UNITED STATES SECRET SERVICE
DEC - 3 2009

Tegan Millspaw
Judicial Watch
501 School Street, S.W.
Suite 725
Washington, D.C. 20024

File Number: 20090685

Dear Ms. Millspaw:

Reference is made to your appeal dated November 3, 2009, through which you appeal the United States Secret Service's response to your August 10, 2009 Freedom of Information Act (FOIA) request for "any and all agency records concerning. . .[a]ll official visitors logs and/or other records concerning visits made to the White House from January 20, 2009 to present."

The Secret Service maintains its position as stated in the October 8, 2009 response to your request. In that letter, we stated that "[i]t is the government's position that the categories of records that you requested are not agency records subject to the FOIA. Rather, these records are records governed by the Presidential Records Act, 44 U.S.C. § 2201 et seq., and remain under the exclusive legal custody and control of the White House Office and the Office of the Vice President." You were also notified that the request was being referred to White House Counsel's office for consideration pursuant to the discretionary release policy.

Please be advised that any decision on appeal, including a finding of no record, is subject to judicial review in the District Court of the district where the complainant resides, has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Sincerely,

A handwritten signature in black ink, appearing to read "Keith L. Prewitt".

Keith L. Prewitt
Deputy Director



U.S. Department of Justice
Civil Division, Federal Programs Branch

Via First-Class Mail
P.O. Box 883
Ben Franklin Station
Washington, D.C. 20044

Via Overnight Delivery
20 Massachusetts Ave., N.W.
Rm. 7224
Washington, D.C. 20001

Justin M. Sandberg
Trial Attorney

Tel: (202) 514-3489
Fax: (202) 616-8202
email: justin.sandberg@usdoj.gov

May 10, 2006

BY HAND DELIVERY

Judicial Watch, Inc.
Christopher J. Farrell
501 School St., S.W.
Suite 500
Washington, D.C. 20024

Dear Judicial Watch:

On January 20, 2006, you submitted to the United States Secret Service a Freedom of Information Act (FOIA) request for records "concerning, relating to, or reflecting . . . [a]ll White House visitor logs from January 1, 2001 to present that reflect the entries and exits of lobbyist Jack Abramoff from the White House."

Pursuant to the stipulation to which we voluntarily agreed, and without conceding that the documents constitute "agency records" under FOIA, we are providing you with the enclosed documents that are responsive to your FOIA request. No exemptions have been claimed, and no responsive documents or portions thereof have been withheld. In addition, please be advised that the enclosed documents were found as the result of a computer-generated query of electronic entry and exit logs for the White House Complex, and that the system does not differentiate between individuals with the same name.

Sincerely,

A handwritten signature in black ink that reads "Justin M. Sandberg".

Justin M. Sandberg
Trial Attorney
U.S. Department of Justice, Civil Division

Enclosures

TOTAL P.02



U.S. Department of Justice
Civil Division, Federal Programs Branch

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P.O. Box 883
Ben Franklin Station
Washington, D.C. 20044

Via Overnight Delivery
20 Massachusetts Ave., N.W.
Rm. 7224
Washington, D.C. 20001

Justin M. Sandberg
Trial Attorney

Tel: (202) 514-3489
Fax: (202) 616-8202
email: justin.sandberg@usdoj.gov

July 7, 2006

BY FACSIMILE

Judicial Watch, Inc.
Christopher J. Farrell
501 School St., S.W.
Suite 500
Washington, D.C. 20024

Dear Judicial Watch:

On January 20, 2006, you submitted to the United States Secret Service a Freedom of Information Act (FOIA) request for records "concerning; relating to, or reflecting . . . [a]ll White House visitor logs from January 1, 2001 to present that reflect the entries and exits of lobbyist Jack Abramoff from the White House." On May 10, 2006, we released to you two Access Control Records System (ACR) documents that related to the subject matter of your FOIA request.

After that release, and only recently, the Secret Service unexpectedly discovered computer files containing Worker and Visitor Entrance System (WAVES) data relating to six appointments involving Jack Abramoff. The Secret Service also retrieved ACR data matching the data included in the previously-released ACR records. The WAVES data reflect appointments involving Jack Abramoff, but do not necessarily reflect actual visits to the White House Complex.

Pursuant to the stipulation to which we voluntarily agreed, and without conceding that the documents constitute "agency records" or would otherwise be required to be produced under FOIA, we are providing you with the enclosed document sets containing the recently-discovered WAVES data and the ACR data. The different document sets reflect different methods of displaying the data stored in the computer files, and some of the sets are more comprehensive than others. Entries are repeated throughout the documents because the data were found in multiple computer files. No exemptions have been claimed, and only information protected by the Privacy Act has been redacted. In addition, please be advised that one cannot differentiate between individuals with the same name with the ACR data provided.

Sincerely,

Justin M. Sandberg
Trial Attorney
United States Department of Justice

Enclosures

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5337

September Term, 2006

06cv001737

Filed On: February 27, 2007

[1025209]

The Washington Post,
Appellee

v.

Department of Homeland Security,
Appellant

BEFORE: Ginsburg, Chief Judge, and Sentelle and Garland, Circuit Judges

ORDER

Upon consideration of the consent motion to vacate preliminary injunction as moot and dismiss appeal, it is

ORDERED that the motion to dismiss the appeal as moot be granted in light of the "Notice of Voluntary Dismissal Pursuant to Rule 41(a)," filed January 8, 2007. It is

FURTHER ORDERED that the district court's order filed October 18, 2006 and memorandum opinion filed October 19, 2006, granting plaintiff-appellee's motion for a preliminary injunction and directing the United States Secret Service to process plaintiff-appellee's June 12, 2006 Freedom of Information Act request within ten days, be vacated.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue forthwith to the district court a certified copy of this order in lieu of formal mandate.

Per Curiam

(FILED) JS-C

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AS REQUIRED BY FRCP, RULE 77(d)

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CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

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AUG - 3 1999
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ABRAHAM JOHN PUSA

Plaintiff,

vs.

FEDERAL BUREAU OF
INVESTIGATION

Defendants.

CASE NO. CV99-04603 NM (CWx)

ORDER RE DEFENDANT'S MOTION
TO DISMISS PLAINTIFF'S
COMPLAINT

I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY
FIRST CLASS MAIL, POSTAGE PREPAID, TO ALL COUNSEL
(OR PARTIES) AT THEIR RESPECTIVE, MOST RECENT, ADDRESS OF
RECORD, IN THIS ACTION, ON THIS DATE

DATED: AUG 05 1999

[Signature]
DEPUTY CLERK

INTRODUCTION

On April 28, 1999, Abraham John Pusa ("Plaintiff") filed this action pro se against the Federal Bureau of Investigation ("Federal Defendant" and/or "FBI") for claims arising under the Freedom of Information Act, 5 U.S.C. § 552(a)(3). In requesting relief, Plaintiff seeks an order from this Court directing Federal Defendant to produce records of all communications between the FBI and individuals: Edward Adams; Gene E. Adeni; Robert Adem; Fehmi Tasci; and Greg Lucett (collectively the "Third Parties"). In the complaint, Plaintiff alleges that the FBI violated the Freedom of Information Act ("FOIA") by denying his request for information concerning the Third Parties and their alleged misstatements to Federal Defendant regarding his

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MLD NOTICE PTYS

JS-6

AUG 05 1999

ENTERED ON RIMS [Signature]

AUG 05 1999

11

1 On June 1, 1999, Federal Defendant filed the instant motion to dismiss the complaint for
2 lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), and Plaintiff's failure to state a
3 claim under Fed. R. Civ. P. 12(b)(6). Without receiving any opposition to its motion to dismiss,
4 Federal Defendant filed its Reply and Notice of Non-Receipt of Plaintiff's Opposition on July 7,
5 1999.¹ However, two days after Federal Defendant filed its notice (and more than five weeks
6 after it filed its motion to dismiss), Plaintiff filed his opposition on July 9, 1999.

7 In the instant motion, Federal Defendant seeks to dismiss this action on the ground that
8 Plaintiff has failed to exhaust his administrative remedies before filing suit under the FOIA.
9 Specifically, Federal Defendant claims that this Court lacks jurisdiction over Plaintiff's claim as
10 he has neither provided specific documentation with respect to his request for third-party
11 information, nor had his request improperly denied by the FBI before seeking judicial review.

12 Upon full consideration of the moving, opposition and reply papers, the parties arguments
13 and authorities, and the entire record herein, this Court grants Federal Defendant's motion to
14 dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief can
15 be granted.

17 II

18 RELEVANT FACTUAL BACKGROUND

19 On February 18, 1999, Plaintiff sent a letter to Federal Defendant's Los Angeles field office
20 requesting information on the Third Parties. Complaint, ¶ 5, Exh. 1. On February 26, 1999,
21 Luis G. Flores ("Mr. Flores"), Chief Division Counsel of the FBI, responded to Plaintiff's letter
22 by informing him that he was required to submit either proof of death or a privacy waiver for
23 the individuals named in his request. Id., ¶ 6, Exh. 2. The letter further stated that without such
24 proof, "disclosure of law enforcement records or information regarding another person is
25 considered an unwarranted invasion of personal privacy." Id. Enclosed with Mr. Flores' letter
26 was a Privacy Waiver and Certification of Identity Form. Id. Plaintiff was informed that once

27
28 ¹ On July 6, 1999, in light of Plaintiff's failure to file any opposition to Federal Defendant's motion to dismiss,
the motion was taken off calendar.

1 he completed and returned these documents, the FBI would conduct a search of its records and
2 advise him of the results. Id.

3 On March 19, 1999, Plaintiff sent a letter described as a FOIA Appeal to the U.S.
4 Department of Justice, asserting that the February 26, 1999 letter from Mr. Flores was a denial
5 of his request for information. Id., ¶ 7, Exh. 3. On April 1, 1999, Derma A. Henshaw ("Ms.
6 Henshaw") of the Office of Information and Privacy, U.S. Department of Justice, sent a letter to
7 Plaintiff acknowledging receipt of his administrative appeal. Id., ¶ 8, Exh. 4. Ms. Henshaw also
8 informed Plaintiff that the Office of Information, which has responsibility of adjudicating such
9 cases, had a substantial backlog of pending appeals and that Plaintiff would be notified of a
10 decision as soon as possible. Id.

11 On April 5, 1999, Plaintiff sent a letter to Timothy McNally ("Mr. McNally"), Assistant
12 Director in Charge of the FBI's Los Angeles field office. Id., ¶ 9, Exh. 5. In his letter, Plaintiff
13 informed Mr. McNally that a few of his agents, along with the Third Parties, had been violating
14 Plaintiff's civil and constitutional rights. Id. Alleging that these individuals were operating
15 outside FBI guidelines, Plaintiff requested that Mr. McNally end their illegal activities so that he
16 would not have to litigate the matter in court.² Id.

17 On April 28, 1999, less than a month after he received acknowledgment of his
18 administrative appeal from the Office of Information, Plaintiff brought this action against
19 Federal Defendant for Injunctive Relief. On June 4, 1999, Plaintiff requested a court appointed
20 attorney, as Federal Defendant was allegedly threatening attorneys who agreed to represent him.
21 Plaintiff's Request for Attorney ("Plf. Req. Atty."), ¶ 1. On July 2, 1999, Plaintiff also
22 requested to change the hearing date, as he had allegedly been poisoned in connection with the
23

24
25 ² In his April 5, 1999 letter to Mr. McNally, Plaintiff claimed that a few FBI agents "have formed a criminal
26 syndicate" with the Third Parties, and together had placed him under "surveillance" and on the FBI's "black list" "to
27 cover up their own criminal activities." Complaint, § 9, Exh. 5. In his untimely opposition to Federal Defendant's
28 motion to dismiss, Plaintiff claimed that the "syndicate" had: 1) placed a chip in his body to prevent him from working
and to cause him emotional distress; 2) portrayed him as a Chinese spy and prevented him from becoming an Arabic
translator with the FBI; 3) illegally searched his house to gain the names of diamond dealers; 4) falsely associated him
with the Y2K problem; and 5) exposed him to poisonous deadly viruses in an attempt to murder him. Plf. Opp., ¶¶
5, 12, 13-14, 16, 18.

1 case and needed time to recover. Plaintiff's Request To Change The Hearing Date ("Plf. Req.
2 Hearing"), p. 1.

3
4 III

5 DISCUSSION

6 A

7 Applicable Standard

8 1. Lack Of Subject Matter Jurisdiction Under FOIA

9 Under the FOIA, a district court of the United States has jurisdiction to order the
10 production of any agency records improperly withheld from a complainant. 5 U.S.C. §
11 552(a)(4)(B). However, before the district court can exercise its jurisdiction over FOIA claims,
12 sound judicial policy dictates that the complainant exhaust all of his/her administrative remedies
13 before filing a complaint. In re Steele, 799 F.2d 461, 465 (9th Cir. 1986). As the Ninth Circuit
14 clearly explained in In re Steele:

15 Exhaustion of a parties' [sic] administrative remedies is required under the
16 FOIA before that party can seek judicial review. The complaint must [also]
17 request specific information in accordance with published administrative
18 procedures, and have the request improperly refused before that party can bring
19 a court action under the FOIA. Where no attempt to comply fully with agency
20 procedures has been made, the [district] courts will assert their lack of
21 jurisdiction under the exhaustion doctrine.

22 Id., at 465-66 (emphasis added) (citations omitted) The underlying purpose of the exhaustion
23 doctrine is to give agencies an opportunity to exercise their discretion and expertise in
24 correcting their own procedural errors before initiating any unnecessary judicial intervention
25 into the administrative process. United Farm Workers, AFL-CIO v. Ariz. Agric. Employment
26 Relations Bd., 669 F.2d 1249, 1253 (9th Cir. 1982).

27 2. Failure To State A Claim Under FOIA

28 In addition to dismissing the action for lack of subject matter jurisdiction, the exhaustion
doctrines also warrants dismissal for a complainant's failure to state a claim upon which relief
can be granted. Scherer v. Balkema, 840 F.2d 437 (7th Cir. 1988), *cert denied* 486 U.S. 1043

1 (1988). Thus, if the complainant has failed to allege that he/she has exhausted all administrative
2 remedies under the FOIA, the complaint must also be dismissed for failure to state a claim. Id.

3 B

4 Application

5 Federal Defendant contends that this action should be dismissed for Plaintiff's failure to
6 exhaust his administrative remedies. Defendant's Motion to Dismiss ("Def. Mot."), p. 4.
7 Specifically, Federal Defendant asserts that this Court lacks jurisdiction to hear Plaintiff's claims
8 on the ground that he has neither complied with the FBI's procedures concerning FOIA
9 requests, nor had his request improperly denied by the agency. Id., at 3-5.

10 In light of the FOIA requirements established by In re Steele, it is clear that Plaintiff failed to
11 exhaust his administrative remedies before bring this suit. Under the procedures delineated in
12 the Code of Federal Regulations, the FBI has set forth specific instructions to be followed in
13 permitting access to its records under the FOIA. Def. Mot., p. 5. In pertinent part, the FBI's
14 procedures state:

15 If you are making a request for records about another individual, either a written
16 authorization signed by that individual permitting disclosure of those records to
17 you or proof that that individual is deceased (for example, a copy of a death
certificate or an obituary) will help the processing of your complaint.

18 28 C.F.R. § 16.3(a). Plaintiff was notified of these procedures when Mr. Flores responded to
19 his February 18, 1999 request for information regarding the Third Parties. In his letter dated
20 February 26, 1999, Mr. Flores carefully explained to Plaintiff that he was required to submit
21 "either proof of death or a privacy waiver" before his request for third-party information could
22 be processed. See Complaint, Exh. 2. As a courtesy, a Privacy Waiver and Certification of
23 Identity Form were enclosed with Mr. Flores' letter. Id. However, Plaintiff did not provide this
24 information to the FBI. Def. Mot., p. 5. As such, he has failed to exhaust his administrative
25 remedies under the FOIA by failing to comply with the agency's published procedures for
26 obtaining third-party information.

27 Moreover, Plaintiff currently has an administrative appeal pending with the Office of
28 Information and Privacy ("OIP") regarding his request for FBI records. Complaint, § 7, Exh. 3.

1 "Courts have consistently confirmed that the FOIA requires exhaustion of this [administrative]
2 appeal process before an individual may seek relief in the courts." Oglesby v. United States
3 Dep't of the Army, 920 F.2d 57, 61 (D.C. Cir. 1990). Thus, Plaintiff is precluded from bringing
4 suit regarding his request for FBI records, as he has not yet exhausted his administrative appeal
5 with the OIP.³

6 Plaintiff contends that he has a right to the information he requested, and that Federal
7 Defendant has no legal basis for denying his FOIA request. Complaint, § 10. Plaintiff further
8 alleges that his request for information on the Third Parties should not be denied by the FBI
9 because both are "engaged in a conspiracy campaign against [him]." Id., at § 9, Exh. 5; and
10 Plaintiff's Opposition ("Plf. Opp."), p. 1.

11 Regardless of the sincerity of Plaintiff's beliefs, he does not have a right under the FOIA to
12 gain access to third-party information. The FOIA provides for the mandatory disclosure of
13 information held by federal agencies, unless the requested material falls within one of the Act's
14 exemption provisions. See St. Michael's Convalescent Hospital v. State of California, 643 F.2d
15 1369, 1372 (9th Cir. 1981); Also Lee Pharm. v. Kreps, 577 F.2d 610, 614 (9th Cir. 1978). In his
16 February 26, 1999 letter, Mr. Flores explained to Plaintiffs that his request for FBI records was
17 exempt "without proof of death or a privacy waiver, [and that] the disclosure of law
18 enforcement records or information about another person is considered an unwarranted invasion
19 of personal privacy" under the FOIA. Complaint, Exh. 2. This language is taken from the
20 statute itself, which states that a request under the FOIA "does not apply to...personnel...files...
21 [and] information compiled for law enforcement purposes...[due to the fact that] the production
22 of such...records...could reasonably be expected to constitute an unwarranted invasion of
23 personal privacy." 5 U.S.C. §§ 552(b)(6) and (7)(C). Thus, Plaintiff was not entitled, on the
24 information submitted, to receive any information on the Third Parties under the FOIA.

25 //

26 //

27 _____
28 ³ The FBI advised Plaintiff of the option to file an administrative appeal with the OIP in its February 26, 1999
letter. Complaint, Exh. 2.

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IV

CONCLUSION

Plaintiff has neither provided the required information to the FBI, nor exhausted his administrative appeal. Accordingly, this court lacks jurisdiction over his claim under the FOIA, and the complaint must be dismissed.

IT IS SO ORDERED

August 2
DATED: July 29, 1999


Nora M. Manella
United States District Judge



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Judicial Watch Files Lawsuit against Obama Administration to Obtain White House Visitor Logs

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During October 27 White House Meeting Obama Administration Officials Sought to Make Deal with Judicial Watch on Records But Refuse to Abandon Erroneous Claim that Visitor Logs are not Subject to FOIA Law

Contact Information:
Press Office 202-646-5172, ext 305

Washington, DC -- December 8, 2009

Judicial Watch, the public interest group that investigates and prosecutes government corruption, announced today that it [filed a lawsuit](#) against the U.S. Secret Service for denying Judicial Watch's Freedom of Information Act (FOIA) request for access to Obama White House visitor logs from January 20 to August 10, 2009. The Obama administration continues to advance the erroneous claim that the visitor logs are not agency records and are therefore not subject to FOIA. As Judicial Watch noted in its complaint, this claim "has been litigated and rejected repeatedly" by federal courts.

The Obama White House did voluntarily release a select number of White House visitor logs to the public. However, other records continue to be withheld in defiance of FOIA law. According to [Judicial Watch's complaint](#) filed in the U.S. District Court for the District of Columbia on December 7:

Since [Judicial Watch] sent its...FOIA request to the Secret Service, the White House has released certain visitor records voluntarily, pursuant to its discretionary release policy. The White House's voluntary production of a portion of the requested records, however, does not satisfy the Secret Service's statutory obligation to produce any and all nonexempt records responsive to Judicial Watch's request. Nor does it remedy the Secret Service's claim, contrary to well established case law, that the requested records are not agency records subject to FOIA.

Judicial Watch [criticized the Obama administration over this issue](#) in a press release on October 16. The following week, a White House lawyer called Judicial Watch to set up a meeting with "senior White House officials." On October 27, Judicial Watch staff visited with White House officials led by Norm Eisen, Special Counsel to the President for Ethics and Government, to discuss Judicial Watch's pursuit of the White House visitor logs, as well as other transparency and ethics issues. During the meeting, the Obama White House officials asked Judicial Watch to scale back its request and expressed hope that Judicial Watch would publicly praise the Obama administration's commitment to transparency. However, the White House refused to abandon its legally indefensible line of reasoning that White House visitor logs are not subject to FOIA law. In a November 30 follow up letter, Mr. Eisen reiterated the Obama administration's legal position and, citing national security concerns, requested that Judicial Watch "focus and narrow (its) request."

"The courts have affirmed that these White House visitor records are subject to release under FOIA law. If the Obama administration is serious about transparency, they will agree to the release of these records under the Freedom of Information Act," said Judicial Watch President Tom Fitton. "The recent 'party crasher' scandal at the White House put the spotlight on the need for transparency under law when it comes to who visits the White House."

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THE WHITE HOUSE

WASHINGTON

November 30, 2009

Ms. Tegan Millspaw
Judicial Watch, Inc.
501 School Street, SW (Suite 700)
Washington, DC 20024

Dear Ms. Millspaw,

I write in response to your November 3, 2009 letter to the Information Quality Officer of the United States Secret Service (“USSS”). Therein you appeal the denial of your August 10, 2009 Freedom of Information Act request for “any and all agency records concerning all official visitors logs and/or other records concerning visits made to the White House from January 20, 2009 to present.” The USSS forwarded your letter to the White House Counsel’s Office.

As you know, on October 27, 2009, I and other members of the Counsel’s Office met with you and your colleagues to discuss your request. In that meeting, we reiterated the Administration’s firm commitment to increased transparency in government, as evidenced by the President’s decision to voluntarily disclose White House visitor logs created after September 15, 2009. This is the first Administration in history to adopt such a policy.

At our meeting we also explained that the system we inherited was not structured to identify sensitive records. As a result, we cannot make a broad retroactive release of White House visitor records without raising profound national security concerns. For example, the release of certain sensitive national security records encompassed in your request could assist foreign intelligence agencies to identify and target U.S. government officials.

For these reasons and others, we asked you to focus and narrow your request. This would allow us to identify relevant records and release them to the public without endangering national security interests. In fact, on October 30, 2009 and on November 25, 2009 the White House released, in response to numerous specific requests, large collections of visitor records from the time period you identified.

We remain happy to work with you to narrow your current request, so that we can release additional records to the public and further increase government transparency. Please contact me if you are interested in further discussions.

Sincerely,

A handwritten signature in black ink, appearing to read "Norman L. Eisen". The signature is fluid and cursive, with the first name being the most prominent.

Norman L. Eisen

Special Counsel to the President

cc: United States Secret Service

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

_____)	
JUDICIAL WATCH, INC.,)	
)	
Plaintiff,)	
)	
v.)	Case No. 1:09-cv-02312
)	
UNITED STATES SECRET SERVICE,)	
)	
Defendant.)	
_____)	

[PROPOSED] ORDER

This matter comes before the Court on Plaintiff’s Motion for Partial Summary Judgment and Defendant’s Cross-Motion for Summary Judgment. Upon consideration of Plaintiff’s and Defendant’s motions and of all materials submitted in relation thereto, it is hereby ORDERED that:

Plaintiff’s motion shall be, and hereby is, DENIED; and

Defendant’s motion shall be, and hereby is, GRANTED; and

Summary Judgment shall be, and hereby is, entered for the Defendant.

Accordingly, this action shall be, and hereby is, DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

Date: _____

Henry H. Kennedy, Jr.
United States District Judge