[NOT YET SCHEDULED FOR ORAL ARGUMENT]

NO. 10-5349

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

JUDICIAL WATCH, INC.

Plaintiff-Appellant,

v.

FEDERAL HOUSING FINANCE AGENCY

Defendants-Appellees.

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Cir. R. 28(a)(1), Plaintiff-Appellant Judicial Watch, Inc. ("Judicial Watch"), by counsel, certifies as follows:

(A) **Parties and Amici.** The parties appearing in the lower court and in this appeal are Plaintiff-Appellant Judicial Watch and Defendant-Appellee Federal Housing Finance Agency. No intervenors or *amici* appeared before the district court, nor are any expected here.

(B) **Rulings Under Review.** The ruling under review in this appeal is the Opinion and Order of September 30, 2010 by U.S. District Court Judge Paul L. Friedman, Joint Appendix (JA 59-70), granting defendants' motion for summary judgment and denying plaintiff's motion for partial summary judgment, available at *Judicial Watch, Inc. v. Federal Housing Finance Agency*, No. 09-1537, 2010 U.S. Dist. LEXIS 104832 (D.D.C. Sept. 30, 2010).

(C) **Related Cases.** This case has not previously been before this Court. To counsel's knowledge, there are no related cases.

/s/ James F. Peterson

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

* Authorities chiefly relied upon are marked with an asterisk.

TABLE OF AUTHORITIES (cont.)

Statutes, Rules, and Other Authorities

STATEMENT OF JURISDICTION

Jurisdiction in the District Court was based upon the Freedom of Information Act ("FOIA"). 5 U.S.C. § 552 and 28 U.S.C. § 1331. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. This appeal is timely because the District Court entered its final judgment on September 30, 2010 (JA 59-70), and pursuant to Fed. R. App. 4(a)(1)(B), a timely notice of appeal was filed on October 19, 2010. JA 71.

STATEMENT OF THE ISSUE PRESENTED

Whether the placement of two government sponsored enterprises into conservatorship, pursuant to which a government agency, the Federal Housing Finance Agency ("the FHFA"), obtained legal title to all records of the government sponsored enterprises, makes the records of the government sponsored enterprises subject to disclosure under FOIA.

STATUTES AND REGULATIONS

12 U.S.C. § 4617:

(b) Powers and duties of the Agency as conservator or receiver.

. . . .

(2) General powers.

(A) Successor to regulated entity. The Agency shall, as conservator or receiver, and by operation of law, immediately succeed to--

(i) all rights, titles, powers, and privileges of the regulated entity, and of any stockholder, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity; and

(ii) title to the books, records, and assets of any other legal custodian of such regulated entity.

STATEMENT OF THE CASE

At issue in this appeal is whether the FHFA must comply with a FOIA request for records of the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Company ("Freddie Mac"), two previously independent, government sponsored enterprises. It is undisputed that Fannie Mae and Freddie Mac were placed into conservatorship by the FHFA in September 2008. It also is undisputed that the boards of both Fannie Mae and Freddie Mac accepted conservatorship by the FHFA with full knowledge that the FHFA would obtain all rights, titles, powers and privileges of the enterprises, including legal title to their books and records. Since that time, the FHFA, a federal agency subject to FOIA, has had full legal custody and control over all of the records of Fannie Mae and Freddie Mac. Because the FHFA obtained these records and has exercised full legal control over them since it placed Fannie Mae and Freddie Mac into conservatorship, the requested records became subject to FOIA just like any other agency records.

STATEMENT OF FACTS

Judicial Watch seeks access to records of contributions made by Fannie Mae and Freddie Mac to political campaigns prior to the government sponsored enterprises' collapse and placement into conservatorship by the FHFA in

September 2008.[1] As a part of an investigation into Fannie Mae, Freddie Mac, and the broader financial crisis, Judicial Watch sent a FOIA request to the FHFA on May 29, 2009, seeking access to the following:

a. Any and all Freddie Mac and/or Fannie Mae records concerning political campaign contributions.

b. Any and all Fannie Mae and/or Freddie Mac records concerning policies, stipulations, and/or requirements concerning campaign contributions.

JA 6. The time frame of the request was from 2005 to the date of the request. *Id.*

The FHFA refused to process Judicial Watch's request, claiming that, while it possessed records of Fannie Mae that are responsive to Judicial Watch's request, the FHFA was not required to produce them because they allegedly were not "agency records." JA 6. The FHFA did not respond as to Judicial Watch's request for records of Freddie Mac. After the denial of a timely administrative appeal, Judicial Watch filed suit. JA 5.

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[1] By statute, the FHFA had sole discretion to place Fannie Mae and Freddie Mac into conservatorship. 12 U.S.C. § 4617(a). Upon doing so, the powers of the directors, officers, and shareholders were transferred to the FHFA. *See, e.g.,* Pltf.'s Opp. to Defs Mot. for Summary Judgment and Pltf's Cross Motion for Partial Summary Judgment, Exh. 1 ("Fact Sheet: Questions and Answers on Conservatorship," Federal Housing Finance Agency, available at www.fhfa.gov). As conservator, the FHFA controls and directs operations of Fannie Mae and Freddie Mac. *Id.* at p. 2. In addition, all powers of stockholders are suspended until the conservatorship is terminated. *Id.* at p. 3.

Following the parties' cross-motions for summary judgment, the district court ruled in favor of the FHFA, holding that the agency did not have to comply with the FOIA request because the requested records were not "agency records." JA 59-70. The district court concluded that, despite the unambiguous statutory language granting legal title to records of Fannie Mae and Freddie Mac, the records were not under the agency's "control." Judicial Watch timely appealed the district court's ruling. JA 71.

SUMMARY OF ARGUMENT

The requested records in this case are agency records because, consistent with the U.S. Supreme Court's definition of an "agency record" for the purposes of FOIA and a statute that plainly granted the FHFA title to all books and records of Fannie Mae and Freddie Mac when those two government sponsored enterprises were placed into conservatorship, the records were in the custody and control of the agency at the time Judicial Watch's FOIA request was made.

STANDARD OF REVIEW

District court decisions on summary judgment motions in FOIA cases are reviewed *de novo*. *Sussman v. United States Marshals Serv.*, 494 F.3d 1106, 1111-12 (D.C. Cir. 2007) (citing *Sample v. Bureau of Prisons*, 466 F.3d 1086, 1087 (D.C. Cir. 2006)).

ARGUMENT

I. The Requested Records Are Agency Records.

As held by the U.S. Supreme Court, records requested under FOIA are "agency records" if they are (1) either created or obtained by the agency, and (2) under agency control at the time the FOIA request is made." *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989) ("*Tax Analysts*"). The burden falls on the agency to establish that documents are not agency records. 492 U.S. at 142 n.3 ("The burden is on the agency to demonstrate, not the requestor to disprove, that the materials sought are not 'agency records' . . .") (citing S. Rep. No. 813, 89th Cong., 1st Sess., 8 (1965)).

The federal statute authorizing the FHFA's takeover of Fannie Mae and Freddie Mac specifically provides that the agency assumed full management and operational control over the two previously independent government sponsored enterprises upon their placement into conservatorship. *See* 12 U.S.C. § 4617. Under this same statute, the FHFA also assumed "all rights, titles, powers, and privileges of [Fannie Mae and Freddie Mac], and of any stockholder, officer, or director . . . ." *Id.* at § 4617(b)(2)(A)(i). Moreover, the FHFA also obtained "title to the books, records, and assets of any other legal custodian of" Fannie Mae and Freddie Mac. 12 U.S.C. § 4617(b)(2)(A)(ii). Under the plain language of these

provisions, once the FHFA placed Fannie Mae and Freddie Mac into conservatorship in September 2008, the records of these government sponsored enterprises were transferred to the custody and control of the FHFA. Therefore, the records were in the custody and control of the FHFA at the time of Judicial Watch's FOIA request on May 29, 2009. Significantly, the FHFA never disputed that it had the capability to search for and produce records responsive to Judicial Watch's FOIA request. *See* Defs. Mem. In Support of Mot. For Summary Judgment at 12-13. Based on the plain language of these statutes, the FHFA had no basis for refusing to comply with the request.

A. The Requested Records Were "Obtained By" and In the Custody of the Agency.

In the proceeding below, Judicial Watch established, and the district court agreed, that the requested records were "obtained" by the agency, as defined in *Tax Analysts*. JA 64. This Court has explained that the key factor in whether an agency has "obtained" a record is whether the record is in the actual custody of the agency. *Wolfe v. HHS*, 711 F.2d 1077, 1080 (D.C. Cir. 1983) (finding that the agency "must actually have custody of the documents.") (citing *Forsham v. Harris*, 445 U.S. 169, 185 (1980)). Here, it is undisputed that the FHFA assumed full legal custody of the requested records when Fannie Mae and Freddie Mac

were placed into conservatorship in September 2008. The agency clearly "obtained" all of the enterprises' records pursuant to the statute that plainly granted it "title to the books, records, and assets" of Fannie Mae and Freddie Mac. 12 U.S.C. § 4617(b)(2)(A)(ii).

B. The FHFA Controlled the Requested Records.

The FHFA also had full "control" over the requested records at the time of Judicial Watch's FOIA request. The Supreme Court has defined "agency control" in the following way: "[b]y control we mean that the material have come into the agency's possession in the legitimate conduct of its official duties." *Tax Analysts*, 492 U.S. at 145. Again, under the plain language of the statute, the FHFA has complete management control over Fannie Mae and Freddie Mac and full legal custody of their records. All of the powers of Fannie Mae and Freddie Mac's prior directors, officers, and shareholders have been transferred to the FHFA by statute. In addition, Congress specifically transferred the "records" of Fannie Mae and Freddie Mac to the FHFA. Hence, the records have "come into the agency's possession" in the legitimate conduct of the FHFA's official duties. In every meaningful way, the FHFA is lawfully in control of the records. There is nothing contingent, hypothetical, indefinite, or limiting about this plain statutory language vesting the FHFA with both legal custody and lawful control over the records.

In other cases examining whether records are under "agency control," this Court has employed a four-part test to aid its inquiry. Under the test, while considering the "totality of the circumstances," a court balances four factors: (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 records as it sees fit," (3) "the extent to which the 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." *United We Stand Am., Inc. v. IRS*, 359 F.3d 595, 599 (D.C. Cir. 2004); *Consumer Fed'n of Am. v. Dep't of Agric.*, 455 F.3d 283, 287 (D.C. Cir. 2006) (noting that the court's totality of the circumstances test seeks to vindicate Congress' purpose "to open agency action to the light of public scrutiny") (internal quotation omitted).

None of these cases applying the four-part test involved records which already had been transferred to an agency by the plain language of a statute. Nevertheless, under the unique circumstances of this case, the four-part test confirms that the records are under the FHFA's control. As the district court concluded, the first factor weighs heavily in favor of control by the FHFA in light of the decision by the boards of both Fannie Mae and Freddie Mac to accept conservatorship by the agency. The entities did so with full knowledge that the

FHFA would obtain all rights, titles, powers and privileges of the enterprises, as well as legal title to their books, records, and assets. JA 65-66 (citing Pltf's Mot., Exh. 4, Statement of FHFA Director James B. Lockhart, Sept. 7, 2008, at 5-6); 12 U.S.C. § 4617(b). As the district court correctly noted, this demonstrates "that they did not intend to retain control of them and in fact intended to relinquish control." *Id.*

The second factor also weighs heavily in favor of the FHFA's control. As the district court correctly held, as the legal custodian of Fannie Mae and Freddie Mac's records, the FHFA has an unfettered ability to use and dispose of the records in any manner it may choose. JA 66 (citing *Burka v. U.S. Dep't of Health & Human Servs.*, 87 F.3d 508, 515 (D.C. Cir. 1996)). This ability is a compelling indicator of the FHFA's control of the requested records.

The district court ruled that the third and fourth factors did not demonstrate control by the FHFA, and concluded that they outweighed the first two factors indicating agency control. JA 66-67. Among other things, this conclusion overlooks the "totality of the circumstances" present in this case.

Even if, as the agency claims, its staff has not "read or relied upon the requested documents" – the third prong of the test – the importance of this factor varies with the circumstances of each case. For example, in *BNA v. U.S. Dep't of*

Justice, 742 F.2d 1484 (D.C. Cir. 1984), the Court observed that use of a requested document by the employee was particularly relevant in that case because it was a record created by an agency employee. *Id.* at 1492. Nevertheless, the Court concluded that "use" of the document alone was not dispositive and that the focus must remain on the "totality of the circumstances." *Id.* at 1492-93. Hence, the third factor, if not weighing in favor of Judicial Watch, is by no means dispositive and must be viewed in the "totality of the circumstances."

As to the fourth factor, the requested records clearly are part of the "agency's files" by virtue of the fact that the FHFA has undisputed custody of all of the records of Fannie Mae and Freddie Mac. Congress could not have been clearer in its mandate that "title to the books, records, and assets" of Fannie Mae and Freddie Mac be transferred to the FHFA upon placement of these government sponsored enterprises into conservatorship. 12 U.S.C. § 4617(b)(2)(A)(ii). It belies Congress' mandate to conclude that such records, after being placed in the FHFA's lawful custody and control, are somehow separate from the agency and its files. Simply put, the records of Fannie Mae and Freddie Mac were transferred to the custody and control of the FHFA. Taken together, at least three of the four factors further demonstrate the agency's full control over the records.

Finally, it is important to note that the unique circumstances of this case making it distinct from prior cases that considered "agency control" over a requested record. This case is nothing like *Kissinger v. Reporters Committee for Freedom of the Press*, in which the records at issue were asserted to be personal papers of a high-level government official. 445 U.S. 136 (1980) (transcripts of telephone conversations removed from agency were not agency records). No statute granted a federal agency full legal title over Dr. Kissinger's papers.

This case is also very different from *Consumer Federation of America v. Dep't of Agric.*, 455 F.3d 283 (D.C. Cir. 2006), in which personal appointment calendars of agency officials were at issue. This case is not at all like *United We Stand America, Inc. v. IRS*, 359 F.3d 595 (D.C. Cir. 2004), which concerned a document prepared for Congress by the IRS and whether Congress had manifested a clear intent to retain control of the document. No issue exists in this case as to whether Fannie Mae or Freddie Mac retain any control over the records at issue.

Nor are the circumstances of this case comparable to *Forsham v. Harris*, 445 U.S. 169 (1980), which concerned records "created and held by [an] entity that was not itself an 'agency'" and which were in the possession of a "privately controlled organization" at the time of the request. *Id.* at 178. The case most heavily relied on by the district court, *Burka v. U.S. Dep't of Health & Human*

Servs., 87 F.3d 508 (D.C. Cir. 1996), is also very different, as mere "constructive control" by an agency of data tapes created by a government contractor was sufficient to constitute control of the records by the agency. Fannie Mae and Freddie Mac retain no interest comparable to a government contractor in the requested records.

The circumstances of this case are distinctly different from any of these cases, as custody and control of the requested records has been transferred by statute to the FHFA. Hence, no issue exists in this case as to whether the records belong to any third party, such as an employee or a government contractor. That question was specifically answered by Congress when it transferred full custody and control of the records to the FHFA. This unique fact is critical, and compelling, when considering the "totality of the circumstances" in this case.

Based on the plain language of the statute, the FHFA has full custody and control of the requested records. The undisputed facts demonstrate that the requested records are, in fact, agency records properly subject to FOIA.

CONCLUSION

For the foregoing reasons, Judicial Watch respectfully requests that the Court reverse the district court's decision below, enter judgment in favor of Judicial Watch, and remand this matter for further proceedings.

February 4, 2011

Respectfully submitted,

/s/ Paul J. Orfanedes

/s/ James F. Peterson

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to F.R.App.P. 32(a)(7)(c) and D.C. Cir. Rule 32(a)(2), the attached principal brief is proportionally spaced, has a typeface of 14 points and contains 3,422 words, as counted by the word-processing system used to prepare the brief.

February 4, 2011 /s/ James F. Peterson

CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2011, the foregoing BRIEF OF APPELLANT was filed via the CM//ECF system and by hand (original and eight copies) with the Court and served by the CM/ECF system and by first-class U.S. mail (two copies), postage prepaid, on the following:

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