[NOT YET SCHEDULED FOR ORAL ARGUMENT]

NO. 11-5282

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

_____

JUDICIAL WATCH, INC.

Plaintiff-Appellee,

v.

UNITED STATES SECRET SERVICE

Defendant-Appellant.

_____

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

_____

BRIEF OF APPELLEE

_____

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Cir. R. 28(a)(1), Plaintiff-Appellee 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 Judicial Watch and Defendant-Appellant United States Secret Service ("Secret Service"). No intervenors or amici appeared before the District Court. Amici in support of Judicial Watch are expected in this appeal.

(B) **Rulings Under Review**. The ruling under review in this appeal is the Memorandum Opinion and Order of the District Court issued August 17, 2011. *Judicial Watch, Inc. v. Secret Service*, No. 09-2312 (Judge Beryl A. Howell), published at 803 F. Supp. 2d 51 and in the Joint Appendix at page 95.

C. **Related Cases**. This case has not previously come before this Court. Counsel is aware of no other related cases.

/s/ James F. Peterson

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STATEMENT OF THE ISSUES PRESENTED

Whether the District Court correctly held that visitor logs created and controlled by the U.S. Secret Service are agency records subject to the Freedom of Information Act.

TABLE OF RELEVANT STATUTES AND REGULATIONS

The relevant statute at issue is the Freedom of Information Act. 5 U.S.C. § 552.

STATEMENT OF THE CASE

This case concerns a Freedom of Information Act ("FOIA") request for Secret Service visitor logs and whether such records are subject FOIA. To date, three different courts have examined this issue, including the District Court below, and all three have concluded that the requested records are agency records and must be processed in response to a properly submitted FOIA request.

The District Court determined that visitor logs to the White House created and controlled by Secret Service are agency records and subject to FOIA. The District Court ordered the Secret Service to process the FOIA request, disclose "all segregable, nonexempt records, and assert specific FOIA exemptions for any records it seeks to withhold or otherwise demonstrate that it would be unreasonably burdensome to search for such withheld records." Joint Appendix ("JA") at 93. The Secret Service then filed this appeal.

STATEMENT OF FACTS

On August 10, 2009, Judicial Watch sent a FOIA request to the Secret Service seeking access to "[a]ll visitor logs and/or other records concerning visits made to the White House from January 20, 2009 to the present." JA49. On October 8, 2009, the Secret Service responded by letter stating that the agency interpreted the FOIA request to encompass "Access Control Records System (ACR) records and/or Workers Visitors Entry System (WAVES) records" and asserted that the requested records "are not agency records subject to the FOIA." *Id.* The Secret Service further claimed that the records are "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." *Id.* Following the Secret Service's denial of the administrative appeal, this lawsuit was filed on December 7, 2009. *Id.*

SUMMARY OF ARGUMENT

The Secret Service is before this Court arguing a claim rejected on at least three different occasions. Not only does the Secret Service continue to assert that visitor logs are not agency records, but it also tries to invoke the separation of powers doctrine, in order remove the records entirely from FOIA. Hence, according to the Secret Service, it should not even have to process Judicial Watch's FOIA request.

The Secret Service has failed to respond properly to a FOIA request for visitor records that the agency creates and maintains as part of its statutory responsibilities and that now three courts have concluded are agency records. Rather than rely on the statutory scheme that Congress put in place when it enacted the FOIA and that provides an agency an opportunity to withhold material that falls within nine specified categories, the Secret Service and the White House attempt to co-opt agency records and place them beyond the reach of this Court and – for the foreseeable future – the public.

The issue of whether Secret Service visitor logs are agency records has been thoroughly examined at the district court level, with three different judges concluding that they are, and that the White House cannot unilaterally decide that records created and maintained by a federal agency can be removed from reach of FOIA. Finally, even if certain visitor logs might somehow raise legitimate confidentiality concerns of the President, the proper approach under FOIA is for the agency to process the request and prove that any claims of exemption it might assert are proper. The Secret Service failed to do this.

Instead, the Secret Service (parroting the White House) trumpets a "voluntary disclosure policy" under which the White House releases only certain visitor records that it sees fit to release at a time of its choosing. This "policy" is entirely irrelevant here as it does not in any way excuse the Secret Service from its

responsibilities under FOIA.[1] An agency cannot opt out of FOIA simply because the White House has other plans.

Despite the objections raised by the Secret Service, the legal issue before this Court remains straightforward – whether Secret Service visitor logs are agency records under FOIA. If, as prior courts below have concluded, the records are subject to FOIA, the Secret Service will then simply be required to process Judicial Watch's request and assert exemptions as provided for under FOIA. The District Court should be upheld.

ARGUMENT

As set forth by the U.S. Supreme Court, materials 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). Importantly, 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)).

[1] In any event, published reports already have questioned whether the voluntary disclosure process is being used to prevent certain embarrassing records of White House visits from being released. Byron Tau, "Depp, Burton Not in W.H. Visitor Logs," *Politico* (Jan. 9, 2012).

In other cases examining whether records are under "agency control," this Court has employed a four-part test to aid its inquiry. *Judicial Watch, Inc. v. FHFA*, 646 F.3d 924 (D.C. Cir. 2011). 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." *Id*. at 926-27; *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).

I. The District Court Correctly Held That Secret Service Visitor Logs Are "Agency Records" Subject to FOIA.

The District Court, like two courts before it, squarely held that Secret Service visitor logs are agency records under FOIA. JA95-113; *CREW v. U.S. Dep't of Homeland Security*, 527 F. Supp. 2d 76, 89 (D.D.C. 2007); *CREW v. U.S. Dep't of Homeland Sec*., 592 F. Supp. 2d 127 (D.D.C. 2009) (reaffirming same conclusion as to agency records); *accord The Washington Post v. U.S. Dep't of Homeland Sec.*, 459 F. Supp. 2d 61, 72 (D.D.C. 2006) (on motion for preliminary

injunction, holding plaintiff had likelihood of success because White House visitor records sought are agency records subject to FOIA) (voluntarily dismissed). As no material facts were at issue, the District Court properly granted partial summary judgment on this straightforward legal issue.

A. The Secret Service "Created or Obtained" the Records.

The Secret Service does not contest here (or in the District Court below) that visitor logs are created by the Secret Service in furtherance of the agency's statutorily mandated protective function. JA101; *CREW v. U.S. Dep't of Homeland Sec*., 527 F. Supp. 2d at 88 ("The Secret Service's affidavits show that the visitor records were 'created or obtained' by the Secret Service.") (citation omitted). The 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"). WAVES records include information White House pass holders provide in advance to the Secret Service – the proposed visitor's identifying information (name, date of birth, social security number), time and location of the scheduled appointment, name of the person submitting the request, name of the recipient of the visitor, date of the request, and type of visitor expected (*e.g.*, press, temporary worker) – as well as any additional information the Secret Service adds as a result of a background check. *CREW v. U.S. Dep't of Homeland Sec.*, 527 F. Supp. 2d at

80. ACR records are created when a visitor swipes his or her pass upon entering or exiting the White House Complex, and include the visitor's name and badge number, the time and date of his or her entry and exit, and the specific post that recorded the swipe. *Id.*

In a prior review of the issue, the Honorable Royce C. Lamberth concluded that visitor logs are "created or obtained" by the Secret Service – indicating agency record status based on the process by which the visitor records are generated, 527 F. Supp. 2d at 90-91 – and that they "are created primarily for the agency's use." *Id.* at 91. The identical conclusion was reached in *The Washington Post v. U.S. Dep't of Homeland Sec.*, 459 F. Supp. 2d 61, 69 (D.D.C. 2006) (Urbina, J.) (on a motion for preliminary injunction, plaintiff had likelihood of success that visitor logs were created or obtained by the Secret Service). And in this case, the District Court held that, despite the fact that information inputted into the records is provided by the White House to the Secret Service, this does not alter that it is the Secret Service that creates the records in fulfillment of its statutory duties. JA102.

Thus, the District Court correctly held that, based on the undisputed facts of how visitor logs are generated, the requested records are "created or obtained" by the Secret Service, satisfying the first prong of the *Tax Analysts* test.

B. The Secret Service "Controls" the Records.

The District Court, as did the two prior reviewing courts, also properly held that Secret Service visitor logs are under agency control. Applying this Court's four-part test to determine agency control, the District Court concluded that even though the Secret Service intends to relinquish control of the visitor logs (relevant to the first factor), the other three factors weigh in favor of the records as agency records. JA102-107.

The District Court's conclusion was entirely in accord with the ruling in *CREW v. U.S. Dep't of Homeland Sec.*, 527 F. Supp. 2d 76, 92 (D.D.C. 2007). In that case, Judge Lamberth "ha[d] no difficulty concluding the visitor records are under the Secret Service's control." *Id.* at 97. While the Secret Service claimed no intention to control the records, its "historical use of the visitor records suggests that it does in fact control the records." *Id.* Accordingly, the Court held "use trumps intent." *Id.* As Judge Lamberth reasoned, "[b]ecause the Secret Service creates, uses and relies on, and stores the visitor records, 'in the legitimate conduct of its official duties,' they are under its control." *Id.* at 98 (citing *Tax Analysts*, 492 U.S. at 145). *See also CREW v. U.S. Dep't of Homeland Sec*., 592 F. Supp. 2d 127 (D.D.C. 2009) (reaffirming same conclusion as to agency records); *accord Washington Post*, 459 F. Supp. 2d 61. No reason exists to disturb these rulings.

In this appeal, the Secret Service does not seriously contest that the application of the four-part test to determine agency control yields the conclusion that the visitor logs are agency records. Instead, it criticizes the District Court for its "rote application" of the four-part test (Appellant Br. at 26) and asserts that the four-part test is not applicable at all. The Secret Service argues that (1) a Memorandum of Understanding between the agency and the White House allegedly shifts control of the records, and (2) the request in this case is comparable to the congressional documents at issue in *United We Stand Am., Inc. v. IRS*, 359 F.3d 595 (D.C. Cir. 2004). These claims, however, offer no support for abandoning the Court's well-established four-part test to determine agency control.

i. The White House's "Assertion" of Control Does Not Transform the Status of Records and Has No Legal Effect.

As an initial matter, an agency cannot unilaterally decide that FOIA does not apply to agency records generated while serving the President. *See Ryan v. Dep't of Justice*, 617 F.2d 781, 788 (D.C. Cir. 1980). As the Court in *Ryan* held, "[the] logical conclusion from the FOIA language and from *Soucie*[2] is that . . . a particular unit is either an agency or it is not. Once a unit is found to be an agency, this determination will not vary according to its specific function in each case." *Id*. at 788. The Court further stated that if a federal agency makes determinations about what is and is not an agency record based on an agency's particular functions

[2] *Soucie v. David*, 448 F.2d 1067 (D.C. Cir.1971).

related to the President, records could be "somehow transformed" into records not subject to FOIA, and that "this does not appear as either a realistic or intended distinction under the Freedom of Information Act." *Id*. at 787.

The Secret Service (along with the White House) is attempting just such a transformation in this case. *See* Appellant Br. at 13 ("The White House at all times maintains 'exclusive legal custody and control' of the records . . . and [the records] are thus not agency records subject to disclosure under FOIA"). Together they are attempting to manipulate the legal status of Secret Service records in order to convert them into non-agency records. Their argument hinges on a Memorandum of Understanding executed in 2006 between the Secret Service and the White House that purports to give the White House full "exclusive legal custody and control" of the visitor logs.[3] This Court, however, has previously concluded that it takes far more than "legal custody" to have control for purposes of FOIA. *Judicial Watch, Inc. v. FHFA*, 646 F.3d 924 (D.C. Cir. 2011) ("But our cases have never suggested that ownership means control.").

Further, as one court has already found, the White House cannot change the legal status of a document simply by executing an MOU. *See American Historical Ass'n v. Peterson*, 876 F. Supp. 1300 (D.D.C. 1995) (addressing the legality of

[3] Not surprisingly, this MOU was executed approximately four months after Judicial Watch and CREW submitted FOIA requests relating to visits to the White House by convicted lobbyist Jack Abramoff.

MOU entered into by President Bush in which he purported to retain exclusive legal control over materials subject to the PRA after he left office). If an MOU is all that was necessary to remove records from the ambit of FOIA, by assigning "legal custody" away from the agency, then wide swaths of agency records are subject to removal from agency access. Notably, this is precisely the type of purposeful routing of an agency record out of an agency's possession about which the U.S. Supreme Court warned in *Kissinger v. Reporters Committee for Freedom of Press*, 445 U.S. 136, 155 n. 9 (1980) (warning that federal agencies may engage in such transfers to avoid an impending FOIA request).

The White House's similar efforts here to manipulate the legal status of Secret Service records are of no avail. Control, for purposes of FOIA, is not dictated by execution of a self-serving agreement. An agency and the White House cannot transform the status of an agency record by executing a mere agreement that has no legal effect.

ii. This Case Is Different Than the Unique Circumstances in *United We Stand Am*.

Relying on this supposedly important, but ineffectual, "assertion of control" by an MOU, the Secret Service argues that this case is the equivalent of *United We Stand Am*. Appellant Br. 19-24. That case, however, is distinctly different.

In *United We Stand Am.,* this Court examined "a FOIA request for a document that the Internal Revenue Service prepared at the direction of a

congressional committee." 359 F.3d at 597. Finding "sufficient indicia of congressional intent to control" the congressional committee's "request[,] and those portions of the IRS response that would reveal the request," the court concluded that "neither Congress nor the agency ha[d] exclusive control over the document." *Id.* at 600, 604. The court held, as a result, "that only those portions of the IRS response that would reveal the congressional request are not subject to FOIA." *Id.* at 597. In addition, and critical to the Court's conclusion, was a specific "confidentiality directive" that appeared on the committee's request. This directive made plain Congress' specific intent to retain control over the agency-generated document.

In this case, the Secret Service has relied on no similar confidentiality directive. In fact, it is undisputed that visitor information is transferred to the Secret Service in many forms by many different individuals. The records at issue here are created by employees of the Secret Service within the scope of their official duties. They are created

> from three distinct sources of information: the White House, the Secret Service, and the visitor. The first source is an authorized White House pass holder, who may or may not be a member of the President's or Vice-President's staff. The pass holder will transfer to the Secret Service, usually electronically, but sometimes by telephone, facsimile, e-mail, or paper, information on an upcoming visit.

527 F. Supp. 2d at 89. Hence, there is no contemporaneous request by a member of the President's staff, as in *United We Stand America*, demonstrating a specific intent to control the records. The various visitor information transmitted to the Secret Service thus lacks the explicit and unambiguous confidentiality limitation that was clearly decisive in *United We Stand America.*

This case is also very different in that it involves a regularly created record by the agency in fulfillment of its statutory duties. Thus, unlike in *United We Stand America,* where a specific record was created for a congressional committee, the visitor logs are created primarily for the agency's use, in order to fulfill its statutory duties. The fact that some of the records would not have been created but for visits connected to the President does not alter their status or diminish the existence of Secret Service control. "To hold otherwise would be to exempt from FOIA's purview a broad array of materials otherwise clearly categorizable as agency records, thereby undermining the spirit of broad disclosure that animates the Act." *Paisley v. CIA*, 712 F.2d 686, 696 (D.C. Cir. 1983).

C. The Secret Service's Own Actions Demonstrate Their Actual Control Over the Records

Further compelling evidence of the Secret Service's actual control over the visitor logs is that the agency has in fact provided visitor logs to Judicial Watch and other parties previously. In response to prior FOIA requests, the Secret Service plainly had "control" over the records at issue such that it provided them to

Judicial Watch and other FOIA requestors. JA50 (Fitton Decl. ¶ 5; JA10 (Declaration of Kathy J. Lyerly, Civ. Action No. 06-0310 (D.D.C.), at ¶ 14, 19). *See also* JA24 (Declaration of Kathy J. Lyerly, Civ. Action No. 06-0883 (D.D.C.), at ¶ 23 ("[T]he Secret Service released to CREW, on May 10, 2006 and July 7, 2006, its WAVES and ACR data/records concerning Jack Abramoff.").

In those instances, the Secret Service had sufficient "control" to produce WAVES and ACR records, including records discovered in searches of the agency's computer hard drives. At no time did the Secret Service suggest that it had less than full control over its use and disposition of the records, which were currently in its possession. For example, in describing its search for records responsive to one of Judicial Watch's prior FOIA requests, Ms. Lyerly stated:

> the FOI/PA Office conducted a search for responsive information. This search was conducted under the direction of the Secret Services Presidential Protective Division by personnel who conduct FOIA searches as part of their regular responsibilities.

JA9 (¶ 9). Ultimately, in *Judicial Watch v. Secret Service*, Civ. Action No. 06-310 (D.D.C.), the Secret Service agreed to be bound by a court-ordered stipulation that required the agency – not the White House or any other entity – to produce the visitor logs, an action that plainly demonstrates the agency's ability to use and dispose of the records as it sees fit. JA5 (Joint Stipulation and Agreed Order, Civ. Action No. 06-0310 (D.D.C.)). Pursuant to the terms of the joint stipulation and

agreed order, on May 10, 2006, the Secret Service produced, without redactions or claims of exemption, all documents located in response to Judicial Watch's January 20, 2006 FOIA request. By entering into a binding stipulation, the Secret Service clearly conceded that it had sufficient "control" over the records at issue to comply with the terms of the stipulation. Moreover, by ultimately producing the requested records to Judicial Watch, the Secret Service demonstrated that it had the requisite control over the records.

As directly relevant and persuasive precedent and the agency's own actions make clear, the Secret Service has control of the requested records. Accordingly, the requested visitor logs are clearly "agency records" subject to FOIA.

II. The District Court Correctly Held That No Constitutional Concerns Are Implicated.

The District Court properly rejected the Secret Service's claims, repeated now to this Court, that application of FOIA to the visitor logs should be avoided as it would raise constitutional concerns. JA108; Appellant Br. at 28. As recognized by the District Court, the doctrine of constitutional avoidance has no application here.

First, the doctrine, which requires a court to construe a statute so as to avoid "serious constitutional problems," applies only to a statute that is "fairly subject to two potential interpretations, one of which raises 'serious constitutional problems' and the other of which does not . . . ." *INS v. St. Cyr*, 533 U.S. 289, 299 (2001).

The doctrine, however, "has no application in the absence of statutory ambiguity." *United States v. Oakland Cannabis Buyer' Coop.*, 532 U.S. 483, 494 (2001).

Here, as the District Court clearly determined, the Secret Service has established no ambiguity in FOIA that would justify application of the constitutional avoidance doctrine. JA108-109. The Secret Service's concerns, as Judge Urbina aptly stated, do "not serve as a license for the court to transmute the meaning of an unambiguous statute." 459 F. Supp. 2d at 72. Echoing this conclusion, Judge Lamberth held that the "doctrine of constitutional avoidance applies only where the statute is open to more than one possible interpretation," which is not this case here. 527 F. Supp. 2d at 99 (citations omitted).

Second, the Secret Service's purported "constitutional concerns" regarding a threat to the "autonomy" of the President and the "confidentiality" of his communications already have been addressed by this Court. Appellant Br. 28-29 (relying on *Cheney v. U.S. District Court*, 542 U.S. 367 (2004)). This Court previously considered and dispensed with this argument, noting that exemptions under FOIA are available in the event of any legitimate concerns as to confidentiality. *CREW v. U.S. Department of Homeland Security*, 532 F.3d 860, 865 (D.C. Cir. 2008) (dismissing prior appeal by Secret Service for lack of appellate jurisdiction).

In this prior review, the Court found "unpersuasive the government's argument that [application of FOIA to Secret Service visitor logs] implicates the same separation-of-powers concerns present in *Cheney*." *Id*. at 865. The Court specifically rejected the argument that "requiring the Secret Service to review FOIA requests for its visitor logs is tantamount to the discovery request at issue in *Cheney*." *Id*. Critical to this conclusion was the fact that *Cheney* involved a discovery request to the Vice President, whereas the FOIA request at issue in that case (same as here) was directed to the Secret Service, an agency indisputably subject to FOIA. The Court found significant that the Secret Service conceded that it had previously processed visitor logs requests after consulting with the White House (*id*. at 866) and noted the "carefully structured process" with FOIA to deal with requests that might reveal too much about presidential communications. *Id*.[4] The Court concludes that routine FOIA requests to agencies do not "ring the same alarm bells" as did the discovery request in *Cheney*. *Id*. at 867. This case is no different.

Finally, the Secret Service's suggestion that this case somehow puts at odds the President's "right to maintain confidentiality" with the Secret Service's ability

[4] Any suggestion that this case is distinguishable from the request before the Court because of the number of records requested is without merit. The Secret Service itself claims that it has a process for "voluntary" release of visitor logs that has reviewed now more than 2 million visitor log entries. Appellant Br. at 9. In any event, the scope of the request was not ruled upon by the District Court and is not before this Court now.

to protect the President is particularly inapt. Appellant Br. at 27. In fact, this Court has previously held that no blanket right to confidentiality applies to the Secret Service. *In re: Sealed Case*, 148 F.3d 1073 (D.C. Cir. 1998). There, the Court denied the Secret Service a special "protective function privilege" to exempt employees from testifying before the grand jury convened by the Whitewater independent counsel. Similarly, in this case, the Secret Service, and its visitor logs, lack any special exemption from the well-established FOIA law.

CONCLUSION

For the foregoing reasons, the District Court's Order and Opinion that Secret Service visitor logs are agency records should be upheld.

Dated: April 23, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7). The brief, excluding exempted portions, contains 4,972 words (using Microsoft Word 2010), and has been prepared in a proportional Times New Roman, 14-point font.

/s/ James F. Peterson

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of April 2012, I filed via the CM/ECF system the foregoing **BRIEF OF APPELLEE** with the Clerk of the Court. Participants in the case are registered CM/ECF users and service will be accomplished by the Appellate CM/ECF system.

I also certify that I caused eight copies to be delivered to the Clerk of Court via hand delivery.

/s/ James F. Peterson