IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CARA LESLIE ALEXANDER, *et al.*,	)	
	)	Civil Action Nos.
Plaintiffs,	)	96-2123/97-1288 (RCL)
	)	
v.	)	**CONSOLIDATED ACTIONS**
	)	
FEDERAL BUREAU OF INVESTIGATION, *et al.*,	)	
	)	
Defendants.	)	
	)	

PLAINTIFFS ALEXANDER AND DUGGAN'S CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiffs Cara Leslie Alexander ("Alexander") and Joseph P. Duggan ("Duggan"), by counsel and pursuant to Rule 56 of the Federal Rules of Civil Procedure, hereby cross-move for summary judgment. As grounds therefor, Plaintiffs Alexander and Duggan respectfully refer the Court to the Memorandum of Law in Opposition to the Government Defendants' Motion For Summary Judgment and in Support of Their Cross Motion for Summary Judgment Plaintiffs Alexander and Duggan's Local Rule 7(h) Response to the Government Defendants' Renewed Statement of Material Facts and Statement of Undisputed Material Facts In Support of Their Cross-motion for Summary Judgment, filed herewith.

Dated: October 19, 2009

Respectfully submitted,

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FEDERAL BUREAU OF INVESTIGATION,	)	
et al.,	)	
	)	
Defendants.	)	
	)	

PLAINTIFFS ALEXANDER AND DUGGAN'S MEMORANDUM OF LAW IN OPPOSITION TO THE GOVERNMENT DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT

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Plaintiffs Cara Leslie Alexander and Joseph P. Duggan, by counsel and pursuant to Rule 56 of the Federal Rules of Civil Procedure, respectfully submit this memorandum of law in opposition to the motion for summary judgment filed by Defendants Federal Bureau of Investigation ("FBI") and Executive Office of the President ("EOP") and in support of their cross-motion for summary judgment. As grounds therefor, Plaintiffs Alexander and Duggan state as follows:

MEMORANDUM OF LAW

I. Introduction.

Over the long and complex history of this matter, certain key facts have remained irrefutable.[1] First, FBI background investigation files are perhaps some of the most sensitive records that the federal government maintains on individuals. Second, the FBI has never disputed that it sent literally hundreds of these files to the Office of Personnel Security ("OPS"), a component of EOP, despite the fact that OPS's requests for the records were, in the FBI's own words, "without justification and served no official purpose." Indeed, the FBI has admitted that it failed to "institute sufficient protections to effectively safeguard" the records and that its conduct constituted a "complete abdication of management responsibility." The FBI also has admitted that this "complete abdication of management responsibility" resulted in "egregious violations of privacy." As will be shown below, there can be no genuine dispute that the FBI violated the Privacy Act by failing to establish appropriate administrative safeguards to insure the

[1] Since the Court dismissed Defendants' various pending motions for summary judgment, without prejudice, in March 2008, Plaintiffs Alexander and Duggan have tried to simplify this thirteen-year old lawsuit by electing not to file an amended complaint and choosing not to pursue their claims against the individual defendants. Plaintiffs Alexander and Duggan have chosen to proceed solely against the FBI and EOP.

security and confidentiality of its background investigation files and that its failure to do so was in flagrant disregard for Plaintiffs' rights under the Privacy Act.

Third, regardless of the circumstances under which OPS acquired the records at issue, there has never been any dispute that OPS continued to maintain them long after it was known that the persons who were the subjects of these records never worked at the Clinton White House and had no need for access to the Clinton White House. OPS should have returned the records to the FBI immediately, as Bernard W. Nussbaum, White House Counsel at the time, testified he would have done if he had known OPS had obtained the records. OPS violated the Privacy Act by continuing to maintain these records when it was neither relevant nor necessary for it to do so, and its failure to return these highly sensitive records to the FBI for more than two years demonstrates a flagrant disregard for Plaintiff's rights.

Because the FBI and EOP violated the Privacy Act and did so in flagrant disregard for the rights of Plaintiffs Alexander and Duggan, and because Plaintiffs Alexander and Duggan suffered adverse effects as a result, the Court should deny EOP's and the FBI's motion for summary judgment and grant summary judgment in favor of Plaintiffs Alexander and Duggan.

II. <u>Statement of Facts</u>.

Plaintiff Alexander is a former employee of the United States Government who worked in the White House Correspondence Office as a correspondence analyst from July 1990 until October 1992. *See* Plaintiff Alexander and Duggan's Responses to Government Defendants' Renewed Statement of Material Facts and Plaintiffs Alexander and Duggan's Statement of Undisputed Material Facts in Support of Cross-Motion for Summary Judgment ("Plfs' Stmt.") at Sec. II, para. 1. Plaintiff Alexander required regular access to the White House while she was

employed in the White House Correspondence Office. *Id.* at Sec. II, para. 2. In order to be granted access to the White House, Plaintiff Alexander underwent a background investigation by the Federal Bureau of Investigation ("FBI"). *Id.* at Sec. II, para. 3.

The FBI's Central Records System, in which records of FBI background investigations conducted by the FBI are maintained, "is classified as a 'Privacy Act System of Records.'" *Id.* at Sec. II, para. 4. The FBI maintains records of its background investigation of Plaintiff Alexander as part of its "Privacy Act System of Records." *Id.* at Sec. II, para. 5.

On December 3, 1993, OPS, a component of EOP, requested records of Plaintiff Alexander's background investigation from the FBI. *Id.* at Sec. II, para. 6. The reason identified by OPS on the request form was "access" to the White House. *Id.* at Sec. II, para. 7. At the time the request was made, however, Plaintiff Alexander no longer required access to the White House, as she had left her White House employment in October of 1992. *Id.* at Sec. II, para. 8. Nonetheless, on December 13, 1993, the FBI provided OPS with records of Plaintiff Alexander's background investigation. *Id.* at Sec. II, para. 9. OPS maintained the records of Plaintiff Alexander's background investigation it received from the FBI in its own system of records from approximately December 13, 1993 until June 13, 1996. *Id.* at Sec. II, para. 10. On June 13, 1996, OPS returned the records of Plaintiff Alexander's background investigation to the FBI. *Id.* at Sec. II, para. 11.

Plaintiff Duggan is a former employee of the United States Government who worked in the White House as a speech writer for President George H. Bush from September 1991 until approximately August 1992. *Id.* at Sec. II, para. 12. Mr. Duggan required regular access to the White House while he was employed as a speech writer for President Bush. *Id.* at Sec. II, para.

13. In order to be granted access to the White House, Plaintiff Duggan underwent a background investigation by the FBI. *Id.* at Sec II, para. 14.

The FBI maintains records of its background investigation of Plaintiff Duggan as part of its "Privacy Act System of Records." *Id.* at Sec. II, para. 15. On January 18, 1994, OPS requested records of Plaintiff Duggan's background investigation from the FBI. *Id.* at Sec. II, para. 16. The reason identified by OPS on the request form was "access" to the White House. *Id.* at Sec. II, para. 17. At the time the request was made, however, Plaintiff Duggan no longer required access to the White House, as he had left his White House employment in approximately September 1992. *Id.* at Sec. II, para. 18. Nonetheless, on January 27, 1994, the FBI provided OPS with records of Plaintiff Duggan's background investigation. *Id.* at Sec. II, para. 19.

OPS maintained the records of Plaintiff Duggan's background investigation it received from the FBI in its own system of records from approximately January 27, 1994 to June 6, 1996. *Id.* at Sec. II, para. 20. On June 6, 1996, OPS returned the records of Plaintiff Duggan's background investigation to the FBI. *Id.* at Sec. II, para. 21.

Plaintiff Alexander learned that the FBI had provided records of her FBI background investigation to OPS and OPS had maintained these records in June 1996, when she received a call from a friend who had seen her name on a list published in a newspaper. *Id.* at Sec. II, para. 45. Since that time, Plaintiff Alexander has expended considerable time investigating Defendants' conduct by reviewing investigative bodies' records and reports on this issue. *Id.* at Sec. II, para. 46. In addition, Plaintiff Alexander has expended considerable time seeking counsel from friends, family and three separate attorneys on how to redress this wrong. *Id.* at

Sec. II, para. 47. Plaintiff Alexander also has incurred out of pocket expenses, including long distance telephone calls, taxi cab fares resulting from meetings with lawyers and others, babysitting costs to attend her deposition and meetings, fax charges, and fees to obtain medical records. *Id.* at Sec. II, para. 48.

Plaintiff Duggan first learned the FBI had provided records of his FBI background investigation to OPS and OPS had maintained these records in June 1996, when he received a call from a reporter with the Associated Press. *Id.* at Sec. II, para. 49. Plaintiff Duggan was immediately upset by the discovery and had difficulty sleeping. *Id.* Plaintiff Duggan has spent an estimated 1,400 hours investigating, responding to, and seeking redress for Defendants' conduct. *Id.* at Sec, II, para. 50. Plaintiff Duggan's efforts included contacting Members of Congress and congressional investigators, the U.S. Department of Justice, and the Office of the Independent Counsel, as well as advocacy groups and legal organizations. *Id.* Plaintiff also spent many hours obtaining and reviewing news reports and records and transcripts of investigations into the matter. *Id.* Plaintiff Duggan also signed a joint letter to the President and participated in a demonstration outside the White House. *Id.* Plaintiff Duggan also has suffered anxiety, emotional trauma, and severe insomnia as a result of Defendants' conduct. *Id.* at Sec. II, para. 51. Plaintiff Duggan has incurred approximately $1,200 in unreimbursed medical expenses as a result of the emotional strain he suffered. *Id.* Plaintiff Duggan also has incurred out of pocket expenses, including long distance telephone calls, taxi cab fares resulting from meetings with lawyers and others, travel costs for doctor visits, postage and messenger costs, and fees to obtain medical records. *Id.* at Sec. II, para. 52.

III. <u>Argument</u>.

A. <u>Summary Judgment Standard</u>.

A party is entitled to summary judgment if the pleadings, depositions, and affidavits demonstrate that there is no genuine issue of material fact in dispute and that the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c); *see also Tao v. Freeh*, 27 F.3d 635, 638 (D.C. Cir. 1994). Under the summary judgment standard, the moving party bears the "initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The non-moving party must "go beyond the pleadings and by its own affidavits, or depositions, answers to interrogatories, and admissions on file, 'designate' specific facts showing that there is a genuine issue for trial." *Id*. at 324 (internal citations omitted).

Although a court should draw all inferences from the supporting records submitted by the non-moving party, the mere existence of a factual dispute, by itself, is not sufficient to bar summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). To be material, the factual assertion must be capable of affecting the substantive outcome of the litigation; to be genuine, the issue must be supported by sufficient admissible evidence that a reasonable trier-of-fact could find for the non-moving party. *Laningham v. U.S. Navy*, 813 F.2d 1236, 1242-43 (D.C. Cir. 1987); *Liberty Lobby*, 477 U.S. at 251 (the court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law"). "If the evidence is merely colorable,

or is not sufficiently probative, summary judgment may be granted." *Liberty Lobby*, 477 U.S. at 249-50 (internal citations omitted). "Mere allegations or denials in the adverse party's pleadings are insufficient to defeat an otherwise proper motion for summary judgment." *Williams v. Callaghan*, 938 F. Supp. 46, 49 (D.D.C. 1996). The adverse party must do more than simply "show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Instead, while the movant bears the initial responsibility of identifying those portions of the record that demonstrate the absence of a genuine issue of material fact, the burden shifts to the non-movant to "come forward with 'specific facts showing that there is a *genuine issue for trial.*'" *Id.* at 587 (citing FED. R. CIV. P. 56(e)) (emphasis in original).

B. The Privacy Act.

The Privacy Act "safeguards the public from unwarranted collection, maintenance, use and dissemination of personal information contained in agency records." *Henke v. U.S. Dep't of Commerce*, 83 F.3d 1453, 1456 (D.C. Cir. 1996). The statute "supports 'the principle that an individual should to the greatest extent possible be in control of information about him which is given to the government.'" *Waters v. Thornburgh*, 888 F.2d 870, 875 (D.C. Cir. 1989) *quoting*, Analysis of House and Senate Compromise Amendments to the Federal Privacy Act, 120 Cong. Rec. 40,405, 40,407 (1974).

In order to prevail on a claim for violation of the Privacy Act, a plaintiff must present evidence that: (1) the information is a "record" in a "system of records;" (2) an agency failed to comply with one or more of the various provisions of the Privacy Act; (3) the agency's failure had an adverse effect on the plaintiff; and (4) the agency's conduct was willful. *Jacobs v. Nat'l*

Drug Intelligence Center, 423 F.3d 512, 515-16 (5th Cir. 2005); *Gowan v. U.S. Dep't of the Air Force*, 148 F.3d 1182, 1187 (10th Cir. 1998); *Quinn v. Stone*, 978 F.2d 126, 131 (3d Cir. 1992); *Tijerina v. Walters*, 821 F.2d 789, 799 (D.C. Cir. 1987).

Among other things, the Privacy Act requires that an agency "maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President." 5 U.S.C. § 552a(e)(1). An agency also must "establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained." 5 U.S.C. § 552a(e)(10).

To prove an "adverse effect," a plaintiff need only show that: (1) he suffered some sort of cognizable injury; and (2) there is a causal nexus between the injury and the violation of the Act. *Albright v. United States*, 732 F.2d 181, 186 (D.C. Cir. 1984). Financial harm, such as out of pocket expenses, constitutes an adverse effect. *Id.* It is also well-established that emotional trauma, which can take the form of stress, embarrassment, anger, frustration, and emotional anguish, constitutes an adverse effect. *Id.* (suffering emotional trauma alone sufficient to qualify as an adverse effect); *Quinn*, 978 F.2d at 135-36 (having undergone stress and emotional anguish enough to satisfy adverse effect requirement); *Parks v. United States IRS*, 618 F.2d 677, 682-83 (10th Cir. 1980) (mental distress about possible misuse of unlawful disclosure of record sufficient to show adverse effect); and *Rorex v. Traynor*, 771 F.2d 383, 387 (8th Cir. 1985)

(testimony from plaintiffs that they suffered emotional trauma from violation of the Act sufficient to warrant recovery).

To willfully violate the Privacy Act "does not require [an] official to set out purposely to violate the Act; if the standard were so viewed, damages would be a rare remedy indeed." *Tijerina*, 821 F.2d at 799. Nor does the standard require a showing of premeditated malice. *Parks*, 618 F.2d at 683 (10th Cir. 1980). Instead, the Act imposes liability where an agency "flagrantly disregard[s] others' rights under the Act." *Albright*, 732 F.2d at 189; *see also Waters*, 888 F.2d at 875. "The agency's actions must be viewed in their context to determine whether the agency's staff acted in a willful or intentional manner." *Id.*

C. The FBI Willfully Violated the Privacy Act by Failing to Maintain Appropriate Administrative Safeguards.

Subsection (e)(10) of the Privacy Act requires federal agencies that maintain systems of records to:

> establish appropriate administrative, technical and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained.

5 U.S.C. § 552a(e)(10).

There can be no dispute that the FBI maintained background investigation records on Plaintiffs Alexander and Duggan. Plfs' Stmt. at Sec. II, paras. 5 and 15. Nor can there be any dispute that the FBI sent background investigation records on Plaintiffs Alexander and Duggan to the Office of Personnel Security at the White House despite the fact that OPS's requests for the

records "were without justification and served no official purpose." *Id.* at Sec II, paras. 6-9, and 16-19, and 24.

Plaintiffs Alexander and Duggan respectfully submit that there also is no genuine dispute of material fact that the FBI failed to establish appropriate administrative safeguards to protect the confidentiality of FBI background investigation records. The FBI has admitted that it failed to do so. *Id.* at Sec. II, paras. 31, 33, and 34 (the FBI "failed in a larger sense to institute sufficient protection to effectively safeguard the very real privacy interests that we, as custodians of so many people's files, are responsible for protecting"). Thus, the FBI clearly violated subsection (e)(10) of the Privacy Act. The question that remains is whether there is a genuine dispute of material fact about whether the FBI flagrantly disregarded Plaintiffs Alexander and Duggan rights under the Privacy Act. Plaintiffs Alexander and Duggan respectfully submit that there is no such dispute and that the FBI flagrantly disregarded their rights as a matter of law.

Indeed, the FBI admitted in a report issued on June 14, 1996 that its disclosure to OPS of records of FBI background investigations on persons like Plaintiffs Alexander and Duggan, who had no need for access to the White House, constituted "egregious violations of privacy." *Id.* at Sec. II, para. 32. Moreover, the FBI attributed these "egregious violations of privacy" to a "complete abdication of management responsibility" by its own officials. *Id.* at Sec. II, para. 34. The FBI also admitted that the dissemination of Privacy Act-protected records, such as the FBI background investigations records of Plaintiffs Alexander and Duggan that the FBI sent to OPS, had "received far too little management or executive oversight." *Id.* "In our drive to maximize our productivity and responsiveness to client agencies," the FBI found, "we have not been sufficiently attentive to our own responsibilities to safeguard our files against negligent or

intentional misuse, nor have been sufficiently exacting of the executive agencies we serve." *Id.* at Sec. II, para. 33. The FBI further admitted that it "failed in a larger sense to institute sufficient protections to effectively safeguard the very real privacy interest that we, as custodians of so may people's files, are responsible for protecting." *Id.* at Sec. II, para. 34.

Even worse, the FBI has admitted being on notice in late 1993 that its procedures were inappropriate and woefully inadequate, but chose to ignore the warning. Specifically, the FBI found that the analysts responsible for answering OPS's requests for previous background investigation records recalled quite clearly receiving an unprecedented number of such requests in late 1993. *Id.* at Sec. II, para. 35. "One analyst in particular bore the brunt of the increased volume and was compelled to work a significant amount of overtime to keep up with the incoming requests." *Id.* "That analyst remembers being surprised by the volume of such requests, all of which, she notes, covered names in the first several letters of the alphabet and were sought for purposes of 'access.'" *Id.* The report further found:

> An analysis of EASU's [Executive Agencies Sub-Unit] computer records confirms the recollections of the analysts regarding the influx of requests. Between December 6, 1993, and February 3, 1994, amid all of the other requests flowing in from the White House, EASU received no fewer than 481 requests which bear the characteristics of a single series. These requests, when parsed out from the normal traffic of requests, arrived in nearly perfect alphabetical order – from Aa to Go – all seeking copies of previous reports and all providing the same justification – "Access (S)." In addition, although constituting only a small proportion of the total White House requests, this series constituted 88% of the requests for "previous reports only" received during December 1993 and January and February 1994.

Id. at Sec. II, para. 36; *see also id.* at Sec. II, para. 37. The FBI admits that the responsible management officials were made aware of the "significant influx in requests" but took no action. *Id.* at Sec. II, para. 38. Despite OPS's unprecedented requests for records of previous

background investigations on hundreds of persons, the requests "were all apparently handled in routine fashion and no particular inquiry was made of the White House." *Id.* at Sec. II, para. 39.

Moreover, the FBI admitted being on notice "for some time" that its exchange of information with the White House, although necessary, is "fraught with peril." *Id.* at Sec. II, para. 40. The June 14, 1996 FBI report recounted issues that arose in the summer of 1993, months before the deluge of OPS requests for records of previous background investigations began, regarding contacts between the White House and the FBI:

> [A]fter questions arose concerning the involvement of the FBI in matters relating to the discharge of several employees from the White House Travel Office, Attorney General Janet Reno and then White House Counsel Bernard W. Nussbaum enunciated a new policy regarding contacts with investigative agencies, in particular, the FBI. The new policy placed both the Counsel to the President and senior DOJ officials between the White House and the FBI in matters relating to pending criminal investigations.

Id. at Sec. II, para. 40. Because of its experience with "Travelgate," the FBI was on notice of the perils involved in exchanges of information with the White House, and it should have been all the more attentive when it began receiving hundreds of requests for previous background investigation records in late 1993 and early 1994. *Id.* Indeed, the FBI itself found that it "should have matched" its "scrupulous adherence" to the new policy regarding White House communications relating to pending investigations, "with greater attention" to requests for records of previous background investigations. *Id.*

While these admissions were set forth in a report prepared for the FBI by the FBI's General Counsel, then-FBI Director Louis H. Freeh concurred in the report's findings. In a statement issued on June 14, 1996, the same date the FBI report was made public, Director Freeh declared that he agreed completely with this finding from the FBI report, including the finding

that the FBI "has failed in a larger sense to institute sufficient protections to effectively safeguard the very real privacy interests that we, as custodians of so many people's files, are responsible for protecting." *Id.* at Sec. II, para. 41. Director Freeh also concurred in the report's findings that "the FBI gave inadequate protection to the privacy interests of persons in FBI files" and that "the Bureau failed to make certain that agencies receiving files followed exacting privacy procedures." *Id.* at Sec. II, para. 42. Director Freeh declared, "[I]t is now clear that the system was very vulnerable to misuse and that government officials over several decades, including himself, had not provided adequate oversight of the system, resulting now in violations of privacy." *Id.* at Sec. II, para. 43. Like the FBI report issued on that same date, Director Freeh's statement concluded that the FBI's dissemination of background investigation records to OPS, which included the FBI background investigation records of Plaintiffs Alexander and Duggan, constituted "egregious violations of privacy." *Id.* at Sec. II, para. 44.

Clearly, Director Freeh's admissions and the admissions in the FBI report constitute compelling evidence of the flagrant disregard by the FBI of Plaintiffs Alexander and Duggan's rights under the Privacy Act. The FBI thus committed a willful violation of the statute. *Albright*, 732 F.2d at 189.

In addition, however, the admitted failure by the FBI to investigate and take corrective measures in light of the huge increase in the number of request for previous FBI background investigation report made by OPS also shows a flagrant disregard for the Privacy Act rights of Plaintiffs Alexander and Duggan, as well as a complete lack of anticipation of the potential for abuse. *See In re VA Data Theft Litig.*, 2007 U.S. Dist. LEXIS 96696 (D.D.C. Nov. 16, 2007) (failure to remedy deficiencies in procedure despite warnings constitutes gross negligence); *Pilon*

v. United States Dep't of Justice, 796 F. Supp. 7 (D.D.C. 1992) (failure to investigate and take corrective action despite warnings constitutes willful and intentional conduct).[2] The FBI's failure to investigate and take corrective measures thus constitutes additional evidence of a flagrant disregard for Plaintiffs Alexander and Duggan's rights and a willful violation of the Privacy Act. *Albright*, 732 F.2d at 189.

Not able to back away from these compelling admissions, the FBI argues that its admissions cannot be used against it because they allegedly constitute subsequent remedial measures inadmissible for establishing culpable conduct under Federal Rule of Evidence 407. Defs' Mem. at 60. Rule 407 does not go as far as the FBI would push it, however. The fact that subsequent remedial measures cannot be used to establish fault does not mean that otherwise competent evidence resulting from an internal investigation should be excluded. *Westmoreland v. CBS, Inc.*, 601 F. Supp. 66, 67 (S.D.N.Y. 1984). It is well-established that evidence in post-event investigative reports and statements is not shielded by Rule 407 even when a report or statement results in or mentions remedial measures taken, so long as the remedial measures themselves are not used to establish culpability. *McFarlane v. Caterpillar, Inc.*, 974 F.2d 176, 181 (D.C. Cir. 1992); *see also Prentiss & Carlisle Co. v. Koehring-Waterous Div. of Timberjack, Inc.*, 972 F.2d 6, 10 (1st Cir. 1992); *Benitez-Allende v. Alcan Aluminio Do Brasil, S.A.*, 857 F.2d 26, 33 (1st Cir. 1988), *cert. denied*, 489 U.S. 1018 (1989); *Rocky Mountain Helicopters v. Bell*

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[2] While the FBI cites *Kostyu v. United States*, 742 F. Supp. 413 (E.D. Mich. 1990) (Defs' Mem. at 56-57), besides being a non-binding, non-authoritative case, *Kostyu* did not consider a situation as here where an agency ignored warnings that its procedures were inadequate.

Helicopters, 805 F.2d 907, 918 (10th Cir. 1986); *Fasanaro v. Mooney Aircraft Corp.*, 687 F. Supp. 482, 486 (N.D. Cal. 1988).

The FBI cites *Specht v. Jensen*, 863 F.2d 700 (10th Cir. 1988) to support its argument, but *Specht* is easily distinguishable because it involved an attempt by one party to admit a document specifically for the subsequent remedial measures it suggested. Not only do Plaintiffs Alexander and Duggan do no such thing, but the admissions on which Plaintiffs Alexander and Duggan rely are not remedial measures.

Equally without merit is the FBI's argument that Congress did not mandate any specific procedures that it had to implement to safeguard the Privacy Act-protected records under its care, but instead gave each agency the discretion to choose its own procedures based on a balancing of interests. Defs' Mem. at 56-57. Plaintiffs Alexander and Duggan do not dispute this. However, while Congress may not have mandated specific procedures for safeguarding Privacy Act-protected records, the fact that the statute includes a legal remedy for persons who suffer adverse effects from an agency's failure to establish appropriate safeguards demonstrates that Congress clearly intended for agencies to be held accountable if their choice of security measures falls short. The FBI admits that the procedures it employed were woefully inadequate to safeguard the background investigation records under its care, which included those of Plaintiffs Alexander and Duggan. Plaintiffs Alexander and Duggan agree and assert further that the FBI acted in flagrant disregard for their rights under the Privacy Act by not crafting procedures that, at minimum, required the following:

(1) that any request seeking copies of or information from FBI files be accompanied by either the consent of the person whose files are being

reviewed, or by a letter from the Counsel to the President to the FBI General Counsel, setting forth a written explanation why such consent cannot be obtained or should not be sought in the circumstances;

(2) that all requests by the White House for information from FBI files, which have previously been submitted anonymously under the typed name of the Counsel to the President or some other White House official, require the actual signatures of both the requesting official and of an attorney in the Counsel's Office who has reviewed and approved all requests prior to their transmittal to the FBI and the requesting official certify, subject to the criminal penalties for making a false statement, that the information is sought only for official purposes;

(3) that its background investigation request forms put White House officials on strict notice that criminal sanctions are available for any violations of the law, including false statements or disclosure of information violating the Privacy Act;

(4) that greater specificity be provided regarding the reason for the request;

(5) that a copy of each White House request for information from FBI files be provided for review to high-level FBI officials, such as the FBI Office of the General Counsel, instead of such requests being routinely filled by low-level personnel; and

(6) FBI executive management provide greater oversight to the process of responding to White House requests for information from FBI files.

Certainly, if these reasonable procedures would have been implemented by the FBI, the "egregious violations of privacy" at issue here would not have occurred. When "viewed in their context," there can be no genuine dispute of fact that the actions of the FBI demonstrate a flagrant disregard for Plaintiffs Alexander and Duggan's rights under the Privacy Act by failing to establish appropriate administrative safeguards to protect the confidentiality of records of background investigations. The FBI thus willfully violated the Privacy Act. *Albright*, 732 F.2d at 189.

D. EOP Willfully Violated the Privacy Act by Maintaining Records On Plaintiffs Alexander and Duggan That Were Neither Relevant Nor Necessary to Accomplish Any Lawful Purpose.

1. The Privacy Act Applies to OPS.

As it has throughout this litigation, EOP once again argues that the Privacy Act does not apply to OPS. After extensive briefing and deliberation, this Court settled this issue years ago when it denied EOP's motion to dismiss:

> Although the plain language of this statute includes the EOP as an "agency"which is accountable under FOIA, the courts, bearing in mind the purposes of the statute and the legislative history, have interpreted the definition to exclude the President's immediate personal staff and units within the EOP whose sole function is to advise and assist the President. *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156, 63 L. Ed. 2d 267, 100 S. Ct. 960 (1980).
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> While it is true that Congress adopted the statutory definition of "agency" as used in FOIA for the Privacy Act, no court has provided the term "agency," as used in the Privacy Act, with the same interpretation which excludes from the plain

> language the President's personal staff and units whose sole function is to advise and assist the President. Recognizing the very different purposes the two statutes serve, this court will not be the first.
>
> * * *
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> Thus, the concerns of FOIA and the Privacy Act are quite different. When passing FOIA, Congress was addressing the need for individuals to have access to government information. When passing the Privacy Act, Congress was addressing the need for individuals to have protection for their privacy concerns. In interpreting the word "agency" to exclude, under FOIA, the immediate staff of the President, the courts recognize, as Congress did, that the access provided by FOIA must be limited. However, no court has found, and there is no evidence that the privacy protections provided by Congress in the Privacy Act must also be necessarily limited. Through the several exceptions to the restrictions on information covered by the Privacy Act, the President and those who work for the President will always have access necessary for the many executive decisions. Thus there is no need to ignore the plain language of the statute and limit the word "agency" as has been done under FOIA.
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> * * *
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> Words in statutes must be construed within the statutory scheme in which they appear, and this court holds that under the Privacy Act, the word "agency" includes the Executive Office of the President, just as the Privacy Act says. Therefore, the motion to dismiss Count II is denied.

Alexander v. FBI, 971 F. Supp. 603, 605-607 (D.D.C. 1997). Upon a motion filed by EOP, the Court certified its decision for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b), but the appellate court declined to rule on the issue as an interlocutory matter.

EOP tried to raise the issue again in motion for judgment on the pleadings filed in 1998, but the Court denied EOP's motion. Memorandum Opinion and Order dated December 7, 1998 (Docket Entry No. 587).

EOP then tried to raise the issue yet again by filing an "Emergency Petition for Writ of Mandamus" in the appellate court, but the appellate court again declined to consider the issue:

> Almost the entire thrust of EOP's petition is that the District Court erred in concluding that the White House is subject to the Privacy Act. And EOP's principal claim for relief is a request that this court "issue a writ of mandamus directing dismissal of the Privacy Act claim." Petition at 20. This court has already ruled that the matter regarding the applicability of the Privacy Act raises a question that properly may be addressed on an appeal of the final judgment in the underlying case. We declined to address the issue as a certified question under 28 U.S.C. § 1292(b), and we see no basis no to address the issue pursuant to a petition for mandamus.

In re Executive Office of the President, 215 F.3d 20, 23 (D.C. Cir. 2000).

Not content with these multiple bites at the apple, EOP tries again. EOP's argument essentially is a motion for reconsideration. Nonetheless, EOP does not and cannot point to any "intervening change of law," "newly available evidence," the need to correct a "clear error," or prevent "manifest injustice." *See Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996). That other courts considering the application of the Privacy Act to other sections of EOP other than OPS may have reached conclusions different from this Court does not constitute a clear error of law.[3] The best EOP can muster is that its reading of the Privacy Act is "a plausible one." Defs' Mem. at 19. EOP's dissatisfaction that the Court did not accept its preferred reading of the Privacy Act does not warrant this Court reversing itself twelve years after the ruling.

EOP's "sovereign immunity" fares no better. As this Court already determined, "under the Privacy Act, the word 'agency' includes the Executive Office of the President, just as the Privacy Act says." "Waivers of the Government's sovereign immunity, to be effective, must be "'unequivocally expressed.'" *United States v. Nordic Village, Inc.*, 503 U.S. 30, 37 (1992).

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[3] While Defendants also cite *Dong v. Smithsonian Institution*, 125 F.3d 877 (D.C. Cir. 1997) in support of their argument, *Dong* quite obviously does not even concern the applicability of the Privacy Act to a component of EOP, but, rather, concerned an action against the Smithsonian Institution.

The language of the statute could not be any clearer. EOP's "sovereign immunity" argument must fail as well.

In sum, Plaintiffs Alexander and Duggan stand by the Court's legally sound and well-reasoned, if not even intuitively obvious, conclusion that the protections of the Privacy Act apply to OPS's maintenance of records of FBI background investigations on persons as part of a system of records. Despite multiple attempts over the years, EOP provides no good reason why the Court should reverse itself now.

2. OPS Willfully Violated the Privacy Act by Maintaining Records on Plaintiffs Alexander and Duggan That Were Neither Relevant Nor Necessary to Accomplish Any Lawful Purpose.

Subsection (e)(1) of the Privacy Act requires federal agencies that maintain systems of records to:

> maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President.

5 U.S.C. § 552a(e)(1). "The authority to maintain a system of records does not give the agency the authority to maintain any information which it deems useful." Office of Management and Budget Privacy Act Guidelines, 40 Fed. Reg. 28,949, at 28,960 (1975). "Information may not be maintained merely because it is relevant; it must be both relevant and necessary." *Id.*; *see also Reuber v. United States*, 829 F.2d 133, 138-39 (D.C. Cir. 1987).

It is undisputed that, when OPS requested records of Plaintiff Alexander's previous FBI background investigation on December 3, 1993, purportedly for "Access" to the White House, she had not worked at the White House for more than a year and no longer required access to the

White House. Plfs' Stmt at Sec. II, paras. 1-3, 5-7. It also is undisputed that, on December 13, 1993, the FBI provided OPS with records of Plaintiff Alexander's previous background investigation. *Id.* at Sec. II, para. 9. It is also undisputed that OPS knowingly maintained these records on Plaintiff Alexander for approximately two and a half years until they were returned to the FBI on June 13, 1996. *Id.* at Sec. II, paras. 10 and 11.

Likewise, it is undisputed that, when OPS requested records of Plaintiff Duggan's previous FBI background investigation on January 18, 1994, purportedly for "Access" to the White House, he had not worked at the White House for more than a year and no longer required access to the White House. *Id.* at Sec, II, paras. 12-17. It also is undisputed that, on January 27, 1994, the FBI provided OPS with records of a previous background investigation of Plaintiff Duggan. *Id.* at Sec. II, para.19. It is also undisputed that OPS knowingly maintained these records on Plaintiff Duggan for more than two years until they were returned to the FBI on June 6, 1996. *Id.* at Sec. II, paras. 20 and 21.

EOP admits that "it was, of course, *not necessary* that [U.S. Department of Defense detailee Anthony] Marceca obtain previous reports on persons who no longer worked at the White House . . . ." Defs' Mem. at 43-44 (emphasis added). Rather, EOP asserts that Mr. Marceca "was simply unaware *for some time* after beginning the Update Project that, in some cases he had done so." *Id.* at 44 (emphasis added). EOP's assertion does not excuse OPS's conduct, however. It is a tacit admission that, at some point, Mr. Marceca knew he had obtained FBI background investigation records OPS simply did not need. *Id.*; *see also* Plfs' Stmt. at Sec. II, para. 27. Indeed, it was well-known throughout OPS that Mr. Marceca had obtained highly sensitive records of FBI background investigations of persons who had never worked for the

Clinton Administration and no longer required access to the White House, which included Plaintiffs Alexander and Duggan. *See* Plfs' Stmt. at Sec. II, para. 28.[4] Regardless of how OPS came to possess such records, it simply was not necessary for OPS to maintain them. The records should have been returned to the FBI immediately. EOP expressly admits, however, that "OPS did not return the *unneeded* background reports to the FBI." Defs' Mem. at 45 (emphasis added). It was only after "Filegate" became public in June 1996 that the records were returned to the FBI. Plfs' Stmt. at Sec. II, paras.11 and 21. EOP's maintenance of the records in the intervening time period violated subsection (e)(1) of the Privacy Act. Like with the FBI, the question that remains is whether there is a genuine dispute of material fact about whether OPS's actions flagrantly disregarded Plaintiffs Alexander and Duggan rights under the Privacy Act. Plaintiffs Alexander and Duggan respectfully submit that there is no such dispute and that OPS flagrantly disregarded their rights as a matter of law.

Again, an agency's actions must be examined "in their context" to determine whether there has been a willful violation of the Privacy Act. *Albright*, 732 F.2d at 189. EOP appears to argue that OPS's conduct was not "willful" by claiming that its purpose was sincere.[5] It argues

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[4] In this regard, Mari Lynne Anderson testified, "I became aware of the fact that we requested files of some people **who had not been at the White House since the Clinton Administration took over** when we actually started receiving those departments that fall under the umbrella of White House Operations." *See* Plfs' Stmt. at Exhibit 5, p. 160 (emphasis added).

Similarly, Lisa Wetzl testified that, not only did she know OPS had obtained FBI background investigation records of persons who never worked for the Clinton Administration, but she informed OPS Director D. Craig Livingstone of the fact: **"I said, Craig, Tony ordered all these files of previous administration people that we don't need."** *Id.* at Exhibit 3, p. 77 (emphasis added).

[5] EOP cites *Albright* in support of its argument that OPS's purpose in ordering the records is relevant to whether OPS acted "willfully," as is the "source of the idea to create or

that this Court should not find OPS flagrantly disregarded the privacy rights of Plaintiffs Alexander and Duggan and hundreds of other person because it was useful for OPS to have obtained FBI background investigation records on these persons in order to carry out the Update Project. Defs' Mem. at 44. In short, EOP's argument appears to be that ordering highly sensitive FBI background investigations records on hundreds of persons helped OPS determine whether these persons still worked in the White House or still needed White House access. To make such a claim is to refute it. It simply does not justify or excuse such significant violations of privacy.[6]

In addition, there is no dispute that, after Mr. Marceca's detail at OPS ended, Lisa Wetzl completed the Update Project without having to request FBI background investigation records to determine whether someone still worked at the White House. Defs' Stmt. at 72; Plfs' Stmt., at Sec. II, para. 53. Moreover, EOP admits that the Update Project was a standard OPS procedure carried out at each change of administration. Defs' Stmt. at 29. No prior administrations had found it necessary to request FBI background investigation files simply to identify whether a person still worked in the White House or otherwise needed White House access.

As part of its consideration of the "context" of an agency's conduct, a court also may look to an agency's *post hoc* reactions to the harm it may have caused. *Albright*, 732 F.2d at 189; *see also Waters*, 888 F.2d at 876. EOP argues that OPS acted with "concern, not disregard, 'for

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obtain the records" and the "subsequent disposition of the records." Defs' Mem. at 40. Plaintiffs respectfully submit that these particular factors are inapposite here, as the plaintiffs in *Albright* claimed the agency violated subsection (e)(7) of the Privacy Act by maintaining records on how the plaintiffs in that case exercised their First Amendment rights, and Plaintiffs Alexander and Duggan obviously do not bring an (e)(7) claim. Nonetheless, the "context" of the agency's actions is relevant. *Albright*, 732 F.2d at 189; *see also Waters*, 888 F.2d at 876.

[6] Mari Lynne Anderson candidly testified, **"[W]e were also looking for ways to save ourselves some work."** Plfs' Stmt. at Exhibit 5, p. 105-06 (emphasis added).

plaintiff[s] privacy interests.'" Defs' Mem. at 44, *quoting Sterling v. United States*, 826 F. Supp. 570, 572 (D.D.C. 1993).[7] OPS's *post hoc* reaction to the "discovery" that Mr. Marceca had obtained previous reports on persons who no longer required access to the White House was to do nothing.[8] It made no effort whatsoever to return the records to the FBI.

By contrast, former White House Counsel Bernard W. Nussbaum, the person with ultimate supervisory responsibility for OPS at the time, testified that he "would have stopped it immediately" if he had known OPS was obtaining FBI background investigation files on persons who did not require access to the White House. Plfs' Stmt. at para. 54. "If I would have known people were doing that, even inadvertently, as I believe it was done in this case, I would have stopped it and I would have had the files sent back." *Id.* "If we received files of people we shouldn't have received, I would have had them sent back. That's what I would have done."[9] *Id.*

By contrast, when Ms. Anderson told Mr. Livingstone that OPS had requested and obtained FBI background investigation records on persons who no longer required access to the

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[7] *Sterling* has no bearing on this matter either. *Sterling* was a "disclosure" case, not a "maintenance" case, and at issue in *Sterling* was whether redactions made to a document produced pursuant to the Freedom of Information Act could give rise to a willful violation of the Privacy Act. It is inapposite here.

[8] Of course, it was well known within OPS that Mr. Marceca was ordering these records, as Ms. Anderson testified: "There was no way that we could come up with, that we could figure out, how can we find out who these people are, because we were also looking for ways to save ourselves some work . . . **so basically, what ended up happening was with White House Operations, those listed under White House Operations, the best way we could figure out who they were and where they were and if they were still there was to request the background."** Plfs' Stmt. at Exhibit 5, p. 105-06 (emphasis added).

[9] Mr. Nussbaum went so far to as say that the confidential records were "wrongly obtained" and "should have never been requested" and characterized OPS's actions as "a serious breach of privacy." Plfs' Stmt. at para. 54.

White House, Mr. Livingstone replied, "[Y]es; that is just -- it's just part of the process." Plfs' Stmt. at Sec. II, para. 28, *citing*, Exhibit 5 (Anderson Dep. (October 1, 1996)) at 161. Rather than return the files to the FBI immediately, OPS continued to maintain them until congressional investigators discovered that OPS had requested and obtained FBI background investigation records of hundreds of former Reagan and Bush Administration staffers. Only then, more than two years later, did OPS return the records to the FBI. Plfs. Stmt. at Sec. II, paras. 11 and 21. Far from exculpating OPS, the fact that OPS continued to maintain the records is compelling evidence of its flagrant disregard for the privacy rights of Plaintiffs Alexander and Duggan.

Finally, EOP argues that the Court cannot find a willful violation of the Privacy Act because EOP did not believe the Privacy Act applied and because OPS personnel believed the Presidential Records Act required OPS to continue to maintain the FBI background investigation records at issue. Defs' Mem. at 21-32 and 45. In essence, the EOP is arguing that a mistake of law negates the intent required to establish a willful violation of the Privacy Act. The EOP advances absolutely no authority for this proposition.

Nonetheless, with respect to EOP's belief regarding the Privacy Act, EOP fails to present any evidence that anyone within OPS was aware of the purported advice or Office of Legal Counsel opinions or other materials it cites in support of its argument. Rather, the undisputed evidence demonstrates that the employees inside OPS, *i.e.* the individuals who improperly obtained and maintained Plaintiffs Alexander and Duggan's FBI background investigation records, believed that the Privacy Act applied to them and to the records they had requested. Specifically, Ms. Anderson, who was Mr. Livingstone's executive assistant and helped him to supervise the office, testified she and everyone else in OPS were aware that the Privacy Act

applied to the OPS and the FBI files in their possession because Nancy Gemmell told them so and trained them on the requirements of the Privacy Act.[10] Plfs' Stmt. at Sec. II, para. 30. Indeed, this testimony is consistent with the numerous protestations throughout EOP's brief that Ms. Gemmell was the expert in procedure inside OPS and that she trained the other OPS employees, including Mr. Marceca, on correct procedure.

Finally, while employees within OPS may have believed the Presidential Records Act governed the FBI background investigation records they wrongfully obtained and maintained, they clearly were wrong. This is demonstrated most compellingly by the fact that the records ultimately were returned to the FBI, albeit it more than two years after OPS had acquired them. Plfs' Stmt. at Sec. II, paras. 11 and 21. And, as demonstrated above, then-White House Counsel Nussbaum testified, "If I would have known people were doing that, even inadvertently, as I believe it was done in this case, I would have stopped it and I would have had the files sent back." Plfs' Stmt. at para. 54. "If we received files of people we shouldn't have received, I would have had them sent back. That's what I would have done." *Id.* It is a fundamental tenet of law that a mistake of law will not excuse an otherwise unlawful act. *Barker v. United States*, 546 F.2d 940, 946 (D.C. Cir. 1976). "A defendant's error as to his *authority* to engage in a particular activity, if based upon a mistaken view of legal requirements (or ignorance thereof), is a mistake of *law*." *Id.* "Typically, the fact that he relied on the erroneous advice of another is not an exculpatory circumstance." *Id.* at 946-47. "He is still deemed to have acted with a culpable

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[10] Ms. Anderson also testified that the OPS employees were never provided with memoranda or training regarding the Privacy Act from anyone outside of OPS, which negates the utility of the EOP's arguments and numerous memoranda attached to its brief in an attempt to show that the White House Office understood that it was not subject to the Privacy Act. Plfs' Stmt. at Sec. II, para. 30, *citing*, Exhibit 1 (Anderson Dep. (May 7, 1998) at 277-279).

state of mind." *Id.* at 947. Thus, OPS's mistake of law does not negate the otherwise compelling, undisputed evidence that it acted in flagrant disregard of Plaintiffs Alexander and Duggan's rights under the Privacy Act.

E. Plaintiffs Alexander and Duggan Were Adversely Affected by Defendants' Violations of the Privacy Act.

The Privacy Act provides that, if a violation of the Privacy Act is established:

> [T]he United States shall be liable to the individual in an amount equal to the sum of –
>
> > (A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and
> >
> > (B) the costs of the action together with reasonable attorney fees as determined by the court.

5 U.S.C. § 552a(g)(4). The U.S. Supreme Court has held that a plaintiff must prove actual damages to recover under the Privacy Act. *Doe v. Chao*, 540 U.S. 614, 624-25 (2004). Although the definition of "actual damages" has not been settled by the U.S. Supreme Court or the D.C. Circuit, "the recent trend at the District Court level has been to allow Privacy Act suits seeking general compensatory damages, such as pain and suffering and non-pecuniary losses, to proceed." *Montemayor v. Fed. Bureau of Prisons*, 2005 U.S. Dist. LEXIS 18039, *14 (D.D.C. Aug. 25, 2005). This Court previously determined in this litigation that "actual damages" means both pecuniary and non-pecuniary losses. *Alexander*, 971 F. Supp. at 607.

Ascertaining the amount of damages Plaintiff Alexander and Duggan are due can be performed on the papers alone without an evidentiary hearing. *Shepherd v. American Broadcasting Cos.*, 862 F. Supp. 486, 491 (D.D.C. 1994), *vacated on other grounds*, 62 F.3d

1469 (D.C. Cir. 1995). A trial court has wide discretion to award compensatory damages and such award will not be overturned unless it abused its discretion. *Peyton v. DiMario*, 287 F.3d 1121, 1126 (D.C. Cir. 2002). Emotional trauma, loss of reputation and embarrassment are traditionally compensated for with money damages. *Hobson v. Brennan*, 646 F. Supp. 884, 887 (D.D.C. 1986). "One basis for quantifying [damages] is precedent." *Id.*; *see also Estate of Heiser v. Islamic Republic of Iran*, 466 F. Supp. 2d 229, 269 (D.D.C. 2006) (stating in determining the appropriate amount of compensatory damages, the Court may look to prior decisions). The Court is not limited to Privacy Act cases, as Congress borrowed from common law principles in drafting the Privacy Act. *Parks*, 618 F.2d at 683; *see also Beaven v. U.S. Dep't of Justice*, 2007 U.S. Dist. LEXIS 24459 (E.D. Ky. Mar. 30, 2007) ("it is reasonable that traditional tort principles of damages should also apply to actions under the [Privacy Act] statute."). Courts have assessed damages for emotional trauma related to invasions of privacy ranging from $2,500 for violations that were neither egregious, severe, nor seriously disabling to $250,000 in cases such as the case at bar where the Defendant's conduct was considered serious and egregious, producing physical harm and/or requiring medical treatment. *See*, *e.g.*, *Dong v. Smithsonian Inst.*, 943 F. Supp. 69, 74 (D.D.C. 1996) ($2,500 damage award for emotional distress where employer violated Privacy Act by contacting third parties about employee misconduct before contacting employee), *reversed on other grounds*, 125 F.3d 877 (D.C. Cir. 1997); *Billings v. Atkinson,* 489 S.W.2d 858, 861 (Tex. 1973) ($10,000 damage award for invasion of privacy arising from illegal wiretap of plaintiff's home telephone); *Simpson v. Burrows*, 90 F. Supp. 2d 1108 (D. Or. 2000) ($200,000 damage award for emotional distress where defendants invaded plaintiff's privacy by releasing personal and confidential information

about plaintiff to others); *Diaz v. Oakland Tribune*, Inc., 188 Cal. Rptr. 762, 774-75 (Cal. Ct. App. 1983) ($250,000 damage award for emotional distress where defendant invaded plaintiff's privacy by releasing personal and confidential information about plaintiff to others).

As set forth above and in their Statement of Undisputed Material Facts, Plaintiffs Alexander and Duggan suffered actual damages as a result of Defendants' willful violations of the Privacy Act. *See* Plfs' Stmt. at Sec. II, paras. 46-52. Both Plaintiffs Duggan and Alexander have demonstrated that they incurred out of pocket expenses, including substantial time investigating and responding to the FBI and EOP's Privacy Act violations. *Id.* at Sec. II, paras. 46-48 and 50-52. Plaintiffs Alexander and Duggan have corroborated their claims of actual damages through sworn testimony. In addition, Plaintiff Duggan demonstrated that he has suffered emotional distress as a result of Defendants' willful violations of the Privacy Act, including anxiety, emotional trauma, and severe insomnia, and also incurred unreimbursed medical expenses as a result of the emotional strain he suffered. *Id.* at Sec. II, paras. 51. Because Plaintiffs Alexander and Duggan have established that there are no genuine disputes of material fact requiring a trial and that they are entitled to judgment as a matter of law, and because Plaintiffs Alexander and Duggan have established undisputedly that they suffered adverse effects as a result of Defendants' willful violations of the Privacy Act, this Court should grant summary judgment in their favor and award them damages in an amount to be determined by the Court within its discretion.

IV. <u>Conclusion</u>.

According to a recently published book by historian Taylor Branch, who recorded seventy-nine separate discussions with President William Jefferson Clinton as part of a secret oral history project undertaken by President Clinton over the course of his entire presidency, Clinton himself said of the controversy that became known as "Filegate" that "those files did not belong at the White House." TAYLOR BRANCH, THE CLINTON TAPES, 364-65 (2009), attached hereto as Exhibit A. They "should have been isolated and returned immediately," Clinton told Branch. *Id.* at 365. According to Branch, Clinton said "[h]is administration should and would be held accountable." *Id.* Despite years of investigation by Congress and the Office of the Independent Counsel, no one has yet been held accountable for "Filegate." This lawsuit represents the last remaining opportunity for the accountability President Clinton said was deserving. The Government Defendants' motion for summary judgment should be denied, and summary judgment should be granted in favor of Plaintiffs Alexander and Duggan.

Dated: October 19, 2009

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CARA LESLIE ALEXANDER, *et al.*, Plaintiffs, v. FEDERAL BUREAU OF INVESTIGATION, *et al.*, Defendants.	)	Civil Action Nos. 96-2123/97-1288 (RCL) **CONSOLIDATED ACTIONS**

PLAINTIFFS ALEXANDER AND DUGGAN'S LOCAL RULE 7(h) RESPONSE TO THE GOVERNMENT DEFENDANTS' RENEWED STATEMENT OF MATERIAL FACTS AND STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiffs Cara Leslie Alexander ("Alexander") and Joseph P. Duggan ("Duggan"), by counsel and pursuant to Local Rule 7(h), respectfully submit this Response to the Government Defendants' Renewed Statement of Material Facts as to Which There Is No Genuine Dispute and Statement of Undisputed Material Facts in Support of Cross-Motion for Summary Judgment.

I. Responses to Defendants' Renewed Statement.

Each of the numbered paragraphs set forth below correspond to the numbered paragraphs of the Government Defendants' Renewed Statement of Material Facts as to Which There Is No Genuine Dispute ("Defs' Stmt."):

1. Undisputed; immaterial as to whether the Office of Personnel Security ("OPS") willfully maintained background investigation summaries on Plaintiffs Alexander and Duggan after it discovered Plaintiffs Alexander and Duggan no longer required access to the White House.

2. Undisputed; immaterial as to whether OPS willfully maintained background investigation summaries on Plaintiffs Alexander and Duggan after it discovered Plaintiffs Alexander and Duggan no longer required access to the White House.

3. Undisputed; immaterial as to whether OPS willfully maintained background investigation summaries on Plaintiffs Alexander and Duggan after it discovered Plaintiffs Alexander and Duggan no longer required access to the White House.

4. Undisputed; immaterial as to whether OPS willfully maintained background investigation summaries on Plaintiffs Alexander and Duggan after it discovered Plaintiffs Alexander and Duggan no longer required access to the White House.

5. Undisputed.

6. Defendants have omitted paragraph 6.

7. Undisputed.

8. Disputed; immaterial as to whether OPS willfully maintained background investigation summaries on Plaintiffs Alexander and Duggan after it discovered Plaintiffs Alexander and Duggan no longer required access to the White House; the evidence cited does not support the assertion about a general understanding by the Executive Office of the President ("EOP") regarding the applicability of the Privacy Act; nonetheless, despite what others persons working in other offices within EOP may have believed, employees within OPS believed that the Privacy Act applied to its activities.[1]

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[1] Deposition Mari Lynne Anderson (May 7, 1998), attached as Exhibit 1, at 279-80 and 281 (noting that Ms. Gemmell "would say we are covered by the Privacy Act").

9. Undisputed as a general statement, but incorrect as a matter of law because the Office of Management and Budget ("OMB"), not the Office of Legal Counsel ("OLC"), is the arbiter of statutory interpretation of the Privacy Act;[2] immaterial as to whether OPS willfully maintained background investigation summaries on Plaintiffs Alexander and Duggan after it discovered Plaintiffs Alexander and Duggan no longer required access to the White House.

10. Undisputed; immaterial as to whether OPS willfully maintained background investigation summaries on Plaintiffs Alexander and Duggan after it discovered Plaintiffs Alexander and Duggan no longer required access to the White House; in addition, there is no evidence indicating that the relevant persons within OPS had any knowledge or awareness of then-Assistant Attorney General Antonin Scalia's opinion; moreover, the Scalia opinion does not conclude as a matter of law that the Privacy Act does not apply to EOP in its entirety, much less to OPS in particular.

11. Undisputed; immaterial as to whether OPS willfully maintained background investigation summaries on Plaintiffs Alexander and Duggan after it discovered Plaintiffs Alexander and Duggan no longer required access to the White House; in addition, there is no evidence indicating that the relevant persons within OPS had any knowledge or awareness of the 1978 OLC opinion; moreover, the opinion does not conclude as a matter of law that the Privacy Act does not apply to EOP in its entirety, much less to OPS in particular.

12. Undisputed; immaterial as to whether OPS willfully maintained background investigation summaries on Plaintiffs Alexander and Duggan after it discovered Plaintiffs Alexander and Duggan no longer required access to the White House; in addition, there is no

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[2] *Albright v. United States*, 631 F.2d 915, 919 (D.C. Cir. 1980).

evidence indicating that the relevant persons within OPS had any knowledge or awareness of the 1982 OLC opinion; moreover, the opinion concerned the applicability of the Privacy Act to certain computer records to be entered and stored by the Office of Administration pursuant to a proposed agreement and does not conclude as a matter of law that the Privacy Act does not apply to EOP in its entirety, much less to OPS in particular.

13. Undisputed; immaterial as to whether OPS willfully maintained background investigation summaries on Plaintiffs Alexander and Duggan after it discovered Plaintiffs Alexander and Duggan no longer required access to the White House; in addition, there is no evidence indicating that the relevant persons within OPS had any knowledge or awareness of the notice.

14. Undisputed; immaterial as to whether OPS willfully maintained background investigation summaries on Plaintiffs Alexander and Duggan after it discovered Plaintiffs Alexander and Duggan no longer required access to the White House.

15. Undisputed; immaterial as to whether OPS willfully maintained background investigation summaries on Plaintiffs Alexander and Duggan after it discovered Plaintiffs Alexander and Duggan no longer required access to the White House.

16. Undisputed; immaterial as to whether OPS willfully maintained background investigation summaries on Plaintiffs Alexander and Duggan after it discovered Plaintiffs Alexander and Duggan no longer required access to the White House; in addition, there is no evidence indicating that the relevant persons within OPS had any knowledge or awareness of the memorandum conclusion; in addition, the memorandum does not address the applicability of the Privacy Act to OPS specifically, but instead concerns a FOIA request made to the White House.

17. Undisputed; immaterial as to whether OPS willfully maintained background investigation summaries on Plaintiffs Alexander and Duggan after it discovered Plaintiffs Alexander and Duggan no longer required access to the White House; in addition, the memorandum does not address the applicability of the Privacy Act to OPS specifically, but instead concerns a FOIA request made to the White House.

18. Undisputed; immaterial as to whether OPS willfully maintained background investigation summaries on Plaintiffs Alexander and Duggan after it discovered Plaintiffs Alexander and Duggan no longer required access to the White House; in addition, there is no evidence indicating that the relevant persons within OPS had any knowledge or awareness of the OLC opinion.

19. Undisputed; immaterial as to whether OPS willfully maintained background investigation summaries on Plaintiffs Alexander and Duggan after it discovered Plaintiffs Alexander and Duggan no longer required access to the White House; in addition, there is no evidence indicating that the relevant persons within OPS had any knowledge or awareness of the OLC opinion.

20. Undisputed; immaterial as to whether OPS willfully maintained background investigation summaries on Plaintiffs Alexander and Duggan after it discovered Plaintiffs Alexander and Duggan no longer required access to the White House; in addition, there is no evidence indicating that the relevant persons within OPS had any knowledge or awareness of the OLC opinion.

21. Undisputed; immaterial as to whether OPS willfully maintained background investigation summaries on Plaintiffs Alexander and Duggan after it discovered Plaintiffs

Alexander and Duggan no longer required access to the White House; in addition, OMB, not OLC, is the arbiter of statutory interpretation of the Privacy Act (*see* Response to para. 8, above), and there is no evidence indicating that the relevant persons within OPS had any knowledge or awareness of OLC's oral advice to Cheryl Mills; moreover, the oral advice purportedly provided to Ms. Mills references only the "White House" generally (not the "White House Office," as Defendants assert) and otherwise fails to differentiate between the various offices within EOP; it reaches no conclusions and provides no advice regarding the applicability of the Privacy Act to OPS in particular.

22. Undisputed; immaterial as to whether OPS willfully maintained background investigation summaries on Plaintiffs Alexander and Duggan after it discovered Plaintiffs Alexander and Duggan no longer required access to the White House; in addition, OMB, not OLC, is the arbiter of statutory interpretation of the Privacy Act (*see* Response to para. 8, above), and there is no evidence indicating that the relevant persons within OPS had any knowledge or awareness of OLC's advice.

23. Undisputed; immaterial as to whether OPS willfully maintained background investigation summaries on Plaintiffs Alexander and Duggan after it discovered Plaintiffs Alexander and Duggan no longer required access to the White House.

24. Undisputed.

25. Undisputed; immaterial as to whether OPS willfully maintained background investigation summaries on Plaintiffs Alexander and Duggan after it discovered Plaintiffs Alexander and Duggan no longer required access to the White House.

26. Undisputed.

27. Undisputed.

28. Undisputed.

29. Plaintiffs Alexander and Duggan do not dispute that Ms. Gemmell explained the Update Project to Mr. Livingstone and Ms. Anderson; Plaintiff Alexander and Duggan dispute Defendants' legal conclusion regarding the Presidential Records Act.

30. Undisputed.

31. Undisputed.

32. Plaintiffs Alexander and Duggan do not dispute that Ms. Gemmell requested a list of White House pass holders to prepare for the Update Project. Plaintiffs Alexander and Duggan dispute that the list Ms. Gemmell obtained from the U.S. Secret Service included active pass holders only, but submit that whether Ms. Gemmell requested a list of only active pass holders is immaterial as to whether OPS willfully maintained background investigation summaries on Plaintiffs Alexander and Duggan after it discovered Plaintiffs Alexander and Duggan no longer required access to the White House.[3]

33. Undisputed; immaterial as to whether OPS willfully maintained background investigation summaries on Plaintiffs Alexander and Duggan after it discovered Plaintiffs Alexander and Duggan no longer required access to the White House.

34. Undisputed; immaterial as to whether OPS willfully maintained background investigation summaries on Plaintiffs Alexander and Duggan after it discovered Plaintiffs Alexander and Duggan no longer required access to the White House.

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[3] Defs' Stmt. at paras. 33-35.

35. Plaintiffs Alexander and Duggan do not dispute that the list did not specify that it included both active and inactive pass holders. Plaintiffs Alexander and Duggan dispute that OPS believed the list was a list of active pass holders only, but submit that whether the list included both active and inactive pass holders is immaterial as to whether OPS willfully maintained background investigation summaries on Plaintiffs Alexander and Duggan after it discovered Plaintiffs Alexander and Duggan no longer required access to the White House; indefinite as to time.[4]

36. Undisputed; immaterial as to whether OPS willfully maintained background investigation summaries on Plaintiffs Alexander and Duggan after it discovered Plaintiffs Alexander and Duggan no longer required access to the White House.

37. Undisputed; immaterial as to whether OPS willfully maintained background investigation summaries on Plaintiffs Alexander and Duggan after it discovered Plaintiffs Alexander and Duggan no longer required access to the White House.

38. Undisputed; immaterial as to whether OPS willfully maintained background investigation summaries on Plaintiffs Alexander and Duggan after it discovered Plaintiffs Alexander and Duggan no longer required access to the White House.

39. Undisputed; immaterial as to whether OPS willfully maintained background investigation summaries on Plaintiffs Alexander and Duggan after it discovered Plaintiffs Alexander and Duggan no longer required access to the White House.

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[4] Exhibit 1 (Anderson Dep. (May 7, 1998)) at 354-358; Declaration of Lisa S. Wetzl, attached as Exhibit 2 (without exhibits), at paras 26-27; Deposition of Lisa S. Wetzl, attached as Exhibit 3, at 72; Statement of Lisa Weztl, attached as Exhibit 4, at 6.

40. Undisputed; immaterial as to whether OPS willfully maintained background investigation summaries on Plaintiffs Alexander and Duggan after it discovered Plaintiffs Alexander and Duggan no longer required access to the White House.

41. Undisputed; immaterial as to whether OPS willfully maintained background investigation summaries on Plaintiffs Alexander and Duggan after it discovered Plaintiffs Alexander and Duggan no longer required access to the White House.

42. Undisputed.

43. Undisputed.

44. Undisputed.

45. Undisputed; immaterial as to whether OPS willfully maintained background investigation summaries on Plaintiffs Alexander and Duggan after it discovered Plaintiffs Alexander and Duggan no longer required access to the White House.

46. Undisputed.

47. Disputed; evidence cited does not support the assertion that Mr. Marceca relied on the same list used by Ms. Gemmell; immaterial as to whether OPS willfully maintained background investigation summaries on Plaintiffs Alexander and Duggan after it discovered Plaintiffs Alexander and Duggan no longer required access to the White House.[5]

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[5] Deposition of Mari Lynne Anderson (October 1, 1996), attached as Exhibit 5, at 105-07, 150-54; Exhibit 1 (Anderson Dep. (May 7, 1998)) at 122-26; 344-45, and 356-58; Exhibit 2 (Wetzl Decl.) at para. 28 (noting only that the list Mr. Marceca "must have been working from" was "similar" to the one found at Ms. Gemmell's former work station); *see also* Plaintiffs Alexander and Duggan's Statement of Undisputed Material Facts (Plfs' Stmt.") at para. 25.

48. Undisputed; immaterial as to whether OPS willfully maintained background investigation summaries on Plaintiffs Alexander and Duggan after it discovered Plaintiffs Alexander and Duggan no longer required access to the White House.

49. Undisputed; immaterial as to whether OPS willfully maintained background investigation summaries on Plaintiffs Alexander and Duggan after it discovered Plaintiffs Alexander and Duggan no longer required access to the White House.

50. Undisputed; immaterial as to whether OPS willfully maintained background investigation summaries on Plaintiffs Alexander and Duggan after it discovered Plaintiffs Alexander and Duggan no longer required access to the White House.

51. Undisputed.

52. Undisputed.

53. Undisputed.

54. Disputed; the evidence cited does not support the assertion that Mr. Livingstone was not aware Mr. Marceca had obtained FBI background investigation summaries on persons who no longer required access to the White House.[6]

55. Undisputed; immaterial as to whether OPS willfully maintained background investigation summaries on Plaintiffs Alexander and Duggan after it discovered Plaintiffs Alexander and Duggan no longer required access to the White House.

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[6] Exhibit 5 (Anderson Dep. (October 1, 1996)) at 157 ("[Mr. Livingstone] did know that we had gotten files on people who were no longer there") and 161; Exhibit 2 (Wetzl Decl.) at para. 29 ("I informed Mr. Livingstone, and expressed my frustration that Mr. Marceca had ordered all these unnecessary reports and that I would have to sort through all the files to ascertain which of them OPS needed to retain."); Exhibit 3 (Wetzl Dep.) at 76 and 77 ("I said, 'Craig, Tony ordered all these files of previous administration people that we don't need.'"); *see also* Exhibit 1 (Anderson Dep. (May 7, 1998)) at 271-73; Defs' Stmt. at 60.

56. Undisputed; immaterial as to whether OPS willfully maintained background investigation summaries on Plaintiffs Alexander and Duggan after it discovered Plaintiffs Alexander and Duggan no longer required access to the White House.

57. Undisputed; immaterial as to whether OPS willfully maintained background investigation summaries on Plaintiffs Alexander and Duggan after it discovered Plaintiffs Alexander and Duggan no longer required access to the White House.

58. Undisputed; immaterial as to whether OPS willfully maintained background investigation summaries on Plaintiffs Alexander and Duggan after it discovered Plaintiffs Alexander and Duggan no longer required access to the White House.

59. Undisputed; immaterial as to whether OPS willfully maintained background investigation summaries on Plaintiffs Alexander and Duggan after it discovered Plaintiffs Alexander and Duggan no longer required access to the White House.

60. Undisputed.

61. Undisputed.

62. Undisputed; immaterial as to whether OPS willfully maintained background investigation summaries on Plaintiffs Alexander and Duggan after it discovered Plaintiffs Alexander and Duggan no longer required access to the White House.

63. Undisputed.

64. Undisputed.

65. Plaintiffs Alexander and Duggan do not dispute that the June 10, 1993 holder list did not identify where within the White House Office a particular pass holder worked; Plaintiffs Alexander and Duggan dispute that OPS had no guidance as to where it could direct inquiries

about such pass holders' workplaces, but submit that it is immaterial as to whether OPS willfully maintained background investigation summaries on Plaintiffs Alexander and Duggan after it discovered Plaintiffs Alexander and Duggan no longer required access to the White House; unsupported by the evidence cited.[7]

66. Disputed; indefinite as to time[8]

67. Undisputed; immaterial as to whether OPS willfully maintained background investigation summaries on Plaintiffs Alexander and Duggan after it discovered Plaintiffs Alexander and Duggan no longer required access to the White House.

68. Plaintiffs Alexander and Duggan do not dispute Ms. Gemmell's instructions; Plaintiffs Alexander and Duggan dispute that the instructions were correct as a matter of law and submit that the instructions are immaterial as to whether OPS willfully maintained background investigation summaries on Plaintiffs Alexander and Duggan after it discovered Plaintiffs Alexander and Duggan no longer required access to the White House.[9]

69. Disputed; immaterial as to whether OPS willfully maintained background investigation summaries on Plaintiffs Alexander and Duggan after it discovered Plaintiffs Alexander and Duggan no longer required access to the White House.[10]

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[7] Exhibit 2 (Wetzl Decl.) at para. 36; Exhibit 3 (Wetzl Dep.) at 68, 70-72, 74, and 90-91; Exhibit 4 (Wetzl Stmt.) at 6-7.

[8] Exhibit 1 (Anderson Dep. (May 7, 1998)) at 139-143; Exhibit 3 (Wetzl Decl.) at paras. 29-30; Exhibit 4 (Wetzl Stmt.) at 4-5; *see also* Plfs' Stmt. at para. 28.

[9] *See* Plfs' Stmt. at paras. 11 and 21.

[10] Exhibit 1 (Anderson Dep. (May 7, 1998)) at 139-143; Exhibit 3 (Wetzl Dep.) at 29-30; Exhibit 4 (Wetzl Stmt.) at 4-5; *see also* Memorandum For the Record, dated June 13, 1996, attached as Exhibit 6 (list of background investigation records returned to the FBI,

70. Undisputed; immaterial as to whether OPS willfully maintained background investigation summaries on Plaintiffs Alexander and Duggan after it discovered Plaintiffs Alexander and Duggan no longer required access to the White House.

71. Undisputed.

72. Undisputed; immaterial as to whether OPS willfully maintained background investigation summaries on Plaintiffs Alexander and Duggan after it discovered Plaintiffs Alexander and Duggan no longer required access to the White House.

73. Plaintiffs Alexander and Duggan do not dispute that some of the FBI background summaries were archived within ORM. Plaintiff Alexander disputes that her FBI background summary was sent to ORM for archival storage. Plaintiffs Alexander and Duggan also dispute that Mr. Marceca "mistakenly" acquired previous records of previous FBI background investigations of persons who never worked for the Clinton Administration.[11]

74. Undisputed.

75. Undisputed.

76. Undisputed.

77. Undisputed.

78. Undisputed.

79. Undisputed.

80. Undisputed.

81. Undisputed.

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including records of Plaintiff Alexander's FBI background investigation); Plfs' Stmt. at para. 28.

[11] *See* Defs' Stmt. at 75; *see also* Plfs' Stmt. at para. 24.

82. Undisputed.

83. Undisputed.

84. Plaintiffs Alexander and Duggan do not dispute that EADS routinely responded to requests from OPS since at least the Eisenhower Administration. Plaintiffs Alexander and Duggan do not dispute that the procedures followed by EADS in responding to requests, as well as the request forms themselves, remained virtually unchanged for at least thirty years. Plaintiffs Alexander and Duggan dispute that there have been no known breakdowns or problems with the request procedure and no cause to believe that EADS' procedures should be changed.[12]

85. Undisputed.

86. Undisputed.

87. Undisputed.

88. Undisputed.

89. Plaintiffs Alexander and Duggan do not dispute that all forms submitted by OPS indicated that persons were being considered for "access (S)." Plaintiffs Alexander and Duggan do not dispute that the individual requests were ordinary on their face and were processed in the same manner as previous report requests. Plaintiffs Alexander and Duggan dispute that EADS

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[12] Report of the FBI General Counsel on the Dissemination of FBI File Information to the White House, attached as Exhibit 7, at 1-2, 23-24, 29, 30 (noting in part that the FBI had "been on notice for some time now that the exchange of information between the FBI and the White House is both necessary and fraught with peril."), and 31; *see also* Statement of FBI Director Louis J. Freeh, attached as Exhibit 8, at 1 and 3.

Research Analysis had no reason to know or suspect any error or impropriety regarding the requests.[13]

II. Plaintiffs Alexander and Duggan's Statement of Undisputed Material Facts.

1. Plaintiff Cara Leslie Alexander is a former employee of the United States Government who worked in the White House Correspondence Office as a correspondence analyst from July 1990 until October 1992.[14]

2. Plaintiff Alexander required regular access to the White House while she was employed in the White House Correspondence Office.[15]

3. In order to be granted access to the White House, Plaintiff Alexander underwent a background investigation by the Federal Bureau of Investigation ("FBI").[16]

4. The FBI's Central Records System, in which records of FBI background investigation conducted by the FBI are maintained, "is classified as a 'Privacy Act System of Records.'"[17]

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[13] Exhibit 7 (FBI Report) at 1-2, 23-24, and 29-31 (noting in part that the FBI had "been on notice for some time now that the exchange of information between the FBI and the White House is both necessary and fraught with peril."); *see also* Exhibit 8 (Freeh Statement) at 1 and 3.

[14] Complaint in Civil Action No. 96-2123, attached as Exhibit 9; Defendant Federal Bureau of Investigation's Answer to Plaintiff's Complaint in Civil Action No. 96-2123, attached as Exhibit 10, at paras. 3 and 21 (admitted); Answer of Defendant Executive Office of the President in Civil Action No. 97-2123, attached as Exhibit 11, at paras. 3 and 21 (admitted); Deposition of Cara Leslie Alexander, attached as Exhibit 12, at 22-23, and 29.

[15] Exhibit 11 (EOP Ans. to Alexander Compl.) at para. 21 (admitted).

[16] Exhibit 10 (FBI Ans. to Alexander Compl.) at para. 22 (admitted); Exhibit 12 (Alexander Dep.) at 61.

[17] Exhibit 7 (FBI Report) at 9.

5. The FBI maintains records of its background investigation of Plaintiff Alexander as part of its "Privacy Act System of Records."[18]

6. On December 3, 1993, OPS, a component of EOP, requested records of Plaintiff Alexander's background investigation from the FBI.[19]

7. The reason identified by OPS on the request form used to request records of Plaintiff Alexander's FBI background investigation was "access" to the White House.[20]

8. At the time the request was made, however, Plaintiff Alexander no longer required access to the White House, as she had left her White House employment in October of 1992.[21]

9. On December 13, 1993, the FBI provided OPS with records of Plaintiff Alexander's background investigation.[22]

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[18] Exhibit 10 (FBI Ans. to Alexander Compl.) at para. 23 (admitted).

[19] Exhibit 10 (FBI Ans. to Alexander Compl.) at para. 27 (admitted); Exhibit 11 (EOP Ans. to Alexander Compl.) at paras. 25 and 27 (admitted); Request for Alexander Background Investigation Records, attached as Exhibit 13; List Entitled "Previous Report Requests to EADSU 1/93 - Present," attached as Exhibit 14, at 1.

[20] Exhibit 13 (Alexander Request Form).

[21] Exhibit 11 (EOP Ans. to Alexander Compl.) at para. 21 (admitted); Exhibit 12 (Alexander Dep.) at 29, 42-43, and 131.

[22] Exhibit 11 (EOP Ans. to Alexander Compl.) at para. 27 (admitted); Exhibit 13 (Alexander Request); Exhibit 14 (List Entitled "Previous Report Requests to EADSU 1/93 - Present") at 1.

10. OPS maintained the records of Plaintiff Alexander's background investigation it received from the FBI in its own system of records from approximately December 13, 1993 until June 13, 1996.[23]

11. On June 13, 1996, OPS returned the records of Plaintiff Alexander's background investigation to the FBI.[24]

12. Plaintiff Joseph Patrick Duggan is a former employee of the United States Government who worked in the White House as a speech writer for President George H. Bush from September 1991 until approximately September 1992.[25]

13. Mr. Duggan required regular access to the White House while he was employed as a speech writer for President Bush.[26]

14. In order to be granted access to the White House, Plaintiff Duggan underwent a background investigation by the FBI.[27]

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[23] Exhibit 6 (June 13, 1996 Memo.); List of 406 White House Personnel Security Files Transferred to FBI on June 14, 1996, attached as Exhibit 15, at 002274; Exhibit 7 (FBI Report) at 25; Exhibit 8 (Freeh Statement) at 1.

[24] Exhibit 6 (June 13, 1996 Memo.); Exhibit 15 (June 14, 1996 List) at 002274; Exhibit 7 (FBI Report) at 25; Exhibit 8 (Freeh Statement) at 1.

[25] Complaint in Civil Action No. 97-1288, attached as Exhibit 16; Defendant Federal Bureau of Investigation's Answer to Plaintiff's Complaint in Civil Action No. 97-1288, attached as Exhibit 17, at paras. 5 and 19 (admitted); Answer of Defendant Executive Office of the President in Civil Action No. 97-1288, attached as Exhibit 18, at paras. 5, 19 (admitted); Deposition of Joseph P. Duggan, attached as Exhibit 19, at 46 and 55.

[26] Exhibit 18 (EOP Ans. to Duggan Compl.) at para. 19 (admitted); Exhibit 19 (Duggan Dep.) at 47.

[27] Exhibit 17 (FBI Ans. to Duggan Compl.) at para. 20 (admitted); Exhibit 19 (Duggan Dep.) at 76-81 .

15. The FBI maintains records of its background investigation of Plaintiff Duggan as part of its "Privacy Act System of Records."[28]

16. On January 18, 1994, OPS requested records of Plaintiff Duggan's background investigation from the FBI.[29]

17. The reason identified by OPS on the request form used to request records of Plaintiff Duggan's FBI background investigation was "access" to the White House.[30]

18. At the time the request was made, however, Plaintiff Duggan no longer required access to the White House, as he had left his White House employment in approximately August 1992.[31]

19. On January 27, 1994, the FBI provided OPS with records of Plaintiff Duggan's background investigation.[32]

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[28] Exhibit 17 (FBI Ans. to Duggan Compl.) at paras. 6, 21, and 28 (admitted); Exhibit 18 (EOP Ans. to Duggan Compl.) at para. 6 (admitted).

[29] Exhibit 17 (FBI Ans. to Duggan Compl.) at para. 25 (admitted); Exhibit 18 (EOP Ans. to Duggan Compl.) at para. 25 (admitted); Request for Duggan Background Investigation Records, attached as Exhibit 20; Exhibit 14 (List Entitled "Previous Report Requests to EADSU 1/93 - Present") at 11.

[30] Exhibit 20 (Duggan Request Form).

[31] Exhibit 18 (EOP Ans. to Duggan Compl.) at para. 19 (admitted); Exhibit 19 (Duggan Dep.) at 55.

[32] Exhibit 17 (FBI Ans. to Duggan Compl.) at para. 25 (admitted); Exhibit 18 (EOP Ans. to Duggan Compl. at paras. 25 and 27 (admitted); Exhibit 20 (Duggan Request Form); Exhibit 14 (List Entitled "Previous Report Requests to EADSU 1/93 - Present") at 11.

20. OPS maintained the records of Plaintiff Duggan's background investigation it received from the FBI in its own system of records from approximately January 27, 1994 to June 6, 1996.[33]

21. On June 6, 1996, OPS returned the records of Plaintiff Duggan's background investigation to the FBI.[34]

22. The records of the FBI background investigations of Plaintiffs Alexander and Duggan had been requested by Anthony Marceca, a detailee from the U.S. Department of Defense temporarily assigned to OPS, as part of a project known as the "Update Project."[35]

23. In addition to records of the FBI background investigations of Plaintiffs Alexander and Duggan, Mr. Marceca requested records of the FBI background investigations of over 400 other persons as part of the Update Project.[36]

24. Mr. Marceca ordered records of FBI background investigations of these persons even if he could not confirm that the persons still required access to the White House.[37]

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[33] Memorandum for the Record dated June 6, 1996, attached as Exhibit 21, at 1-23448 (list of background investigation records returned to the FBI, including records of Plaintiff Duggan's FBI background investigation); Exhibit 15 (June 14, 1996 List) at 002280; Exhibit 7 (FBI Report) at 25; Exhibit 8 (Freeh Statement) at 1.

[34] Exhibit 21 (June 6, 1996 Memo) at 1-23448; Exhibit 15 (June 14, 1996 List) at 002280; Exhibit 7 (FBI Report) at 25; Exhibit 8 (Freeh Statement) at 1.

[35] Defs' Stmt. at paras. 29-31, 42, 44, 46, and 52.

[36] Defs' Stmt. at para. 52.

[37] Deposition of Anthony Marceca, attached as Exhibit 22, at 174 ("if all else failed I then sent for an [FBI background investigation file]"); *see also id.* at 164-66, and 172-74; Exhibit 5 (Anderson Dep. (October 1, 1996)) at 105-06 ("There was no way that we could come up with, that we could figure out, how can we find out who these people are, because we were also looking for ways to save ourselves some work . . . [s]o basically, what ended up happening was

25. David Craig Livingstone, who served as Director of OPS from February 1993 until June 26, 1996, reviewed all of the FBI background investigation records received by OPS.[38]

26. Mr. Marceca also reviewed all of the FBI background investigation records received by OPS.[39]

27. Mr. Marceca maintained records of FBI background investigations of persons who no longer required access to the White House in what he called the "dead file" in a vault at OPS. These records stayed in this location for a period of time after Mr. Marceca's detail to OPS ended.[40]

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with White House Operations, those listed under White House Operations, the best way we could figure out who they were and where they were and if they were still there was to request the background") and 161-62. In addition, after being given a grant of immunity, Mr. Marceca testified to the Office of the Independent Counsel ("OIC") that there came a time when he knew there were persons on the list off of which he was working who no longer worked at the White House." *See* Final Report of the Independent Counsel, March 16, 2000, at 59-61, attached as Exhibit 81 to the Government Defendants' Renewed Motion for Summary Judgment.

[38] Exhibit 5 (Anderson Dep. (October 1, 1996)) at 109-10 ("Any time a background investigation came in to our office, Craig reviewed it"); Exhibit 1 (Anderson Dep. (May 7, 1998)) at 283-84 and 314-17; Declaration of D. Craig Livingstone, attached as Exhibit 23, at para. 2; Exhibit 3 (Wetzl Dep.) at 92-93.

[39] Defs' Stmt. at paras. 44 and 52; Exhibit 22 (Marceca Dep.) at 165 and 180-83; Exhibit 3 (Wetzl Dep.) at 92-93. In addition, in immunized testimony to the OIC, Mr. Marceca confirmed that he reviewed records or previous background investigations for content, including derogatory information such as prior arrests, and that when he found such information, he informed Mr. Livingstone. *See* Final Report of the Independent Counsel, March 16, 2000, attached as Exhibit 81 to the Government Defendants' Renewed Motion for Summary Judgment, at 52 and 71-73.

[40] Exhibit 22 (Marceca Dep.) at 180 ("If I found that they were gone, okay, I now had an SBI on somebody that was gone, and in the dead file it went"); *see also id.* at 181 ("Now, once I identified clearly that the person was gone, then it would go in the dead file . . . It was done"), 182, and 183 ("Now, if somebody came back and I could not find where they worked in the White House, okay, if they were previous employees, previous White House employees and not with this new administration, as I said, they would go in the dead file.").

28. OPS knew Marceca had obtained and maintained records of FBI background investigations on persons who had never worked for the Clinton Administration and no longer required access to the White House, including persons such as Plaintiffs Alexander and Duggan.[41]

29. OPS subsequently archived some of the FBI background investigation records ordered by Mr. Marceca on persons who no longer required access to the White House. Plaintiff Duggan's records were archived by OPS. Plaintiff Alexander's records were not archived.[42]

30. All of the employees in OPS believed that records of FBI background investigations were covered by the Privacy Act and that the requirements of the Privacy Act applied to OPS.[43]

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[41] Exhibit 5 (Anderson Dep. (October 1, 1996)) at 102 ("I do know that after everybody was aware of it that we did say, well, what are we going to do."), 104-05, 106 ("Craig, Tony, Lisa. We all sat down and tried to figure it out."), 107-09, 158-60, 160 ("I became aware of the fact that we requested files of some people who had not been at the White House since the Clinton Administration took over when we actually started receiving those departments that fall under the umbrella of White House Operations"), 161 ("I asked Craig if -- I said Craig, or we thought -- do you know that --- it was sort of like an in passing type thing, because we had already known that we were getting background investigations on people who had left, and he said yes; that is just -- it's just part of the process"), and 163; Exhibit 1 (Anderson Dep. (May 7, 1998)) at 134-37, and 140-143; Exhibit 22 (Marceca Dep.) at 183 ("Now, if somebody came back and I could not find where they worked in the White House, okay, if they were previous employees, previous White House employees and not with this new administration, as I said, they would go in the dead file"); Exhibit 2 (Wetzl Decl.) at paras. 25-29 and 32; Exhibit 3 (Wetzl Dep.) at 70-72, 75-76, and 77 ("I said, Craig, Tony ordered all these files of previous administration people that we don't need"); Exhibit 4 (Wetzl Stmt.) at 6.

[42] Defs' Stmt. at 73 and 75.

[43] Exhibit 1 (Anderson Dep. (May 7, 1998)) at 277-81. Ms. Anderson also testified that OPS employees were never provided with memoranda or training regarding the Privacy Act from anyone outside of the OPS. *Id.* at 277-279.

31. The FBI provided OPS with records of background investigations based on nothing more than a simple, pre-printed form filled out by OPS that bore the typed name of the White House Counsel but otherwise was unsigned and lacked any indication of the actual requestor. The FBI was "institutionally inclined to process facially valid White House requests without reflection and without any effort to assess and balance the inherently competing interests underlying the Privacy Act."[44]

32. FBI subsequently admitted in a report issued on June 14, 1996 that its disclosure to OPS of records of FBI background investigations on persons like Plaintiffs Alexander and Duggan who had no need for access to the White House constituted "egregious violations of privacy."[45]

33. The FBI also admitted that it "failed to afford sufficient protection to the privacy interests of those whose files we maintain." "In our drive to maximize our productivity and responsiveness to client agencies, we have not been sufficiently attentive to our own responsibilities to safeguard our files against negligent or intentional misuse, nor have we been sufficiently exacting of the executive agencies we serve.[46]

34. The FBI also admitted that the dissemination of Privacy Act-protected records, such as the records of background investigation of Plaintiffs Alexander and Duggan that the FBI

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[44] Exhibit 7 (FBI Report) at 13-14; *see also* Exhibit 22 (Marceca Dep.) at 165 ("[I]f I needed additional [forms], I would go to the copier and make additional ones. As I explained, I'd make the form, make a copy, stamp "copy" on the form, put the copy in the file, put the date on it, take the original over, and it would go in a packet to go to the FBI").

[45] Exhibit 7 (FBI Report) at 2.

[46] Exhibit 7 (FBI Report) at 1-2.

had sent to OPS, had "received far too little management or executive oversight" and suffered from "a complete abdication of management responsibility." The FBI "failed in a larger sense to institute sufficient protections to effectively safeguard the very real privacy interest that we, as custodians of so many people's files, are responsible for protecting."[47]

35. The FBI further admitted being on notice in late 1993 that the volume of requests from OPS for record of previous background investigations was unusually large. According to the June 14, 1996 FBI report:

> The analysts [responsible for processing requests from the White House] recall quite clearly, however, that in late 1993 a large number of such requests seeking copies of previous reports were received from the Office of Personnel Security. One analyst in particular bore the brunt of the increased volume and was compelled to work a significant amount of overtime to keep up with the incoming requests. That analyst remembers being surprised by the volume of such requests, all of which, she notes, covered names in the first several letters of the alphabet and were sought for purposes of "access."[48]

36. Also according to the June 14, 1996 FBI Report:

> An analysis of [Executive Agencies Sub-Unit]'s computer records confirmed the recollections of the analysts regarding the influx of requests. Between December 6, 1993, and February 3, 1994, amid all of the other requests flowing in from the White House, EASU received no fewer than 481 requests which bear the characteristics of a single series. These requests, when parsed out from the normal traffic of requests, arrived in nearly perfect alphabetical order -- from Aa to Go -- all seeking copies of previous reports and all providing the same justification -- "Access (S)." In addition, although constituting only a small proportion of the total White House requests, this series constituted 88% of the requests for "previous reports only" received during December 1993 and January and February 1994.[49]

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[47] Exhibit 7 (FBI Report) at 2, 29.

[48] Exhibit 7 (FBI Report) at 23.

[49] Exhibit 7 (FBI Report) at 24.

37. To further demonstrate this disparity, the June 14, 1996 FBI Report noted that the "total number of such requests [for records of previous background investigations] was 249 in December 1993, 219 in January 1994, and 84 in February 1994. In contrast to these large numbers, only 79 such requests were submitted by the White House Office of Security throughout the ten remaining months of 1994."[50]

38. Also according to the June 14, 1996 FBI report, both the EASU Section Chief and the responsible Unit Chief were made aware of the "significant influx in requests" but took no action.[51]

39. Rather, despite the unprecedented number of requests from OPS for records of hundreds of previous background investigations, the FBI admits that the requests "were all apparently handled in routine fashion and no particular inquiry was made of the White House." "We now know that many of these 481 requests, while facially valid, were without justification and served no official purpose." "In recognition of this fact, the White House Counsel's Office has voluntarily surrendered to the FBI more than 400 folders containing FBI records since June 6, 1996."[52]

40. Moreover, the FBI admitted that it "[had] been on notice for some time now that the exchange of information between the FBI and the White House is both necessary and fraught with peril." The June 14, 1996 FBI report recounted events that had occurred in the summer of

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[50] Exhibit 7 (FBI Report) at 24, n.28.

[51] Exhibit 7 (FBI Report) at 24.

[52] Exhibit 7 (FBI Report) at 23 and 25.

1993, months before the deluge of OPS requests for records of previous background investigations began:

> [A]fter questions arose concerning the involvement of the FBI in matters relating to the discharge of several employees from the White House Travel Office, Attorney General Janet Reno and then White House Counsel Bernard W. Nussbaum enunciated a new policy regarding contacts with investigative agencies, in particular, the FBI. The new policy placed both the Counsel to the President and senior DOJ officials between the White House and the FBI in matters relating to pending criminal investigations.

The report concluded that the FBI "should have matched" its "scrupulous adherence" to the new policy regarding White House communications relating to pending investigations, "with greater attention" to requests for records of previous background investigations. "Our failure until now to have done so needs to be promptly remedied."[53]

41. In a statement released on June 14, 1996, the same date the FBI report was made public, then-FBI Director Louis J. Freeh declared that he agreed completely with the finding of the FBI report, including the findings that the FBI ". . . has failed in a larger sense to institute sufficient protections to effectively safeguard the very real privacy interests that we, as custodians of so many people's files, are responsible for protecting."[54]

42. Director Freeh also concurred in the report's findings that "the FBI gave inadequate protection to the privacy interests of persons in FBI files" and that "the Bureau failed to make certain that agencies receiving files followed exacting privacy procedures."[55]

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[53] Exhibit 7 (FBI Report) at 30-31.

[54] Exhibit 8 (Freeh Stmt.) at 3.

[55] Exhibit 8 (Freeh Stmt.) at 1.

43. Director Freeh also declared, "[I]t is now clear that the system was very vulnerable to misuse and that government officials over several decades, including himself, had not provided adequate oversight of the system, resulting now in violations of privacy."[56]

44. Like the FBI report issued on that same date, Director Freeh's statement concluded that the FBI's dissemination to OPS of records of background investigations of persons who no longer required access to the White House, including Plaintiffs Alexander and Duggan, constituted "egregious violations of privacy."[57]

45. Plaintiff Alexander learned that the FBI had provided records of her FBI background investigation to OPS and OPS had maintained these records in June 1996, when she received a call from a friend who had seen her name on a list published in a newspaper.[58]

46. Since that time, Plaintiff Alexander expended considerable time investigating Defendants' conduct by reviewing investigative bodies' records and reports on this issue.[59]

47. In addition, Plaintiff Alexander expended considerable time seeking counsel from friends, family and three separate attorneys on how to redress this wrong.[60]

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[56] Exhibit 8 (Freeh Stmt.) at 3.

[57] Exhibit 8 (Freeh Stmt.) at 4.

[58] Exhibit 12 (Alexander Dep.) at 45.

[59] Exhibit 12 (Alexander Dep.) at 64-65.

[60] Exhibit 12 (Alexander Dep.) at 46-58, and 158-160.

48. Plaintiff Alexander also incurred out of pocket expenses, including long distance telephone calls, taxi cab fares resulting from meetings with lawyers and others, babysitting costs to attend her deposition and meetings, fax charges, and fees to obtain medical records.[61]

49. Plaintiff Duggan first learned the FBI had provided records of his FBI background investigation to OPS and OPS had maintained these records in June 1996, when he received a call from a reporter with the Associated Press. Plaintiff Duggan was immediately upset by the discovery and had difficulty sleeping.[62]

50. Plaintiff Duggan has spent an estimated 1,400 hours investigating, responding to, and seeking redress for Defendants' conduct. Plaintiff Duggan's efforts included contacting Members of Congress and congressional investigators, the U.S. Department of Justice, and the Office of the Independent Counsel, as well as advocacy groups and legal organizations. Plaintiff also spent many hours obtaining and reviewing news reports and records and transcripts of investigations into the matter. Plaintiff Duggan also signed a joint letter to the President and participated in a demonstration outside the White House.[63]

51. Plaintiff Duggan also has suffered anxiety, emotional trauma, and severe insomnia as a result of Defendants' conduct. Plaintiff Duggan incurred approximately $1,200 in unreimbursed medical expenses as a result of the emotional strain he suffered.[64]

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[61] Exhibit 12 (Alexander Dep.) at 97-119.

[62] Exhibit 19 (Duggan Dep.) at 84-85.

[63] Exhibit 19 (Duggan Dep.) at 86-88, 90-93, 96-98, 102-07, 110-12, 114-24, and 148-53.

[64] Exhibit 19 (Duggan Dep.) at 147-53.

52. Plaintiff Duggan also has incurred out of pocket expenses, including long distance telephone calls, taxi cab fares resulting from meetings with lawyers and others, travel costs for doctor visits, postage and messenger costs, and fees to obtain medical records.[65]

53. Lisa Weztl completed the Update Project after Mr. Marceca's detail ended without requesting records of previous FBI background investigations of persons in order to determine whether those persons still required access to the White House. Rather, she was able to complete the project by obtaining updated pass holder lists from the U.S. Secret Service and identifying persons through other means.[66]

54. Bernard Nussbaum, who served as White House Counsel at the time and had ultimate supervisory authority over OPS, testified that he "would have stopped it immediately" if he had known OPS was requesting FBI background investigation files on persons who no longer required access to the White House. "If I would have known people were doing that, even inadvertently, as I believe it was done in this case, I would have stopped it and I would have had the files sent back." "If we received files of people we shouldn't have received, I would have had them sent back. That's what I would have done." Mr. Nussbaum went so far to say that the confidential records were "wrongly obtained" and "should have never been requested" and characterized OPS's actions as "a serious breach of privacy." "Those whose files were wrongly

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[65] Exhibit 19 (Duggan Dep.) at 140-42, and 144-147.

[66] Exhibit 2 (Weztl Decl.) at paras. 25-27, 32; Exhibit 3 (Wetzl Dep.) at 70-73, 74 ("I would just call the supervisor of the office and say we are doing the Update Project on previous administration employees, send me a list of all the people who work in your office who worked there before; and that turned out to be the most effective way"), and 75; Exhibit 4 (Wetzl Stmt.) at 6.

obtained have every right to be agitated, to be angry, knowing that even one person reviewed their private FBI files when he should not have done so."[67]

Dated: October 19, 2009

Respectfully submitted,

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[67] Deposition of Bernard W. Nussbaum (June 12, 1996), attached as Exhibit 24, at 22; Deposition of Bernard W. Nussbaum (June 4, 1999), attached as Exhibit 25 at 381-82 and Exhibit 7 thereto.