IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,	)	
	)	
Plaintiff,	)	Civil Action No. 09-1537 (PLF)
	)	
v.	)	
	)	
FEDERAL HOUSING FINANCE AGENCY,	)	
	)	
	)	
Defendant.	)	
	)	

PLAINTIFF'S REPLY IN SUPPORT OF ITS CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff Judicial Watch, Inc., by counsel and pursuant to Federal Rule of Civil Procedure 56, respectfully submits this reply in support of its cross motion for partial summary judgment and in response to the opposition brief submitted by Defendant Federal Housing Finance Agency ("FHFA"). As grounds therefor, Plaintiff states as follows:

MEMORANDUM OF LAW

I. Plaintiff's Cross Motion for Partial Summary Judgment Should Be Granted As the Requested Records Are In the Custody and Control of the Agency.

It is uncontested that, pursuant to federal law, FHFA has full management and operational control over Federal National Mortgage Association ("Fannie Mae") and Federal Home Loan Mortgage Company ("Freddie Mac"). 12 U.S.C. § 4617. In addition, FHFA has "all rights, titles, powers, and privileges of [Fannie Mae and Freddie Mac], and of any stockholder, officer, or director . . . ." *Id.* at § 4617(b)(2)(A)(i). And most significantly, FHFA has "title to the books, records, and assets of any other legal custodian of" Fannie Mae and Freddie Mac. 12 U.S.C. § 4617(b)(2)(A)(ii). Because of these plain statutory directives, the requested records have been

transferred by law to the custody and control of the agency. Furthermore, because the records were in the custody and control of FHFA at the time of Plaintiff's FOIA request, the records are "agency records" subject to FOIA.[1]

FHFA does not dispute that it has the ability to search for and produce the requested records – further demonstrating the agency's custody and control of the documents. FHFA's only response as to why the plain language of the statutes should not control in this case is to argue that if Congress had intended FOIA to apply to the requested records it would surely have said so. Defs. Opp. at 5. It did say so. The language transferring title of the records of the entities to FHFA is quite specific. There is no reason to look beyond the plain language of these statutes. *Consolidated Rail Corp. v. United States*, 896 F.2d 574, 578 (D.C. Cir 1990) ("the plain meaning of legislation should be conclusive, except in the 'rare' cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters.") (citations omitted). Additionally, the burden remains at all times on an agency to establish that documents are not agency records. 492 U.S. at 142 n.3 ("The burden is on the agency to demonstrate, not the requestor to disprove, that the materials sought are not 'agency records' . . .") (citing S. Rep. No. 813, 89th Cong., 1st Sess., 8 (1965)). FHFA has not done so.

Notably absent from FHFA's opposition is any further mention of its ill-chosen metaphor

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[1] FHFA's complaint that Plaintiff's response to FHFA Statement of Material Facts did not comply with the Local Rule is misplaced. FHFA's statement is rife with legal conclusions and an improper mix of fact and legal argument and "does nothing to assist the court in isolating the material facts, distinguishing disputed from undisputed facts, and identifying the pertinent parts of the record … nor does it provide the non-movant 'an opportunity fairly to contest the movant's case.'" *Robertson v. American Airlines*, 239 F. Supp. 2d 5, 9 (D.D.C. 2002) (citations omitted). It appears as though the FHFA largely cut and pasted entire paragraphs from its declarations into the statement rather than parsing out the factual material it asserts is not in dispute. In any event, the critical facts in this FOIA case are few and undisputed.

that FHFA has "stepped into the shoes" of Fannie Mae and Freddie Mac. This is not surprising because, as demonstrated in Plaintiff's opening brief, the cases involving FOIA and federal takeovers of financial institutions uniformly confirm that records of such institutions are agency records subject to FOIA. *See Nadler v. FDIC*, 899 F. Supp. 158 (S.D.N.Y. 1995); *Nikelsberg v. FDIC*, 640 F. Supp. 2d 55 (D.D.C. 2009) (Robertson, J.) (ruling on claims of exemption under FOIA for information regarding banks in receivership); *Lepelletier v. FDIC*, 23 Fed. Appx. 4 (D.C. Cir. 2001) (FDIC provided names of depositors at banks in receivership in response to FOIA request); *McAllister v. Resolution Trust Corp*., 201 F.3d 570 (5th Cir. 2000) (RTC provided information in response to FOIA for information on creditors of S&L for which RTC was receiver). In each of these cases involving federal takeovers of financial institutions, the requested records were considered agency records and subject to FOIA.

These cases are factually far closer to this case than any of the cases cited by FHFA. For example, FHFA discusses *Forsham v. Harris*, 445 U.S. 169 (1980) which involved records "created and held by an entity that was not itself an 'agency.'" Defs. Opp. at 5-6. *Forsham*, however, plainly is inapposite as it involved records that, at the time of the request, were held by a "privately controlled organization." Defs. Opp. at 6 (quoting *Forsham*, 445 U.S. at 178). The factual situation in this case is distinctly different, as the custody and control of the requested records has been transferred by statute to FHFA. No such transfer of custody and control to a government agency was present in *Forsham* or any other case relied upon by the FHFA.

This is particularly clear when compared to another case relied upon by FHFA, *Wolfe v. HHS*, 711 F.2d 1077, 1080 (D.C. Cir. 1983). Defs. Opp. at 10-11. At issue in *Wolfe* were documents prepared by a presidential transition team relating to an agency and that were in a

locked bookcase of an agency official marked private. The D.C. Circuit concluded that the documents were not agency records, as they were not actually in the custody of the agency. *Id.* at 1080. In this case, however, custody of the documents is not in dispute, as FHFA has full custody of the requested records under the statute that plainly granted it "title to the books, records, and assets" of Fannie Mae and Freddie Mac.

As demonstrated in Plaintiff's opening brief, the unique factual situation present here makes this case distinct from many of the cases which construe what constitutes an "agency record." This case does not involve records obtained from a third party or records that an agency may or may not have accessed. This is why the D.C. Circuit's four-part test to determine whether requested documents are under agency control is not clearly determinative in this case, and why much of FHFA's arguments miss the mark. *See* Pltf's Opening Brief at 5 n. 2. The question of custody and control already has been answered by the specific directive of Congress transferring the records to the agency. As such, the records are now no different from any other records of the agency.

In any event, as demonstrated in Plaintiff's opening brief, the requested records fit comfortably within the definition of "agency records" as set forth in *Dep't of Justice v. Tax Analysts*, 492 U.S. 136 (1989). FHFA plainly "obtained" the requested records when, by statute, custody and control was transferred to FHFA, granting it "title to the books, records, and assets" of Fannie Mae and Freddie Mac. FHFA also had full "control" over the requested records at the time of the FOIA request. As the Supreme Court has stated, "agency control" is based on whether "material[s] have come into the agency's possession in the legitimate conduct of its official duties." *Tax Analysts*, 492 U.S. at 145. Again, under the plain language of the statute,

FHFA has complete management control of the previously independent Fannie Mae and Freddie Mac and custody of their records. Congress has specifically transferred the "records" of Fannie Mae and Freddie Mac to FHFA. Hence, the records have "come into the agency's possession" in the legitimate conduct of FHFA's official duties. In every meaningful way, FHFA has custody and control of the requested records.

II. The Public Interest Is Clearly Furthered By A Finding That Requested Records Are Subject to FOIA.

The question of whether the "purpose" of FOIA is furthered by a finding that the requested records are agency records is not part of the legal inquiry when the statutory language is clear. In this case, however, if the Court were to look at whether the purpose of FOIA is advanced by such a finding, the answer clearly is yes. Contrary to FHFA's claims, the history of political activities by these entities – the subject of Plaintiff's request – is a significant matter of public concern. Defs. Opp. at 13. Plaintiff respectfully submits that understanding how – and why – the federal government was forced to seize control of Fannie Mae and Freddie Mac are inherently of great public concern. Moreover, at a minimum, the records of Fannie Mae and Freddie Mac are now, by definition, of public concern, as they have been transferred by statute to an agency of the federal government, making them legitimate subjects of public inquiry.

FHFA's claim that a response to Plaintiff's FOIA request would somehow constitute a burden on the agency is misplaced. The issue of whether the requested records are "agency records" does not turn on how burdensome it may or may not be for the agency to process this FOIA request. Moreover, the prospect that other FOIA requesters might burden the agency with subsequent requests (Defs. Opp. at 17) similarly is irrelevant to this case. Finally, contrary to

FHFA's claim (Defs. Opp. at 17 n.9), Plaintiff previously did respond to the agency's meritless claim that it can choose, under its powers as conservator, to exempt the requested records from FOIA under 12 U.S.C. § 4617(f). *See* Pltfs. Opening Brief at 8. Nothing in that statute, however, allows an agency to unilaterally exempt itself from FOIA, any more than FHFA can choose to ignore any other law it deems contrary to its goals. *Id.*.

CONCLUSION

For the reasons set forth above and in Plaintiff's Opening Brief, the Court should deny FHFA's motion for summary judgment and grant Plaintiff's motion for partial summary judgment.

Dated: March 31, 2010

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