IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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In this Freedom of Information Act ("FOIA") case, Plaintiff Judicial Watch challenges Defendant Federal Housing Finance Agency's ("FHFA") determination that private corporate records generated by and in the custody of the Federal Home Loan Mortgage Company ("Freddie Mac"), and the Federal National Mortgage Association ("Fannie Mae") (collectively, the "Enterprises"), are not agency records under FOIA. Specifically, Plaintiff seeks information generated by and in the custody of the Enterprises concerning political campaign contributions, and their policies, stipulations, and requirements concerning campaign contributions. Plaintiff's lawsuit is predicated upon its apparent belief that, because FHFA is acting as the temporary conservator of the Enterprises, documents created by and within the custody of the Enterprises somehow become agency records that are subject to FOIA. The predicate for Plaintiff's FOIA claim is unsupported both as a matter of fact and as a matter of law, and summary judgment in favor of FHFA is warranted.

It is undisputed that the Enterprises are not "agencies" under FOIA. The Enterprises are publicly traded private corporations with shareholders, boards of directors, and CEOs. Accordingly, any records created by or held in the custody of the Enterprises reflecting their political campaign contributions or policies, stipulations and requirements concerning campaign contributions necessarily are private corporate documents. They are not "agency records" subject to disclosure under FOIA.

Furthermore, the Enterprises' documents are not subject to FOIA as federal agency records by mere virtue of FHFA's temporary conservatorship of the Enterprises. Indeed, these publicly traded corporate entities held in temporary conservatorship do not "step into the shoes" of FHFA. Instead, as the temporary conservator, FHFA's goal is to preserve and conserve assets, and it is in this role that FHFA steps into the shoes of the Enterprises, thereby acquiring the rights that existed in those entities prior to the conservatorship. Nor does FHFA exercise "control" over the Enterprises' documents, as that term has been defined by the Supreme Court for the purposes of FOIA. Accordingly, because the records created and held in the custody of the Enterprises are not "agency records" subject to FOIA, FHFA is entitled to summary judgment.

BACKGROUND

A. The Regulated Enterprises, Fannie Mae and Freddie Mac

Freddie Mac and Fannie Mae are publicly traded private corporations chartered by Congress. *See* 12 U.S.C. § 1452 (Freddie Mac); *id.* § 1723 (Fannie Mae); *see also* SMF ¶ 1.[1] Fannie Mae was established in 1938 to create a secondary market for residential loans

[1] "SMF ¶ ___" refers to the Statement of Material Facts filed in connection with this motion for summary judgment.

guaranteed by the Federal Housing Administration and the Department of Veterans Affairs. Fannie Mae was privatized into a government-sponsored corporation in 1968, and its charter expanded to cover conventional, non-federally-insured residential mortgage loans. Freddie Mac was established as a government-sponsored corporation in 1970 to strengthen and expand the secondary market for residential loans; its goal was to provide competition for Fannie Mae and increase the availability of funds to finance mortgages and home ownership. *See* Federal Home Loan Mortgage Corporation Act, Pub. L. No. 91-351, § 301, as amended. In 1989, the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA") restructured and privatized Freddie Mac, much as Fannie Mae had been privatized in 1968.

The Enterprises' activities are confined to the secondary mortgage market. *See* SMF ¶ 2. They are the largest entities in that market, where they buy mortgages from commercial banks, thrift institutions, mortgage banks, and other primary lenders, and either hold these mortgages in their own portfolios or package them into mortgage-backed securities for resale to investors. *Id.* The secondary mortgage market plays a major part in creating a ready supply of mortgage funds for American homebuyers, and is fundamental to both the availability of residential mortgage credit and the stability of the housing finance system. *Id.* Although the recent economic crisis resulted in significant losses for both corporations, the government has determined that the Enterprises need to continue as ongoing businesses as they did before the conservatorship. *See* SMF ¶ 3.

Like all private corporations, the Enterprises enjoy extensive corporate powers necessary to operate successfully. *See* 12 U.S.C. § 1723(a); *id.* § 1452(c). And like all corporations, the Enterprises possess the right to make political contributions within the limits of campaign-finance laws, including through political action committees. *See*

http://www.congress.org/congressorg/bio/fec/?commid=C00404129 (Freddie PAC); http://www.congress.org/congressorg/bio/fec/?commid=C00393520 (Fannie Mae PAC). As required by law administered by the Federal Election Commission, political contributions by the Enterprises or their political action committees must be publicly reported. *See, e.g.*, Federal Election Commission Disclosure Report Search Results, *at* http://query.nictusa.com/cgi-bin/com_supopp/C00393520/ (Fannie Mae PAC contributions).[2]

B. The Federal Housing Finance Agency

On July 30, 2008, Congress passed the Housing and Economic Recovery Act of 2008 ("HERA"), 12 U.S.C. §§ 4501 *et seq.*, creating the Federal Housing Finance Agency (the "Agency" or "FHFA") as an independent federal agency. Pursuant to HERA, FHFA succeeded to the roles previously filled by the Office of Federal Housing Enterprise Oversight ("OFHEO").[3] FHFA now serves as the primary regulatory and oversight authority for the Enterprises.

In addition, HERA granted the Director of the FHFA the authority to place the Enterprises into conservatorship and into receivership "for the purpose of reorganizing, rehabilitating, or winding up the affairs of [the Enterprises]." *Id.* § 4617(a).[4] On September 6, 2008, pursuant to this authority and after determining that the Enterprises could not continue to

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[2] On September 7, 2008, pursuant to an order from the conservator, both Enterprises ceased engaging in political activity – including lobbying and fundraising – after entering conservatorship. *See* SMF ¶ 4.

[3] FHFA also succeeded to the role of the Federal Housing Finance Board, the prior regulator of the Federal Home Loan Banks.

[4] The Federal Housing Enterprises Financial Safety and Soundness Act of 1992 had granted OFHEO the authority to place the Enterprises into conservatorship, but had not created such authority for receivership. *See* 12 U.S.C. § 4513(b)(4) (1993).

meet their missions without government funding and support, the Director took the unprecedented step of placing the Enterprises under FHFA's temporary conservatorship to stabilize the institutions with the objective of maintaining their normal business operations. *See* SMF ¶¶ 4-5. In its capacity as conservator, FHFA steps into the shoes of the regulated Enterprises and is vested with broad statutory powers to act on their behalf. Upon appointment as conservator, FHFA immediately succeeded to "all rights, titles, powers, and privileges of [the Enterprises], and of any stockholder, officer, or director." 12 U.S.C. § 4617(b)(2)(A)(i). FHFA is entitled to exercise these powers "to preserve and conserve the assets and properties of" the Enterprises, *id.* § 4617(b)(2)(B)(iv), and toward that end to "take any such action that may be . . . necessary to put the regulated entity in a sound and solvent condition," *id.* § 4617(b)(2)(D)(I); "exercise . . . such incidental powers as shall be necessary to carry out" the powers and authorities of a conservator," *id.* § 4617(b)(2)(J)(i); and "take any action authorized by this section, which the Agency determines is in the best interests of the regulated entity or the Agency. *Id.* § 4617(b)(2)(A)(I). To provide the Agency with the broadest latitude to preserve and conserve the Enterprises' assets without interference, Congress explicitly circumscribed judicial review of the Conservator's activities by providing that "no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a Conservator." *Id.* § 4617(f).

C. Plaintiff's FOIA Request and Suit

On May 29, 2009, Plaintiff submitted a request to FHFA pursuant to the FOIA. *See* SMF ¶ 8. Plaintiff's request sought the following records from 2005 to the present: (1) any and all records in the custody of Fannie Mae or Freddie Mac concerning political campaign contributions; and (2) any and all records in the custody of Fannie Mae or Freddie Mac

concerning policies, stipulations, and/or requirements concerning campaign contributions. *Id.* Plaintiff's FOIA request stated that "[w]e are directing this request to FHFA because we understand that FHFA is the conservator for both Fannie Mae and Freddie Mac. As conservator, we understand that FHFA controls and directs the operations of Fannie Mae and Freddie Mac, including holding title to all books and records of both entities." *Id.* On July 1, 2009, FHFA responded to Plaintiff's request and noted that, although the Enterprises themselves may have records that would be responsive to the request, only FHFA's records are subject to the FOIA. *See* SMF ¶ 9. The Agency further explained that

> Fannie Mae is a private company, and its documents are not subject to the FOIA unless they have been collected by a government agency and retained as agency records. Documents from the Enterprises only become agency records once the agency has collected those records and brought them within the agency's control. The FOIA does not apply to documents for which an agency has not yet exercised its right of access. The FOIA only applies to records that an agency has actually obtained, and does not apply to records that the agency merely could have obtained.

Id.

Plaintiff administratively appealed the Agency's response. *See* SMF ¶ 10. In denying the appeal, FHFA noted that the Enterprises are private companies and, thus, are not subject to FOIA. *See* SMF ¶ 11. Because the Agency's records alone are subject to the FOIA, FHFA determined that Enterprise documents become agency records only if they are obtained by FHFA and maintained in the Agency's control, which has not happened. *Id.*

On August 14, 2009, Plaintiff filed the instant suit, claiming that the Agency "violated the FOIA by failing to produce any and all non-exempt records responsive to" its request. Complaint at 3 [Dkt. 1]. As relief for this supposed violation, Plaintiff seeks (1) a declaratory judgment that "Defendant's failure to comply with FOIA" is unlawful; (2) an order compelling

"Defendant to search for and produce any and all non-exempt records responsive to" its FOIA request and to produce a *Vaughn* index of exempt records; (3) to "enjoin Defendant from continuing to withhold any and all non-exempt records"; and (4) an award of Plaintiff's attorney's fees and costs. *Id.*

For reasons described below, FHFA has fully complied with its FOIA obligations. The premise offered in Plaintiff's Complaint – that corporate records generated by and belonging to Freddie Mac and Fannie Mae that are not maintained by FHFA are "agency records" subject to the FOIA – is without merit. Therefore, summary judgment for the Defendant is appropriate.

ARGUMENT

I. SUMMARY JUDGMENT IS APPROPRIATE BECAUSE THE AGENCY HAS DISCHARGED ITS OBLIGATIONS UNDER THE FOIA

The FOIA, 5 U.S.C. § 552, "represents a balance struck by Congress between the public's right to know and the government's legitimate interest in keeping certain information confidential." *Center for Nat'l Sec. Studies v. Dep't of Justice*, 331 F.3d 918, 925 (D.C. Cir. 2003). In enacting FOIA, Congress was "principally interested in opening *administrative processes* to the scrutiny of the press and general public," and the principal concern of FOIA is "to enable the public to have sufficient information in order to be able, through the electoral process, to make intelligent, informed choices with respect to the nature, scope, and procedure of *federal governmental activities.*" *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 17 (1974) (citations omitted) (emphasis added). In this regard, "FOIA represents a carefully balanced scheme of public rights and agency obligations designed to foster greater access to *agency records* than existed prior to its enactment." *Kissinger v. Reporters Comm. for Freedom of the Press,* 445 U.S. 136, 150 (1980) (emphasis added). Accordingly, the thrust of the FOIA is

to create a right of access to "agency records." The Supreme Court has held that to constitute an "agency record" the agency must: (1) either request or obtain the materials, and (2) be in control of the requested material at the time the FOIA request was made. *See United States Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 145 (1989). Under FOIA, "control" means that "the materials have come into the agency's possession in the legitimate conduct of its official duties." *Id.* The FOIA does not require agencies to create documents responsive to a request or to obtain them from other entities. *See id.* at 144-45; *Kissinger*, 445 U.S. at 151-52.

Plaintiff's FOIA request, when read in conjunction with the Complaint, seeks to require FHFA to search not its own files, but those of the two private companies for which it acts as temporary conservator; private companies with shareholders, boards of directors, and CEOs. *See* SMF ¶ 6. As explained below, FHFA has fully complied with its obligations under FOIA. Plaintiff's argument that the FHFA was required to search the records of the Enterprises – private corporations for which the Agency is temporarily acting as conservator pursuant to 12 U.S.C. § 4617 – is without merit. Accordingly, the Court should enter summary judgment for Defendant.

A. The FOIA Does Not Require FHFA to Request or Search the Business Records of the Enterprises for Which FHFA Acts as Conservator

Plaintiff's FOIA request and this lawsuit assert that FOIA required the Agency to search the Enterprises' records for responsive documents. However, for the reasons below, this assertion is without merit. The Enterprises are not "agencies" subject to the FOIA. Moreover, the FHFA's role as conservator does not transform the business records of these private companies into "agency records" subject to the FOIA. Based upon Supreme Court precedent,

the FHFA does not have control, as required by FOIA, over the Enterprises' records concerning their political activities.

1. The Enterprises are not "agencies" for purposes of the FOIA

By its terms, the FOIA applies only to "agencies," defined as, among other things, "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government." 5 U.S.C. § 552(f)(1). It is beyond question that the Enterprises are not executive or military departments or establishments of the Executive branch; presumably, any independent FOIA applicability would thus depend upon the Enterprises' qualification as "Government corporations" or "Government controlled corporations." They are neither.

Like banks, thrifts, credit unions, and other federally chartered financial institutions, the Enterprises have historically not been viewed by courts as controlled by the Government, but as operating independently. *See, e.g.*, *Am. Bankers Mortg. Corp. v. Fed. Home Loan Mortg. Corp.*, 75 F.3d 1401, 1407-09 (9th Cir. 1996) (applying *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995), and holding that Freddie Mac is not a federal agency for Fifth Amendment purposes because the Government exercised little control over its operations); *see also Mendrala v. Crown Mortg. Co.*, 955 F.2d 1132 (7th Cir.1992) (noting historic lack of government control of Freddie Mac: government had no ownership interest in Freddie Mac, exercised no control over Enterprise[5] and made no appropriations to the Enterprise).[6] Although the Enterprises are

[5] The Government appoints none of the directors of the Enterprises when the entities are not in conservatorship. In conservatorship, the directors selected by the Board serve as an active, rather than advisory body, are subject to liability, and are not protected by sovereign immunity in the manner of federal employees. *See* SMF ¶ 6.

[6] Prior to Freddie Mac's 1989 restructuring, the D.C. Circuit held that the entity was substantially controlled by the Government and thus subject to the FOIA's public-reporting

chartered by Congress, "[t]he term 'Government corporation,' as used in" the FOIA, is limited to only "include a corporation that is a wholly Government-owned enterprise, established by Congress through statute, such as the St. Lawrence Seaway Development Corporation, the Federal Crop Insurance Corporation (FCIC), the Tennessee Valley Authority (TVA), and the Inter-American Foundation." *Irwin Mem'l Bank of San Francisco Med. Soc'y v. Am. Nat'l Red Cross*, 640 F.2d 1051, 1054 (9th Cir. 1981) (holding that American Red Cross is not an agency for FOIA purposes; quoting H.R. Rep. No. 93-876, 93rd Cong.); *see also Deaf Smith County Grain Processors, Inc. v. Glickman*, 162 F.3d 1206 (D.C. Cir. 1998) (noting that the Commodity Credit Corporation is a wholly-owned Government corporation). Although the insolvency of the Enterprises has required the temporary custodianship of the Enterprises by the government, and the United States Treasury has provided temporary financial assistance to permit them to continue to operate, the Enterprises were not established to be permanently owned in whole or in part by the federal government. Thus, they are not agencies under the FOIA. *See Frank v. Bear Stearns & Co.*, 128 F.3d 919, 923-24 (5th Cir. 1997) (*"*Fannie Mae and Freddie Mac, however, are both shareholder-owned corporations in which the United States has no [permanent] ownership interests. As such, the defendants' contracts with Fannie Mae and Freddie Mac are not 'government contracts' because the United States is not a party to those contracts.") (citation omitted).

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requirements. *See Rocap v. Indiek*, 539 F.2d 734, 177 (D.C. Cir. 1976). However, for reasons described in *Am. Bankers*, 75 F.3d at 1407-08, and *Liberty Mortg. Banking, Ltd. v. Fed. Home Loan Mortg. Corp.*, 822 F. Supp. 956, 959 n.7 (E.D.N,Y. 1993), FIRREA's restructuring of the entity invalidates the *Rocap* analysis. Defendant is unaware of any case in which a court subsequently has held that either Fannie Mae or Freddie Mac are subject to FOIA and, indeed, neither Enterprise maintains a FOIA compliance mechanism. SMF ¶¶ 18, 19, 24.

2. The Enterprises records are not transformed into "agency records" during FHFA's temporary conservatorship

The Enterprises have not become federal agencies as a result of being placed under FHFA's temporary conservatorship, and Enterprise records have not become "agency records." When a regulatory agency such as FHFA acts as conservator, it essentially becomes a separate entity for that purpose, *i.e.*, it "steps into the shoes" of the regulated corporation, and acquires "the rights that existed [in the entity] prior to the receivership." *See O'Melveny & Myers v. FDIC*, 512 U.S. 79, 86-87 (1994); *Nadler v. FDIC*, 899 F. Supp. 158, 163 (S.D.N.Y. 1995) ("[T]he FDIC assumes as receiver a separate legal existence. Unlike the FDIC *qua* agency, the FDIC in its role as receiver may assert the rights of private parties."). In other words, the records of the Enterprises in conservatorship remain corporate records, just as they were before conservatorship. FHFA as conservator assumed the rights of a private party – such as to manage corporate records without the additional requirements FOIA applies to government agencies. *See* 12 U.S.C. § 4617(b)(2)(A)(i) (providing that upon assuming conservatorship the Agency immediately succeeds to "all rights, titles, powers, and privileges of [the Enterprises], and of any stockholder, officer, or director").

There is no support for the contrary position – that a private entity in conservatorship "steps into the shoes" of the government agency and must operate as a government agency during the period of stewardship, subjecting its otherwise private books to public inspection under FOIA. Indeed, such a result would do nothing to foster the purposes of FOIA or the conservatorship, but may well harm the conservator's mission of seeking to restore the Enterprises to financial health. *See Nadler*, 899 F. Supp. at 164 ("The thrust of the FOIA is to create a right of access to official information. . . . Here, the [information sought has] nothing to

do with the FDIC's regulation of the deposit insurance system . . . . . Disclosure here would not enlighten the public as to how the government in its sovereign capacity regulates deposit insurance, but would only frustrate the FDIC's goal of keeping the insurance coffers as full as possible.").

Moreover, FHFA has no duty under FOIA to search, or require the Enterprises to search, the corporations' records for responsive information.[7] Indeed, the Supreme Court has held that documents constitute "agency records" subject to the FOIA only if they are created or obtained by an agency, and are maintained in the agency's control. *See Tax Analysts*, 492 U.S. at 144-46. Here, there is no dispute that the corporate records of the Enterprises were neither created nor obtained by FHFA in the performance of its duties as conservator. *See* SMF ¶¶ 15-17.[8] Nor were the requested records within the Agency's "control" at the time of the FOIA request. In

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[7] Because Plaintiff's FOIA request sought only documents in the custody of the Enterprises, and did not seek documents in the custody of FHFA, no search of the records in the custody of the Agency was required. Nevertheless, FHFA chose to search FHFA's records for similar materials, and found no such records. *See* SMF ¶¶ 12, 14. This search – which exceeded FHFA's obligations under FOIA – was adequate because it was reasonably calculated to uncover relevant information. *See* SMF ¶¶ 12-14; *see Weisberg v. United States Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). *Casillas v. U.S. Dep't of Justice*, No. 07-1621, 2009 WL 4546677 (D.D.C. Dec. 7, 2009) ("It is undisputed that" the Agency "conducted a search" of its records, "and that it found no responsive records. . . . On this basis, the defendant is entitled to judgment as a matter of law.").

[8] Indeed, any responsive material for the most part would have been created well before FHFA was appointed conservator. No such documents would have been created for the period after FHFA was appointed conservator, because the Enterprises ceased their political activities at that time, at the instruction of the Agency as conservator. *See* SMF ¶ 11. Moreover, any such records have not been obtained by the Agency, as demonstrated by the Agency's failure to locate any responsive information after its reasonable search. *See* SMF ¶ 14. The fact that FHFA has not obtained records pertaining to past political contributions by the Enterprises is not surprising, because such contributions are irrelevant to the Agency's missions of safety and soundness and seeking to restore the Enterprises to financial health. *See* SMF ¶ 5. FHFA does not examine the Enterprises for their political activities, and does not maintain records regarding those activities. *See* SMF ¶ 15. FHFA has promulgated no regulation or agency guidance that addresses these types of activities or records.

determining agency control in the FOIA context, the D.C. Circuit considers four factors: (1) the intent of the record's creator to retain or relinquish control over the record; (2) the ability of the agency to use and dispose of the record as it sees fit; (3) the extent to which agency personnel have read or relied upon the record; and (4) the degree to which the record was integrated into the agency's record system. *See Burka v. Dep't of Health and Human Servs.*, 87 F.3d 508, 515 (D.C. Cir. 1996) (citing *Tax Analysts v. U.S. Dep't of Justice*, 845 F.2d 1060, 1069 (D.C. Cir. 1988)).

Here, each of these factors weighs heavily against a finding of agency control. FHFA personnel have not requested documents related to campaign contributions from the Enterprises, let alone read or relied upon such documents. *See* SMF ¶¶ 15-17.[9] Nor has FHFA integrated any of the requested documents into the Agency's records systems. *See* SMF ¶ 17.[10] Indeed, the Agency does not enjoy the ability to use and dispose of the Enterprises' records as it sees fit. During its service as conservator, the Agency is tasked with preserving and conserving the assets and property of the regulated entity. *See* 12 U.S.C. § 4617(b)(2)(B)(iv), (D)(ii). In fact,

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[9] This is unsurprising given that such contributions, which took place before the conservatorship began, are irrelevant to the conservator's mission of maintaining the ongoing business operations of the Enterprises. *See* SMF ¶ 15. Indeed, records of political contributions are filed with and available from the FEC, the agency that is charged with making this type of information available to the public.

[10] *See Wolfe v. Dep't of Health and Human Servs.*, 711 F.2d 1077, 1081 (D.C. Cir. 1983) ("The fact that the Department never integrated these documents into its records system suggests the absence of Department control. Furthermore, the fact that no one in the agency ever read or relied upon these documents supports the finding that neither Newhall nor the Secretary ever surrendered his exclusive, private control over the reports. Based upon the uncontested facts, we conclude that the Department never obtained control over these documents.") (citations and footnote omitted); *see also Missouri v. Dep't of Interior*, 297 F.3d 745, 750-51 (8th Cir. 2005) (holding that records maintained in agency office were not "agency records" because they were not integrated into the agency's files and were not used by the agency in performing its official functions).

recognizing FHFA's role as conservator, HERA restricts the Agency's ability to dispose of Enterprise records of which it takes possession.[11] And, although the Agency has the right to all Enterprise records, *see* 12 U.S.C. § 4617(b)(2)(A)(i) (granting the FHFA "all rights, titles, powers, and privileges of [the Enterprises]"), FHFA has no intention or statutory authority to maintain "title" to these records beyond the conservatorship period. *See* SMF ¶ 22.

Thus, the *Tax Analyst* factors demonstrate that the Agency does not have "control" as required under the FOIA over records pertaining to political contributions by the Enterprises. Indeed, in this case – where the documents at issue were not created by the Agency and have never been acquired or utilized by the FHFA for any government purpose – the last two *Tax Analyst* factors are of paramount importance. *Wolfe v. Dep't of Health and Human Servs.*, 711 F.2d 1077, 1080-81 (D.C. Cir. 1983). Indeed, the D.C. Circuit has explained that the agency's actual "control" of the subject documents, rather than the intent to control the documents, is dispositive:

> The "control" issue has been analyzed from two different perspectives. Some courts look to the document creator's intent to retain control, while others examine the control exercised by the agency to which the FOIA request is directed . . . . We do not use the "intent to control" test because . . . these transition team reports are not within the agency's possession and have never been used by the agency. Instead, following *Kissinger*[, 445 U.S. at 157], we focus upon the nature and extent of control exercised by the agency to which the FOIA request was directed, i.e. [FHFA].

Id. at 1080-81 & n.7 (citations omitted). Here, all of the evidence weighs against a finding of control for purposes of FOIA, particularly in light of the fact that no one from the Agency has reviewed or relied upon the requested documents, let alone incorporated them into its records

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[11] Pursuant to HERA, the conservator succeeded to "title to the books, records, and assets of any other legal custodian of" the Enterprises. 12 U.S.C. § 4617(b)(2)(A)(ii). Thus, if necessary to accomplish its purpose as conservator, FHFA could request access to records pertaining to campaign contributions from the Enterprises. To date, it has not done so. *See* SMF ¶¶ 15-17.

system. Because FHFA lacks "control" over any records requested by Plaintiff, summary judgment is appropriate.

II. THE PURPOSES OF FOIA WOULD NOT BE FURTHERED BY FINDING THE ENTERPRISES' DOCUMENTS TO CONSTITUTE "AGENCY RECORDS"

In this case, disclosure of the requested records would do nothing to enlighten the public about how OFHEO, and later FHFA, performed their statutory and administrative responsibilities in regard to Fannie Mae or Freddie Mac. *See Renegotiation Bd.*, 415 U.S. at 17 (purpose of FOIA is to open "*administrative processes* to the scrutiny of the press and general public," and "to enable the public to have sufficient information in order to be able, through the electoral process, to make intelligent, informed choices with respect to the nature, scope, and procedure of *federal governmental activities*.") (emphasis added). The Enterprises' documents will shed no light on any *administrative processes* or *governmental activities*, but rather will reveal the corporate workings of publicly traded companies.

Indeed, forcing disclosure would interfere directly with FHFA's role as conservator by requiring it to devote resources to search for and process, and possibly publicly release, corporate records under FOIA, at significant expense to these struggling companies. *See* SMF ¶¶ 18-24. HERA, 12 U.S.C. §§ 4501 *et seq.*, grants FHFA significant authority to "step into the shoes" of the Enterprises. That statutory grant includes the power to take such action as the Agency deems "necessary to put the [Enterprise] in a sound and solvent condition, 12 U.S.C. § 4617(b)(2)(D)(i), and "appropriate to . . . preserve and conserve the assets and property of the" Enterprises. *Id.* § 4617(b)(2)(D)(ii); *see id.* § 4617(b)(2)(B)(iii), (iv); *id.* § 4617(b)(2)(J)(ii). To protect this authority, HERA prohibits courts from taking "any action to restrain or affect the exercise of powers or functions of the Agency as a conservator or receiver." 12 U.S.C.

§ 4617(f); *see, e.g., Kuriakose v. Fed. Nat'l Home Loan Mortg. Co.*, --- F.Supp.2d ----, 2009 WL 4609591 (S.D.N.Y. Dec. 7, 2009); *Sadowsky v. Syron*, 639 F. Supp. 2d 347, 350-51 (S.D.N.Y. 2009); *In re Fed. Nat'l Ass'n Sec., Derivative, & ERISA Litig.*, 629 F. Supp. 2d 1, 2 (D.D.C. 2009); *In re Fed. Home Loan Mortg. Corp. Derivative Litig.*, 643 F. Supp. 2d 790, 795-96 (E.D. Va. 2009). In light of Section 4617(f), a significant question would arise whether the application of FOIA to the Enterprises' records would restrain or affect a power or function of the Agency as conservator. The answer to that question would undoubtedly be "yes." To require the FHFA to search for and publicly disclose corporate records entrusted to its safekeeping would be directly counter to the conservator's statutory authority to "preserve and conserve the assets and property" of the Enterprises, 12 U.S.C. § 4617(b)(2)(B)(iv), and to "perform all functions of the [Enterprises] . . . which are consistent with the appointment as conservator or receiver." *Id.* § 4617(b)(2)(B)(iii); *see also id.* § 4617(b)(2)(J)(ii) (granting Agency "incidental powers" to take "any action" FHFA "determines is in the best interests of the [Enterprises]"); SMF ¶¶ 16, 18-21. For these reasons, the Court should reject Plaintiff's attempt to obtain private corporate documents under the rubric of FOIA.

CONCLUSION

For the foregoing reasons, FHFA's motion for summary judgment should be granted and Plaintiff's claims should be dismissed.

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Dated: January 29, 2010

Respectfully submitted,

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