[Oral Argument Not Yet Scheduled]

APPEAL NO. 10-5140

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

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CARA LESLIE ALEXANDER, *et al.*,

Plaintiffs-Appellants,

vs.

FEDERAL BUREAU OF INVESTIGATION, *et al.*,

Defendants-Appellees.

_____

REPLY BRIEF OF APPELLANTS

_____

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

_____

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GLOSSARY

Executive Office of the President	EOP
Freedom of Information Act	FOIA
Government in the Sunshine Act	Sunshine Act

SUMMARY OF THE ARGUMENT

Courts must presume that, when a legislature enacts a statute, the legislature says what it means and means what it says. While the Privacy Act adopts the definition of the term "agency" from the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, the plain language of that definition expressly and unambiguously includes the Executive Office of the President ("EOP"). It is only when a statute is ambiguous that a court may look beyond the text of the statute. Because the definition of the word "agency" is unambiguous, resort to legislative history and congressional intent with respect to the Privacy Act, as advocated by the EOP, is unnecessary and improper.

Even assuming, *arguendo*, that the Court were to look beyond the text of the statute, the EOP's arguments fall short. First, there is nothing in the legislative history of the Privacy Act that gives any indication that the plain and ordinary meaning of the term "agency," which expressly includes the EOP, should not apply. Second, FOIA's legislative history has no bearing on interpretation of the Privacy Act because the two statutes serve very different, if not completely opposite, functions and purposes.

Finally, there simply is no basis to conclude that application of the Privacy Act to the EOP, or, more particularly, to the two subordinate units within the EOP

that maintained the records at issue, would chill discussions between close presidential advisors. There is no such chilling effect, and, consequently, there is no reason to define the term "agency" in any way other than as it has been expressly defined in the statute.

ARGUMENT

I. The Privacy Act Unambiguously Defines the Term "Agency" to Include the EOP, and the EOP Presents No Compelling Reason Why the Court Should Disregard the Plain Language of the Act.

As Plaintiffs Cara Leslie Alexander and Joseph P. Duggan ("Plaintiffs") argued in their opening brief, "in interpreting a statute a court should always turn first to one, cardinal canon before all others . . . [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Only if the language is ambiguous may a court look beyond the text of a statute. *See Staples v. United States*, 511 U.S. 600, 605 (1994). "When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Connecticut Nat'l Bank*, 503 U.S. at 254 (internal quotation omitted). In addition, "[a] mere disagreement among litigants over the meaning of a statute does not prove ambiguity; it usually means that one of the litigants is simply

wrong." *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 461 (1999) (Thomas J. and Scalia J., concurring in the judgment).

The Privacy Act of 1974, 5 U.S.C. § 552a, defines the term "agency" as "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of Government (**including the Executive Office of the President**), or any independent regulatory agency." 5 U.S.C. §§ 552a(a)(1) and 552(f) (emphasis added).[1] Consequently, by any plain reading of this definition, the Privacy Act applies to the EOP. Since neither the term "agency" nor the phrase "Executive Office of the President" are the least bit ambiguous, the Court has "no need to employ, nor any legitimate purpose in employing, canons of construction designed to reconcile confusing language." *United States v. Espy*, 145 F.3d 1369, 1371 (D.C. Cir. 1998); *see also Staples*, 511 U.S. at 605 (noting that a court may look beyond the text of a statute only if its language is ambiguous).

In order to avoid the plain meaning of the Privacy Act, the EOP would have the Court look to the legislative history of another statute -- FOIA. The EOP's

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[1] Until 1986, the definition of the term "agency" was codified at 5 U.S.C. § 552(e). With the enactment of the Anti-Drug Abuse Act of 1986, this definition was recodified at 5 U.S.C. § 552(f). There was no substantive change to the definition, and no technical conforming amendment was made to the Privacy Act.

argument falls short. The Privacy Act plainly means what it says -- the EOP is subject to the protections of the statute. The unambiguous language of the statute makes resort to its legislative history or any other external indicia of congressional intent unnecessary and improper. The Court's inquiry regarding the plain meaning of the Privacy Act should end here. *Connecticut Nat'l Bank*, 503 U.S. at 254.

Even assuming, *arguendo*, that the Court were to look beyond the unambiguous text of the statute, the EOP's argument still falls short. There is nothing in the legislative history of the Privacy Act indicating that the unambiguous definition of the term "agency" should be given anything other than its express meaning. Unlike with FOIA, the legislative history of the Privacy Act contains no indication that Congress did not intend the statute to apply to "the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President." H. R. CONF. REP. NO. 93-1380, 15 (1974) (legislative history of FOIA).

Nonetheless, the EOP would have this Court create an exception to the Privacy Act, even though no exception can be found in the text of the statute, based on the assumption that Congress wanted the legislative history of FOIA to apply to the Privacy Act as well. This is because the Privacy Act borrows the

definition of the term "agency" from FOIA. While it might be reasonable to construe the Privacy Act and FOIA in the same way if the two statutes served the same or similar purposes, they plainly do not. As a result, Defendant's syllogism must fail.

As Plaintiffs demonstrated in their opening brief, Congress' intent in enacting FOIA was to open up the records of the federal government to the "light of public scrutiny." *See Wisconsin Project v. United States Doc*, 317 F.3d 275, 279 (D.C. Cir. 2003), *quoting*, *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) (stating purpose of FOIA is "to pierce the veil of administrative secrecy and open agency action to the light of public scrutiny . . . "). By contrast, Congress' intent in enacting the Privacy Act was to protect against the disclosure of records of the federal government that contain information about individuals. *See* Privacy Act of 1974, Pub. L. No. 93-579, § 2(a)(4), 88 Stat. 1896 (1974) (noting the Privacy Act's purpose to "provide certain safeguards for an individual against an invasion of personal privacy"). The Privacy Act is the opposite of FOIA.

Similarly, and as this Court recognized in *Espy*, the definition of the term "agency" was limited under FOIA because it was believed that Congress would not have intended to chill discussion between close presidential advisors by

requiring that records of such discussions be subject to possible disclosure. *Espy*, 145 F.3d at 1373; H. R. CONF. REP. NO. 93-1380 (1974). There is no such concern with respect to the Privacy Act, however, and, consequently, there is no corresponding need to construe the term "agency" in any way other than as it has been expressly defined by Congress. Because the Privacy Act operates to safeguard the disclosure of government records, it does not have the potential to chill candid discussion between close presidential advisors.

The EOP did not even attempt to show otherwise, except to make the unsupported, speculative claim that Congress "could have rationally concluded" that the same chilling effect and separation of powers concerns might apply to the Privacy Act. *See* Brief for the Appellees at 17-18. Certainly, something more than an unsupported, speculative assertion is required to ignore an express, unambiguous term in a statute. This is especially the case considering the lack of any ambiguity in the definition of the term "agency" and the additional lack of any discussion in the legislative history of the Privacy Act about an alleged "chilling effect" on "close presidential advisors." Moreover, the EOP has never claimed that application of the Privacy Act to the White House Office of Personnel Security and the White House Office of Records Management, the two subordinate units within the EOP that maintained the records at issue, would have

a "chilling effect" on discussion between "close presidential advisors" or that the "sole function" of staffers in these subordinate units "is to advise and assist the President." It has not because it cannot.

Nor would application of the Privacy Act to the EOP or the two subordinate units at issue limit, much less prevent, the President from making executive decisions. 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). If, in fact, Plaintiffs had required continued access to the White House, as the EOP initially but falsely claimed, the EOP easily could have justified maintaining the records at issue under the Privacy Act. *Id.* Also, it is simply inconceivable that requiring the White House Office of Personnel Security and the White House Office of Records Management to adhere to the protections of the Privacy Act would harm presidential decision making.

In arguing that the legislative history of FOIA should be applied to the Privacy Act, the EOP relies heavily on *Rushforth v. Council of Economic Advisers*, 762 F.2d 1038 (D.C. Cir. 1985). *Rushforth* is easily distinguishable, however, as it concerns the Court's application of FOIA's legislative history to the

Government in the Sunshine Act ("the Sunshine Act"), 5 U.S.C. § 552b, another open records statute that serves a purpose very similar to the purpose of FOIA. Congress enacted FOIA and the Sunshine Act to "open up the workings of government to public scrutiny through the disclosure of government records." *Stern v. FBI*, 737 F.2d 84, 88 (D.C. Cir. 1984) (internal quotation omitted) (discussing FOIA); *see also Common Cause v. Nuclear Regulatory Com.*, 674 F.2d 921, 928 (D.C. Cir. 1982) (discussing the Sunshine Act). Reliance on FOIA's legislative history to construe the Sunshine Act is inoffensive because the two statutes are *in pari materia*, *i.e.*, they should be considered together because they serve the same purpose. *See United States v. Villanueva-Sotelo*, 515 F.3d 1234, 1248 (D.C. Cir. 2008) (statutes should not be construed *in pari materia* unless they are "obviously designed to serve the same purpose and objective"), *quoting*, 2B Norman J. Singer, SUTHERLAND STATUTORY CONSTRUCTION § 51:3 (6th ed. 2000 & Supp. 2007-2008). Because the Privacy Act serves an entirely different purpose, and, thus, is not *in pari materia* with either FOIA or the Sunshine Act, *Rushforth* is inapposite.

The EOP also cites -- in a footnote, in passing, and without discussion -- several district court decisions, including an unpublished decision that is not entitled to any precedential weight whatsoever. *See* Brief for the Appellees at 10,

n.4; D.C. Cir. Rule 32.1. As this Court has declared, "District court decisions do not establish the law of the circuit, nor, indeed, do they even establish the law of the district." *In re Executive Office of the President*, 215 F.3d 20, 24 (D.C. Cir. 2000) (internal citations and quotations omitted). Consequently, these decisions are of no effect.

Equally ineffective is the EOP's heavy reliance on *Dong v. Smithsonian*, 125 F.3d 877 (D.C. Cir. 1997). *Dong* is of no assistance to EOP because the Court's decision that the Privacy Act does not apply to the Smithsonian Institution rested upon a finding that the educational and research institute and museum complex was not an "agency" under the plain meaning of that term as defined by the statute. *Dong*, 125 F.3d at 879. By contrast, the EOP's argument in this case looks beyond the express definition of the term "agency," and indeed seeks to contradict that express definition, by relying on the legislative history and judicial interpretations of a different statute -- FOIA.

Finally, the EOP argues that the Court should create an exception to the Privacy Act, even though none is included in the text of the statute, because the Privacy Act became law forty days after certain amendments were made to FOIA in 1974. *See* Brief for the Appellees at 13. Defendant appears to reason that Congress must have been aware of the legislative history of the 1974 FOIA

amendments when it crafted the Privacy Act and that it intended the same limitation identified in that legislative history to apply to the Privacy Act. The EOP's argument is unpersuasive. While it may be true that, as a general rule of statutory construction, when Congress passes a new statute, it can be assumed that Congress was aware of previous statutes concerning the same subjects and intended to give a particular word the same meaning as used in prior similar statutes, this rule only applies when the two statutes serve the same functions and purposes. *See*, *e.g.*, *Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972). When two statutes serve different functions and purposes, however, the rule does not apply. *Id.* at 244-45 (declining to create an exception to a statute, based on a companion statute, because the two statutes did not serve the same function). This is especially the case here, where, not only do the two statutes have demonstrably different functions and purposes, but the rule is being used to contradict the express language of the statute and to create an exception where none was expressly included by Congress, based not on the text of either statute, but on the legislative history of only one of them.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Plaintiffs' opening brief, Plaintiffs respectfully request that this Court vacate the District

Court's March 9, 2010 Memorandum Opinion and Order dismissing this case and remand the case for further proceedings.

Dated: April 7, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO F.R.A.P. 32(a)(7)(c) AND CIRCUIT RULE 32(a)(2)

I certify that pursuant to F.R.App.P. 32(a)(7)(c) and District of Columbia Circuit Rule 32(a)(2), the attached Reply Brief of Appellants is proportionally spaced, has a typeface of 14 points and contains 2,975 words.

Dated: April 7, 2011 /s/ Paul J. Orfanedes

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of April 2011, I filed the foregoing REPLY BRIEF OF APPELLANTS with the Court via the CM/ECF system and by hand (the original and eight copies of) and served the foregoing REPLY BRIEF OF APPELLANTS on the following counsel of record via the CM/ECF system and first-class U.S. mail (two copies):

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